

# CONTINGENT WORKERS IN A CHANGING ECONOMY: ENDURE, ADAPT, OR ORGANIZE?

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## INTRODUCTION

A growing portion of America's working poor are "contingent" workers: the disposable, part-time, and temporary labor force that comprises as much as thirty percent of American workers. Contingent workers encounter a wide array of problems as a result of their contingent status: their employers may fail to take responsibility for payment of social security, minimum wages, or workers' compensation benefits; their lack of job security may facilitate sexual or racial harassment by employers or co-workers; or their short-term worksites may fail to comply with basic health and safety standards. These problems are largely due to the fact that contingent laborers often lack vital job protections that Congress and employers have extended over the last sixty years. Such protections include federally-mandated programs like social security, minimum wage laws, unemployment insurance, the Employee Retirement Income Security Act (ERISA), and workers' compensation; standard employee benefits like health insurance, sick leave, and a pension; and federal antidiscrimination and family leave provisions.

The trend toward using temporary labor has permeated every type of working environment. Different groups have very different needs and legal problems related to their status as temporary and expendable. Thus, the nature of the contingent workplace relationship varies for those working for low-cost contractors, for those who are themselves classified—albeit unwillingly—as independent contractors, for part-time workers, and for temporary workers. However, all of these groups of employees share a common vulnerability under current labor and employment law.

Businesses in every facet of production are increasingly "outsourcing" elements of their operations to low-cost contractors who cut corners to compete. As firms contract out more and more work, they transfer legal responsibility for the employees ultimately doing the work to subcontractors farther down the line. The result for workers in the garment, electronics, and janitorial industries (to name just a few notorious offenders) may be weeks or months of work for bottom-rung contractors who evade legal requirements and then shut down, move, or declare bankruptcy, leaving workers unpaid or injured due to illegal working conditions. Where such workers are classified as independent contractors and therefore not covered by protective legislation, or where their temporary status leaves them outside the traditional employer/employee relationship on which much of federal and state employment law is based, they are likely to be without legal recourse.

Perhaps the largest segment of the contingent workforce is the part-time working poor. Millions of Americans juggle two and three part-time jobs and yet remain unable to make ends meet—partly because they are denied traditional employer-provided benefits. They may be one paycheck or layoff away from homelessness or welfare dependency, despite their

willingness and ability to work. The failure of Congress to provide a federal system of national health insurance is one more instance in which the system has denied the traditional safety net to those who "work hard and play by the rules."

Temporary workers placed through temporary hiring agencies are the middle-class manifestation of the contingent workforce. America's largest employer is now Manpower, Inc., which placed 560,000 workers into temporary positions in 1993.<sup>1</sup> Largely women, temporary workers shuffle from one employer to another on a daily or weekly basis. Their transience makes them vulnerable to exploitation by co-workers. While some of these temporary workers may prefer the flexibility and variety which temporary assignments offer, many others would prefer full-time work and endure temporary jobs as a second-best alternative. Other temporary workers may be downsized or leased employees—workers who may have been full-time employees at one point but whose employer simply fired the entire workforce, only to rehire them back under the auspices of an employee-leasing company for lower pay or no benefits.<sup>2</sup>

Employers' increasing use of contingent labor is significant for several reasons. First, it threatens workers by undercutting their security and workplace protections. Firms evade workplace regulations by shedding the legal status of employer in their relationships with a significant portion of the workers performing services for them. Employers typically accord temporary and part-time workers few or none of the benefits enjoyed by full-time workers. Beyond such cost-cutting measures, however, is a more structural reason for the advent of a contingent labor army. The trend, at root, heralds a shift occurring throughout the global economy. Corporations are shedding the behemoth-style management of the Fordist era in favor of systems of "just-in-time" production, "flexible specialization," and "accordion management."<sup>3</sup> These corporate buzzwords all refer to the same phenomenon: businesses seeking constant innovation require the ability to change their workforce size, skills, and abilities as easily as they change their product line or services.

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1. Janice Castro, *Disposable Workers*, TIME, Mar. 29, 1993, at 42, 43.

2. For example, consider the woman who had been on the Bank of America payroll for 14 years when the bank offered her a choice: reduce her workweek to 19 hours without benefits, or leave with a modest severance package. The Bank's downsizing plan calls for only 19% of the workforce to be full-time. Ann Crittenden, *Temporary Solutions: Increase in Temporary and Part-Time Workers*, WORKING WOMAN, Feb. 1994, at 32, 32. See also Howard E. Potter, *Getting a New Lease on Employees*, MGMT. REV., Apr. 1989, at 28 (discussing the "substantial savings" that businesses can make by firing an existing workforce and replacing it with one that has been "leased").

3. For explanations of the trend toward flexible specialization and the demise of the command-and-control corporation, see, e.g., MICHAEL BEST, *THE NEW COMPETITION: INSTITUTIONS OF INDUSTRIAL RESTRUCTURING* (1990); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984).

In this Article, I explore the implications of this trend for employment and labor law in the United States. I conclude that, although significant changes would be necessary in the current legal regime to protect contingent workers, such changes are unlikely to come about in the current political climate. Furthermore, reworking the legal regime to extend traditional workplace protections to nontraditional workers may be a misguided, backward-looking solution to what is in fact a symptom of a fundamental economic restructuring. Rather than tinkering within the employment law regime, workers and their advocates must design new methods of organization and collective action to protect their interests in the new economic order. Accordingly, I examine some of the efforts undertaken by unions and by worker-associations to respond to the economic shifts compelling the increased use of contingent labor. The efforts described include both oppositional and collaborative models. I conclude that new economic processes and structures of production require workers to adapt not through defensive attempts to maintain the traditional privileges and guarantees of the post-war employment model, but rather through developing worker-controlled mechanisms for skills development, employment allocation, and benefits provision.

## I. BACKGROUND

The framework of current employment and labor laws exhibits an underlying structural tension. The baseline rule in an employment contract is "employment at will." This rule provides that, just as the worker may walk off the job at any time, so may the employer terminate the employee at will for any reason.<sup>4</sup> The rule presumes no job security and a functioning free market for labor in which a worker may obtain another job as easily as an employer may find another worker. Under such a regime, the bargain struck between the employer and the employee is one of free contract and, *ipso facto*, fair to both parties involved.<sup>5</sup>

While employment at will is the traditional doctrine governing employment relationships, a host of employment-related benefits and statutory protections have developed over the last fifty years which operate to

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4. See, e.g., *Adair v. United States*, 208 U.S. 161, 174-75 (1908) (stating employment-at-will rule). The employment-at-will rule is usually attributed to Horace Gay Wood, who first expounded it in his *Treatise on the Law of Master and Servant*:

[T]he rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will . . . and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . [U]nless their understanding was mutual that the service was to extend for a fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.

HORACE GAY WOOD, *TREATISE ON THE LAW OF MASTER AND SERVANT* 272 (1877). For historical analysis and criticism of the rule, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

5. Feinman, *supra* note 4, at 132.



transform employment into a status-like relationship. First, many state courts have recognized significant exceptions to the employment-at-will doctrine, eroding its force and limiting employers' ability to terminate at will.<sup>6</sup> The Supreme Court has even recognized that, in certain situations, public employees may have property interests in employment which are constitutionally protected by the Due Process Clause.<sup>7</sup> Second, employers have bargained with employees to provide, in addition to wages, a range of social insurance benefits as a form of compensation.<sup>8</sup> Thus, many workers obtain their health insurance, life insurance, disability insurance, and pensions directly from employers. Third, the government has mandated that employers underwrite other protections for workers, including unemployment insurance and workers' compensation insurance.<sup>9</sup> Finally, Congress has passed an ever-increasing series of nondiscrimination regulations, health and safety regulations, and economic regulations governing conduct,

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6. See, e.g., *Pugh v. See's Candies*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (recognizing violation of implied contract where thirty-year employee, frequently reassured about his future with the company, was fired without reason); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985) (finding promise of job security in employee manual binding on employer); *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (recognizing wrongful termination claim where plaintiff fired for fulfilling jury duty).

7. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (stating that, where there is a statutorily guaranteed right to a hearing, the Due Process Clause is implicated in the firing process); *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (holding that, where a public employee has a statutorily defined entitlement to employment, a property right can be found); *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972) (holding that, if the explicit terms between employer and employee support a "claim of entitlement" to the position, the employee may have a due process right to a hearing). A voluminous literature has developed commenting on the idea of property rights in jobs. See, e.g., Jack M. Beerman & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Question of Property in Jobs*, 23 GA. L. REV. 911, 916 (1989) (discussing the "suppressed moral and political questions underlying employment at will"); Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457 (1979) (observing how recent changes in employment law have served to tighten and structure the employment relationship); William B. Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885 (examining the constitutional and common law development of employment rights); Phillip J. Levine, *Towards a Property Right in Employment*, 20 BUFF. L. REV. 1081 (1973) (examining the relation of property to employment on the creation of abstract rights); Peter Drucker, *The Job as Property Right*, WALL ST. J., Mar. 4, 1980, at 21 (stating the evolution of the job into a species of property that can be seen as a genuine opportunity).

8. This arrangement originally developed when the federal government imposed wage caps during the Second World War. Unable to bargain for direct increases in wages during the economic upturn brought about by the war, unions bargained with employers to finance a variety of insurance benefits. Cf. FRIEDRICH BAERWALD, *ECONOMIC PROGRESS AND PROBLEMS OF LABOR* 141-49 (2d ed. 1970). Subsequently, non-union employers were forced to provide such benefits also, in order to compete with unionized employers. *Id.* at 148-49.

9. See 5 U.S.C. § 8101 (1994) (authorizing workers compensation insurance); 42 U.S.C. § 502 (1994) (authorizing unemployment insurance).

compensation, and the relative rights and duties of employers and employees.<sup>10</sup> As a result of this series of developments, individuals obtain their link to a panoply of public protections for their health, safety, and welfare through their connection to the labor market in general and to a specific job in particular, rather than through the general public provision of social and economic safety net entitlements.<sup>11</sup>

The tension between our background regime of employment at will and our reliance on employment, rather than government, to provide the most basic social insurance protections has resulted in a three-tier economy. On the top are those privileged workers who enjoy the benefits of full-time employment with employers who provide a full range of amenities and can rely on protection by the variety of statutory enactments governing the workplace. These workers are becoming a shrinking minority. Below are the workers whose employers utilize the contractual freedoms of the employment-at-will regime to deny them the increasingly expensive full employment package. These employers refuse to provide benefits either outright or by employing people on a part-time and short-term basis. They may evade statutorily-mandated benefits by classifying workers as independent contractors or by carefully structuring their employment relationships so as not to be liable as "employers" under certain statutory definitions. Thus, we see the growth of the contingent workforce. Finally, at the bottom rungs of the economy, are the long-term unemployed, whose connection to the labor market and thus to the wide array of social benefits it may provide is irretrievably severed.<sup>12</sup>

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10. For regulations on nondiscrimination, see, e.g., Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1994). For regulation on health and safety, see, e.g., Occupational Safety and Health Act, 29 U.S.C. § 651 (1994). For economic regulations, see, e.g., Fair Labor Standards Act, 29 U.S.C. § 201 (1994); Employee Retirement Income Security Act, 29 U.S.C. § 1001 (1994); Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. § 1161 (1994) (mandating employers to make continuation coverage in group health insurance available to employees after termination of employment); Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994).

11. Charles A. Reich, in his enormously influential essay on the "new property," recognized the significance of this trend as early as 1964:

[M]ore and more of our wealth takes the form of rights or status rather than tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or a bank account, for a new house can be bought and a new bank account created, once a profession or job is secure.

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964).

12. See generally RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989) (discussing the changing labor market in the United States and corporate shifts away from strong affiliations with workers).

Business' reluctance to continue the implicit bargain of the full-benefit employment model is in part a result of structural shifts in the global economy. Today's unprecedented international mobility of capital and goods, combined with increased competition from abroad, has contributed to the need for businesses to devolve operations from bureaucratic mammoths and to adopt more streamlined and changeable structures.<sup>13</sup> Such arrangements, however, snatch away workers' long-held expectations of relatively secure and stable employment. As one laid-off advertising executive who turned to temporary work at ten dollars per hour put it:

I was used to working in the corporate environment and giving my total loyalty to the company. I feel like Rip Van Winkle. You wake up and the world is all changed. The message from industry is, "We don't want your loyalty. We want your work." What happened to the dream?<sup>14</sup>

The demise of "the dream" is a reality that will not easily be stemmed through further extensions of protective labor legislation and policies which discourage the use of temporary workers. Business' need for flexibility and the rise in low-cost labor competition, resulting from the passage of the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT), will only serve to accelerate corporate use of contingent work arrangements. Attempts to entrench further

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13. An article in *Fortune* magazine describes and extols this trend:

In a leap of industrial evolution, many companies are shunning vertical integration for a lean, nimble structure centered on what they do best. The idea is to nurture a few core activities . . . . The new breed avoid becoming monoliths laden with plants and bureaucracy. Instead, they are exciting hubs surrounded by networks of the world's best suppliers. . . .

Modular companies aren't a fad. Their streamlined structure fits today's tumultuous, fast-moving marketplace.

Shawn Tully, *The Modular Corporation*, *FORTUNE*, Feb. 8, 1993, at 106, 106. See generally PIORE & SABEL, *supra* note 3; ROBERT B. REICH, *THE WORK OF NATIONS* (1991).

14. Castro, *supra* note 1, at 44. Castro aptly describes the breakdown of the postwar employment model:

Almost overnight, companies are shedding a system of mutual obligations and expectations built up since the Great Depression, a tradition of labor that said performance was rewarded, loyalty was valued and workers were a vital part of the enterprises they served. In this chilly new world of global competition, [workers] are often viewed merely as expenses. Long-term commitments of all kinds are anathema to the modern corporation. For the growing ranks of contingent workers, that means no more pensions, health insurance or paid vacations. No more promises or promotions or costly training programs. No more lawsuits or wrongful termination or other such hassles for the boss.

*Id.* at 43-44. See also Maria Shao, *New U.S. Workers: Flexible, Disposable, "Tempting of America" Rolls On*, *BOSTON GLOBE*, Apr. 3, 1994, at 1, 18 (quoting Richard S. Belous, chief economist of the National Planning Association: "This is the work-force equivalent of a one-night stand. There's no long-term commitment."); Jack Gordon, *Into the Dark: Rough Ride Ahead for American Workers*, *TRAINING*, July 1993, at 21 (relating the trend toward contingent work to the need for high training and skills levels and its implications for productivity and living standards).

an employment regime which businesses are rapidly abandoning are short-sighted at best and, at worst, may speed its ultimate demise.

Workers' responses to such structural changes in their economic environment must be equally structural. As businesses seek to protect their interests by limiting their liability and responsibilities toward employees, workers must develop organizations and work arrangements that provide those structural guarantees without reliance on any particular employer. Models for such extra-employer, private protection of workers' interests exist both historically and currently.

## II.

### THE DATA: GROWTH OF THE CONTINGENT WORKFORCE

Current estimates place the number of contingent workers at around thirty-two to thirty-seven million, or about one-quarter of the nation's working population.<sup>15</sup> This figure represents a substantial increase since 1980, when approximately twenty-five to twenty-eight million workers were classified as contingent.<sup>16</sup> The catch-all term "contingent workers" encompasses a wide variety of work arrangements and types of workers. Some forms of contingent work have grown more rapidly than others in the course of the past decade. While data are incomplete for many types of workers, the following sections survey the information available on the growth of each segment of the contingent workforce.

#### A. *Part-time Workers*

Part-time workers comprise by far the largest segment of contingent workers, almost one-fifth of the entire U.S. workforce.<sup>17</sup> The reasons for the increasing use of part-time workers are many, including some workers' desires to work fewer hours so they may take care of family or other responsibilities or to accommodate needs for nonstandard scheduling arrangements. Disturbingly, however, the number of involuntary part-time workers—those workers who would like full-time employment, but whose employers prefer to hire several part-time employees—is increasing.<sup>18</sup>

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15. Richard Belous of the National Planning Association estimates that if the contingent workforce is calculated to include temporary, part-time, business service workers, and the self-employed, contingent workers would total between 32 and 37.9 million in 1992. Richard S. Belous, Comments at the Conference on the Contingent Workforce before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Feb. 8, 1994 (relying on U.S. Bureau of Labor Statistics data).

16. *Id.*

17. Chris Tilly, *Reasons for the Continuing Growth of Part-Time Employment*, MONTHLY LAB. REV., Mar. 1991, at 10, 10.

18. Involuntary part-time work increased 178% between 1970 and 1990, while voluntary part-time work went up 53% in the same period. By 1992, more than six million workers worked part-time involuntarily, a 26% increase from only two years before. KELLY SERVICES, INC., *THE FLEXIBLE WORKFORCE IN A CHANGING ECONOMY* 51 (1994) (citing U.S. Bureau of Labor Statistics data).

Many of these workers in fact work full-time hours (thirty-five per week or more), but they do so through holding down two or more part-time jobs, and thus are without the protections of full-time work.<sup>19</sup> The stress of such arrangements is compounded by the need to coordinate shifts and transportation.

Part-time jobs are most common in the clerical, sales, and service industries. They typically offer low pay and few or no benefits, require few skills, and demonstrate high rates of turnover.<sup>20</sup> Part-time jobs are, on average, worse than full-time jobs along nearly every dimension. The median part-time worker earned fifty-eight percent of the hourly wage of the median full-time worker in 1989. Even controlling for disparities in sex, race, education, experience, industry, and occupation, part-timers still earned ten percent less than their full-time counterparts.<sup>21</sup> In 1984, more than one-quarter of part-time workers earned the minimum wage, as compared to one in twenty full-time workers.<sup>22</sup> Moreover, only twenty-two percent of part-time workers received health insurance benefits through their jobs in 1988, while seventy-eight percent of full-time workers did. The corresponding numbers for pensions were twenty-six percent for part-timers and sixty percent for full-timers.<sup>23</sup> As discussed below, part-time workers are also frequently exempted from statutory workplace protections. Thus, as a growing proportion of the U.S. workforce works one or more part-time jobs rather than a single full-time job, fewer and fewer workers enjoy the benefits of a living wage, employer-provided insurance, or basic statutory workplace protections.

### B. Contract Workers

A second segment of the contingent work force is contract workers, those who may be employed by a primary employer but who provide services to a secondary employer on a contract basis. Typical examples include construction, janitorial services, and garment manufacturing, but the trend occurs throughout all segments of the economy. It is impossible to quantify how many workers fall directly into this category. Anecdotal evidence, however, suggests that increasing amounts of work that was once performed in-house by full-fledged employees of the recipient business are now subcontracted to secondary employers. Denominating such contract

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19. Tilly, *supra* note 17, at 10.

20. *Id.* at 11-12. Tilly examines data demonstrating growth in involuntary part-time work and compares it with comparative wage gaps between part-time and full-time work and with data demonstrating sectoral shifts in the economy. After running regression analyses, she concludes that the growth in involuntary part-time work is not a result of increases in the costs of full-time workers relative to part-timers. Rather, it is a result of the increased prevalence of the service and trade sectors, where part-time work proliferates. *Id.* at 14-15.

21. *Id.* at 12, 17.

22. *Id.* at 12.

23. CHRIS TILLY, ECONOMIC POLICY INST., *SHORT HOURS, SHORTER SHRIFT: CAUSES AND CONSEQUENCES OF PART-TIME WORK* 10 (1990).

workers as "business services," Richard Belous of the National Planning Association reports that their numbers have grown from 3.3 million in 1980 to 5.3 million in 1992, a sixty-one percent increase.<sup>24</sup> Kelly Services, one of the nation's leading temporary service agencies, claims that as many as 6.4 million workers labored in the business services sector in 1992, a full 5.5% of the workforce.<sup>25</sup>

Subcontracting relieves employers from responsibilities toward the workers who perform services for them. Jonathan Hiatt, General Counsel to the Service Employees International Union, provides some telling examples of the effects of the trend toward subcontracting:

One of the larger cleaning contractors in Seattle, . . . after successfully positioning himself as the lowest cost bidder on commercial office building accounts in the city, turned around and began "selling" floors of office buildings as "franchises" to individuals—mostly Central American and Asian immigrants. These "franchisees" each pay from \$4000 to \$7000 for the privilege of "buying" a floor to clean . . . [T]he contractor thus disclaims any responsibility for Social Security or unemployment compensation payments, minimum wage or overtime violations, or tax withholdings of any kind.<sup>26</sup>

In the Hartford, Connecticut area, 1,000 school bus drivers lost full-time jobs with good benefits when the school districts privatized their jobs. These workers, who once enjoyed health insurance, pensions, and other fringe benefits, now are employed part-time, and receive virtually no benefits, even though they are performing precisely the same work as before.<sup>27</sup>

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24. BELOUS, *supra* note 12, at 16.

25. KELLY SERVICES, INC., *supra* note 18, at 51 (relying on U.S. Bureau of Labor Statistics data).

26. Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future*, (presented to the American Bar Association Section of Labor & Employment Law Aug. 10, 1993), reprinted in DAILY LAB. REP. (BNA) No. 154, at D-23 (Aug. 12, 1993).

27. *Id.* at 14. One need look no further than local debates over privatizing throughout city and state governments to see other examples of this trend. For an interesting contrast on the desirability of "outsourcing" in the assembly industry in Silicon Valley, compare Tully, *supra* note 13, at 106 (describing outsourcing as an advantage helping to create a "lean nimble structure") with Elizabeth Kadetsky, *High-tech's Dirty Little Secret: Silicon Valley Sweatshops*, NATION, Apr. 19, 1993, at 517 (stating that outsourced Silicon Valley assembly shops provide terrible working conditions and unstable employment). Kadetsky quotes Lenny Siegel of the Pacific Studies Center, an electronics industry watchdog group:

Printed circuit boards are the worst . . . You don't need a lot of technology or expertise to move into it, so you'll get someone who was a foreman or a supervisor at a larger company. They rent a garage and start hiring people and they get the work. Printed circuit-board production is fairly standardized and can be farmed out to fly-by-night companies like Versatronex where the only way they can compete is by cutting costs.

The recent corporate ardor for integrated networks of operations, downsizing, and just-in-time production all have contributed to an increase in outsourcing operations to contract workers and a corresponding decline in full-time, steady employment with primary employers.

### C. Temporary Workers

Temporary workers comprise a third category of contingent workers. The growth in temporary workers over the past decade is the most dramatic among the various types of contingent workers.<sup>28</sup> Temporary agencies supplied two million workers to American companies in 1994,<sup>29</sup> filling one in six new jobs. This compares with only 170,000 temporary workers in 1972.<sup>30</sup> Manpower, Inc., with 560,000 employees in its ranks, is by some definitions the nation's largest private employer.<sup>31</sup> The industry recorded revenues of \$18.3 billion in 1992 and includes more than five thousand firms operating at fifteen thousand locations including branches abroad.<sup>32</sup> They placed an average of 1.6 million workers per day in 1993.<sup>33</sup> Increasingly, businesses are establishing exclusive relationships with a single temporary supply agency, effectively cementing their long-term use of temporary workers and subcontracting a chunk of their human relations processes to outside firms.<sup>34</sup>

Temporary workers are still predominantly female and clerical, though temporary agencies increasingly supply a varied and specialized range of

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*Id.* at 517. These are high-stress assembly-line jobs which pay approximately six dollars per hour without benefits and are characterized by astronomical rates of health and safety problems due to their use of toxic chemical compounds. *Id.*

28. Belous estimates that temporary workers have increased from 400,000 in 1980 to 1,400,000 in 1992, a 250% increase. Temporary workers, however, still make up only about 4% of total contingent workers and 1.5% of the total workforce. *BELOUS, supra* note 12, at 20.

29. See Barnaby J. Feder, *Bigger Roles for Suppliers of Temporary Workers*, N.Y. TIMES, Apr. 1, 1995, at 37 (reporting that the number of temporary workers supplied to American companies by agencies rose from 500,000 in 1983 to nearly 2,000,000 in 1994).

30. KELLY SERVICES, INC., *supra* note 18, at 19, 51.

31. Castro, *supra* note 1, at 43. Kelly Services disputes this claim, noting that many temporary workers are registered with several different temporary agencies or may be on a temporary agency's "active" payroll only a few weeks a year. KELLY SERVICES, INC., *supra* note 18, at 21.

32. KELLY SERVICES, INC., *supra* note 18, at 19.

33. Shao, *supra* note 14, at 18.

34. Barnaby Feder reports:

Some companies have essentially turned over many of their recruiting and training functions to their biggest temp suppliers, either through national contracts or exclusive local ones that put a temp agency employee in charge of the site's needs for temporary workers. Manpower controlled 330 client sites at the end of 1994, up from 15 in 1992.

Feder, *supra* note 29, at 37.

This practice graphically demonstrates the interconnections among several corporate trends: the expanded use of temporary workers, the subcontracting of entire sectors of operations, and the establishment of networked relations among supplying firms.

workers. About half of temporary workers are clerical, a quarter industrial, and a quarter professional; eighty percent are women.<sup>35</sup> Wages vary widely; the national average is over eight dollars per hour.<sup>36</sup> Participation in the benefit plans that some temporary agencies offer is low,<sup>37</sup> which may be due to the short-term nature of the work as well as high co-payment or minimum hours requirements. Although temporary agencies must pay all employment-related taxes for their personnel and comply with all relevant employment regulations, most have no ability to oversee the work conditions into which they place employees.<sup>38</sup> Because agencies exert little or no control over the employers to whom they send workers, effective monitoring of working conditions by even the most scrupulous of agencies can be difficult. Moreover, the status of temporary workers as nonemployees of the recipient firm may facilitate workplace abuses such as sexual and racial harassment and discrimination, as well as unsafe working conditions.<sup>39</sup>

#### D. Independent Contractors

The self-employed comprise a fourth category of contingent workers. For self-employed professional workers such as consultants or writers, status as a contingent worker may be a misnomer. Rather, the workers in this category who suffer exploitation are those who lose benefits as a result of employers' misclassification.<sup>40</sup> The legal test for determining employee/

35. BELOUS, *supra* note 12, at 27-28.

36. NATIONAL ASSOCIATION OF TEMPORARY SERVICES, PAMPHLET TO THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, UNITED STATES DEPARTMENT OF LABOR 5 (July 18, 1994) [hereinafter TEMPORARY SERVICES] (on file with author).

37. *Id.*

38. *See, e.g.,* Secretary of Labor v. Manpower Temporary Services, Inc., 1977-1978 O.S.H.D. (CCH) ¶21,542, 5 O.S.H. Cas. (BNA), 1977 WL 6891 (O.S.H.R.C. Jan. 10, 1977) (finding that it would be "unconscionable" to require temporary firms to supervise the safety requirements of every work site in which they place employees).

39. A whistle-blower at one temporary firm, whose job was to place temporary employees with clients needing secretarial services, reported that she was required to use a secret coding system whereby client-employers could communicate their preferences for the race, sex, national origin, age, and sexual orientation of their temporary employees. After complaining about the illegal system, she was fired. John M. True III, *Contingency Workers' Frayed Safety Net*, LEGAL TIMES, Dec. 13, 1993, at 7. *See also* Castro, *supra* note 1, at 44 ("Placement officers report client requests for 'blond bombshells' or people without accents. Says an agency counselor: 'One client called and asked us not to send any black people, and we didn't. We do whatever the client wants, whether it's right or not'"). It is impossible to know how many workers are denied jobs under systems like these, which can easily go undetected due to the volatile nature of the placement system.

40. *See, e.g.,* Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399 (1989) (finding, over dissent, that although seasonal cucumber pickers had signed a contract stating that they were independent contractors, they were in fact employees because of their economic dependence on the grower); *see also* Marsha S. Berzon, *Employer Evasion of Collective Bargaining and Employee Protective Statutes through Independent Contractor Status*, 13 LAB. L. EXCHANGE 1, 1 (1994) ("Thus, at least for certain types of employees, the problem at its knottiest is not simply blatant misclassification of employees, but a conscious structuring of the employer-worker relationship to support an independent contractor classification.").



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.<sup>41</sup> Many employers relieve themselves from complying with safety regulations and paying payroll taxes by calling their employees independent contractors, thereby shifting the costs of such workplace protections directly onto the workers.<sup>42</sup> In addition, misclassified workers have no access to federally-mandated benefits and standards, including unemployment benefits, workers' compensation, pension regulation through ERISA, health and safety standards, antidiscrimination laws, federal disability insurance, and protection under the Fair Labor Standards Act (FLSA).<sup>43</sup>

The definition of an employee as opposed to an independent contractor is unnecessarily complex, involving as many as twenty criteria in an unweighted appraisal of each individual job situation.<sup>44</sup> The numbers of misclassified independent contractors are impossible to calculate, though attempts at enforcement of tax regulations by the Internal Revenue Service (IRS) demonstrate massive fraud on the part of employers in this area. Based on a 1984 study, the IRS estimated that, among 5.2 million businesses both small and large, fifteen percent misclassified 3.4 million employees as independent contractors.<sup>45</sup>

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41. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (setting forth multifactor test); RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957) (listing factors to determine if a party is a servant or independent contractor).

42. Examples of cases challenging this practice include: *Borello & Sons, Inc. v. Department of Indus. Relations*, 769 P.2d 399 (1989) (cucumber pickers); *Gonzales v. Furukawa Farms*, No. SM 62038 (Santa Barbara Sup. Ct. filed Aug. 31, 1992) (strawberry pickers); *Yellow Cab Coop. v. Workers' Compensation Appeals Bd.*, 226 Cal. App. 3d 1288 (Ct. App. 1991) (taxicab drivers). The practice can be particularly difficult to combat in a systematic fashion because agencies administering protective statutes are generally empowered only to make case-by-case determinations of employment status. See, e.g., CAL. LAB. CODE §§ 5300, 5201, 5307 (Deering Supp. 1996) (setting forth actions to be instituted at Workers' Compensation Appeals Board (WCAB) and powers of WCAB). No provision of the California Workers' Compensation Act gives the WCAB authority to issue injunctive or class-wide relief; indeed, claims may be joined only in limited circumstances. CAL. LAB. CODE § 5303 (Deering 1976 & Supp. 1996). See also Ca. Unempl. Ins. Code § 409 (Deering Supp. 1996) (requiring special action by Unemployment Insurance Appeals Board to achieve precedential effect of their decisions).

43. See *infra* Part III, examining which workers enjoy coverage under various statutory protections. Each requires that beneficiaries be "employees," precluding coverage if the worker is misclassified as an independent contractor.

44. See INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL, 8465 to 8465-6 (listing twenty factors which the I.R.S. uses to determine independent contractor status). The courts use a similar formulation, although theirs is even less determinate, relying on common law factors in some cases and "economic realities" of the employment relationship in others. See also cases cited in note 42, *supra*. For a discussion of both the common law and the "economic realities" test for defining the employer/employee relationship, see *infra* part III.B.

45. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/T-GGD-94-194, TAX ADMINISTRATION: IMPROVING INDEPENDENT CONTRACTOR COMPLIANCE WITH TAX LAWS, TESTIMONY BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS 5 (1994).

In response to high rates of tax noncompliance by workers classified as independent contractors, the IRS began an Employment Tax Examination Program in 1988. The program investigates small business compliance with the common law rules for classifying workers as either employees or independent contractors.<sup>46</sup> In about 6,900 audits between 1987 and 1991, the IRS assessed \$468 million for misclassification and mandated reclassification of 338,000 workers as employees.<sup>47</sup> Between 1989 and 1992, ninety percent of audits found misclassified workers.<sup>48</sup> The IRS, however, focuses its enforcement on nabbing high-wage professionals who may prefer to be independent contractors, rather than low-wage misclassified workers who would benefit from proper employee status.<sup>49</sup>

Also included within the independent contractor category are the tens of thousands of day laborers who gather to find work each day in labor pools that have proliferated around the country. Prospective employers simply drive up to corners where workers gather on a daily basis and take any of the mostly immigrant men to work in construction, landscaping, agriculture, or any number of other trades.<sup>50</sup> Often, workers are paid by the day, and their wages are sometimes subminimum after employers deduct for provision of tools, transportation, or a meager lunch. They are given the dirtiest and most hazardous jobs. Although it is impossible to estimate the number of day laborers, a recent trend toward increased regulation of areas where individuals may solicit work and of labor pool contractors suggests the practice is expanding.<sup>51</sup>

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46. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/T-GGD-92-108, TAX ADMINISTRATION: APPROACHES FOR IMPROVING INDEPENDENT CONTRACTOR COMPLIANCE 1-3 (1992).

47. *Id.* at 3.

48. *Id.*

49. See David Cay Johnston, *Earning It: Are You Your Own Boss? Only If the I.R.S. Says So*, N.Y. TIMES, Mar. 19, 1995, § 3, at 13. Johnston writes:

[T]here is [a] group of contractors who would like nothing better than to be employees—the poor ones like farmworkers, janitors and seamstresses toiling in Brooklyn sweatshops.

Many of these workers want to be employees just to be covered by the minimum wage laws. As employees, they also would have taxes withheld from their pay, making them eligible for jobless, disability and old-age benefits.

But the I.R.S. is not spending much time reclassifying these low-wage people. Why? Because their tax bills are so small that the issue is not an agency priority.

*Id.*

50. See generally Christian Zolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305, 2331 (1994) (finding that immigrants have responded to the deteriorating labor conditions wrought by subcontracting by working in the informal economy, including day labor and small-scale vending).

51. See, e.g., Florida's proposed Labor Pool Act, C.S.H.B. 595, 104th Leg., 1st Sess. (1995) (prohibiting, *inter alia*, charging rental fees to temporary employees for equipment, uniforms, or transportation; failing to inform temporary employees about exposure to toxic substances; paying temporary employees in nonnegotiable instruments; and requiring that temporary employees sign waivers of protections); Tracey Kaplan, *Curbside Laborers Still in*

## III.

LEGAL IMPLICATIONS: STATUS OF CONTINGENT WORKERS  
UNDER EMPLOYMENT LAWS

One of the primary motivations for employers to move to contingent work arrangements is to avoid employment regulations.<sup>52</sup> Each of the many employment laws regulating the American workplace has a slightly different definition of who is an employee, who is an employer, and under what conditions certain employees are eligible for coverage. Frequently, workers who do not work a certain number of hours in the year or who have not worked for a particular employer long enough are denied coverage by many basic employment regulations. This section provides an overview of the variety of inclusions and exclusions of major employment laws as well as proposed approaches for unifying and standardizing this area of the law.

## A. Coverage

No standard length of service, type of employment, or minimum number of hours qualifies any given worker for inclusion within the spectrum of employment protections. Unlike the 1938 Fair Labor Standards Act (FLSA), which broadly includes within its reach any individual engaged in interstate commerce whom an employer "suffer[s] or permit[s] to work,"<sup>53</sup> many recent enactments are restrictive in their coverage. Federally-mandated economic security programs such as unemployment compensation and workers' compensation leave determinations of who should be "in" and who should be "out" of the safety net up to the states. As a result, programs are inconsistent and often vulnerable to lobbying by employers seeking to restrict their coverage.<sup>54</sup> Other programs require a minimum number of full-time employees in the workplace or carry minimum

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*Business Despite Ordinance*, L.A. TIMES, Aug. 22, 1994, at A1 (detailing lack of enforcement of one-month-old local ordinance criminalizing curbside job solicitation); *Off the Street: Pacific Beach Center is a Good Idea*, S.D. UNION TRIB., Nov. 14, 1994, at B6 (advocating support of employment center designed to "get day laborers off street corners"); *The Sting: Targeting Day Laborers an Exercise in Frustration*, HOUSTON CHRON., Dec. 6, 1994, at 10 (noting that day laborers are not utilizing the new city-sponsored gathering site).

52. See, e.g., *supra* notes 27, 39-40, 49, and accompanying text.

53. 29 U.S.C. §§ 203(g), 206(a) (1994). The Act contains no minimum hour or length of service requirements for eligibility. It does, however, include categorical exclusions in its overtime provisions, exempting executive, administrative, and professional workers from those protections. 29 U.S.C. § 213 (1994).

54. The temporary employment industry is utilizing this vulnerability to press several states to enact laws which would both limit their own liability for unemployment payments to their workers and encourage unemployed workers to maintain contact with temporary firms in order to continue to qualify for unemployment benefits. Christopher Cook, *Temps—The Forgotten Workers*, NATION, Jan. 31, 1994, at 124, 126. Florida was the first state to adopt such a restriction. See FLA. STAT. ch. 443.101(10)(b) (1993) ("A temporary employee will be deemed to have voluntarily quit . . . if, upon conclusion of his latest assignment, the temporary employee, without good cause, failed to contact the temporary help firm for reassignment . . ."). California has also considered similar legislation at the urging

hours and tenure requirements for the regulations to apply to *any* of an employer's employees.<sup>55</sup>

Unemployment programs are a prime example of the difficulties contingent workers face in qualifying for standard benefits. Many states categorically exclude contingent workers such as casual workers, domestic workers, and independent contractors.<sup>56</sup> Across the states, workers are required to work an average of twenty weeks per year in order to qualify for unemployment benefits.<sup>57</sup> Such requirements operate to deny coverage to many seasonal and temporary workers.<sup>58</sup> Many states also impose minimum earnings requirements which effectively exclude part-time workers who may be working as many as thirty-five hours per week.<sup>59</sup> Most states disqualify those who are seeking only part-time employment from state unemployment programs, excluding such workers on the basis that they are not "available" for full-time work.<sup>60</sup> Few work hours and low earnings will also, of course, lower workers' social security benefits in later years.

The Employee Retirement Income Security Act (ERISA)<sup>61</sup> severely limits the availability of benefits for contingent workers by authorizing restrictive tenure and vesting requirements. Under ERISA, employers may

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of the California Association of Temporary Services. *See* Cook, *supra* this note, at 126-27 (detailing how this temporary services organization worked with California Assemblyman Mickey Conroy to craft a bill limiting temporary workers' unemployment compensation). Georgia already denies benefits to workers who previously worked temporary or intermittent assignments and refuse comparable assignments without good cause. GA. CODE ANN. § 34-8-195(c) (1995) (stating that an individual will not be considered unemployed in any week she "refuses an intermittent or temporary assignment without good cause").

55. *See, e.g.* VA. CODE ANN. § 65.2-101 (Michie 1994) (exempting employers with fewer than three employees from unemployment insurance coverage).

56. *See, e.g., id.* (exempting casual, domestic, farm, and horticultural workers); *see generally* John C. Williams, *Part-Time or Intermittent Workers as Covered by or Eligible for Benefits Under State Unemployment Compensation Acts*, 95 A.L.R.3d 891 (1979) (providing detailed examples of states' coverage of part-time and intermittent workers).

57. Virginia L. duRivage, *New Policies for the Part-Time and Contingent Workforce*, in *NEW POLICIES FOR PART-TIME AND CONTINGENT WORKERS* 89, 106 (Virginia L. duRivage ed., 1992). In calculating the twenty weeks, many states do not count the most recent quarter of work, excluding what may have been the worker's most productive period. National Employment Law Project, statement to the Commission on the Future of Worker-Management Relations 9 (July 18, 1994) (on file with *New York University Review of Law & Social Change*).

58. duRivage, *supra* note 57, at 106.

59. *Id.* duRivage calculated that, in 1992

[A] temporary worker earning the industry's hourly average wage of \$6.42 for thirty hours of work a week and earning a total of \$770.40 per month would fail the minimum earnings test in at least nineteen states. Similarly, a part-time worker employed up to thirty-five hours per week and earning the 1988 average hourly wage of \$4.42 would fail to meet minimum earnings requirements in at least half the states.

*Id.*

60. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-91-56, *WORKERS AT RISK: INCREASED NUMBERS IN CONTINGENT EMPLOYMENT LACK INSURANCE, OTHER BENEFITS* 9 (1991).

61. 29 U.S.C. §§ 1001-1461 (1994).

establish a minimum tenure period—between five and seven years—before an employee's pension fully vests.<sup>62</sup> Further, no employer is required to permit employees to participate in a pension plan until the employee has worked at least one thousand hours in a twelve-month period, even if the employee has worked continuously for the employer for the minimum tenure period.<sup>63</sup> Thus, employees who either work part-time for several years or work in short-term positions for several employers will likely never vest in a pension plan. Likewise, because most plans increase the benefit payment as the workers' tenure and salary increase, even if the employee vests, she will receive a lower benefit if she later leaves the company.<sup>64</sup>

The Family and Medical Leave Act (FMLA)<sup>65</sup> excludes many contingent workers. First, the FMLA does not apply at all to businesses with fewer than fifty employees (including part-time employees).<sup>66</sup> Second, the Act excludes part-time workers even if their employer is covered.<sup>67</sup> One employer, remarking on her responsibilities under the FMLA, demonstrates the incentives such minimum-employee requirements establish for employers:

"Fifty is the magic number," says Ruth Stafford, president of Kiva Container Corp., a Phoenix packing manufacturer with 48 employees. To keep her payroll under 50, she plans to use temporary employees as needed to handle simple jobs such as bundling cardboard boxes or stripping dye items off a machine.<sup>68</sup>

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62. 29 U.S.C. § 1053(a)(2) (1994).

63. 29 U.S.C. §§ 1052(a)(1), 1052(a)(3)(A) (1994).

64. See generally, *Personal Savings and Pension Security, Hearings Before the Subcomm. on Deficits, Debt Management and Long-Term Growth of the Senate Comm. on Finance*, 103rd Cong., 2d Sess. (1994) (statement of Robert Reich, Secretary of Labor) (explaining that only about 45% of U.S. workers participate in a private pension plan and noting that participants are generally higher-income, full-time workers at large employers, rather than part-time workers who receive virtually no coverage); Linda Wheeler, *Bereaved & Bewildered: A Family of Worker at Memorial Denied Benefits*, WASH. POST, July 10, 1993, at A1 (detailing the story of a five-year, full-time groundskeeper at the Lincoln Memorial, who was not entitled to a pension or federal health and life insurance because he was officially a temporary employee).

65. 29 U.S.C. §§ 2601-2654 (1994).

66. 29 U.S.C. § 2611 (1994). Similarly, the Worker Adjustment and Retraining Notification Act (WARN) explicitly does not count part-time workers toward the minimum number of employees a business must have before it is obliged to follow the Act's provision. See 29 U.S.C. § 2101(a)(1) (1994) (providing that "the term employer means any business that employs (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)").

67. Workers must have worked with the same employer for at least 12 months and 1250 hours over that 12 month period. 29 U.S.C. § 2611(2)(A) (1994). The Bureau of Labor Statistics estimates that only about 10.8% of private U.S. establishments are covered by the FMLA, and that approximately 46.4% of private U.S. workers are eligible to use it. *Executive Summary of Westat Inc. Survey of Employers on the Impact of the Family and Medical Leave Act*, DAILY LAB. REP. (BNA) No. 204, at D-20 (Oct. 23, 1995).

68. Jeanne Sandler, *Small Firms Try to Curb Impact of Leave Law*, WALL ST. J., Aug 5, 1993, at B1.

Congress' deliberate choice to exclude part-time or short-term workers from the protections of its most recent labor legislation imposes a two-fold burden on the contingent workforce: (1) it encourages employers to shift to contingent work arrangements in order to evade the requirements of the statutes, and (2) it directly imposes a second-class status on contingent workers who labor alongside full-time employees but who do not enjoy the same minimum guarantees Congress provides for them.<sup>69</sup>

Likewise, all antidiscrimination laws require employment of a minimum number of employees—between fifteen and twenty-five—for a certain period per year before a business is covered under their provisions.<sup>70</sup> As a result, many employers with large proportions of contingent workers may be completely outside regulation under these laws. Additionally, courts interpreting who is an employee for purposes of coverage under Title VII and other antidiscrimination statutes have employed restrictive criteria which effectively deny coverage to many workers who subcontract with their employers or who are intermittently employed.<sup>71</sup>

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69. See generally *KELLY SERVICES, INC.*, *supra* note 18, at 42 (explaining that businesses are turning to temporary workers in part because "[t]he proliferation of state and federal legislation and regulation impacting the employment relationship has tended to discourage the creation of full-time jobs."); MARK WILSON, *HOW TO CLOSE DOWN THE DEPARTMENT OF LABOR* (Heritage Found. Rep. No. 1058, Oct. 19, 1995, at 21) available in LEXIS, Nexis Library, HFRPTS File ("[T]hese [mandated benefits] requirements add to the cost of hiring and managing workers and directly affect an employer's decisions about whether and when to hire a worker, which worker to hire, and how long to retain that worker. The rise in nonwage labor costs . . . is one of the forces leading employers to . . . utilize part-time, temporary, and contract labor.").

70. Title VII of the Civil Rights Act of 1964 applies only to workplaces of 15 employees or more in *each* working day, for at least 20 weeks of the preceding year. 42 U.S.C. § 2000e(b) (1988). The Age Discrimination in Employment Act (ADEA) applies to workplaces of 20 or more for the same period. 29 U.S.C. § 630(b) (1994). The Americans with Disabilities Act (ADA) used a phase-in provision whereby it began by applying only to businesses of 25 employees or more, but by 1994 applied to businesses of 15 or more. 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

The method of counting the number of people a business employs has become another area of dispute as employers seek to evade coverage under these laws. Courts apply two different methods: the first approach counts all employees who worked at some point in a given week, while the second averages the number of employees working on each day of a given week. The second approach thus permits massive evasion by employers who are able to rely on part-time workers to side-step the prohibitions of antidiscrimination legislation. See *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. 251, 254 (N.D.N.Y. 1993) (weighing two approaches and following EEOC guidelines to count the total number of employees on employers' payroll). The Supreme Court recently granted *certiorari* to decide this question. *EEOC v. Metro. Educ. Enter., Inc.*, 60 F.3d 1225 (7th Cir. 1995), *cert. granted sub nom.*, *Walters v. Metro. Educ. Enter., Inc.*, 116 S.Ct. 1260 (1996).

71. See, e.g., *Caryn Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994) (finding that woman who suffered sexual harassment by county official was not an "employee" for purposes of Title VII; plaintiff had rented office space to the alleged harasser and performed multiple duties for him including drafting press releases and grant applications, editing, speech writing, and consulting); *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 915 n.8 (7th Cir. 1981) (finding insurance salesman to be independent contractor under

Finally, although all employers must pay social security withholding taxes (FICA) for employees,<sup>72</sup> workers must have been in "covered" employment earning above a statutory minimum amount<sup>73</sup> for six of the past thirteen quarters in order to be eligible for benefits.<sup>74</sup> Therefore, workers who move in and out of the workforce or who work part-time may not be eligible to receive social security retirement benefits or disability insurance, despite having paid into the system.

In contrast to these restrictive statutes, the Occupational Safety and Health Act (OSHA) and most states' workers' compensation schemes cover all employers and do not incorporate complex eligibility schemes for employees.<sup>75</sup> Contingent workers may still find themselves left out of these protections, however, if they are not considered "employees" or if their immediate worksite is not an "employer" under the particular law.

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ADEA and therefore ineligible for protection under that statute); *Dulcinea Spirides v. Reinhardt*, 613 F.2d 826, 830-33 (D.C. Cir. 1979) (finding foreign-language broadcaster for Voice of America to be independent contractor under Title VII).

Senator Howard Metzenbaum related several stories of individuals denied coverage under antidiscrimination laws in the Congressional Record, including this one:

Jimmie Ruth Daughtrey had worked for Honeywell [Corporation] as a computer programmer for seven years when the company eliminated her job. Shortly thereafter, Honeywell rehired her as an independent contractor—performing the same job, but without health care, pension, or other benefits. When Honeywell later terminated Daughtrey and other older workers, she filed suit under the Age Discrimination in Employment Act, but was deemed a consultant rather than an employee covered by the Act.

140 CONG. REC. S14247 (1994) (statement of Sen. Metzenbaum). For commentary and suggestions concerning the limitations of antidiscrimination and other laws for contingent workers, see generally John M. True III, *Contingency Workers' Frayed Safety Net*, LEGAL TIMES, Dec. 13, 1993, at 7; National Employment Law Project, statement submitted to the Commission on the Future of Labor Management Relations (July 18, 1994) (on file with *New York University Review of Law & Social Change*).

72. 26 U.S.C. § 3102(a) (1994). The entity which pays the worker, as opposed to the one which controls the worker, is responsible for payment of withholding taxes. *Otte v. United States*, 419 U.S. 43, 50 (1974). Temporary agencies and other employee leasing services are therefore the responsible entities rather than the client employer. See, e.g., *General Motors Corp. v. United States*, No. 89-CV-73046-DT, 1990 U.S. Dist. LEXIS 17986, (E.D. Mich. Dec. 26, 1990) (holding that an overseas leasing service, rather than GM, is the "employer" of design engineers hired to supplement GM's American workers).

73. See 42 U.S.C. § 413 (1994) (defining a "quarter of coverage" to include minimum earnings requirements).

74. See 42 U.S.C. § 414 (1994) (defining "fully insured individual" and "currently insured individual").

75. Congress enacted OSHA with the intent to provide safe and healthy working conditions to "every working man and woman in the Nation," and to impose responsibility for safety compliance on both employers and employees. See 29 U.S.C. §§ 651(b), 654 (1994) (stating the Congressional purpose of OSHA). For a discussion of the variety of state approaches to workers' compensation coverage of temporary employees, see Edward A. Lenz, *Co-Employment—A Review of Customer Liability Issues in the Staffing Services Industry* 2-3 (Aug. 10, 1993) (paper presented to the American Bar Association Section of Labor and Employment Law).

### *B. Definitions of Employee and Employer*

The question of who is an employer and who an employee for purposes of employment statutes is mired in contradictory opinions and varying interpretations for purposes of different statutes. Its relevance to contingent workers is twofold. First, as exemplified by the Title VII cases, if a worker is classified as an independent contractor rather than an employee, she enjoys no protection under most statutes. Second, if that worker is under the direction of multiple entities, either through a subcontracting arrangement or through work in a subsidiary operation of a primary employer, she must determine which entity is the employer in order to ascertain who is liable for violations of minimum economic and health and safety standards.

#### *1. Definition of Employee*

The distinction between an employee and an independent contractor arose at common law as an effort to determine who should be held responsible for torts between private parties. Many commentators and practitioners have criticized the use of this distinction in the contemporary employment law realm as outmoded and inappropriate.<sup>76</sup> Nonetheless, the Supreme Court reaffirmed its vitality in this arena as recently as 1992<sup>77</sup> and the distinction continues to be, for the most part, the touchstone for determination of who may enjoy the protections of employment statutes and who may not.

Only one employment statute, the FLSA, incorporates an expansive and comprehensive definition of who is an employee. Although the statute contains the tautological definition of employee as "any individual employed by an employer," it goes on to define the verb "employ" as "to suffer or permit to work."<sup>78</sup> As early as 1947, the Supreme Court declared that the purposes of the Act were such that the term employee should be interpreted broadly.<sup>79</sup>

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76. See, e.g., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 37 (1994) [hereinafter COMMISSION REPORT] ("[T]he definition of employee . . . is based on a nineteenth century concept whose purposes are wholly unrelated to contemporary employment policy."); Berzon, *supra* note 40, at 1 ("[T]he common-law definition of 'employee,' derived from tort law and directed originally toward the question whether the employer should be held vicariously liable for the putative employee's actions, for the most part governs, quite inappropriately, in the area of employee-protective statutes.")

77. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (holding that traditional agency principles should govern the determination of employee status under ERISA).

78. 29 U.S.C. § 203 (1994).

79. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) (defining "meat boners" as employees because their work was part of an integrated unit of production); *United States v. Silk*, 331 U.S. 704, 712 (1947) (opining that a constricted interpretation of the term would "invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the [social security] legislation"); see also



Courts have long considered the economic dependence of the worker on the employer as the key concept in determining a worker's status as an employee for purposes of the FLSA and have evaluated each of the factors of the traditional common-law employee/independent contractor test in that light.<sup>80</sup> This test has come to be known as the "economic realities" test. In *Nationwide Insurance Mutual Co. v. Darden*,<sup>81</sup> however, the Supreme Court expressly distinguished the interpretation of employee under the FLSA from the term's definition under ERISA (and, presumably, other employment statutes<sup>82</sup>). In *Darden*, the Court relied on the statute's "suffer or permit to work" language to find that the FLSA "stretches the meaning of 'employee' to some parties who might not qualify under such a strict application of traditional agency law principles."<sup>83</sup>

Thus, the *Darden* Court expressly declined to stretch the FLSA's "economic realities" test beyond that statute. As a result of the Court's limited holding in *Darden*, a multifactor test for independent contractor status derived from the common law governs the determination for everything from whether one may recover for sexual harassment by one's employer<sup>84</sup> to whether one has to pay one's own social security and withholding taxes.<sup>85</sup> The precise contours of the distinction between the common law standard championed in *Darden* and the "economic realities" test of the FLSA remain unclear, however, as many of the same factors are pertinent.<sup>86</sup> Further, the lack of weighting of any of the factors leaves the tests wholly

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NLRB v. Hearst Publications, Inc., 332 U.S. 111, 131-32 (1944) (holding that the term "employee" in the Wagner Act should be interpreted "in light of the mischief to be corrected and the end to be attained").

80. *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (stating that dependence on the employer creates employee status).

81. 503 U.S. 318 (1992).

82. See, e.g., *Kennel v. Dover Garage, Inc.*, 816 F. Supp. 178, 184 (E.D.N.Y. 1993) (applying *Darden* standard to ADEA); *Lattanzio v. Security Nat'l Bank*, 825 F. Supp. 86, 89 (E.D. Pa. 1993) (abandoning hybrid economic realities test to apply *Darden* standard to Title VII claim).

The "economic realities" test may continue to be the one used under OSHA, however, on the theory that employers are generally the cheapest cost-avoiders for safety hazards and so a broader definition would serve the purposes of the statute. See *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974) (adopting economic realities test under OSHA).

83. *Darden*, 503 U.S. at 320.

84. See *Folkerson v. Circus Circus Enter.*, 1995 U.S. App. LEXIS 30137, at \*7 (9th Cir. 1995) (using common law agency factors to determine independent contractor status); *Lattanzio*, 825 F.Supp. at 88-89 (adopting a multifactor test for defining an employee, including most importantly the party's right to control the manner and means by which work is accomplished).

85. See INTERNAL REVENUE SERV., *supra* note 44, at 8465 to 8465-6 (setting out factors); 26 U.S.C. § 3401(d) (1994) (defining "employer" for income tax withholding purposes); 26 U.S.C. § 3102(a) (1994) (requiring FICA withholding from employers).

86. Overlapping factors include the degree of control over the worker's work, the worker's opportunity for profit or loss, the worker's investment in tools and materials, whether the work requires a skill, the duration of the relationship, and whether the service is an integral part of the employers' business. Compare *United States v. Silk*, 322 U.S. 704 (1947) (economic realities test) with *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318

indeterminate and permits the same manipulations by employers and judges under the economic realities test that occur under the common law test.<sup>87</sup>

## 2. *Definition of Employer*

Even if a worker qualifies as an employee, it may still be unclear whose employee she is. Under both employee leasing<sup>88</sup> arrangements and subcontracting relationships, questions arise as to which entity is the employer and is therefore liable for compliance with employment regulations. Again, different statutes utilize different definitions and courts have interpreted the myriad of relationships under formalistic and manipulable tests. In general, the farther a business places itself from the ultimate hiring, firing, and payment of an employee, the less likely it is to be considered that employee's employer, even though it may be the ultimate beneficiary of the work performed. Thus, the law establishes incentives for businesses to enter complex arrangements of subcontracting and employee leasing in order to circumvent their responsibilities toward the workers involved.

The broadest definition of employer appears under the FLSA. At the threshold, a business must do at least \$250,000 annual gross volume of business to be an "enterprise" covered by the FLSA.<sup>89</sup> The law then protects all employees (broadly defined) of such an enterprise.<sup>90</sup> Courts look to the economic realities of the work relationship to determine liability: whether the entity has the power to hire and fire, supervise, control work conditions and schedules, set compensation, and maintain employment records.<sup>91</sup> Further, courts may be willing to find liability for "common enterprises" in

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(1992) (common law test); *see also* Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) (comparing the two tests).

87. *See, e.g.*, Lauritzen, 835 F.2d at 1539 (Easterbrook, J., concurring) (criticizing the "economic reality" test "because it offers little guidance for future cases and because . . . [it] begs the question about what aspects of 'economic reality' really matter, and why"); *see also* Berzon, *supra* note 40, at 6-7 (concluding that the two tests may in fact result in the same outcomes in individual cases) and cases cited therein.

88. I use the term "employee leasing" here to refer to both hiring workers on a day-to-day basis from temporary service agencies, and contracting with an "employee leasing" firm which takes over all payroll, tax, and other "human resources" responsibilities for an entire workforce. In both cases, the legal issues are substantially the same. *See generally* Jonathan G. Axelrod, *Who's the Boss? Employee Leasing and the Joint Employer Relationship*, 3 LAB. LAW. 853, 854 (1987) (stating that an employer's decision to subcontract labor is based on economic considerations); H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683 (1994) (giving a history and survey of labor leasing in the United States); Gregory L. Hammond, *Flexible Staffing Trends and Legal Issues in the Emerging Workplace* (Aug. 10, 1993) (paper to the American Bar Association Section on Labor & Employment Law) (providing a history and analysis of trends in employee leasing) (on file with the *New York University Review of Law & Social Change*).

89. 29 U.S.C. § 203(s)(1) (1994).

90. 29 U.S.C. §§ 206-207 (1994).

91. *See* Bonette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (finding that, under the FLSA, public service agencies were employers).

an effort to make it more difficult for businesses to evade liability by shuffling corporate forms.<sup>92</sup> Despite such efforts, however, employers still routinely forswear liability for minimum wage and overtime payments by structuring their relationships with subcontractors at a sufficiently arms-length distance.<sup>93</sup>

Disputes over whether a particular entity is an individual's employer under antidiscrimination legislation usually center around whether the entity "control[s] some aspect of an employee's compensation or terms, conditions, or privileges of employment."<sup>94</sup> This "right to control" test has resulted in liability for some employers who lease employees but maintain responsibility for the working conditions in which those employees labor.<sup>95</sup> The prototypical example is sexual harassment: even if the complainant is a temporary worker at Bank of America for a single day, the bank is still liable to her for the actions of its agents if they create a hostile working environment. Indeed, some supporters of employee leasing have cited the

92. See *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (finding employee status based on the managerial responsibilities and control the corporation had on maintenance workers).

93. See Laura Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994) (documenting abuses against garment workers in California and proposing, *inter alia*, tougher standards for joint liability). See also Alan Finder, *Despite Tough Laws, Sweatshops Flourish*, N.Y. TIMES, Feb 6, 1995, at A1 (describing sweatshops in New York as being still common despite rules on labor, health, safety, and immigration); U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-95-29, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS (1994).

94. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (stating that Title VII, § 703(a) construes the term "employer" in a functional sense to encompass persons who may not be considered employers in conventional terms).

95. See, e.g., *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021-22 (9th Cir. 1983) (holding hospital could not be granted summary judgment under Title VII of the Civil Rights Act of 1964 for racially motivated rejection of a contract with Hispanic-owned physician group despite the fact that the physician group was an independent contractor); *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (reversing trial court grant of summary judgment and holding hospital contracting with nursing agency for nursing services could be found liable for discrimination against nurses); *Magnuson v. Peak Technical Services*, 808 F. Supp. 500, 507-08 (E.D. Va. 1992) (holding auto dealership could be considered an employer and proper defendant in a Title VII sexual harassment claim of sales agent hired and paid by employee leasing agency), *aff'd on other grounds*, No. 93-1032, 1994 U.S. App. LEXIS 30723 (4th Cir. Nov. 30, 1994); *Baranek v. Kelley*, 630 F. Supp. 1107, 1113 (D. Mass. 1986) (finding that the Massachusetts Department of Elder Affairs, which funded employer's activities under contract, exercised sufficient control over plaintiff's employment situation to be an indispensable party defendant in Title VII claim).

Some management advisors have warned of the potential multiplication of liability for employers under such decisions:

[Courts are willing] in discrimination suits to give the aggrieved employee the opportunity to pursue remedies against any party that was involved in supervisory activities, not just the entity that had actual control and authority over the conduct alleged . . . .

Because these laws apply from the lowest level employee to the president of the company, the potential for liability is greater in federal discrimination cases than perhaps in any other area of law.

Dennard & Northrup, *supra* note 88, at 708.

potential for temporary employees to be covered under antidiscrimination statutes as employees of leasing firms, where they might not be covered if the recipient firm were too small or otherwise exempted, to be a great benefit of these arrangements for workers.<sup>96</sup>

The question of which employer is liable for extending benefits to employees is treated differently under various employment legislation. For example, ERISA uses the word "employer" in both Subchapter I (which governs reporting, disclosure, and funding requirements)<sup>97</sup> and Subchapter III (which provides protections where employers terminate pension plans). Subchapter III, however, provides no definition for the term, nor does it refer to the Subchapter I definition of employer. From this silence the First Circuit has held that courts have latitude to define the meaning of "employer" in Subchapter III.<sup>98</sup> The Second Circuit, however, has reasoned that a definition broader than the common law definition of "employer" is the appropriate one, given the purposes of the Act.<sup>99</sup> Inasmuch as employers are not required to provide benefits to contingent workers, however, ERISA itself may have less of an impact on the provision of benefits than certain tax regulations governing pensions.<sup>100</sup>

Regulations under the FMLA specifically address multiple employer situations, outlining a "right to control" test similar to that used in antidiscrimination law. Under this test, if a court finds that a joint employment relationship exists, both firms must count leased employees to determine whether the employer is covered and whether the employee is eligible for benefits.<sup>101</sup> Under OSHA,<sup>102</sup> courts hold employers liable for violations of standards resulting in the exposure of workers to hazards which the employer created or controlled, even where the exposed workers were employees of a third party.<sup>103</sup> Finally, many states' workers' compensation

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96. See Hammond, *supra* note 88, at 3 ("Not only do employee leasing companies assist businesses in legal compliance, but they regularly extend the benefits of statutory protections to employees who would otherwise not be covered by them."); TEMPORARY SERVICES, *supra* note 36, at 6 ("[B]ecause the business using temporary help generally is held to be a joint employer, workers often have recourse against *both* the temporary help employer and the worksite employer.").

97. See 29 U.S.C. § 1002 (1994) (providing that "For purposes of this subchapter: . . . (5) The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan . . .").

98. DeBreceni v. Graf Bros. Leasing Inc., 828 F.2d 877, 880 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

99. Korea Shipping Corp. v. New York Shipping Ass'n, 880 F.2d 1531, 1537 (2d Cir. 1989) (defining employer expansively to include "one obliged to contribute to a plan for the benefit of the plan's participants").

100. For example, I.R.C. § 414(n) (1995) mandates that employers count leased employees in determining coverage for certain retirement and other benefits plans.

101. 29 C.F.R. § 825.106 (1995).

102. 29 U.S.C. § 651 (1994).

103. See, e.g., A/C Co. v. Elec. Occupational Safety & Health Review Comm'n, 956 F.2d 530, 533 (6th Cir. 1991) (holding that subcontractor at multiemployer job site could be held liable for violations of OSHA regulations); Brennan v. Occupational Safety & Health

laws hold that both the worksite employer and the temporary agency are covered by statute, thereby precluding workers from pursuing a tort remedy against the worksite employer, even though the agency usually pays all workers' compensation premiums.<sup>104</sup>

The result of this panoply of laws and interpretations of relationships has been to encourage employers to avoid liability by structuring their relationships with workers so as to deter a finding that they are joint employers or have the right to control the worker. These evasions include establishing sham corporate subsidiaries or other abuses of corporate limited liability,<sup>105</sup> extensive use of subcontracted or leased labor, and "double-breasted" contractor arrangements.<sup>106</sup> Two distinct doctrines, the single employer doctrine and the joint employer doctrine, have evolved to deal with these arrangements. Both require expansion if the current system of employment law is to protect those workers who may be left without recourse as a result of unscrupulous employers' legal machinations.

The single employer doctrine holds that a single employment relationship exists where two ostensibly separate entities are part of a unitary, integrated employment enterprise. Factors relevant to such a determination are the functional integration of the operations, the centralization of control of labor relations, common management, and common ownership.<sup>107</sup> For example, where a single individual operated two separate corporations, used their names virtually interchangeably, employed the same employees in both, and bid on the same projects through both, the two corporations

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Review Comm'n, 513 F.2d 1032, 1038 (2d Cir. 1975) (holding that an employer could be held liable if "the area of the hazard was accessible to employees of the cited employer or those of other employers engaged in a common undertaking").

104. See, e.g., *Donna Marlow v. Mid South Tool Co.*, 535 So.2d 120, 122 (Ala. 1988) (holding that a temporary service employee is an employee of both the general and special employer, and thus the exclusive remedy is workers' compensation); *Lenz*, *supra* note 75, at 2-3 (explaining that many states extend the exclusive remedy provisions of workers' compensation via the common law of "special employer" doctrine).

105. See *Foo*, *supra* note 93, at 2189.

Employers . . . often play the "shell game"—that is, they close down one corporation and start up another. The corporate shield of limited liability protects shareholders, directors and officers from personal liability for the [unpaid] wages of their former employees. Former employees are unable to reach the assets of the new corporation or company because of the legal fiction that the predecessor and successor are separate legal entities. . . . Alternatively, an employer may transfer all of his assets to a family member, and continue to operate under the same management with a new company name.

*Id.*

106. The term "double-breasted contractor" refers to a practice whereby a unionized contractor establishes a subsidiary corporation to do essentially the same kind of work, but to do it with a non-union workforce. See *UA Local 343 of United Journeymen Ass'n & Apprentices of Plumbing and Pipefitting Indust. v. NOR-CAL Plumbing, Inc.*, 48 F.3d 1465, 1469-70 (9th Cir. 1994) (explaining the term).

107. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

were found to be a single employer.<sup>108</sup> Although the single employer doctrine developed in the context of holding employers to the terms of collective bargaining agreements, the doctrine is also relevant where employers create two "separate" entities for the purpose of evading minimum employee requirements of employment regulations or where a business closes and reopens under a new name to avoid past liabilities to workers.

The joint employer doctrine, on the other hand, governs when two employers are in fact separate—for example, a business and a subcontractor or a business and a temporary service—but each retains significant control over the terms and conditions of work for the employees. As one court has stated, "[T]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment."<sup>109</sup> Regulations under the FLSA state that a joint employment relationship will be found:

- (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
- (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.<sup>110</sup>

Where a joint employment relationship exists, both employers are liable for complying with wage and hour standards.<sup>111</sup>

Commentators criticize the joint employer doctrine as manipulable by courts and attorneys, and not sufficiently expansive to cover a range of potential abuses.<sup>112</sup> In many subcontracting relationships, the contractor may act directly in the interest of a client employer, yet the client employer maintains sufficient distance from the operations of the subcontractor to disclaim liability. Client employers in this situation may escape liability

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108. See *Trustees of IBEW Local 1701 Pension Fund v. Favia Elec.*, 995 F.2d 785 (7th Cir. 1993).

109. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

110. 29 C.F.R. § 791.2 (1995).

111. *Id.*

112. See Axelrod, *supra* note 88, at 866 ("Litigating joint employer cases . . . is legal Russian roulette. Every case contains a multiplicity of facts, some which support a finding of joint employer status and others which do not."); COMMISSION REPORT, *supra* note 76, at 41 (suggesting areas in which the doctrine should be expanded); Hiatt & Rhinehart, *supra* note 26 (criticizing the varying application of the joint employment doctrine depending on the law in question).

even though they are fully aware of the wage and hour violations committed by the subcontractors in performing the work. The doctrine requires a degree of control over the employees sufficiently high to insulate the primary beneficiaries of wage violations (the client employer who pays a lower price for services) and thereby encourages multilayered subcontracting arrangements. The ultimate result is that workers at the bottom of the hierarchy lack legal recourse against the "deep pocket" recipient of their work.<sup>113</sup>

The current state of employment law is clearly a morass for contingent workers. Congress, in passing employment legislation, may seek to establish broad-based protections to insulate workers against discrimination and economic exploitation. Yet employers, sometimes with the help of courts, respond by finding loopholes and innovative structures for their employment relationships which permit them to escape coverage under the laws. Often, these evasions involve further expanding the ranks of part-time workers, contract employees, and temporary or leased workers. Proposals for reform have aimed at unifying the disparate definitions of employers and employees, standardizing legal treatment of all types of workers, and increasing penalties and enforcement where workers may be legally protected but violations are nonetheless routine.

### *C. Proposals for Reform*

#### *1. Federal Initiatives*

Proposals for reform at the federal level have taken place in two arenas. Senator Howard Metzenbaum (D-OH) and Representative Patricia Schroeder (D-CO) have both introduced legislation that would cover contingent workers under most employment legislation, though they have met with little success. President Clinton also established the Commission on the Future of Worker-Management Relations, which is empowered to make recommendations on ways to increase productivity by promoting workplace cooperation and collective bargaining and reducing conflict in the workplace. Like the Senate bills, the Commission's recommendations are unlikely to precipitate meaningful reform legislation in the current Congress.

Representative Schroeder has introduced legislation every year since 1987 to extend statutory protections to the expanding contingent workforce. The Part-Time and Temporary Worker Protection Act would amend ERISA to mandate that employers offer pro-rated health and pension benefits to part-time and temporary workers.<sup>114</sup> The bill, however, has

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113. See Foo, *supra* note 93, at 2186-88 (describing such subcontracting arrangements in the garment industry); Hiatt & Rhinehart, *supra* note 26 (detailing such arrangements in the building services trade); Kadetsky, *supra* note 27, at 518 (describing such arrangements in the electronics industry).

114. See 135 CONG. REC. E2013 (daily ed. June 7, 1989) (statement of Rep. Schroeder).

never moved beyond the Education and Labor Committee or the Ways and Means Committee.

Senator Metzenbaum, now retired, introduced his Contingent Workforce Equity Act in October 1994, after nearly two years of hearings.<sup>115</sup> That law would "ensure that contingent workers—who now account for over a quarter of the workforce—have the same rights and protections under our Federal labor laws as full-time workers. In short, their work may be contingent, but their rights shouldn't be."<sup>116</sup> Covering civil rights laws, the National Labor Relations Act, (NLRA), OSHA, the Worker Adjustment and Retraining Notification Act (WARN), the FMLA, ERISA, and unemployment schemes, as well as tax matters, classification questions, and several federal service and procurement statutes, the legislation comprehensively addresses major employment legislation's exclusion of contingent workers and seeks to standardize statutory protections for them. It also reduces thresholds for coverage in many statutes to protect part-time workers and limit the use of temporary employment in the federal government.<sup>117</sup> The introduction of the law in the Senator's last months in office, however, relegated it to little more than a departing gesture to the labor community. As the Senator acknowledged in its introduction, "I will be retiring at the end of this session, but I hope that this legislation will be reintroduced in the next Congress."<sup>118</sup> Given the current makeup of the House as well as the Senate, however, little action to extend worker protections is likely.<sup>119</sup>

Likewise, the *Report and Recommendations* issued by President Clinton's Commission on the Future of Worker-Management Relations in December 1994 is unlikely to spur much action in Congress. Addressing the increased use of contingent worker relationships, the Commission proposed that Congress and/or the courts should: (1) streamline the definitions of employee and employer across statutes, with "economic reality" being the preferred test;<sup>120</sup> (2) eliminate tax incentives for misclassification of

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115. See 140 CONG. REC. S14247-53 (daily ed. Oct. 5, 1994) (statement of Sen. Metzenbaum).

116. *Id.* at S14247.

117. See *id.* (articulating § 2504 of the bill, which would extend coverage of the FMLA, OSHA, and other statutes to contingent workers); see also *Contingent Workers: Metzenbaum Bill Would Extend Protections to Temporary Employees*, PENSIONS & BENEFITS REP. (BNA) No. 21, at 1966-67 (Oct. 17, 1994) (stating the bill would provide protection for contingent workers under many existing statutes).

118. 140 CONG. REC. S14242-43 (1994).

119. See, e.g., *Benefit Reform for Contingent Workers Seen off the Agenda*, CORP. FINANCING WK., Nov. 28, 1994, at 4 (quoting Diane Dodson of the Women's Legal Defense Fund and Suzanne Smith of New Ways to Work as predicting that none of the provisions introduced by Sen. Metzenbaum are likely to pass).

120. For an explanation and discussion of the economic reality test, see part III.B.1., *supra*.



employees as independent contractors;<sup>121</sup> and (3) expand both the single and joint employer doctrines<sup>122</sup> in an effort to reduce incentives for employers to misuse corporate form or contracting relationships in order to evade responsibilities under employment laws.<sup>123</sup> Despite submissions and testimony from unions, worker-advocates, and the temporary services industry,<sup>124</sup> the Commission declined to adopt detailed recommendations on specific statutory and regulatory changes that could be made. Instead, the Commission treated the issue with a broad brush, stating that federal policy should not seek "to reduce the ability of the buyers and sellers of labor to experiment with all manner of contingent relationships, but rather to remove the incentives to use those arrangements in ways that undercut national employment standards."<sup>125</sup> Despite issuance of the report in December 1994, however, neither the President nor individual members of Congress have yet taken action to implement any of the Commission's recommendations in this arena.

## 2. State Initiatives

Some individual states are making progress towards protecting contingent workers. Despite the federal nature of much employment law, there is a great deal that state legislatures can do to extend coverage to contingent workers. For example, they can limit state government use of contingent arrangements as an employer by capping the amount of time workers can be kept in temporary status without benefits and by limiting privatization and subcontracting. Both the unemployment and workers' compensation systems are completely state-run; states can increase eligibility to cover more contingent workers under unemployment and use broad definitions of "employer" and "employee" under workers' compensation. States can

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121. For a discussion of the tax incentives which currently motivate businesses to misclassify employees as independent contractors, see *supra* notes 44-49 and accompanying text.

122. For an explanation of the single and joint employer doctrines, see *supra* notes 107-13 and accompanying text.

123. See COMMISSION REPORT, *supra* note 76, at 35-41.

124. See Bureau of Nat'l Affairs, *Commission Debates Laws Governing Employees, Independent Contractors, PENSIONS & BENEFITS REP.* (BNA) No. 21, at 1499 (Aug. 1, 1994) (providing examples of groups and individuals testifying to the commission).

Several groups submitted detailed recommendations for legislative and regulatory changes, the most common of which were to adopt a single definition of "employer" and "employee" modeled after the economic realities test; to adopt more restrictive criteria for independent contractor status; to increase penalties for misclassification, particularly regarding independent contractor status; to mandate equal pay and pro-rated benefits for part-time and temporary workers; to expand the single and joint employer doctrines; and to expand portability of pension and welfare benefits. See, e.g., ASIAN LAW CAUCUS ET AL, STATEMENT ON CHANGES TO CURRENT LABOR LAWS NECESSARY TO ADDRESS THE CRITICAL NEEDS OF THE CONTINGENT WORKFORCE (1994) (providing a detailed proposal with these type of suggestions).

125. COMMISSION REPORT, *supra* note 76, at 40.

also mandate pro-rating of non-ERISA benefits such as sick leave, vacation, and severance pay for part-time workers without incurring pre-emption problems.

Many states have already begun to regulate the temporary help industry. While some laws only ensure that either the temporary firm or the client employer, or both, pay workers' compensation insurance and payroll taxes for the employee,<sup>126</sup> others impose substantial regulations on the industry. For example, Florida requires companies to obtain licenses and comply with minimum standards of net worth to ensure they are able to meet payroll and taxes.<sup>127</sup> Florida and Tennessee currently mandate certain disclosures regarding benefits plans for employees.<sup>128</sup> Florida also requires leasing agencies to maintain rights and responsibilities over hiring, firing, transferring, disciplining, and ensuring the safety of employees.<sup>129</sup> In the past, Texas statutorily designated who shall be deemed the employer or co-employer for purposes of workers' compensation and other insurance.<sup>130</sup>

Although some states are making strides to protect contingent workers, their ability to enact comprehensive employment reform legislation is limited by broad federal preemption of the area of law. Moreover, in an era of interstate competition to lure businesses, state legislators are likely to respond to pressure from business lobbyists, resulting in a "race to the bottom," rather than improvements, in state employment protections for contingent workers.

### 3. *Enforcement and Litigation Strategies*

Even where contingent workers putatively enjoy coverage under protective statutes, enforcement of those provisions is often severely inadequate. Enforcement is especially a problem in the context of minimum wage and health and safety violations among subcontractors and misclassification of employees as independent contractors.

The United States Department of Labor has undertaken an effort to examine the problems of contingent workers and is currently attempting to

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126. See, e.g., KAN. STAT. ANN. § 44-758 (1994) (requiring any company in the business of leasing employees to comply with the workers' compensation laws); ME. REV. STAT. ANN. tit. 32, § 14055 (West 1994) (allowing the superintendent to adopt rules for employee leasing companies to obtain workers' compensation insurance); MO. REV. STAT. § 287.282 (1994) (stating that an employer who uses temporary service agencies may be required to provide workers' compensation insurance).

127. See FLA. STAT. ch. 468.525 (1995).

128. See *id.*; TENN. CODE ANN. § 62-31-203 (1995) (requiring temporary service firms to keep records of employees acknowledging receipt of these benefits).

129. See FLA. STAT. ch. 468.525 (1995) (using a licensing scheme whereby an employee leasing firm has specific responsibility for all of these items).

130. See TEX. REV. CIV. STAT. ANN. art. 5221a-10 (repealed 1995).

improve its system of enforcement.<sup>131</sup> The Department plans to increase investigations and implement national outreach, education, and enforcement initiatives. The strategy targets the worst violators in the garment, janitorial, and guard service industries and particularly scrutinizes the agriculture and construction industries for child labor violations.<sup>132</sup> One of the Department's most powerful weapons in enforcing the FLSA is the "hot goods" provision, which allows the Department to seize goods manufactured by employees who were not paid by contractors in accordance with the FLSA.<sup>133</sup> Although the provision has rarely been used in the past, the Department has invoked it recently in some highly-publicized cases to seize garments made by sweatshop manufacturers.<sup>134</sup> While the stepped-up investigations have generated some attention in the media and thus may be deterring violations, the Department's severe lack of staff and resources are likely to hamper comprehensive enforcement efforts.<sup>135</sup> Some observers have called for amendment of the FLSA to permit private rights of action to enforce the "hot goods" provision on behalf of an entire workforce, collect multiple damages, and impose civil penalties, thereby increasing enforcement power through the participation of the private bar.<sup>136</sup>

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131. See Janet Novack, *Is Lean, Mean?*, FORBES, Aug. 15, 1994, at 88 (describing Secretary of Labor Robert Reich's concern that contingent workers may not be receiving the protections and benefits provided to other workers). Novack quotes Jeffrey McGuinness, president of the Labor Policy Association:

"The unions and the Secretary of Labor are erecting a straw man to justify major changes in labor law," says McGuinness. He worries Reich will use the contingent worker issue to raise the costs of using part-timers and temporaries by mandating they receive the same hourly wages as an employer's regular full-timers get and to broaden the definition of "employee" to include more independent contractors. The paperwork alone would be a costly burden.

*Id.* at 88.

132. NORA LOZOYA, WAGE AND HOUR DIVISION: REPORT ON THE CONTINGENT WORKFORCE 11 (July 21, 1994) (on file with the *New York University Review of Law & Social Change*). The Wage and Hour Division's plan also seeks to promote compliance in the areas of day labor, the hotel/motel industry, restaurants, telemarketing, and health care. *Id.*

133. 29 U.S.C. § 215(a)(1) (1995) (making it unlawful to transport these goods). Only the Department has the authority to use the clause; there is no private right of action on the part of the aggrieved workers. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 51 (8th Cir. 1984) (explaining that the Secretary of Labor must bring proceedings, although employees may sue for unpaid wages or liquidated damages).

134. See, e.g., Stuart Silverstein, *Fashion Firms Told to Police Contractors*, L.A. TIMES, June 11, 1993, at D1 (describing recent use of "hot goods" statute against one-quarter of Southern California's apparel industry). The Department has also warned some building maintenance firms that they may face action under the provision. Michelle Levander, *U.S. Warns Tech Firms to Clean Up Janitorial Contracts*, SAN JOSE MERCURY NEWS, Jan. 22, 1994, § Bus., at 10D.

135. Increased wage and hour violations over the past decade have been met with drops in the wage and hour division's staff. Full-time equivalent staff has plummeted from 1098 in 1980 to 727 in 1994. COMMISSION REPORT, *supra* note 76, at 54.

136. See Foo, *supra* note 93, at 2205-08 (arguing that the FLSA would be more effective if Congress amended it to allow employees to seek injunctive relief under the "hot goods"

Private litigation strategies may also help to standardize and broaden the definitions of "employer" and "employee" throughout labor legislation and to deter misclassification of independent contractors. Marsha Berzon, Associate General Counsel for the AFL-CIO, argues that employee status established under a "friendly" statute, such as Title VII, where judges are more disposed to find liability in joint employer and contract situations, should be extended to labor legislation.<sup>137</sup> Berzon maintains that such determinations might deter some employers from structuring contingent relationships in the first place. Further, the reasoning of *Darden*, the Supreme Court's most recent pronouncement on the definition of employee, may permit plaintiffs to import a finding of employee status with respect to one statute into the context of another.<sup>138</sup> Thus, Berzon suggests that, through a system of cross-fertilization among statutes, findings of employee status may gradually become more standardized.

Litigation options also exist to increase compliance with independent contractor rules. Several states have enacted laws permitting contractors who lose contracts as a result of competitors' misclassification of workers to recover damages, though most only apply to construction contracts.<sup>139</sup> Misclassified workers may also bring suit on their own behalf under the FLSA, but only if their employer failed to adhere to that statute's minimum wage and overtime provisions.

#### D. Futility of Reliance on Reform

Despite a variety of legislative, administrative, and judicial avenues for synthesizing the law and improving the status of contingent workers within it, policy makers have demonstrated little interest in enacting significant measures to benefit contingent workers. The Supreme Court's decision in *Darden* does not bode well for judicial attempts to apply an "economic realities" test to determine employer and employee status under most employment statutes. Although some states are undertaking piecemeal reform, their role is limited in what is predominantly a federal arena. Extensive state regulation is also unlikely in the face of grueling interstate

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provision); Letter from Jonathan P. Hiatt, Diana Ceresi, and Craig Becker, Service Employees International Union, to Karen Nussbaum, Director, Women's Bureau, Department of Labor 6 (Sept. 13, 1994) (on file with the *New York University Review of Law & Social Change*) (advocating government encouragement of private enforcement by clients).

137. See *supra* note 95 (citing cases in which plaintiffs have prevailed on Title VII claims).

138. See Berzon, *supra* note 40, at 8 (claiming that, under *Darden*, "[t]here is a wider range of comparable contexts available—whether through some preclusion doctrine, or simply as persuasive precedent—in evaluating the employee status of a group of employees for NLRA purposes"). For a discussion of the Supreme Court's decision in *Darden*, see *supra* notes 80-87 and accompanying text.

139. See Robert J. Jones, *Employees and Independent Contractors: The Tax Consequences for Labor Unions*, 13 LAB. L. EXCHANGE 15, 24-25 (1994) (describing Connecticut, California, Florida, Massachusetts, Montana, New Hampshire, Oregon, and Pennsylvania statutes).

competition to lure employers, regardless of the quality of jobs those employers may offer. Although stepped-up enforcement efforts by the Department of Labor for wage and hour violations and by the IRS for intentional misclassification of independent contractors are hopeful, they are but a small contribution to a problem requiring much more broadly-based statutory reform. The failure of the President's Commission to call more strongly for change in this arena is one more sign of policy makers' reluctance to respond as businesses increase "flexibility" for themselves while creating uncertainty and insecurity for workers.

Recognizing that federal and state legislatures are unlikely to make any significant changes in the laws surrounding contingent labor, many workers' organizations have developed a variety of grassroots responses and adaptations to the new challenges of the contingent workplace. The next sections of this Article explore some of the individual and collective efforts undertaken by both unions and non-union workers' organizations. Some of these responses have been defensive, at times desperate, attempts to perpetuate the increasingly obsolete paradigm of good jobs providing a full range of social insurance benefits. Other workers' responses have recognized the need to adapt to new economic processes in the global marketplace—whether such processes be employers' stated need for networked systems of contracting or for the ability to respond to market changes by increasing and decreasing staff on a daily or weekly basis—but have sought to make the adaptation beneficial for both workers and managers.

As workers begin to adapt to the new economic conditions, they have sought to fashion structures that will permit them some degree of stability, even if they no longer expect their jobs to provide life-long security through a full cornucopia of benefits and social insurance. After describing some of the historical and current responses by workers to contingent work arrangements in parts IV and V, I examine academic proposals for new forms of organization that can better meet workers' needs within the changing systems of work in part VI. Ultimately, legislative protections for workers which seek to reify an outmoded system of full-time, life-long jobs with full benefits will not succeed in stemming the long-term economic trend away from that model. Reform must not be backward-looking. Rather, workers and their organizations should both benefit from and respond to changed conditions of production, and should seek innovative means to protect and advance their interests within an evolving economy.

#### IV.

##### UNION RESPONSES TO CONTINGENT WORK ARRANGEMENTS

Unions have fashioned a variety of mechanisms to deal with the growth of the contingent workforce, a workforce that is extremely resistant to organization due to its transient nature and workers' tenuous job status.

This section surveys some of those attempts, both historical and contemporary.

*A. Garment Workers and the Jobber-Contractor Provision*

The use of contingent forms of labor and extensive subcontracting arrangements to bid down wages is hardly a new phenomenon; certain industries have operated under similar conditions throughout their histories and organized labor has historically developed various means of protecting workers' rights within them. One instructive example is the garment industry, an industry that has been notorious for its abusive practices for at least a century. For a time, garment worker unions were able to stam the abuses and provide effective representation for their members.<sup>140</sup> The recent increase in the availability of cheap and exploitable immigrant labor since the passage of the Immigration Reform and Control Act of 1986 (IRCA),<sup>141</sup> however, combined with competition from overseas manufacturers, has resulted in a reemergence of sweatshop conditions for garment workers during the past decade.

International Ladies' Garment Workers' Union (ILGWU) President Jay Mazur describes the system of contracting out prevailing in the garment industry as follows:

The great majority of garment workers in this country and around the world are employed by small (sub)contractors (average employment: fifty)—who neither design, nor own, nor sell, nor in any way control the work they do or the price they are paid for it. They are really glorified foremen, with no life of their own, totally dependent on the "jobbers" who are the source of all work. These jobbers (usually—and ironically—referred to as

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140. See generally Max Zimny & Brent Garren, ILGWU Legal Dep't, *Protecting the Contingent Work Force: Lessons from the Women's Garment Industry* (July 21, 1994) (on file with the *New York University Review of Law & Social Change*).

141. 8 U.S.C. § 1101 (1994). The IRCA for the first time criminalized employment of undocumented immigrants, subjecting employers to potential sanctions. The result has been to drive undocumented workers into an underground economy in which they are at the mercy of employers who take the risk of employing them, usually in return for substandard wages. Workers' fear of apprehension by the Immigration and Naturalization Service serves to deter them from speaking out against illegal labor practices. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 413 (1995) (noting that undocumented workers, who often work long and irregular hours for extremely low wages, are hard pressed to demand better treatment because they live in fear of deportation); Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553, 554 (1989) (noting that employers take advantage of undocumented workers by paying them low wages and interfering with organizing activity).

"manufacturers"), operate at the center of "global webs" of production, have their familiar names on the label, but frequently do not employ a single direct production worker.<sup>142</sup>

The garment industry's tradition of "outside systems of production" provides the model for the "virtual corporations" operating in every industry today. Garment manufacturers began contracting out early in this century to avoid unionization by denying any responsibility toward the people who produced their designs. Women's fashion has always exhibited the need for "just-in-time" production, rapid shifts in product lines, and constant innovation so prevalent throughout all types of industry today. The production modes that developed in that industry serve as prototypes for global manufacturing in the modern economy.

Workers' advocates in the garment industry have a long history of addressing the abuses that such modes of production can spawn. As early as 1910, the ILGWU negotiated a "Protocol of Peace" with the coat and suit manufacturers' association in New York, under which manufacturers offered standardized wages and work conditions throughout contracting shops as long as the ILGWU successfully organized throughout the entire industry. The agreement broke down, however, as manufacturers found themselves facing competition from contractors outside the region. In 1926, New York Governor Al Smith convened a commission to look into conditions in the garment industry; that commission made observations similar to those "revelations" we see around the growth of contingent work today. After observing that garment manufacturing had previously been "concentrated in large 'inside' shops under employers who were directly responsible both for manufacturing and marketing the product," the commission noted that "[s]ince that time, however, there has been a gradual displacement of inside manufacturers by so-called jobbers. This system has grown up partly as a device to escape labor responsibilities and partly as an adaptation to new methods of retail buying . . . ."<sup>143</sup> In 1949, New York Senator Ives, in a remarkably prescient use of jargon, remarked to Senator Taft as they debated provisions of the Taft-Hartley bill aimed at the garment industry: "The jobber is in economic reality the virtual employer of the workers in the contractors' shops; . . . he must be responsible for their wages and labor standards."<sup>144</sup>

The ILGWU pressed a system of "jobber responsibility" in order to hold client contractors responsible for the work conditions imposed by the

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142. Letter from Jay Mazur, President of ILGWU, to John Dunlop, Chairman of the Commission on the Future of Worker-Management Relations 2 (Apr. 29, 1994) (on file with the *New York University Review of Law & Social Change*).

143. *Id.* at 5 n.1 (quoting the Advisory Commission on New York Coat & Suit Industry).

144. 81 CONG. REC. S8876 (1949).

subcontractor, and sought to bind jobbers to contracting only with unionized firms.<sup>145</sup> By requiring jobbers to bear the full costs of producing under union standards, the system eliminated competition among subcontractors to lower their wages and limited sweatshops to a marginal problem in the garment industry for nearly fifty years.<sup>146</sup> In order to maintain this system, the union required a special exemption from the Taft-Hartley amendments to the NLRA to permit what would otherwise be unlawful secondary picketing and economic pressure against the jobber.<sup>147</sup> Debate over the exemptions reveals that Congress understood the need for the union to exert pressure on the jobber in order to prevent sweatshop conditions from returning to the industry. Senator John F. Kennedy commented that "while production is carried out by subcontractors, it is highly integrated and the unions customarily have utilized clauses in their contracts to insure against subcontracting to substandard sweatshops."<sup>148</sup> Senator Javits of New York attributed the elimination of sweatshops in the industry "to this method of proceeding to unionization through the fact that there is an integrated production process."<sup>149</sup>

If an integrated process of production is the touchstone for permitting secondary activity against the entity which in reality controls the terms and conditions of work, then similar exemptions might be appropriate to help organizing efforts and thus eliminate sweatshop conditions in dozens of other industries and service trades today. Indeed, the Service Employees International Union (SEIU) has sought such exemptions in its "Justice for

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145. Labor agreements between the ILGWU and the coat, suit, and dress industry manufacturers generally contained the following conditions: first, jobbers may contract out production only to shops bound to collective bargaining agreements with ILGWU affiliates. Second, the jobber is responsible for wages in the contracting shops, which must be written into the agreement between the jobber and the contractor. If the contractor defaults on payment of wages, the jobber is liable for payment of up to two weeks' wages due. Third, jobbers provide health and welfare benefits by remitting contributions to an employee benefit fund based on a percentage of bills submitted by the contractor to the jobber. Fourth, a variety of related measures seek to prohibit jobbers from inducing a bidding war among contractors. See Zimny & Garren, *supra* note 140, at 7-8 (giving a list of proposals from the Commission implemented by the union).

146. *Id.* at 10.

147. The Landrum-Griffin Act's ban on secondary activity specifically exempts "persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry . . ." 29 U.S.C. § 158(e) (1995).

148. 105 CONG. REC. 17327 (1959).

149. 105 CONG. REC. 17381 (1959).

For a comprehensive explanation of the history of the exemptions as well as their legal operation, see *R.M. Perlman v. New York Coat, Suit, Dresses, Rainwear & Allied Workers' Union*, 33 F.3d 145 (2d Cir. 1994). In a description eerily resonant of today's conditions, the court described the situation which led to the development of the union:

The industry was fiercely competitive, keeping with profit margins slim or nonexistent. The workers, mostly newly arrived immigrants, worked for depressed wages under sweatshop conditions; it was these conditions that prompted the birth of the International Ladies Garment Workers' Union.

*Id.* at 152.



Janitors" campaigns targeting the building cleaning industry. Ultimately, however, the effectiveness of the exemption relies on the ability of the union to utilize it effectively to organize throughout the industry.

The 1980s and 1990s have witnessed the breakdown of jobber-contractor agreements and the increasing reliance of garment producers on non-union contractors, both overseas and in the United States, as a result of the availability of cheap overseas manufacturers and the increased numbers of exploitable immigrant workers at home.<sup>150</sup> Sweatshops have returned in the wake of the union's decline.<sup>151</sup> Yet unions, policy makers, and workers can learn an important lesson from the experiences of the garment industry. Where the need for rapid product design shifts and just-in-time production result in systems of widespread subcontracting (or "integrated processes of production"), protection of workers from the intensely competitive bidding wars that result requires that workers have the ability to adopt minimum standards throughout the industry and to hold the primary employer liable for violations.

The ILGWU's jobber-contractor agreements have another feature that is instructive in fashioning responses to the shift to contingent work in other industries. The union resolved the problem of a lack of benefits available in low-wage and short-term jobs by establishing an industry-wide health and welfare fund to which all employers contributed on a pro-rated basis. Defaults were minimized by requiring the jobber—rather than the (frequently insolvent) subcontractor—to make contributions in amounts determined as a percentage of the bills submitted by the jobber to the contractor.<sup>152</sup> The system effectively provided coverage to workers who worked primarily in the garment manufacturing industry, but moved from contractor to contractor as jobs came and went. Promoting portable systems of coverage on an industry-wide basis, like mandating pro-rated coverage for part-timers, would provide an effective means to circumvent employers' incentives to hire short-term workers in order to avoid paying them benefits.

### *B. Organizing Contingent Workers: Justice for Janitors*

Perhaps the most difficult challenge for unions is the initial effort to organize the contingent workforce. These highly transient workers defy the labor movement paradigm of attachment to and solidarity with a single corpus of co-workers. Furthermore, their very presence in an industry frequently serves to divide a work force between the high-status, full-time, permanent employees who enjoy benefits and the second-class ranks of

150. See generally U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-88-130, "SWEATSHOPS" IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS (1988).

151. *Id.*

152. See Zimny & Garren, *supra* note 140, at 7 (explaining how this proposal was implemented by the union).

short-term or part-time workers. Some industries, however, have adopted the contingent work model so completely that secure and full-time positions barely remain. One example is the building service industry, where building owners have shifted away from directly employing janitors. Instead, owners hire cleaning contractors, who in turn hire janitors for the four-to-six hour nightly shifts required for cleaning. The Service Employees International Union's (SEIU) Justice for Janitors campaign in Silicon Valley, one of a series of campaigns nationwide, provides a graphic contemporary example of the obstacles as well as the potential inherent in organizing the contingent workforce of the new economy.

Silicon Valley, perhaps more than anywhere in the United States, displays most vividly the contemporary transformation of work structures. Sun Microsystems, for example, is a prototype of the "disaggregated" corporation—through farming its production processes out to Solectron, Wellex, Hadco, Mektex, and other assembly contractors, Sun Microsystems has doubled its shipments since 1990 while reducing its own manufacturing workforce by ten percent.<sup>153</sup> The relationships that primary electronics firms in the Valley establish with their contract partners belie the premise that workers have a single employer responsible for the terms and conditions of their work. Karen Hossfeld, Professor of Sociology at San Francisco State University, describes the relationships:

[Corporations] want the benefits of contracting out, "unbundling their companies," [as well as] . . . the benefits of vertical integration through directing, coordinating and overseeing much of the work done by contractors.

Because of this reintegration, key business decisions are dispersed throughout a network of related but nominally distinct companies. The contract manufacturers would not exist without the contracting client companies, and the client companies must be intimately involved with their manufacturing contractors and service contractors to ensure the quality, reliability and flow of work. . . .

The 1990s find more and more contractors as strategic partners, offering design, equipment, and materials procurement advantages. The so-called arms-length relationship between client company and contractor is continually shortened as the design and manufacturing process become more integrated. . . .<sup>154</sup>

The result for workers is employment relationships in which the putative employer relies upon third-party employers to determine the terms and

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153. Karen Hossfeld, statement before the Commission on the Future of Worker-Management Relations 8 (Jan. 27, 1994) (on file with *New York University Review of Law & Social Change*).

154. *Id.* at 10.

conditions of work. At the same time, however, the third-party employers might disavow all legal responsibilities toward those workers.

Mike Garcia, President of SEIU Local 1877 in Silicon Valley, describes the structure of the building service industry in the region.<sup>155</sup> Following the pattern of subcontracting all but the corporation's core responsibilities, building owners solicit competitive bids from subcontractors for their janitorial services. The owners often include detailed specifications concerning how the work should be done, how many workers must perform it, and sometimes even which cleaning products must be used. The only basis on which cleaning companies can compete is price, of which eighty percent are labor costs:

Building owners are thus in the enviable position of controlling wage and benefit levels through the process of selecting the lowest bidder, while claiming they have no legal or moral responsibility for the poverty and misery they create for the workers. Building owners are insulated from the traditional legal responsibilities of employers. They don't have to worry about the NLRA, the EEOC, unemployment compensation, or workers compensation. Yet they unequivocally control how work is performed and what it costs.<sup>156</sup>

The result of this system is that average wages in San Jose for janitors plummeted from \$7.80 per hour with employer-paid health and vacation benefits in the early 1980s to \$5.25 per hour with few if any benefits for non-union janitors today.<sup>157</sup>

The union responded with intensive organizing. As in the garment and construction industries, however, the subcontracting practice meant that, even if workers successfully organized and acquired an agreement with an individual contractor, building owners could simply switch to another non-union contractor and the union janitors would be out of work. The union thus chose to eschew organizing contractor by contractor, recognizing that such a course could never allow them to win a majority position within the industry. Instead, janitors directly targeted building owners, the entities who in fact controlled the work. They employed confrontational and highly public pressure tactics to demand that building owners hire unionized janitorial contractors:

We held no [National Labor Relations Board] elections [to certify our union]. We've had dozens of strikes. Hundreds of workers have been fired and dozens arrested in protests. We've blocked

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155. Mike Garcia, statement before the Commission on the Future of Worker-Management Relations 3 (Jan. 27, 1994) (on file with *New York University Review of Law & Social Change*).

156. *Id.*

157. *Id.* at 4.

highways and had sit-ins, hunger strikes, and an international boycott of Apple Computer. Our local has been fined \$50,000 by the Board for secondary boycott activity. And we've recently been forced to pay another \$10,000 to Santa Clara County as a result of arrests during a round of civil disobedience.<sup>158</sup>

The fines incurred by the local union were a result of the secondary activity prohibitions of the National Labor Relations Act (NLRA),<sup>159</sup> which envisions an employment system not of networked, interdependent contractual arrangements among firms, but rather of isolated, single-employer units which bear no relation to each other's labor practices. In Silicon Valley, however, the old NLRA model is no longer a viable one.

Janitors adapted to the new model with innovative organizing techniques that fell outside those sanctioned by the NLRA. Ultimately, they succeeded in imposing industry-wide minimum standards: they negotiated a geographically-defined master contract establishing standardized wages for all work sites in Santa Clara County. The agreement permits janitors to maintain seniority rights and benefits even as they move from firm to firm within the industry. These tenuous victories came at the high price of years of hard-fought and confrontational organizing which often ran afoul of the law.<sup>160</sup>

The lesson offered to both organized labor and policy makers by the Justice for Janitors campaign is that the postwar system of employment and the laws which developed within it are no longer relevant to the work situations of millions of workers. Defending workers' interests within the new systems of production requires abandoning the strictures of the hoary labor laws and adapting to the realities of "virtual" corporations and their networks of contract relationships. Moreover, workers can best defend their interests by demanding changes which permit new, flexible work relations to continue, but to do so in ways that do not leave an underclass of workers behind. Rather than seeking to outlaw the subcontracting system altogether, Justice for Janitors was able to acknowledge its prevalence in the industry and to achieve gains for workers within that system.

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158. *Id.* at 5. See also Lisa Hoyos, *Workers at the Center*, CROSSROADS, July/Aug. 1994, at 24, 24-27 (describing the organizing model in relation to the subcontracting system in Silicon Valley); John B. Judis, *Can Labor Come Back? Why the Answer May Be Yes*, NEW REPUBLIC, May 23, 1994, at 25, 25 (describing the Justice for Janitors strategy: "Instead of seeking supervised elections through the National Labor Relations Board, which employers can thwart through court appeals, Justice for Janitors forced the building owners to negotiate directly with the unions [and] used '60s-style sit-downs and demonstrations to embarrass building owners, many of whom were prominent in local politics.").

159. 105 CONG. REC. 17333 (daily ed. Aug. 28, 1959).

160. See Stephen Franklin, *Union Claims Key Victory in Bid to "Clean Up" Silicon Valley*, CHI. TRIB., July 20, 1992, at C1 (describing tactics such as a hunger strike and jamming office telephones).

### C. *Contractual Protections for Contingent Workers*

Management has sought to impose contingent work arrangements in many long-unionized workplaces. Where unions exist, workers have the opportunity to adapt to these changes by participating in structuring the new work arrangements.<sup>161</sup> In this way, such changes can benefit both the contingent workers and the full-time workers whose jobs may be eroded by increased use of temporaries and part-timers. Bargaining over these issues can be sensitive and difficult, however. Union members are quick to recognize that management's increased use of contingent and contract workers threatens to erode traditional bargaining unit jobs, while managers seek to hold fast to their unilateral control over the structure and quantity of work.

In general, unions have utilized four main types of strategies in bargaining about contingent work.<sup>162</sup> The first approach is to attempt to limit or prohibit altogether the employer's use of part-time, temporary, or contract labor. Most often, unions seek to constrain management's use of these arrangements by bargaining for either restrictions on or mandatory union approval of management use of contract, temporary, or part-time workers. Some contracts may require that an employee may only maintain her temporary status for a limited period, after which management must give her a right to convert to permanent employee status. While contractual limitations can help maintain the integrity of the bargaining unit, they are prototypical examples of the reasons why management complains that unions limit their ability to respond quickly to changing market conditions. By seeking to maintain indefinitely the number and types of jobs that existed in a particular bargaining unit during a particular negotiating period, such limits may hamper both workers' and companies' willingness to adapt compatibly to shifts in market conditions, product design, or new technologies.

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161. Contracting out (and, by analogy, use of temporary workers) is a mandatory subject of bargaining. See *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 210-11 (1964) (stating that inclusion of "contracting out" within the statutory scope of collective bargaining promotes the peaceful settlement of industrial disputes). As such, labor may require management to bargain over decisions to contract out and either side may insist on adoption of a particular contract term through unilateral economic pressure. Partial closings, however, which can include management's decision to terminate a contractor or eliminate a sector of work, are permissive subjects of bargaining. See *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 686 (1981) (holding that the employer's decision to shut down part of its business is not part of the terms and conditions over which Congress has mandated bargaining). Management need not consult unions on permissive issues and unions may not strike to obtain particular contract terms addressing them. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (stating that it is unlawful to insist upon matters which are not within the scope of mandatory bargaining).

162. The strategies described in this section appear in a forthcoming internal instructional booklet written by the SEIU to assist member locals in negotiations over contingent work. The observations about contract language come from union staff's familiarity with locals' contracts and negotiating positions.

A second way that unions have addressed use of contingent workers is to demand comparable or pro-rated wages and benefits for contingent workers, thereby making them at least as expensive as regular employees. This mechanism directly addresses one of the root problems with contingent work: its failure to provide the range of social insurance benefits associated with full-time work and the attractive, limited liability labor it offers for employers. Effectively pro-rating contingent work, however, requires several contract provisions: (1) wages must be equal for all categories of workers doing the same work; (2) outside contractors should provide equivalent compensation packages as part of contract requirements with management; (3) seniority and threshold eligibility for benefits should be based on date of hire rather than hours worked; and (4) some benefits that are not easily divisible (such as pensions and health insurance) might require cash payments in lieu of pro-rated contributions. All of these provisions are desirable from the point of view of both existing bargaining unit members and the contingent workers whom they directly benefit. Moreover, they do not hamstring management's ability to utilize part-time, short-term, or contract work where appropriate, rather than where such arrangements are merely cheaper. Despite these advantages, management's steadfast grip on its prerogative to determine questions of hiring and staffing unilaterally make contract guarantees of this sort extremely difficult to achieve even in the strongest of organized workplaces.

Third, unions have sought to stabilize high-turnover workforces through seniority provisions and thus reduce the need for short-term hires. Seniority and bidding rights on jobs can be the gateway to full-time, permanent work in industries such as construction, where seasonal or mixed full- and part-time labor is typical. Adopting a structure of seniority rights based on date of hire, rather than hours worked, protects workers who may float in and out of the work force or work predominantly part-time.

Fourth, many unions have recognized the desirability of flexible work arrangements for their members, especially unions representing large numbers of women and professionals. These unions have embraced pro-worker forms of flexibility which tailor short-term and part-time work to the needs of members, rather than more exploitative arrangements which force workers to adjust their schedules to the unpredictable needs of management. Innovations like "flex-time," job sharing, and in-house temporary services with full contract protections can offer choice and protection to workers as long as companies implement them at the request of the workers themselves, rather than imposing them against employees' will and without their input.

The Communication Workers of America negotiated an agreement with AT&T in New Jersey which offers an example of experimentation

with contingent work forms within unionized workforces.<sup>163</sup> In the early 1990s, the union charged the company with exceeding contractual limits on the use of agency-provided temporary workers by about 750,000 worker-hours over a fourteen-month period. After complaining to the National Labor Relations Board, the union and the company negotiated a pilot program of in-house temporary services fully comprised of bargaining-unit members. The three hundred and fifty "administrative intern" positions created offer full contract benefits and full-time employment, but workers float among assignments within AT&T as needed. No assignment lasts more than six months, and interns have the right to transfer into regular full-time jobs after nine months. In effect, the union was able to convert many of the jobs that temporary workers had been filling into full-time union positions. At the same time, the agreement improved management's ability to be flexible because temporary workers were now trained, full-time AT&T employees rather than outside temps unfamiliar with company processes. Further, limits on use of temporary work were no longer as necessary from the union's point of view. While in-house temporary services like AT&T's are not unique, they demonstrate that contingent work arrangements and managerial flexibility need not go hand in hand with erosion of working standards.

Whether bargaining contract rights for temporary and part-time workers or organizing an entire industry of contingent workers, examples of successful adaptation to contingent work arrangements all involve workers' active involvement in, as well as the commitment of resources by, unions. For the vast majority of U.S. workers today, however, unions are simply not a relevant presence in the workplace. Those who labor outside the shrinking net cast by unions, or who have chosen to organize outside the auspices of the American labor movement, have also developed responses to the demands of contingent work. The next section surveys some examples of their efforts.

## V.

### NON-UNION RESPONSES TO CONTINGENT WORK ARRANGEMENTS

Without union protection, workers have very little ability to express their interests to management. Too often, this lack of meaningful input results in contingent work arrangements being imposed on workers by companies seeking flexibility and cost-cutting, relegating employees to a choice of either accepting the new terms of employment or quitting.

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163. The following description of AT&T's program is derived from materials submitted by Jim Meadows, Vice President for Human Resources, AT&T, Basking Ridge, New Jersey, to *The Growing Contingent Workforce: Flexibility at the Price of Fairness?* Conference before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources (Feb. 8, 1994).

Rarely do such changes occur through consultation with employees and attention to their needs. In response to particularly egregious management practices, some employees have organized community groups and demonstrations, lobbied state legislatures, started independent businesses, and sought recourse in the courts to combat the undesirable and frightening corporate changes they see occurring around them.

Independent worker actions have taken an even wider diversity of forms than their union-led counterparts. Some efforts display a sophisticated understanding of the business environment and seek to represent worker interests within it. Others strictly seek to stem economic shifts and to reimpose a retrograde model of employer-employee relations. Those which hold the most promise for workers, management, and future collaborative efforts between the two demonstrate the ability to promote a variety of work arrangements without sacrificing fairness and dignity toward individual employees.

#### A. *Asian Immigrant Women Advocates*

Holding beneficial employers of contingent workers liable for labor violations is one of the common challenges throughout efforts to organize and represent those who work in networked and subcontracted forms of employment. Asian Immigrant Women Advocates (AIWA), an Oakland, California-based grassroots group, has spearheaded a campaign to focus attention on the exploitative practices of the garment industry in that state. The campaign targeted the designer Jessica McClintock to highlight the abuses that occur when legal structures permit manufacturers to wash their hands of the sweatshop conditions imposed on workers by subcontractors. It sought to require McClintock and other designers to take responsibility for ensuring that the dresses and clothes which display their names were sewn by people who were paid a legal wage and worked in safe and humane conditions.

The campaign began in May 1992 when twelve Chinese seamstresses from the Lucky Sewing Company approached AIWA complaining that their employer owed them \$15,000 in back wages.<sup>164</sup> The workers had earned that meager sum by working ten- and twelve-hour days, six and seven days per week, at piece rates that rarely met the federal minimum wage and never included overtime premiums.<sup>165</sup> Lucky had closed down and filed for bankruptcy, leaving no assets behind to pay the debts owed the workers, much less the penalties they might owe for minimum wage and hour violations. Jessica McClintock, a designer who makes lacy, romantic dresses sold in department stores nationwide, had utilized the

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164. See Sarah Henry, *Labor and Lace: Can an Upstart Women's Group Press a New Wrinkle into the Rag Trade Wars*, L.A. TIMES, Aug. 1, 1993, § Mag., at 20 (explaining that workers had been given bad checks for about \$15,000).

165. *Id.*



Lucky Sewing Company for at least six years. AIWA contacted McClintock, requesting reimbursement for the workers. McClintock wrote back that she had paid the contractor and she thus bore no liability for the debts because she did not "exercise any control over contractors."<sup>166</sup> Acknowledging that McClintock could not be held legally liable as a joint employer, AIWA organized public pressure against her. They demanded that she take responsibility for the conditions under which her dresses were sewn, and they sought, through the campaign, to garner attention for the exploitative system as a whole.

AIWA published a full-page advertisement in the *New York Times*<sup>167</sup> and staged pickets, boycotts, and rallies in support of the workers. Community rallies involving garment workers took place in ten cities nationwide at McClintock boutiques throughout the Christmas season in 1992. McClintock ultimately offered a \$24,000 "charitable contribution" to the workers one week before Christmas in 1993, hoping to end the campaign against her merchandise.<sup>168</sup> Most of the workers refused her offer and the AIWA campaign continued.

The campaign garnered significant media attention for the garment industry, including skepticism that designers' were ignorant of any connections between the low prices they pay to contractors and the massive labor law violations suffered by seamstresses.<sup>169</sup> In addition, the campaign resulted in concrete successes for workers. It helped to prompt the California Department of Labor, in coordination with other state agencies, to increase enforcement efforts against subcontractors in the garment and agricultural industries, as well as in restaurants.<sup>170</sup> In 1992, the Department

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166. *Id.*

167. Steven A. Chin, *Garment Workers Fight for Back Pay*, S.F. EXAMINER, Feb. 16, 1994, at A20.

168. *Id.*; Bill Wallace, *S.F. Dress Firm Offers Gift to Seamstresses*, S.F. CHRON., Dec. 21, 1993, at A22 (referring to a charitable contribution of an unspecified amount made to twelve seamstresses).

169. See, e.g., *Chinese Immigrant Workers Want California Designers to Set Payment Pattern*, CHI. TRIB., Dec. 18, 1994, at 13A (reporting McClintock's lawyer's contention that McClintock has led efforts for reform by requiring her contractors to comply with state and federal labor laws); Henry, *supra* note 164, at 20 (indicating that seamstresses were paid \$5 to make a dress selling for \$175). CBS's news program *60 Minutes* also ran a segment on the growth of sweatshops and the California Department of Labor's renewed enforcement efforts, featuring the Lucky seamstresses. *60 Minutes: Behind the Seams* (CBS Television broadcast, Dec. 11, 1994).

170. The state's project, called the Targeted Industries Project Program (TIPP), undertook a survey of the garment industry in the state and found that 93% of firms committed health and safety violations, 68% committed overtime violations, and 51% committed minimum wage violations. Stuart Silverstein, *Survey of Garment Industry Finds Rampant Labor Abuse in Workplace*, L.A. TIMES, Apr. 15, 1994, at D1 (percentages rounded from original). Cf. S.J. Diamond, *The Enforcer: Labor Chief Vicky Bradshaw Makes Sure Employers Tow the Line—Or Else*, L.A. TIMES, Sept. 20, 1993, at E1 (crediting Vicky Bradshaw, head of the Division of Labor Standards Enforcement in California, with the success of implementing labor laws).

investigated Guess, Inc. and secured a major agreement making the company responsible for its contractors' labor practices.<sup>171</sup>

The campaign also prompted action on the part of the apparel industry, which announced in September 1993 that it was advocating a "prototype contract" for use between manufacturers and subcontractors. While the industry claimed that the contract would ensure payment of minimum wages and overtime, however, its provisions in fact only permitted the subcontractor to "request a price adjustment" if the payment due would not permit it to meet the minimum wage for its workers. The contract went on to warrant that: "The Company [manufacturer] shall promptly and in good faith review this information and, at its option, *may agree* to make a price adjustment."<sup>172</sup> AIWA also succeeded in passing legislation that would impose joint liability directly on client company manufacturers, only to have it vetoed twice by Governors George Deukmejian and Pete Wilson.<sup>173</sup>

The AIWA campaign brought the power of consumers, activists, state government, and industry leaders to confront the problems of exploited workers within the subcontracting system directly. In doing so, it proved that workers who face legal roadblocks in their attempts to achieve fairness may yet be able to hold accountable those who control the conditions under which they work. The AIWA campaign did not demand an end to the subcontracting system or try to impose restrictive rules that would hamper the ability of contractors to utilize subsidiary sewing shops. Rather, they merely sought to impose responsibility for wages paid upon the entity that already takes responsibility for the designs, the timing of work, the manner it is to be performed, the materials on which it is to sewn, and every other aspect of the production process. Such responsibility should be a necessary concomitant of the integration of all other aspects of the contractors' working relationship.

### *B. Fighting Temporary Work: Carolina Alliance for Fair Employment*

Worker advocates have also developed means to fight businesses' long-term use of temporary workers throughout their operations. Grass-roots community groups in the South have responded to adverse labor conditions by seeking to limit use of contingent work and impose punitive measures on businesses adopting them. The Carolina Alliance for Fair Employment (CAFE), in coalition with a number of other local organizations, including Southerners for Economic Justice and the Coalition

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171. See Silverstein, *supra* note 170, at D1 (explaining that the California Department of Labor secured the agreement after investigating the company under a statute barring interstate transport of goods made at companies that violate federal labor laws).

172. Master Apparel Industry Contractor Agreement 1 (July 26, 1993), *quoted in* Foo, *supra* note 93, at 2194 n.93 (emphasis added). Foo notes that "far from solving the problems in the industry, however, this model contract simply cemented the status quo within the four corners of a written document." *Id.* at 2195.

173. Henry, *supra* note 164, at 20; Foo, *supra* note 93, at 2195.

Against Temporary Services (CATS) in Tennessee, has spearheaded battles at the state level to pass legislation that would limit businesses' use of temporary workers, require comparable training and disclosure for them in certain hazardous jobs, and deny federal job-training funds to businesses using temporary workers.

CAFE, a fourteen-year-old, community-based organization with eleven chapters throughout South Carolina, has tracked the growth and abuses of temporary employment arrangements in its region. It focuses on two primary areas of concern. The first is the expanded use of temporary workers as a permanent labor force as a means to cut costs. In a 1993 article in the *Wall Street Journal*, CAFE members related stories of being hired as temporaries, only to be kept in the contingent status for years at a time without gaining permanent status and its concomitant security and benefits.<sup>174</sup> One worker described a typical situation at a condom factory:

Beverly Garner started work in October 1991 as a temporary doing quality control work at Schmid Laboratories, which makes condoms in Anderson, S.C. Eager to land a full-time slot, she came in early and worked through breaks earning \$5 an hour, while full-timers earned \$8. When no full-time job materialized by July 1992, she became frustrated and angry and on occasion showed up late. A day after she told supervisors about having attended a meeting on the rights of temporary employees, she was fired. . . . Moreover, she contends quality suffered from the constant influx of temporaries. "Every time you'd get a big batch of new people, you'd start finding more holes in the condoms," she says.<sup>175</sup>

In response to stories like Ms. Garner's and dozens of others,<sup>176</sup> CAFE advocated state legislation to limit the duration of temporary employment

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174. Clare Ansberry, *Hired Out: Workers Are Forced to Take More Jobs with Fewer Benefits*, WALL ST. J., Mar. 11, 1993, at A1.

175. *Id.* at A4.

176. One other story related by CAFE staff representative Florence Gardner bears repeating because of its paradigmatic evocation of life in the "flexible" workforce. A CAFE member took a job at Flour-Daniel's in-house temporary service in Greenville, South Carolina:

She worked as a temp for 9 months, received no health insurance, retirement, or any other benefits. She was then hired as a regular employee, gaining health insurance, a 410(k) [sic] pension plan, and paid vacations. After 5 months of working in this capacity, she was laid off in 1990 as part of a major corporate downsizing effort . . . . After being laid off for 2 weeks, she was called back to work, but this time as a temporary employee of TRS, again with no health benefits, pension, or paid vacations. She returned to the same desk with the same phone in an identical job but lost all her benefits in the process. She worked in this "temp" capacity until she was laid off again in July, 1993.

Florence Gardner, testimony to the Commission on the Future of Worker-Management Relations 1-2 (Oct. 7, 1994).

to six months, and to ensure that temporaries doing full-time work comparable to permanent employees receive the same benefits and protections as their permanent co-workers.<sup>177</sup>

CAFE's second major concern around temporary work is the lack of training and safety provided for temporaries as compared with permanent workers.<sup>178</sup> Temporary workers in factory and construction jobs frequently do not receive adequate protective equipment or orientation to the machinery and operations to ensure their safety in the work site.<sup>179</sup> Southerners for Economic Justice relate the story of day laborers hired to help build the Atlanta sports dome who, without proper equipment and training, were offered an additional fifty cents per hour (above the regular rate of \$4.50) to do iron work on the scaffolding. On the first day, a worker fell to his death.<sup>180</sup> The *Wall Street Journal* documents another chilling practice:

In an internal memo, Du Pont Co.'s Consolidated Coal unit tells its employees that when they see a contract employee doing something dangerous or illegal, they should *not* interfere—unless company property or employees are endangered. The unit, known as Consol, says the memo doesn't encourage employees to look the other way, but rather establishes that the "contractor has the obligation and responsibility to insure the safety" of its own employees.<sup>181</sup>

CAFE has sought state reforms that would extend liability under workers' compensation to require that temporaries receive the same training as permanent workers and to hold client companies liable for providing workers' compensation where they control and supervise the workers' tasks.<sup>182</sup> CAFE is currently undertaking an effort to unionize temporary workers, utilizing an unusual form of outreach: the organization is hiring the workers for a day or week at a time and conducting job rights programs and discussion groups with them.<sup>183</sup>

CATS, a group which originated in response to a General Electric (GE) plant-closing in Morristown, Tennessee, provides another example of workers' local efforts to defend themselves in the face of corporate restructuring and involuntary imposition of contingent work arrangements. In

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177. *Id.* at 2.

178. *Id.*

179. *Id.*

180. *Georgia Dome Worker Falls to Death*, ATLANTA J. & CONST., Oct. 18, 1991, at C2.

181. Ansberry, *supra* note 174, at A4 (emphasis in original).

182. Gardner, *supra* note 176, at 4.

183. See Jean McAllister, *Carolina Temps Talk Organizing*, LAB. NOTES, Feb. 1995, at 14, 14 ("Determined to organize, the graduates of the [temporary] school . . . discussed a plan of action for 1995. Proposals included: putting out a newsletter for temps, holding a Job Rights Workshop, and general community outreach.").

1989, GE announced that it was closing the non-union facility which employed one hundred workers at ten to twelve dollars per hour plus benefits, and opening a new distribution center thirty miles away.<sup>184</sup> The new center would be operated by an independent contracting company offering jobs at six to eight dollars per hour.<sup>185</sup> The laid-off workers found themselves placed by the state employment service in contract-labor and temporary jobs, most at minimum wage, to fill positions in factories that had once provided stable, permanent employment in the region.<sup>186</sup> The workers founded CATS to generate public support for protective labor legislation.

As part of their investigations, the workers discovered that GE was slated to receive a \$200,000 federal subsidy through the Job Training Partnership Act. The money was earmarked to pay for training for new workers at the plant—the same plant that GE claimed was fully controlled and operated by its contractor. Ultimately, the workers were able to pressure the United States Department of Labor to declare GE ineligible for the funds.<sup>187</sup> They have continued to fight for state laws to regulate temporary agencies, to forbid replacement of permanent workers with temporary ones, and to deny federal funding in analogous situations.<sup>188</sup>

Ad hoc worker organizations like CAFE and CATS, founded in response to a perceived crisis in employment and living standards, have had some successes in generating attention for the problems of the contingent work force and pressing for protective legislation. Their efforts, however, have largely been directed toward state and federal legislators for support in turning back the clock on corporations. By requiring businesses to limit their use of temporary workers, these advocates hope to re-impose the responsibility for lifetime employment with full benefits back on companies that are increasingly averse to playing that role in society. Indeed, corporations are demonstrating their willingness to run from such models at every turn. In addition to protecting their interests through state regulation, workers should seek means to work with industry to adopt flexible structures of employment, in conjunction with portable provision of benefits and insurance. Such measures might permit both labor and corporations to reap the benefits of the increased productivity of flexible work.

Many of the abuses of contingent labor involve pure cost-cutting at the direct expense of workers. To the extent, however, that businesses seek productivity gains through short-term arrangements and networked relations with suppliers, workers must fight for their rightful place at the table alongside corporate decision-makers. Workers should be participating with

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184. Linda Yount & Susan Williams, *Temporary in Tennessee*, 15 LAB. RES. REV. 73, 74 (1990).

185. *Id.*

186. *Id.*; see also Sue Allison, *State Concerned with Increases in Temporary Jobs*, U.P.I. NEWSWIRE, Aug. 30, 1989, available in LEXIS, Nexis Library, UPI File.

187. Yount & Williams, *supra* note 184, at 78.

188. *Id.* at 79.

management in determining how productivity gains can be achieved with their inclusion and cooperation *and* how those productivity gains can be distributed equitably.<sup>189</sup> The following example demonstrates one attempt to do just that: an attempt that developed in potentially inhospitable conditions and whose outcome has yet to be determined.

*C. Levi-Strauss & Co.*

Monitors of corporate responsibility have lauded Levi-Strauss & Co. (Levi's) for its progressive practices, such as promoting diversity in its staff and issuing guidelines for outsource suppliers.<sup>190</sup> The company's 1990 decision to close a plant in San Antonio and move operations to Costa Rica, however, called that image into question.<sup>191</sup> The lawsuit and publicity campaign which ensued, undertaken by the laid-off Hispanic women workers at the plant through the local workers' organization Fuerza Unida, may have prompted the company to seek greater labor peace through collaboration with worker representatives.

Just before Levi's announced it was moving the San Antonio plant's operations, the seamstresses were expecting relatively secure employment for years to come—they had just rebuffed an organizing effort by the Amalgamated Clothing & Textile Workers' Union (ACTWU) in a demonstration of trust and loyalty for the company. Instead, the company's choice to move operations overseas put more than 1100 workers out of work and caused severe dislocation in the local economy.<sup>192</sup> The angry laid-off employees decided to fight the move, initially staging rallies and demonstrations to push the state to pay for job retraining and education.<sup>193</sup>

When local activism failed to prompt a reconsideration on the part of Levi's officials, the workers turned to the courts. They sued the company, alleging discrimination under ERISA § 510, which prohibits companies from discriminating against workers in the exercise of their rights to pension and health benefits.<sup>194</sup> They also invoked the Texas workers compensation prohibition against discrimination for filing of workers'

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189. For a provocative vision of how productivity gains might be distributed to permit increases in the standard of living for everyone while reducing work hours, see JEREMY RIFKIN, *THE END OF WORK* (1995).

190. The awards include the Corporate Conscience Award from the Council on Economic Priorities; top rankings among the best companies to work for for Hispanics and women by Hispanic Magazine, Vista Magazine, and Working Mother Magazine; and Forbes Magazine's 1993 business ethics award. See Suzanne Espinosa Solis, *Rare Shadow on Company's Image*, S.F. CHRON., July 18, 1994, at A1. But see *id.* (explaining how many workers have left Levi's to spread the word that the company does not live up to its image).

191. *Id.*

192. See Reese Erlich, *Former Levi Strauss Workers Protest Texas Plant Closing*, CHRISTIAN SCI. MONITOR, Nov. 9, 1992, at 7 (stating that Levi's shifted jobs to Costa Rica where it would pay workers much less).

193. *Id.*

194. *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 973 (5th Cir. 1993). The workers argued that the group as a whole suffered discrimination (1) because a motivation for the

compensation claims.<sup>195</sup> The district judge dismissed the claims on summary judgment, raising the specter that, under the plaintiff's theory, every plant closure would be subject to charges of specific intent to violate ERISA.<sup>196</sup> The appeals court affirmed, and a district court later sanctioned the workers' attorney \$5000 under Rule 11 for bringing a frivolous claim.<sup>197</sup> The workers' abject defeats in the courts demonstrate the impotence of relying on the law to vindicate the perfectly legal abuses which the contingent economy visits on workers.

The workers were undaunted by the courts' disdainful treatment of their claims, however. They continued their campaign against the company, seeking to pressure it through public humiliation into providing compensation for the workers who lost their jobs and to retain more secure positions in the United States.<sup>198</sup> They established an office outside the

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closure was to prevent the workers from accruing rights under the company benefit plans, and (2) because the higher workers' compensation costs at the San Antonio plant contributed to the decision to relocate. See *id.* (affirming the district court's summary judgment denying these claims).

195. *Id.* For a discussion of the workers' compensation claim in the context of plant closures, see Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757 (1993).

196. See *Plant Closing Not Discriminatory Under ERISA*, Fifth Circuit Rules, PENSIONS & BENEFITS DAILY (BNA), at 823 (Apr. 12, 1993).

197. See Richard Connelly, *Target Celebrates \$5000 Sanction: Plaintiff's Counsel in Civil Rights Case Had Faced Up to \$300,000*, TEXAS LAW., Dec. 6, 1993, at 5.

198. See Erlich, *supra* note 192, at 7. Publicity included pieces like an article in *The Nation* which described one of Levi's sourcing manufacturers, Intersew in Suarez, Mexico. High-level Levi's management oversaw the plant, where conditions (which apparently met the company's award-winning sourcing guidelines) included the following:

At least ten children under 14 had worked at the plant. In the rainy season, rain poured through the roof and collected in puddles on the floor, causing workers to get electric shocks from their sewing machines. To sop up the water, managers would throw "dirty toilet tissues and used Kotex" on the floor. "It smelled really bad, and there were no windows," one worker said. Workers were laid off for a few days if they went to the toilet too often. . . . Intersew's owner, Donald Heath, owed \$400,000 in back wages.

Laurie Udesky, *Sweatshops Behind the Labels: The 'Social Responsibility' Gap*, NATION, May 16, 1994, at 666.

In an interesting media twist, the *Washington Post* ran a story shortly before Congress' vote on NAFTA extolling the experience of the Intersew workers as demonstrating an element of Mexican labor law that, the paper claimed, could be "devastatingly effective in protecting workers' rights." When the owner ran off without paying wages due, that law permitted the workers to seize the plant as well as jeans they had sewn in payment. While such a provision would be a step forward for U.S. garment workers, who currently have to rely on the Department of Labor to enforce the "hot goods" clause of the FLSA, see *supra* notes 135-41 and accompanying text, the workers at Intersew ultimately recouped only a fraction of what they were owed. Nor would Levi Strauss contract directly with the Intersew workers once they owned the machinery and the factory. See Tod Roberson, *Mexican Labor Shows Who's Boss: Workers Win Suit, Now Own Factory*, WASH. POST, Nov. 16, 1993, at A24 (recounting how Maquilas employees used Mexican labor law to defend against abuses by foreign employers).

Levi's headquarters in San Francisco, and many of the Mexican and Mexican-American women who lost their jobs spent weeks there leading pickets and speaking out against the company's practices.<sup>199</sup>

On the heels of workers' legal challenges against Levi's and public condemnation for its treatment of the 1100 workers in San Antonio, the company adopted a new tactic for relations with its workers. Instead of simply closing plants and contracting out jobs, Levi's began to seek more cooperative means of dealing with the twenty-four thousand it still employed in plants in the United States. The cooperative and team-based production which Levi's sought to introduce, however, required a degree of trust and commitment between workers and management to which the company's former practices were not especially conducive.

The company's first project was to institute a team concept in its plants to replace the repetitive and exhausting piece-work system. The program, appropriately called FAST (Finishing and Sewing Team), ties compensation to productivity. By at least one account, the new team concept has led to fist fights among workers who blame slower team members for lowering the earnings of the group.<sup>200</sup> A pilot team program instituted in one plant resulted in lower wages for the workers by as much as a dollar per hour.<sup>201</sup> Despite these results, the company continued its efforts to enlist workers into new relational forms of production.<sup>202</sup> In doing so, Levi's apparently realized that it had to build trust and actually sought participation by union members in achieving that goal.<sup>203</sup> Workers may have wondered, however, if the team-based concept was simply another form of breaking up existing signs of solidarity among workers, rather than a shift to "cooperation" to boost productivity.

In October 1994, Levi's efforts resulted in a unique agreement between the company and ACTWU.<sup>204</sup> The agreement seeks to enlist workers into cooperative production units through collaborating with the

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199. See Solis, *supra* note 190, at A1 (giving as an example Virginia Castillo, a former employee who is now an activist).

200. Udesky, *supra* note 198, at 666.

201. Louise Uchitelle, *A New Labor Design at Levi Strauss*, N.Y. TIMES, Oct. 13, 1994, at D1.

202. *Id.* Uchitelle describes the system, designed to boost productivity:

Under the new Levi production system, workers at many plants have been reorganized into teams of 15 people or more. The teams are intended to produce an entire garment more quickly than under the old piecework system where people worked separately, each one performing a specific task such as sewing on pockets or zippers. With team members helping each other, the goal is to make a garment in less than a week, instead of 10 days or more under the old system.

*Id.* See also *A Look at the Clothing Industry of Today* (NPR Morning Edition radio broadcast, Dec. 20, 1994) (describing the team-based "modular manufacturing" model).

203. See *Has Levis Sold Its Soul to Organized Labor?*, INVESTOR'S BUS. DAILY, Oct. 20, 1994, at A4.

204. See *Levi Strauss, ACTWU Announce New Partnership Agreement*, DAILY LAB. REP. (BNA) No. 197, at D-12, (Oct. 14, 1994) (describing and reprinting portions of the agreement). ACTWU has 6,000 members at 12 of Levi's United States plants, about 26% of



union.<sup>205</sup> The agreement sets forth among its objectives that each party shall:

2. Endeavor to improve the employment security of employees by continuously improving operations, recognizing that there are no employment security guarantees . . . .
4. Make LS&Co. locations increasingly flexible, cost effective, responsive, and competitive in the global marketplace. . . .
7. Empower employees to bring forth their ideas, solve and prevent problems, be accountable for their actions and hold LS & Co. accountable for its commitments. . . .<sup>206</sup>

The agreement articulates an explicit trade-off: the union will assist Levi's through "joint commitment to the achievement of customer service targets and the development of a high performance work environment, as evidenced by the implementation of various joint initiatives and the successful operation of the plant."<sup>207</sup> In return, Levi's agreed to a card-check system for authorizing ACTWU to represent its employees at plants that are currently unorganized, rather than forcing NLRB elections.<sup>208</sup> During the authorization process, the union will "participate in the plant redesign process," during which "employees will have an opportunity to view an

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the Levi's domestic workforce. *Id.* I place the discussion of this agreement in the non-union section both because it was the activities of non-unionized workers that helped prompt the agreement, and because the agreement has significant ramifications for the majority of Levi's workers who currently are not unionized.

205. See Uchitelle, *supra* note 201, at D1 (quoting a Levi's plant manager: "the more workers in the union, the greater their voice, and that drives the process forward."). Commentators disagree on the effectiveness of labor-management cooperation schemes, though most concur that they are more effective where undertaken with unions. Compare LOWELL TURNER, *DEMOCRACY AT WORK* 163-64 (1991) ("From the management side, requirements for smooth implementation of new technologies and work organization mean that managers need union and works council support (unless they can exclude or marginalize the union); engaging worker representatives in decision-making is perhaps the best way to win such support.") with Maryellen Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in *UNIONS AND ECONOMIC COMPETITIVENESS* (Lawrence Mishel & Paula Voos eds., 1992) (finding that both union and non-union plants with joint labor-management committees are less efficient than plants without them, but that such committees in union plants fare better than those in non-union plants).

206. Levi Strauss & Co. and Amalgamated Clothing & Textile Workers Union, Partnership Agreement 1 (Oct. 14, 1994) [hereinafter Partnership Agreement], reprinted in *Levi Strauss, ACTWU Announce New Partnership Agreement*, *supra* note 204. It concludes, with high rhetorical flourish, in a section entitled "The Choice":

The new North American reality calls for a new partnership. ACTWU and LS&Co. are linking arms to create a better future. Our Partnership sets new standards for ourselves, our industry, and the broader industrial community. The choice before us is continued antagonism or common purpose; ongoing blame-shifting or shared accountability; workplaces which falter in the face of global competition or ones that step up to the challenge; the same old behaviors or a bold new adventure.

*Id.*

207. Partnership Agreement, *supra* note 206, at 4.

208. *Id.* at 4-6.

honest, open, productive, and mutually beneficial partnership between ACTWU and LS&Co.”<sup>209</sup>

Perhaps most important in an examination of contingent work arrangements, “flexible production,” and outsourcing, the agreement recites job security as a key goal of the partnership. Conceding that “there may be real threats to LS&Co. Owned and Operated facilities,” presumably through increasing reliance on outsourced labor, the company agreed to discuss with the union “the nature and reasons for the threat,” and to “jointly strive to find alternate solutions that preserve jobs. These solutions can include full examination of sourcing decisions, measurement assumptions, opportunities for improvement, and any other options.”<sup>210</sup>

The Partnership Agreement between Levi’s and ACTWU demonstrates the close interconnections among globalization of production, new “relational” forms of work organization, and business’ shift to contingent work arrangements. Decisions to move overseas, to outsource production, or to save on labor costs through use of temporary workers create reverberations both through deteriorating living standards for workers and, possibly, deteriorating image problems for companies at home. At the same time, increasing competition and technological changes are pressing companies to adopt integrated work processes that require the active participation and cooperation of trained and group-oriented work forces. How can management reconcile these conflicting trends?<sup>211</sup> Bob Rockey, President of Levi-Strauss North America, commented when the agreement was announced that “[a]n adversarial relationship won’t work in a rapidly changing marketplace that demands flexibility and innovation. We wanted to forge a partnership that will add value to our business and enhance employee security by continuously improving our operations.”<sup>212</sup> Such “continuous improvement” in other contexts has meant moving operations overseas and shifting to short-term outsourced labor. It remains to be seen

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209. *Id.* at 6. The agreement also sets forth a steering committee structure which will oversee labor-management collaboration efforts in unionized plants and target non-union plants for the “redesign” process. *Id.* at 4.

210. *Id.* at 6-7.

211. Karen Nussbaum, currently the director of the Women’s Division at the Department of Labor, commented on this tension in a 1989 book:

[A] growing body of research reveals that improved efficiency and quality of products and services is impossible without an ongoing exchange of information between managers and workers, as well as continual retraining. Transient workers are not around long enough to pass on many ideas to managers. Nor is there much incentive for employers to invest in training workers who will be out the door tomorrow.

JOHN J. SWEENEY & KAREN NUSSBAUM, *SOLUTIONS FOR THE NEW WORKFORCE* 65-66 (1989).

212. *Levi Strauss & Co. and Amalgamated Clothing and Textile Workers Union Ratify Ground-Breaking Partnership Agreement*, PR NEWswire, Oct. 13, 1994, available in LEXIS, Nexis Library, PRNEWS File.

whether the new agreement between ACTWU<sup>213</sup> and Levi's will in fact result in enhanced productivity and retention of secure and permanent jobs, or whether it will be simply a management tool to induce cooperation from the union in implementing a team-based speed-up at selected plants.<sup>214</sup>

#### D. Worker Ownership: Cooperative Contingent Workplaces

Partnership and collaboration may be one way for workers to adapt to new styles of management, yet imbalanced power relationships in non-union workplaces threaten the effectiveness of those models for many workers. In response to the management-labor imbalance, some workers are seeking to shift the power dynamic in their favor and to confront the increased use of contingent workers head-on by starting up their own temporary service agencies. Cooperatively-owned, worker-run employment agencies or temporary help services can offer the benefits of flexible scheduling, a variety of assignments, on-the-job training, and portable benefits, without trapping workers in the underclass contingent segment of the workforce. They can provide low-income workers with valuable job and training opportunities while promoting a long-term financial stake in the venture for both workers and communities alike.<sup>215</sup>

The Industrial Cooperative Association in Boston (ICA), a consulting organization whose "mission is to promote human and economic development through the creation of model community- and worker-owned companies that create and save jobs,"<sup>216</sup> has identified the temporary help industry as a potential area in which community-based initiatives and worker ownership can address the problems which temporary work poses for workers.<sup>217</sup> The ICA is currently working with United Community Ministries (UCM), a church-based community service agency in Alexandria, Virginia, to establish a worker-owned temporary agency which would

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213. ACTWU and the ILGWU have since merged into a single union, called UNITE (Union of Needletrades, Industrial, and Textile Employees). See *Garment Union Leader Predicts Growth as ACTWU Approves Merger into UNITE*, DAILY LAB. REP. (BNA) No. 125, at D-17 (June 29, 1995).

214. Early indications show satisfaction with the program by both union leaders and management. See Elizabeth Walpole-Hofmeister, *Levi-Strauss, UNITE Partnership is Making Progress Toward Goals*, DAILY LAB. REP. (BNA) No. 162, at D-16 (Aug. 22, 1995).

215. See, e.g., Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897 (1993) (describing the potential benefits of worker-owned child care centers for community economic development, provision of needed services, and work opportunities).

216. JAMES D. MEGSON & CAROL DiMARCELLO, *THE ICA GROUP, INDUSTRY SECTOR ASSESSMENT FOR CED REPLICATION STRATEGY* at i (1994).

217. See *id.* at 12-16 (describing five different community initiatives which seek to address problems of the temporary services industry and key issues that should be addressed by a successful program).

offer secretarial and word processing services to local businesses.<sup>218</sup> Workers will be graduates of a UCM training school which teaches basic computer skills to low-income women and recovering substance abusers.<sup>219</sup> The agency will place graduates in local jobs, seeking to provide workers with as near to regular, full-time work as possible, and offer ongoing training to employees to upgrade their skills toward higher-paid positions.<sup>220</sup> Workers will be governing members of the enterprise entitled to select all management and to retain a share of its annual profits.<sup>221</sup>

The ICA has assisted other local attempts by workers to exploit the growing market for temporary workers. For example, in 1986, the Farm Workers Association of Central Florida began the ninety-six member Peoples Enterprise Project to provide labor crews to orange growers on a temporary basis.<sup>222</sup> The cooperative business maintains market share by providing growers a reliable and steady supply of workers, while also upgrading working conditions for members by acting as workers' intermediaries with the growers. The cooperative ensures that members receive full pay for their work, inspects work and living conditions, develops a sequence of jobs as the harvesting season moves north, and then divides profits among the members based on hours worked throughout the year.<sup>223</sup> Similarly, the ICA-backed Manos, a cooperative of one hundred temporary domestic and landscape workers in Oakland, California manages a job referral service for members and provides limited health benefits.<sup>224</sup> Other worker organizations are forming worker-owned temporary agencies in San Francisco and in Manchester, New Hampshire.<sup>225</sup>

These initiatives toward worker ownership are instructive in their attempts to build on the benefits of contingent work arrangements for the advantage of the workers in them. If successful, they could take the place of agencies like Manpower or Kelly Services and act as independent worker-run organizations controlling the supply of labor to businesses. However, such organizations entail risks for members who have to compete in the market at cut-rate prices for temporary workers while at the same time trying to provide basic benefits, secure hours, and ongoing training *and* turn a profit at the end of the year.<sup>226</sup> If these challenges can be

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218. *Id.* at 13.

219. *Id.*

220. *Id.*

221. Interview with Jim Megson, Industrial Cooperative Association Executive Director, in Boston, MA (Apr. 22, 1995).

222. MEGSON & DiMARCELLO, *supra* note 216, at 13.

223. *Id.*

224. *Id.* at 14.

225. See *Temporary Workers From Co-op*, GEO EXCHANGE, (Grassroots Economic Organizing, New Haven, Ct.), Mar./Apr. 1995, at 12-13; *A Union-Based Temp Agency*, GEO EXCHANGE (Grassroots Economic Organizing, New Haven, Ct.), Mar./Apr. 1995, at 13-14.

226. Some critics charge that worker ownership of firms can involve substantial risk for worker-owners because it sacrifices investment diversification and stakes workers' savings as well as their job on a single enterprise. See, e.g., Adam Bryant, *Betting the Farm on the*

met, the initiatives represent a pro-active means for workers to adapt their needs and skills to those of businesses, working within the system of unstable and temporary work assignments without becoming victims of it.

## VI.

### LESSONS OF WORKERS' ORGANIZING EFFORTS AND PROPOSALS FOR ALTERNATIVE WORKER ORGANIZATIONS

With the exception of worker-owned temporary agencies, organizing efforts against contingent work by non-union workers demonstrate a common feature: they occur only *after* workers have been displaced by a change in company employment patterns. Whether it is seamstresses fighting for months of backpay only after their employer has become insolvent, factory workers taking political action against short-term work after their plant laid them off, or employees waging battle with the company when they had no more jobs to lose, each effort occurred at a time when workers no longer had anything to risk by taking action. Efforts involving unions, in contrast, tend to occur when workers still have jobs, seeking to make those jobs more livable and humane. Unions may accomplish their goals by organizing to gain a contract with their employer, by bargaining to develop rules around use of contingent workers, or by pressuring employers to adhere to union standards.

The contrast between union and non-union responses to contingent work points to a fundamental barrier for those workers seeking to adapt to contingent work arrangements in mutually productive and beneficial ways. Typically, workers who are not unionized lack the bargaining strength or the power on the job to work in conjunction with management toward change. As in the Levi's example, any beneficial changes which occur are at the whim of management—management may decide to involve workers in changing production processes, or they may decide simply to shut the plant down. In the current context of a grave imbalance in power between workers and management, it is difficult to foresee workers taking the initiative to combat negative employment trends until long past the time when they can make an impact.

Recent signs pointing toward a possible revitalization of organizing—both inside and outside of the labor movement—may provide avenues by which workers might begin to take control of their working lives before economic dislocations strike. John Sweeney, the newly-elected President

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*Company Stock*, N.Y. TIMES, Apr. 16, 1995, § 3, at 1 (explaining that although some evidence supports employee stock ownership, many financial experts find it perplexing that some employees keep their money in their companies' stock even when they have a choice of investments). While this criticism may be salient for highly-paid workers, cooperatives employing low-income workers frequently offer the first opportunity such individuals have to accumulate savings at all. Lack of sufficient diversification seems like a minor concern when the alternative is no investments whatsoever.

of the AFL-CIO, intends to prioritize organizing non-union workers.<sup>227</sup> He has promised to spend substantial amounts of the body's resources on new organizing and to send at least one thousand organizers into the field in 1996.<sup>228</sup> Formerly President of the SEIU, Sweeney oversaw that union's Justice for Janitors campaigns and has demonstrated that he is not afraid of testing innovative organizing techniques, especially among low-wage and service sector workers.<sup>229</sup> Even if organizing campaigns at particular work-sites are ultimately unsuccessful, renewed activism among vulnerable workers will provide incentives for employers to take workers' concerns more seriously.

Growing organizing efforts outside of the labor movement may also provide means through which workers can confront economic changes pro-actively. Community-based and ethnically-based organizations addressing workplace issues have begun to appear in several parts of the country, especially in centers of immigration. These include the Workplace Project in Hempstead, New York; the Chinese Staff and Workers Association in New York City; the Korean Immigrant Workers Association in Los Angeles; and Fuerza Unida in El Paso, Texas.<sup>230</sup> An explicit goal of these organizations is to bring workers together to address common concerns about jobs or particular employers in the local economy.<sup>231</sup> As organizing efforts like these continue, workers may be able to identify threats of economic destabilization and act to avert them or to respond to them before such threats ripen into local crises.

Despite the practical limitations that any organizing effort entails,<sup>232</sup> workers' advocates nonetheless have the potential to propose wide-ranging changes in the ways that jobs and benefits are structured. Rather than adhering to a static and outdated model of employer-employee relationships, commentators have examined current and historical organizing models to propose different employment arrangements. In order to implement such

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227. Frank Swoboda, *After Tough Talk, A Leadership Test for Labor*, WASH. POST, Oct. 29, 1995, at H1. The AFL-CIO is also aggressively recruiting young people from all backgrounds to become organizers and providing them with extensive training through its seven-year-old Organizing Institute. See Lisa Belkin, *Showdown at Yazoo Industries*, N.Y. TIMES, Jan. 21, 1996, § Mag., at 26.

228. See Belkin, *supra* note 227, at 28 (noting that the AFL-CIO's Organizing Institute spent \$2.8 million in 1995 and may send as much as \$ million in 1996 to recruit and train new organizers, after receiving a "blank check" from Sweeney, whereas it spent less than \$400,000 on such efforts in 1990).

229. See James L. Tyson, *The Risks and Rewards of Labor's New Militancy*, CHRISTIAN SCI. MONITOR, Oct. 27, 1995, at 3 (describing the newly aggressive stance of the AFL-CIO under Sweeney's guidance, as exemplified by a recent march by unionized janitors that blocked passage across Roosevelt Bridge in Washington, D.C. during rush hour).

230. Interview with Laurie Haefer, Attorney, Latino Workers Center, in New York, N.Y. (Feb. 20, 1996).

231. *Id.*

232. For compelling examples of the obstacles to organizing that employers can use in traditional union representation elections, see Belkin, *supra* note 227, at 29, 30.

proposals, however, both management and employees must see their interests not only in increasing competitiveness and promoting constant innovation, but also in involving and empowering workers in the changes taking place—whether workers are organized into unions or not.

While a rich academic literature has developed to describe the growth of flexible specialization and relational forms of production,<sup>233</sup> only a few commentators have addressed, from labor's point of view, the question of what these new business forms mean for workers and their organizations. Below, I summarize three models developed by writers sympathetic to the labor movement which would assist workers and their unions to respond to the growth of the contingent workforce. Although the proposals may require some adjustment in the current labor and employment law framework, they are plausible means of developing and maintaining independent worker organizations to help adapt to changing business practices. The adaptations are not attempts to reify current arrangements into a system of vested rights. Rather, they are efforts to develop independent, worker-controlled bodies that can protect threatened worker interests in harmony with firms' objectives of increased flexibility.

#### *A. Associational Unionism*

Writing in 1988, Charles Heckscher, then an Assistant Professor at the Harvard Business School, was one of the first to address the impact of changing systems of production on workers and their organizations. In *The New Unionism*,<sup>234</sup> Heckscher argued that unions must adapt to the failure of the industrial union model through a program of "associational unionism": decentralized representative organizations forged around employees' common identity within a sector of work or profession, rather than around a single employer or a single contract.<sup>235</sup>

Heckscher describes his model of associational unionism as a mix between a political pressure group, service organization, and traditional confrontational union. Such associations would exhibit five defining characteristics: (1) a focus on principles, such as excellence in the profession or respect on the job; (2) heightened internal education and participation; (3) diversified forms of representation and service, such as the provision of job training, insurance, or legal assistance; (4) a wide variety of tactics to pressure employers besides the strike; and (5) "extended alliances" with outside organizations and local groups.<sup>236</sup> These worker associations would not focus on gaining official legal recognition from a single employer to negotiate a contract, leaving workers who did not fit

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233. See sources cited *supra* note 3.

234. CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* (1988).

235. *Id.* at 177.

236. *Id.* at 188-90. Heckscher summarizes his proposal as follows:

into that model of employer/employee relations without any avenue for representation. Rather, they would be more loosely-joined, voluntary groups representing members as many professional associations do currently: through public relations activities, by defending members within the existing system of employee rights, and by promoting cooperation with employers toward common objectives.<sup>237</sup>

Heckscher's vision of associational unionism might provide significant benefits for contingent workers in that it could offer a measure of representation to workers who are not attached to a single employer in a clearly-defined, long-term relationship, but who nonetheless are sufficiently attached to the workforce to require representation and advocacy. Organizations like CATS,<sup>238</sup> CAFE,<sup>239</sup> and the AIWA<sup>240</sup> fit well within his model.

The overall transformation Heckscher advocates—greater adoption within the traditional labor movement of associational characteristics—may not be beneficial for workers as a whole, however. Currently, workers are free to develop their own associations along much the same lines as Heckscher proposes. Yet such organizations lack the legal protections afforded to recognized unions enabling them to place economic pressure on employers through strikes or to cement their gains through negotiated contracts—as much as CATS can lobby on behalf of temporary workers or AIWA may picket outside Jessica McClintock, their gains are subject to political whims and to their ability to mobilize membership temporarily. Unions bargaining under the NLRA offer a somewhat more stable and enforceable mechanism for workers to assert their interests. Recommending that the labor movement adopt more of the tactics of associations, if it occurs at the expense of enforceable commitments from employers, may not on the whole advance workers' interests. Thus, although associational unionism can hold significant benefits for contingent workers, it need not

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The final alternative, the one I have advocated, is the evolution of unionism toward a form that can effectively represent employees more flexibly than the present system—able to embrace diverse types of members, including managerial and professional ranks; able to deal comfortably with both long-term strategic concerns and shopfloor participation bodies; able to engage in multilateral negotiations among several parties around complex issues; and able to use a range of tactics according to the situation.

*Id.* at 254.

237. Heckscher provides two examples of the labor movement's tentative steps toward more associational structures. One is the Communications Workers of America's Committee on the Future, established in 1981, which foresaw significant changes in the communications industry and developed strategic initiatives to respond, including decentralization of authority within the union, a focus on employment security over job security, and an encouragement of diversified local initiatives. *Id.* at 179-81. The second is the AFL-CIO's Associate Member program (currently defunded), in which the union provided a variety of benefits such as credit or legal services to workers who need not be members of a union through their job. *Id.* at 183.

238. See part V.B., *supra*.

239. See part V.B., *supra*.

240. See part V.A., *supra*.



replace union structures but rather should work alongside and within them to advance the interest of contingent worker membership. In the face of systemic changes and growing instability, workers need both regimes to be available in order to advocate effectively for themselves.

### B. Occupational Unionism

Dorothy Sue Cobble, Assistant Professor of Labor Education at Rutgers University, undertook a comprehensive study of waitress unionism in the first half of this century to develop a model for "occupational unionism," a form of craft unionism particularly adapted to the women workers' needs as waitresses.<sup>241</sup> Her proposal to reinvigorate occupationally-based forms of organization particularly suited to women's experiences in the workforce holds tremendous potential for effective representation of the contingent workforce in a manner consistent with the interests of employers and employees in flexibility, cooperation, and strong skills development.

Waitresses, like a variety of contingent workers, frequently float from one employer to another yet remain attached to the occupation over time. The organizations they built in the early part of this century stressed worker control over occupational labor supply and work standards in order to maintain dominance within a highly mobile labor force. Cobble identified four features of the occupational unionism practiced by waitresses that met the needs of this early contingent labor force: (1) identity forged around occupation rather than employer; (2) control over the labor supply in the occupation through hiring halls and closed shops; (3) rights and benefits extended to workers as a function of union membership rather than worksite affiliation; and (4) peer control over occupational performance standards.<sup>242</sup> These organizations stressed employment security over job security, permitting employers to fire employees freely and allocating work evenly among members in times of downturns. They provided portable benefits to members that were one of the principal attractions of union affiliation. Moreover, by enforcing strict performance standards as well as conducting extensive job training, the union assured employers that they

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241. See DOROTHY SUE COBBLE, *DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY* (1991) [hereinafter COBBLE, *DISHING IT OUT*] (combining oral interviews and extensive archival records to show how waitresses adopted the basic tenants of male-dominated craft unions but rejected other aspects of male union culture); Dorothy Sue Cobble, *Organizing the Postindustrial Workforce: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419 (Apr. 1991) [hereinafter Cobble, *Organizing the Postindustrial Workforce*] (providing as an alternative to unionism based on mass-production, occupational identity, control over the labor supply, portable rights and benefits, and peer determination of performance standards and workplace discipline).

242. Cobble, *Organizing the Postindustrial Workforce*, *supra* note 241, at 421.

would receive reliable and high-quality staff in a sector of the economy that experienced high rates of turnover.<sup>243</sup>

Cobble explains the implications of the waitress' example for the contingent workforce today:

These [contingent] workers need to be bound together by more than animus against a single employer or the promise of job security at a single worksite. A unionism that relied on the ties of occupational identity and the mechanism of the hiring hall would create bonds between workers that cross the boundaries of individual workplaces and aid organizing efforts. Representation based on individual workplace rights and protections is simply untenable in sectors characterized by high turnover. Moreover, such a reformulated unionism would offer practical, appealing new services to this floating, decentralized, increasingly female population.<sup>244</sup>

Significantly, the occupational unionism Cobble proposed also matches well with employers' turn to flexible specialization and cooperative competition. By enforcing peer monitoring and control over performance standards, while permitting short-term and part-time attachments to the workforce, such organizations enhance flexibility for both firms and workers while simultaneously promoting the development of a group-based system of work relations.

Cobble's proposal would require some fairly significant changes in current labor laws. The NLRA, premised upon mass-production-style jobs, makes difficult or illegal some practices that are a necessary feature of craft-style unionism like multiemployer bargaining, secondary boycotts, and prehire agreements.<sup>245</sup> Other features of occupational unionism could be adopted immediately, however, such as an emphasis on employment over job security, establishment of union-run training programs, and provision of portable benefits. Efforts such as Justice for Janitors are increasingly utilizing these time-honored techniques to organize and represent the marginalized contingent workforce.<sup>246</sup>

### C. Geographic Associationalism

Extrapolating from the Justice for Janitors model, Howard Wial of the Department of Labor proposes "geographic associationalism" as a form of

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243. *Id.* at 426-28. Among the attributes the locals guaranteed of its members were honesty, sobriety, punctuality, and civil behavior. The union, rather than supervisors, mediated disputes and enforced discipline, creating a system of constant peer-group learning and monitoring. *Id.*

244. *Id.* at 433.

245. See DOROTHY SUE COBBLE, U.S. DEP'T OF LABOR WOMEN'S BUREAU, MAKING POSTINDUSTRIAL UNIONISM POSSIBLE (1994).

246. See part IV.B., *supra*.

organizing among low-wage service workers.<sup>247</sup> The low-wage service industry shares many of the same characteristics as contingent work: high rates of turnover, heavy temporary and part-time work, and short-term attachments to a particular employer. Wial recognizes that, due to these characteristics, worksite organizing is an anomaly in this growing sector.<sup>248</sup> He criticizes Cobble's occupational unionism proposal on the basis that many low-wage workers lack the strong occupational consciousness necessary to implement such a regime. Further, he argues, Cobble's proposed peer-based enforcement of work standards, which would usually mean including supervisors in the union, would be problematic among workers whose primary workplace grievances frequently are directed toward their immediate supervisors.<sup>249</sup>

Instead, Wial finds in the Justice for Janitors model elements of an emerging structure of unionism for low-wage workers based on an amalgam of geography and occupation. The structure unites workers in a region around loosely-defined common occupational interests, primarily seeking to impose a uniform wage and benefit structure on employers in that region. The union negotiates a regional, multiemployer collective bargaining agreement and thereby eliminates wage and benefit competition, rather than seeking to control the entire local labor supply. The model relies on a top-down form of organizing in which the union pressures the employers to sign on to a single contract, rather than organizing the workers into a solidaristic group (though the two goals are complementary and interdependent).<sup>250</sup> Pressure on employers can include boycotts, pickets, strikes, political and public pressure; it is usually confrontational and often treads the borderline of illegal secondary activity.<sup>251</sup>

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247. See Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671 (1993) (arguing that a new kind of union organizational structure is needed in order to enable low-wage service workers to organize and achieve effective representation at work and in order to induce employers to raise both wages and productivity in traditional low-wage service jobs).

248. *Id.* at 678-79.

249. *Id.* at 685-87. Wial also criticizes Charles Hecksher's associational unionism, arguing that its subordination of collective bargaining to diverse forms of political pressure is ill-suited to low-wage workers because it dilutes their economic strength and disregards the important valence adversarial relations with management provides for organizing efforts. *Id.* at 689.

250. Wial considers his model to incorporate organizing of both employers and workers in a complementary fashion:

[T]he geographical/occupational structure seems to accommodate organizing activity that combines top-down and bottom-up features. The Justice for Janitors campaign, for example, relies heavily on coordinated, area-wide direct worker actions that express workers' demands for industrial justice in a highly adversarial manner . . . [these direct actions] build area-wide worker solidarity and give workers a sense of their collective power.

*Id.* at 697.

251. See discussion of Justice for Janitors campaigns, *supra* part IV.B.

While the geographical-occupational model addresses the high level of job mobility in the service sector, providing uniform wages and employer-financed portable benefits, it does little to provide effective representation to workers in the workplace or to promote worker involvement. Rather, it relies on a highly adversarial model to achieve economic benefits—a vitally important, albeit limited, goal for low-wage service workers. Wial's geographic-occupational unions may not be an appropriate model for many contingent workers who work alongside permanent, full-time employees. Unlike building or food service jobs, where the entire workforce often works part-time and short-term assignments, many contingent workers—such as those who see their full-time jobs farmed out to low-wage contractors or those who accept a new assignment from Manpower, Inc. every day—have interests which differ from or conflict with their occupational co-workers. By concentrating on securing multiemployer agreements imposing uniform conditions throughout a region, the model threatens to create rifts between those working in a contingent status and those who retain their primary loyalty toward a single employer and seek to retain particular workplace practices and identity. For the low-wage service workers Wial addresses, however, the model may be an effective means to achieve greater economic power and security in highly unstable jobs.

#### CONCLUSION

Businesses seeking to enhance flexibility and to reduce paralysis in their operations often have done so at the expense of workers who have seen their expectations of long-term job security dashed. Instead, workers increasingly face a world of job opportunities that may be here today and gone tomorrow; they have been forced into relationships with employers in which legal rights are severely attenuated if they exist at all. Worker organizing in response to newly-developing contingent work arrangements has taken a multiplicity of forms, testament both to the creativity and innovation of workers and to the diversity of challenges posed by emerging systems of production.

Current employment law is rife with loopholes and restrictive definitions which operate to exclude millions of workers from coverage. Reform of the current system is far from imminent. At the same time, businesses are seeking to promote cooperation with their workforces and to encourage innovation and teamwork at all levels of production. The tension between these two forces threatens to create two classes of workers: the privileged, full-time team members and the vast reserve army of second-class contingent workers. Yet such a bleak outcome is not the sole possibility. Workers and their organizations, in conjunction with management, have a wide range of opportunities available to them by which they can both adapt to increased needs for flexibility and maintain rights and benefits in the workplace.

This Article has only begun to explore some of the possible forms and styles of worker organizing that can permit adaptation to contingent work within a system of meaningful representation. Surveying current efforts, certain characteristics and features of promising models emerge: portability of benefits across employers, independent and empowered worker organizations that exert some degree of control over the work, and responsibility on the part of actors in all phases of integrated production processes for maintaining basic standards on the job. Conversely, movements which seem doomed to failure are those which solely try to resist economic changes and reimpose the system of strong worker-employer affiliations with mutual commitments over a lifetime.

Workers can begin immediately to build new structures which might help them adapt to economic changes. By forming local associations along lines of common jobs, ethnicity, or economic sector, workers could begin to advocate for regional standards and benefits. By staging more organizing efforts and strengthening the labor movement, employees can create lasting bodies within their workplaces and communities to foresee changes and to ensure that employee interests are represented when they occur. Workers might form cooperatives and manage their own contingent work arrangements. Models presently exist which might permit contingent workers, currently at the mercy of changing economic tides, to undertake their own flexible specialization in advocating for more humane and stable jobs. With such efforts underway, workers would not have to resort to political campaigns or to rely on the existing patchwork of protective legislation when employers imposed structural changes without regard to social cost.

Current shifts in management and production styles, corporate attempts to develop cooperative work processes and systems of constant learning, and the expansion of the contingent workforce are all interrelated. Forces that appear to be in tension—between businesses' attempts to sever commitments to individual workers in favor of contingent work arrangements and their simultaneous promotion of work styles that require high degrees of trust and loyalty—may not in fact be incompatible. A system of strong worker organizations may be able to fill the gap, providing benefits and job security on a sector-wide basis for members who move from employer to employer. Firms would thereby gain the ability to shrink and enlarge their work forces as needed, while also being ensured highly trained and able workers who can participate and contribute in learning organizations. Although establishing such systems of representation and organization may seem impossible in the current pro-business climate, historical and contemporary examples demonstrate that they may not be so far afield. Management, government, and workers alike need only perceive their mutual interests in establishing employment structures that benefit *both* the economy as a whole and the individual workers within it.

