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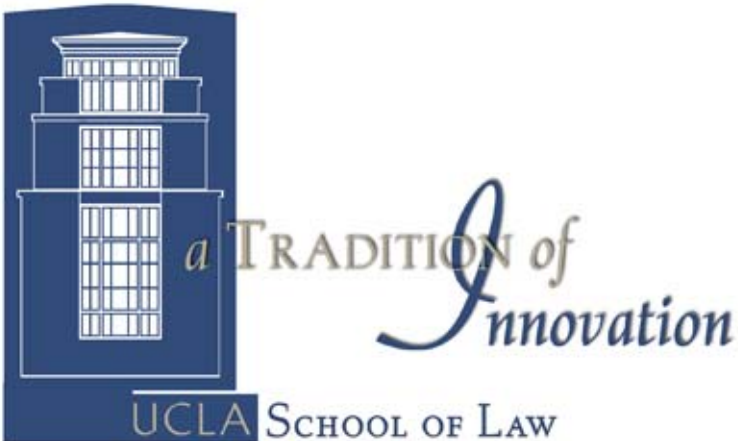
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LEGAL PROTECTIONS FOR ATYPICAL EMPLOYEES:  
EMPLOYMENT LAW FOR WORKERS WITHOUT WORKPLACES  
AND EMPLOYEES WITHOUT EMPLOYERS

by

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# **Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees Without Employers**

**Katherine V.W. Stone\***

## **Introduction**

In the past two decades, many U.S. corporations have restructured their internal corporate organizations, moving away from centralized decision-making toward decentralized structures and production networks. Vertical disintegration and production decentralization have enabled firms in both the manufacturing and service sectors to make their operations leaner, more flexible, less top-heavy, and better adapted to global competition. Many large firms in the United States have achieved a more decentralized structure by dispersing their production facilities. Thus, for example, firms in the electronics and apparel industries have subcontracted major parts of their operations to smaller supplier firms, often abroad. Others, such as General Motors and Ford Motor Company, have created spin-offs such as Delphi and VisiTron, semi-autonomous firms informally controlled by their creators, to perform core auto-making functions. Others have increasingly turned to contract manufacturing, in which they use contracting partners who have their own facilities, rather than an in-house workforce, to produce their core products. Yet others have abandoned or downsized their large U.S.-based facilities and relocated entire production operations to overseas locations. Others, such as film production, utilize overseas labor and facilities for particular projects while maintaining a skeleton headquarters staff in the United States.<sup>1</sup>

The trend toward decentralized production has developed at the same time that an important change has occurred in firms' employment practices. In the past two decades, many firms have departed from a system that offered long-term stable employment and adopted instead a free agency model of employment. One feature of this new employment relationship is that firms use a large

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<sup>1</sup> The literature of production decentralization in the United States is vast. Notable examples include Bennet Harrison, *LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY* (Basic Books, 1994); Michael Storper, *The Regional World: Territorial Development in a Global Economy* (The Guilford Press, 1997); Manuel Castells, *The Rise of the Network Society* (Blackwell, 1996). For a contemporary account, see Thomas W. Malone, *THE FUTURE OF WORK: HOW THE NEW ORDER OF BUSINESS WILL SHAPE YOUR ORGANIZATION, YOUR MANAGEMENT STYLE, AND YOUR LIFE* (Harvard Business School Press, 2004).

number of workers that are explicitly denoted as “temporary.”<sup>2</sup> According to the Department of Labor, in 2005, nearly 4.5 million employees in the United States – a full 3.6 per cent of the work force – were engaged in temporary work.<sup>3</sup> In addition, firms are subcontracting tasks not only to other firms, but also to “independent contractors,” – individuals who formerly did the same tasks in an employment relationship. Some of those termed independent contractors work at the firms’ premises, but many others work at home, akin to 19<sup>th</sup> century home-based piece-workers. As of 2005, there were over 10 million independent contractors, comprising 8.4 per cent of the labor force.<sup>4</sup> Furthermore, firms are shifting long-term employees to spin-off firms, which often lack unions and do not have a history and culture of fostering long-term jobs. In addition, firms have been changing the nature of the employment relationship of their regular workforce – those that remain with the core firm – so to extinguish any expectation of a long term relationship.<sup>5</sup>

The process of production decentralization and the concomitant changing nature of employment relationships raises numerous issues for U.S. labor and employment laws. As I have argued at length elsewhere, the U.S. labor and employment laws were built upon the assumption of a long-term employment relationship between employees and firms.<sup>6</sup> The legal rules governing collective bargaining, the laws pertaining to individual employment rights, and the provision of social welfare benefits, all assumed the existence of a stable, on-going relationship between an individual and a firm. Now, as firms are breaking apart, downsizing, rearranging their functions, and dispersing their facilities, they no longer offer the kind of stable long-term relationship upon which our legal rules depend. Further, as they repudiate any commitment to career-long relationships, employees are often left to fend for themselves without a safety net to protect them.<sup>7</sup>

The legal consequences of the changing nature of the employment relationship in light of the decentralization of production are numerous and varied. In this article, I examine the consequence for three categories of workers: temporary workers, home-workers, and independent contractors.

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<sup>2</sup> In the United States most workers are at-will and hence can be fired at any time for any reason. In this respect, all workers are formally “temporary.” See Katherine V.W. Stone, *Rethinking Labor Law: Employment Protection for Boundaryless Workers*, in G. Davidov & B. Languille, eds., *BOUNDARIES AND BORDERS: DEFINING THE SCOPE OF LABOUR LAW* (2006). Yet the term “temporary worker” applies to those workers who are told at the outset that their job assignment is temporary rather than open-ended.

<sup>3</sup> U.S. Dept. of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements, February 2005*, Table 8 (released July 27, 2005) (available at <http://www.bls.gov/cps>).

<sup>4</sup> *Id.*

<sup>5</sup> These trends are described in Katherine V.W. Stone, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (Cambridge Univ. Press, 2004).

<sup>6</sup> *Id.* at 119 - 126.

<sup>7</sup> *Id.* at 67 - 86.

I explore the eligibility of each type of atypical work for minimum wage and maximum hour protection, occupational health and safety protection, anti-discrimination, family and medical leave, unemployment insurance, compensation for work-related injuries, collective bargaining rights, and retirement security. I show how the labor and employment laws do not give full protection to atypical workers. I then argue that due to the changing nature of work, the distinctions between temporary and permanent employees, and between workers and independent contractors, are becoming blurred. I make a series of proposals that would help give employment protections for all employees in order to address the vulnerabilities of the workforce today.

## **I. Temporary Work**

### A. Introduction / Definitions

Since the 1980s, temporary employment has been the fastest growing portion of the labor market in the United States. According to the U.S. Department of Labor, between 1982 and 1998, the number of jobs in the temporary help industry grew 577 percent, compared to a 41 percent increase in jobs in the labor force generally.<sup>8</sup> In 2005, the Bureau of Labor Statistics reported that over 2 million employees worked for temporary-help agencies or contract labor provider firms and another 2.5 million workers were on-call.<sup>9</sup>

There are many types of temporary work utilized by firms in the United States. Some of the most common forms of temporary work are as follows:

*1. Agency Work.* Agency Work occurs when temporary workers are dispatched by a temporary work agency for what are usually short term assignments from one firm to another. The work may be overseen by a supervisor at the job site or by a supervisor at the temporary work agency. Firms have expanded their use of temporary help agencies exponentially in recent years. Whereas temporary work at one time involved a clerical worker hired to fill in during a permanent employee's sick leave or vacation, today temporary work includes highly skilled workers who perform work that is central to a firm's mission.

*2. Employee Leasing.* Employee leasing is when employees work for a leasing firm that supplies a group of workers, typically an entire department, to a client company known as the user firm. Leased employees are obligated to follow the work rules and regulations stipulated by the user company for which services are being provided. Even though the leased employees report directly to the user firm, they receive their paychecks and benefits from the leasing firm. Leased employees do not typically work at one job site for more than a fixed time period because once a specific job is done, they are assigned to work at another client company.

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<sup>8</sup> GAO, CONTINGENT WORKERS: INCOME AND BENEFITS LAG BEHIND THOSE OF THE REST OF THE WORKFORCE 16 (2000); *see also*, Autor, *supra*, note 92, at 1 (reporting that the temporary-help supply industry grew more than five times faster than U.S. nonfarm employment between 1979 and 1995).

<sup>9</sup> Bureau of Labor Statistics, *supra*, n. 3, *Contingent and Alternative Employment Arrangements*, February 200, Table 8.

3. *In-House Temps.* Some firms have established their own in-house temporary work agencies to provide temporary worker to their numerous divisions on an as needed basis. For example, some insurance companies maintain an in-house temporary department that can dispatch clerical personnel throughout their operation when there are unexpected vacancies or unusually high work volume. These temporary worker work for the firm that both employs them and utilizes their services, but they are designated “temporary” and expected to be available for multiple job assignments.

4. *On-Call Workers.* On-call workers are workers who work only on an as-needed basis. They form a reserve pool and typically are required to be available during certain on-call periods. On-call workers can be either retained by a specific employer to work on an as-needed basis or placed on-call by a temporary help agency. On-call workers are required to be available for work without knowing where their next place or when their next hours of work will be.<sup>10</sup>

In this article, the aforementioned categories of temporary work will be discussed together except when there are significant differences for purposes of legal rights and obligations.

## B. Minimum Wage and Maximum Hour Protection

The Fair Labor Standards Act (FLSA) establishes a federal minimum wage and sets a statutory maximum number of hours worked before an overtime premium must be paid.<sup>11</sup> The minimum wage is currently at \$5.15 an hour and overtime pay is time and a half of the regular hourly rate after 40 hours in a week. The FLSA applies to employer-employee relationships so that to be covered, a worker must be an “employee” as defined by the Act., That is, to be covered, a temporary worker has to prove she/he is an employee, and not a independent contractor.

The Act defines an “employee” as “any individual employed by an employer.”<sup>12</sup> And it defines “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>13</sup> It states that “employ” is meant “to include to suffer or permit to work.”<sup>14</sup> Despite the linguistic circularity, the Supreme Court has stated that definitions under the Act are to be construed broadly, and that employee status is determined by an “economic reality test” rather than the narrower

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<sup>10</sup> Some on-call workers are regular employees who are required to spend off-duty time on-call and available for unscheduled assignments in case they are needed. See, e.g., *Owens v. Local No. 169, Ass’n of Western Pulp & Paper Workers*, 971 F.2d 349 (9<sup>th</sup> Cir. 1992); *Rousseau V. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245 (5<sup>th</sup> Cir. 1986).

<sup>11</sup> 29 USC §201 et seq.

<sup>12</sup> 29 U.S.C. 203(e)(1).

<sup>13</sup> 29 U.S.C. 202(a).

<sup>14</sup> 29 U.S.C. ‘203(g).

common-law master-servant test.<sup>15</sup> Specifically, courts look beyond the question, central to the common law agency test, of who controls the employee's work, and looks instead to whether, as a matter of economic reality, the individual is dependent on the entity.<sup>16</sup> In applying the "economic reality test," courts have stated that the following factors are relevant to determine whether an employment relationship exists for purposes of the FLSA: whether the putative employer has the right to hire, fire and set daily working conditions; whether the worker is paid by the hour, week, or month, instead of a set amount for completing a specific job; whether the worker receives benefits; the extent to which the work was a part of an integrated process; the degree of skill required to perform the work; the permanence of the working relationship; whether the worker has invested in the business; whether the putative employer owned the premises and equipment where the work was performed; whether the services are integral to the business; the putative employer's amount and degree of control over the work process; the employee's liability for loss or profit; the employee's initiative, judgment, or foresight in open market competition; and the degree that the work is an independent operation.<sup>17</sup> No one factor is dispositive – the totality of the circumstances is considered and courts must engage in a "particularized inquiry into the facts of each case."<sup>18</sup>

Given the breadth of the test, many temporary employees are covered under the FLSA while they are on the job. However, on-call employees are not always covered. In an early decision under the Act, the Supreme Court held that waiting time is compensable if it is "primarily for the benefit of the employer and his business."<sup>19</sup> Since then, most lower courts have found that when an on-call worker is free to engage in personal activities during the waiting time, such as to stay at home and watch television, go out to movies, visit friends, engage in exercise, attend church, or run errands, then the time spent on-call is not compensable under the FLSA.<sup>20</sup> The fact that a worker has considerable

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<sup>15</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947). See also, *Nationwide Mut. Ins. v. Darden*, 503 U.S. 381, 326 (1992) (recognizing the "striking breadth" of definition of "employ" under Fair Labor Standards Act). For a discussion of the common law agency test, see *infra.*, Part III.

<sup>16</sup> See generally, *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (describing multi-factor economic realities test for determining employee status); *U.S. v. Silk*, 331 U.S. 704, 716 (1947) (accord).

<sup>17</sup> *Rutherford*, 331 U.S. at 729 - 730; *Baker v. Flint Engineering & Construction Co.*, 137 F.3d 1439 (10<sup>th</sup> Cir. 1998). See also *Herman v. RSR Security Services, Ltd.*, 172 F.3d 132 (2d Cir. 1999) (adopting a four-factor economic reality test).

<sup>18</sup> *Goldberg v. Whitaker House Corp.*, 366 U.S. 28, 33 (1961). See also, *Danneskjod v. Hausrath*, 82 F.3d 37, 39 (2d Cir. 1996), *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984).

<sup>19</sup> *Armour & Co. v. Wantock*, 323 U.S. 126 (1944).

<sup>20</sup> See, e.g., *Bright v. Houston Northwest Mediasl Center Survivor, Inc.*, 934 F.2d 671 (5<sup>th</sup> Cir. 1991); *Owes, v. Local No. 169, Ass'n of Western Pulp and Paper Workers*, 971 F.2d 347 (9<sup>th</sup> Cir. 1992).

restrictions placed on their geographic mobility and activities while on call will not render the time compensable for purposes of the FLSA.<sup>21</sup> One court held that an employee who was required by his employer to remain on the employer's premises was not engaged in compensable time because he was "free to sleep, eat, watch television, watch VCR movies, play ping-pong or cards, read, listen to music . . ."<sup>22</sup> Hence on-call workers get the benefit of the minimum wage provisions of the FLSA when they are actually working, but not for the time spent on-call.

In addition to meeting the test of "employee," an employer is only covered by the FLSA if the employer is an enterprise engaged in interstate commerce and has a gross volume of business of at least \$500,000 per year.<sup>23</sup> Employees in small firms are not covered. However, under the Act, it is the temporary agency, not the user firm, that is the statutory employer for purposes of ascertaining employee eligibility and determining whether the proper wage was paid.

The proposition that the temporary agency rather than the user firm is the statutory employer of a temporary worker is based on a legal fiction. After all, it is the user who has the most control over the employee on a day-to-day basis. The legal fiction was the result of concerted efforts by temporary staffing industry in the 1960s to be designated status the statutory employer for purposes of labor law obligations. The industry, organized as the National Association of Temporary Services, waged intense lobbying campaigns in the state legislatures to persuade them to enact statutes proclaiming that temporary agencies were the employers of record for purposes of state labor law obligations. They succeeded, so that by 1971, all but two states had complied.<sup>24</sup>

As a result of the temporary staffing industry's legislative strategy, employees of small temporary agencies are often not covered by the minimum wage. Also temporary agencies are often unstable business entities, so that employees of fly-by-night temporary agencies can be left with unpaid minimum wages and no one to sue.

Temporary workers who are dispatched by small agencies, or agencies that have gone out of business without paying wages, can try to prove there is a "joint employer" relationship between the user and leasing firm so that the user firm is responsible for their minimum wages and overtime pay.

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<sup>21</sup> Some courts have found that when the restrictions are too extreme and the employees are frequently called in to work, the time is compensable. See e.g., *Renfro v. City of Emporia, Kansas*, 948 F.2d 1529 (10<sup>th</sup> Cir. 1991).

<sup>22</sup> *Rousseau v. Teledyne Movable Offshore, Inc.*, 805 F.2d 1245, 1248 (5<sup>th</sup> Cir. 1987).

<sup>23</sup> 29 U.S.C. § 203 (s) (1) (A).

<sup>24</sup> George Gonos, *The Contest Over 'Employer' Status in the Postwar United States: The Case of Temporary Help Firms*, 31 Law & Soc. Rev. 81 (1997).

In 1973, the Supreme Court held that an employee can have more than one employer under the FLSA.<sup>25</sup> As later explained, a joint employment arises where

“the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s). 29 C.F.R. 791.2(a). In such situations, all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the [FLSA] [and] all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions.”<sup>26</sup>

To find a joint employment, the agency looks at the extent to which both employers are involved with the employment activities. When the court finds a joint employer, both the user firm and the leasing firm are jointly and severally liable for any FLSA violations.<sup>27</sup>

Because the Court has interpreted the FLSA coverage broadly, it gives temporary workers more protection than most other labor statutes. However, despite the breadth of the definition of “employee” for purposes of the FLSA, there remains considerable uncertainty in individual cases. The Second Circuit, for example, has warned that the multiple factors have to be weighed anew in each case.<sup>28</sup> With a multi-factor test, the factors can be weighed and clustered differently in each case, resulting in unpredictable results in borderline cases – the cases in which temporary workers are most likely to fall.<sup>29</sup>

### C. Health & Safety Protections

The Occupational Safety and Health Act (OSHA) was enacted in 1970 with the express purpose of ensuring “so far as possible every working man and woman in the nation safe and healthful working conditions.”<sup>30</sup> OSHA authorizes the U.S. Department of Labor’s Occupational Safety and Health

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<sup>25</sup> Falk v. Brennan, 414 U.S. 190, 195 (1973) (finding apartment building owners and maintenance company to be joint employers of maintenance workers despite contractual provision designating workers as employees of building owners).

<sup>26</sup> Lopez v. Silverman, 14 F. Supp.2d 405, 412 (S.D.N.Y. 1998).

<sup>27</sup> Falk v. Brennan, 414 U.S. at 195; Antenor v. D&S Farms, Inc, 88 F.3d 925 (11th Cir. 1996); Lopez v. Silverman, 14 F. Supp.2d 405 (S.D.N.Y. 1998) (holding garment industry jobber and its production sub-contractor held to be joint employer for purposes of FLSA).

<sup>28</sup> Superior Care, supra., 840 F.2d at 1060.

<sup>29</sup> See, e.g. Lopez v. Silverman, 14 F.Supp.2d 405 (S.D.N.Y. 1998); Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997); Johns v. Stewart, 57 F.3d 1544, 1557 (10th Cir. 1995) (holding that workfare workers do not fall under FLSA’s employment definition, with no analysis).

<sup>30</sup> 29 U.S.C. §§ 651 - 678 (1988).

Administration (OSH Administration) to establish occupational and health standards for workplaces and to issue citations for violations against employers who do not adhere to the standards. If a citation is issued, the employer may appeal it to an administrative law judge, then to the Occupational Safety and Health Review Commission (OSHRC), then to a federal court of appeals, and ultimately to the Supreme Court. There is no private right of action under OSHA. The Administration also conducts periodic inspections of workplaces for compliance with OSHA standards.

The OSHA Act covers all workplaces and all employees in interstate commerce, regardless of how many employees a workplace has or how many hours an employee works. Hence it covers both temporary and part-time workers so long as they are “employees” for purposes of the statute. The Supreme Court has not yet directly ruled on what the definition of an employment relationship is under OSHA. Moreover, OSHA does not contain a definition for an ‘employment relationship.’ It only defines “employer” as a “person engaged in a business affecting commerce who has employees...”<sup>31</sup> The term “employee” is defined as “an employee of an employer who is employed in a business of his employer which affects commerce.”<sup>32</sup> In determining whether an employment relationship exists, OSHRC has emphasized that the primary factor to be considered is control over the work environment and hence has the ability to prevent or abate occupational hazards.<sup>33</sup>

In 1992, the Supreme Court held in *National Mutual Insurance v. Darden* that the common law agency test rather than the broader economic realities test should govern the determination of employee status for purposes of the Employee Retirement and Income Security Act.<sup>34</sup> The Court stated, “[I]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”<sup>35</sup> Soon after the decision in *Darden*, OSHRC indicated that it will follow *Darden* for purposes of determining who is an “employee” under OSHA.<sup>36</sup> Hence OSHA does not apply the

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<sup>31</sup> 29 U.S.C. §652(5).

<sup>32</sup> 29 U.S.C. §652(6).

<sup>33</sup> See, e.g. *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1985 CCH OSHD 27, 408 at p. 35,570 (No. 83-231, 1985) (placing primary reliance on who controls the work environment in determining whether an employment relationship exists; *Secretary of Labor v. Froedtert Memorial Lutheran Hospital* 20 OSHC (BNA) 1500 (holding that hospital, rather than temporary agency that supplied housekeeping services, was the employer for purposes of OSHA because the hospital exercised a high degree of control over temporary employees).

<sup>34</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992).

<sup>35</sup> *Id.* at 323.

<sup>36</sup> *Loomis Cabinet Co.*, 15 BNA OSHC 635, 1637, 1992 CCH OSHD 29,775 (No. 88-2012, 1992), *Loomis Cabinet Co. v. OSH Review Commission*, 20 F.3d 938 (9th Cir. 1994).

expansive definition of “employee” found in the FLSA.

Protection for temporary employees under OSHA depends not only on the definition of employee but also upon who is the “employer” for purposes of the Act. When an employee is injured at a jobsite due to unsafe conditions, the OSHA Administration must decide which company or companies was the “employer.” It treats the entity that has control over the temporary worker’s day-to-day activities as the one responsible for reporting an incident to the OSHA office.<sup>37</sup> Hence, in one case, employer status was assigned to the user firm on the grounds that it was most directly in charge of the job site and most capable of abating the hazard, even when the leasing company was the one that recruited, hired, and paid the workers.<sup>38</sup> Under OSHA, courts have also held that more than one entity may be the employer of a single worker and thus, may be individually or jointly responsible for compliance with a safety standard.<sup>39</sup> However, OSHRC has confirmed that while an employer can delegate its OSHA compliance obligations, it cannot discharge its obligation to maintain a safe workplace by contractual agreement.<sup>40</sup>

#### D. Employment Discrimination

Discrimination in employment is prohibited by a number of federal statutes. The Equal Pay Act of 1963 requires employers to pay men and women the same wages for the same work.<sup>41</sup> Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, ethnicity, national origin, color, religion, and sex.<sup>42</sup> The Age Discrimination in Employment Act of 1967<sup>43</sup> (ADEA) prohibits discrimination on the basis of age, and the American with Disabilities Act<sup>44</sup> (ADA) prohibits employment discrimination on the basis of actual or perceived disability. Under these statutes,

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<sup>37</sup> 29 CFR 1904.8

<sup>38</sup> CNG Transmission Corp., 1994 OSAHRC Lexis 12 (1994), Union Drilling, 1994 WL 86002 (1994) (client company, not the leasing company considered “employer”).

<sup>39</sup> See, e.g., Sam Hall & Sons, Inc., 8 OSH Cas. (BNA 2176 (1980) (leasing company found to be employer,” because client company and leasing company shared control over the employees, such that either could have prevented the employees from harm.

<sup>40</sup> See also Baker Tank Co./Altech, 17 BNA OSHC 1177, 1995 CCH OSHD 30,734 (No. 90-1786-S, 1995); Bayside Pipe Coaters, Inc., 2 BNA OSHC 1206, 1974-75 OSHD 18,677 (No. 1974).

<sup>41</sup> 29 U.S.C. § 206(d) (1963).

<sup>42</sup> 42 U.S.C. §§ 2000e - 2000e-17 (1964, as amended).

<sup>43</sup> 29 U.S.C. §§ 621 - 634 (1967, as amended).

<sup>44</sup> 42 U.S.C. §§ 12101 - 12213 (1990).

temporary workers have the same rights as permanent employees to be free from discrimination because of race, sex, religion, color, national origin, age or disability, in the workplace so long as they meet the eligibility requirement.

Title VII provides that to be covered, an employer must employ a minimum of fifteen employees in 20 weeks in the previous year. The ADEA requires employers to employ at least twenty persons to be covered. However, for purposes of the discrimination statutes, the statutory employer is not necessarily the temporary agency; it is the party who exercises control over the worker. Sometimes employers attempt to avoid coverage by classifying their workers as independent contractors or by utilizing subcontractors to keep down the official number of employees.<sup>45</sup>

When a temporary employee suffers discrimination on a job assignment, that employee can, in theory, sue both the user firm and the temporary agency. However, each putative employer must exert some control over the employment relationship.<sup>46</sup> Also, courts have held that the employee must show that the agency knew of the harassment. As one court explained:

It is only fair to require the plaintiff show that each defendant she contends committed unlawful discrimination knew of the discriminatory conduct or, at a minimum, should have known of it. Addressed above, today's workforce is composed of increasingly large numbers of part-time employees provided by temporary employment agencies. Discrimination of some form among some of these temporary employment relationships will inevitably occur. Workplace discrimination will most likely come from the employer where a person works, not the temporary agency. As in the instant case, the temporary agency often will have little to no daily contact with the employee. In such a setting, a temporary employment agency would have no indication of any workplace discrimination without notice from the employee. It would be grossly inequitable to hold such an agency liable for discrimination that it was not aware of, had no reason to know was taking place, and of which it had no control.<sup>47</sup>

Hence a temporary worker has protection against employment discrimination, but must complain to the temporary agency as well as the user firm if it wants to get the benefit of suing both entities.

#### E. Family and Medical Leave

The Family and Medical Leave Act (FMLA) requires employers to grant employees unpaid leave for up to twelve weeks for the birth or adoption of a child or for care for a sick spouse, parent,

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<sup>45</sup> See, *Arbauch v. Y & H Corp.*, Civ. 03-30365 (5<sup>th</sup> Cir., August 18, 2004).

<sup>46</sup> *Magnuson v. Peak Technical Co.*, 808 F. Supp. 500 (E.D.Va. 1992); *Amornore v. Merrill Lynch, Pierce, et. al.*, 611 F. Supp. 344 (D.C.N.Y. 1984). See generally, Jason E. Pirruccello, *Contingent Worker Protection from Client Company Discrimination*, 84 Tex. L. Rev. 191 (2005).

<sup>47</sup> *Williams v. Grimes Aerospace Co.*, 988 F.Supp. 925, 938 (D.S.D. 1967).

child or oneself.<sup>48</sup> The Act does not require an employer to pay an employee's wages during the leave period, but it requires an employer to continue coverage under the employer's health plan, if it has one.

The FLMA has strict eligibility requirements that exclude many temporary workers. To be eligible, an employer has to employ fifty or more employees during a 20 week period. In addition, the employee must have worked for the employer for at least twelve months and for at least 1250 hours during the preceding twelve months. Temporary workers often cannot satisfy the eligibility requirement and hence often are not eligible for coverage under the Act.<sup>49</sup> However, when two or more businesses exercise some control over the working conditions of an employee, a joint employer relationship may be found. In such case, the user firm of a temporary worker, as the secondary employer, may have an obligation to comply with FMLA.<sup>50</sup>

#### F. Unemployment Compensation

Unemployment insurance is provided by a the result of a partnership between the federal and state government. The Federal Unemployment Compensation Act that establishes a framework within which states have great latitude to determine their own program.<sup>51</sup> In particular, states determine individual qualification requirements, disqualification provisions, eligibility, weekly benefit amounts, and maximum weeks of benefits. In most states, employers pay an unemployment compensation tax that goes into a fund from which unemployment workers can draw benefits. The taxes are experienced-rated, so that employers who frequently lay off employees are required to pay higher taxes.

Employees' benefit levels are a percentage of their past earnings, but they are capped at a fixed amount and given only for a determinate time period. The percentages, caps, and time periods vary from state to state. Most states have a maximum of 26 weeks, and provide between 50 and 70 per cent of earnings up to a statutory maximum. The weekly maximum benefits range from \$133 in Puerto Rico to \$646 in Massachusetts.<sup>52</sup>

State laws also determine eligibility requirements that can be difficult for temporary workers to satisfy. To be eligible, an applicant must have been employed in covered employment for a period of time and have earned above a set minimum amount from a covered employer to be eligible. On

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<sup>48</sup> 29 U.S.C. §§ 2601 - 2559.

<sup>49</sup> Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 Berkeley J. Emp. & Labor L. 153, 165 (2003).

<sup>50</sup> Harbert v. Healthcare Services Group, Inc. 391 F.3d 1140 (10<sup>th</sup> Cir. 2004).

<sup>51</sup> Federal Unemployment Compensation Act, 42 U.S.C. §§ 501 - 504 & 1101 - 1105.

<sup>52</sup> "Unemployment Compensation," 2000 House Ways and Means Green Book, available at [http://www.policyalmanac.org/social\\_welfare/archive/unemployment\\_compensation.shtml](http://www.policyalmanac.org/social_welfare/archive/unemployment_compensation.shtml).

average, workers must have worked in 2 quarters and earned \$1734 to qualify for a minimum monthly benefit. To qualify for the minimum benefit, a worker must have had annual wages ranging from \$130 in Hawaii to \$3400 in Florida. To qualify for the maximum weekly benefit level, a worker must have earned \$5450 in Nebraska and \$29,432 in Colorado.<sup>53</sup> Temporary workers often lack the hours or wages necessary for eligibility.

Another problem that arises when temporary workers attempt to receive unemployment compensation after separating from temporary work is determining who is the employer. Because the employer is responsible for paying the temporary worker's unemployment taxes, both the temporary agency and the client firm claim that the other is the employer, in an effort to avoid the tax liability.<sup>54</sup>

Some states have statutes that identify temporary agencies as the "employer," and thus the party responsible for tax payments. In general, these statutes are of three types. Some state laws classify the temporary agency as the employer. For example, Oklahoma states that "the temporary help firm is deemed the employer of the temporary employee."<sup>55</sup> This gives temporary agencies the ability to advertise and provide to a client firm a workforce that is almost guaranteed not to lead to unemployment tax liability. Other states specify factors used to determine which is to be designated the employer. For example, California law designates the temporary agency as the employer if it performs all of the following functions:

- (a) negotiate with clients regarding time, place, type of work and working conditions;
- (b) determine assignments and reassignments of workers
- (c) retain the authority to assign or reassign workers to other clients when a worker is determined unacceptable;
- (d) assign or reassign the workers to perform services for a client;
- (e) set the rate of pay;
- (f) pay the worker from its own account; and
- (g) retain the right to fire and hire workers.<sup>56</sup>

Other states treat temporary agencies and user firms as co-employers for purposes of unemployment compensation.<sup>57</sup>

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53 Id.

<sup>54</sup> National Employment Law Project, Mending the Unemployment Compensation Safety Net for Contingent Workers (October 1997) available at <http://www.nelp.org/docUploads/pub21%2Epdf>.

<sup>55</sup> Okla Stat. '2-404A(C)(1995).

<sup>56</sup> Cal. Unempl. Ins. Code '606.5(a) (1986).

<sup>57</sup> Mo. Rev. Stat.. '288.032; Neb. Rev. Stat. '48-648.

In most states, workers who voluntarily quit their jobs are not eligible for unemployment compensation. Different states interpret the voluntary quit disqualification differently. For example, some do not disqualify a worker who quits for “good cause,” and each state has its own definition of what constitutes “good cause.” Approximately two thirds of the states require good cause to be “connected to the work” or attributable to the employer.<sup>58</sup> However, if a worker knowingly takes a job that is temporary, a question is often raised as to whether the employee has quit voluntarily when the job ends. States differ as to how they treat temporary workers for purposes of the voluntary quit disqualification. For example, Delaware has a statute that provides that “[a]n individual who becomes unemployed solely as the result of completing a period of employment that was of a ... temporary or casual duration will not be considered as a matter of law to have left work voluntarily without good cause attributable to such work solely on the basis of the duration of such employment.”<sup>59</sup> In a similar vein, the Oklahoma Unemployment Compensation Act provides:

“[A] temporary employee of a temporary help firm will be deemed to have left his or her last work voluntarily without good cause connected with the work if the temporary employee does not contact the temporary help firm for reassignment. A temporary employee will not be deemed to have left work voluntarily without good cause connected with the work unless the temporary employee has been advised of the obligation to contact the temporary help firm on completion of assignments and that unemployment benefits may be denied for failure to do so.”<sup>60</sup>

On the other hand, some states maintain that when work is temporary due to the employee’s preference, then the cessation of the work term is deemed to be a voluntary quit. For example, the Vermont Supreme Court held that “an employee who accepts a temporary position does not leave that position involuntarily at the end of the agreed period if it is shown that the employee requested temporary employment in light of his or her needs or availability.”<sup>61</sup> The Vermont Court added that the issue of voluntariness needed to be decided on a case by case basis, and that no inference should be made from the fact that the employee agreed to temporary employment at the outset.

In sum, temporary workers have obstacles to collecting unemployment insurance, but they are not universally ineligible. Rather, they must meet the eligibility requirements of their particular state and be able to show that they have not left their former voluntarily.

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<sup>58</sup> U.S. Dept. of Labor, Employment & Training Administration, *Comparison of State Unemployment Insurance Laws* 4-33 (August 1994).

<sup>59</sup> Del. C. § 3315(1).

<sup>60</sup> 40 Okl.St. Ann. § 2-404A(B). See, *Baldrige v. Express Temporary Services, Inc*, 125 P.3d 709 Okla.Civ.App. Div. 4, 2005. Other states have similar provisions. See, e.g., Del. C. 2237 (b).

<sup>61</sup> *Lincoln v. Dept. of Employment*, 156 Vt. 317, 320 (1991).

## G. Compensation for Workplace Injuries

Workers compensation laws in every state provide compensation for workers injured on their jobs. These laws were passed in the first half of the twentieth century, and they all have a similar structure. They all provide an exclusive remedy for an injured worker, so that workers do not have a right to sue their employer for common law tort. Compensation is available regardless of fault and notwithstanding contributory negligence. Forty-two states and the District of Columbia require, to be covered for worker's compensation, an injury must "arise out of" and "in the course of" employment. Other states use functionally equivalent language.<sup>62</sup> Hence, to recover, all a worker need prove is the fact of injury and that it arose out of and in the course of employment.

Injured workers who lose time from work are entitled to receive a set fraction of their pre-injury wage, up to a statutory maximum. In addition, permanent injuries, such as loss of limb, are compensable according to a set schedule of benefits. The amounts of benefits and wage substitution vary greatly from state to state. In each state system is administered by a state worker's compensation board and employers are required to maintain insurance or to self-insure to cover their worker's compensation exposure.

Temporary workers who are injured in the course of their employment are entitled to worker's compensation under their state's law. However, when an employee works for a temporary or leasing agency and is placed with a user firm, questions arise as to which employer's workers' compensation insurer has responsibility for a workplace injury. Each one has an interest in being deemed the employer for purposes of worker's compensation because they would get the advantage of the exclusive remedy provision in the law and avoid the prospect of a much more costly judgment in tort. At the same time, the injured worker is likely to sue the user firm, claiming that it is not the employer and hence cannot take advantage of the worker's compensation shield.<sup>63</sup> Many courts, when confronting this problem, have looked to which employer had control over the worker at the time of the injury. Some have held that both the user firm and the temporary agency are the "employer" for purposes of the exclusive remedy of worker's compensation. And some use a multi-factor test to determine which employer, or both, has the most significant control over the worker at the time of the injury. Thus, for example, Michigan courts have stated that the employer, for purposes of workers compensation, is determined by looking at which employer had (1) control of the worker's duties; (2) responsibility for the payment of wages; (3) the right to hire, fire, and discipline; and (4) for which performance of the duties was an integral part of the employer's business toward the accomplishment of a common goal<sup>64</sup>

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<sup>62</sup> Matthew B. Duckworth, *The Need for Workers' Compensation in the Age of Telecommuters*, 5 J. Small & Emerging Bus. L. 403, 409 - 417 (2001).

<sup>63</sup> See generally, Michael S. Hale, *The Employee Leasing Exposure and the Exclusive Remedy Problem*, 1997 Det. Coll. L. Rev. 891 (1997).

<sup>64</sup> See *White v. Central Transport, Inc*, 150 Mich. App. at 129-30, 388 N.W.2d at 274-75 (citing *Askew v. Macomber*, 398 Mich. 212, 217-18, 247 N.W.2d 288, 290 (1976)).

Although temporary workers have the same rights to workers' compensation as other workers, there is one difference that pertains to on-call workers. It is the general rule that employees are not covered for injuries under workers' compensation that occur commuting to or from work. However, on-call workers who are injured when traveling in response to a call have been found to be covered by worker's compensation.<sup>65</sup> The rationale is that on-call employees remain under their employer's control when they are on-call, and that their very availability provides a benefit to the employer.<sup>66</sup>

#### H. Collective Bargaining

The National Labor Relations Act gives employees a right to organize unions of their own choosing and bargain collectively with their employer.<sup>67</sup> When a group of workers wants to form a union, the agency that administers the Act, the National Labor Relations Board (NLRB) determines the appropriate unit for collective bargaining and conducts an election to determine whether a majority of the employees in the unit want to be represented by the union. In 1990, the NLRB ruled that long-term temporary employees could not be included in a bargaining unit with a user-employer's regular employees unless both the provider-agency employer and the user-employer consented.<sup>68</sup> Thereafter, the Board refused to consider any unit that combined temporary and regular employees, absent consent of both employers.<sup>69</sup> Because it is highly unusual for an employer to consent to its employees forming a union, the dual consent requirement made it virtually impossible for temporary workers to unionize.

In 2000, in *Sturgis & Textile Processors*, the NLRB reversed its former position and held that regular employees and temporary employees could be in the same bargaining unit so long as they shared a community of interest.<sup>70</sup> The Board also stated that temporary employees could unionize in a bargaining unit of all the employees of a single temporary work agency. As a result, the NLRB began to permit temporary employees to be included in bargaining units that are comprised of temporary and regular employees of a single employer, or that are comprised of all employees of a single temporary agency. This ruling greatly expanded the possibilities for temporary workers to claim the protection of the labor law.

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<sup>65</sup> See *Donnell v. Waccabuc Country Club*, 29 A.D. 2d 1022, 289 N.Y.S. 2d 534 (N.Y. App. Div. 1968); *Gonzalez v. Worker's Compensation Appeals Board*, 186 Cal. App. 3<sup>rd</sup> 514 (Cal. App. 5<sup>th</sup> Dis. 1986).

<sup>66</sup> *Paige v. City of Rahway*, 74 N.J. 177, 276 A.D. 2d 1226 (N.J. 1977).

<sup>67</sup> 29 U.S.C. §§ 158 et. seq.

<sup>68</sup> See *Lee Hosp.*, 300 N.L.R.B. 947 (1990).

<sup>69</sup> See, e.g., *Int'l Transfer of Fla.*, 305 N.L.R.B. 150 (1991).

<sup>70</sup> 331 N.L.R.B. 1298, 165 L.R.R.M. (BNA) 1017 (2000).

However, in 2004 the NLRB again reversed itself in the case of *Oakwood Care Center and N & W Agency*, and reinstated the dual consent requirement for temporary worker organizing efforts.<sup>71</sup> As a result, temporary workers are not able to organize in units with the permanent workers they work alongside. Rather, if they want to unionize, they must do so together with the other workers employed by their temporary agency. Yet agency temporary workers are dispersed and have little contact with each other. Thus, as a practical matter, temporary workers lack representation or a collective voice.

## I. Retirement Security

### *1. Private Pensions*

The Employee Retirement Income Security Act, known as ERISA, establishes eligibility standards and funding requirements for private pension plans. The Act requires that employees who work 1,000 hours in a pension plan year must be included in all appropriate company pension plans that are offered to other similar workers.<sup>72</sup> An employer cannot discriminate on the basis of age or length of service in determining eligibility for pension coverage, nor may it reserve its pensions for highly paid employees. However, ERISA permits employers to determine who is included in its pension plan, so long as they do so in accordance with the terms of their plan. Hence employers may elect to exclude temporary workers from their pension plans.<sup>73</sup>

ERISA permits employers to determine when an employee's benefits under a pension plan vest within certain statutory limits. Under ERISA, an employer can elect to have benefits vest all at once after five years of service, or to have benefits vest gradually over a seven year period.<sup>74</sup> In either case, a short term temporary employee, like any other short term employee, can find that their pension benefits never vest.

### *2. Social Security*

Social security provides monthly benefits for workers who retires upon reaching the normal retirement age of 65, or 62 for early retirement at reduced benefits. It is financed by a tax paid by both employers and employees, and the amount of benefits are determined by prior contributions. An employer is required to make social security payments on a worker's behalf if the worker earns more than \$500 a quarter. Temporary employees are employees of either an agency, a user firm, or an in-house temporary work department and hence are covered by social security.

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<sup>71</sup> 176 L.R.R.M. (BNA) 1033 (2004).

<sup>72</sup> 29 U.S.C. §§ 1052(a)(1), 1052(a)(3)(A).

<sup>73</sup> Steven J. Aresenault, et. al., *An Employee By Any Other Name Does Not Smell as Sweet: A Continuing Drama*, 16 Labor Lawyer 285 (2000).

<sup>74</sup> 29 U.S.C. § 1052 (a)(2) (2002). See Befort, *Black Hole*, supra., 24 Berk. J. of Lab. & Empl. at 165.

## J. Summary

In sum, temporary workers have great difficulties obtaining the protections and benefits under most employment law statutes. While the Fair Labor Standards Act uses a broad “economic realities” test to determine who is an “employee,” ERISA and OSHA use the narrower common law agency test that treats many temporary employees as independent contractors and hence ineligible for protection. In addition, most states’ laws define the statutory employer as the temporary agency rather than the user firm, potentially restricting temporary workers’ access to unemployment and workers’ compensation benefits. In addition, temporary workers often work for more than one employer at a time, but are dependent upon and subject to the supervision of each employer for the time they are at work. Yet, when a worker has multiple employers, each employer will often claim that the worker is an independent contractor rather than an employee. Courts often accept the employer’s own definition of a temporary worker’s status, thereby excluding a fast-growing portion of the workforce from unionization altogether.<sup>75</sup> And in recent years, temporary workers ability to unionize has been severely restricted.

## **III. Home Workers**

### A. Introduction

#### *1. Definitions*

In an industrial economy, most employees work at a centralized worksite. However, there is a growing class of non-traditional workers known as homeworkers. Homeworkers are employees perform their work at home but are not self-employed. There are two terms for homeworkers that have somewhat different but overlapping meanings. “Industrial homemaker” is an older term and it denotes an employee who works at home to produce a good. “Telecommuter” is a newer term that refers to an employee who works at home using telecommunications devices to provide a service. This article refers both groups collectively as “homeworkers” and, unless otherwise indicated, the legal regimes discussed apply to both groups equally.

#### *2. Demographics*

According to the Department of Labor, approximately 2.4 percent of U.S. workers are homeworkers. Women are slightly more likely than men to be homeworkers – 2.7 percent of women in the workforce are paid to work at home, while 2.2 percent of men are paid to work at home.<sup>76</sup> By race and ethnicity, whites are most likely to be homeworkers (2.7 percent), followed by Asians (1.8

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<sup>75</sup> See, e.g., *Clark v. E.I. DuPont de Nemours & Co.*, 105 F.3d 646 (4th Cir. 1997) (per curiam); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1132 (5th Cir. 1996). *But see Vizcaino v. United States Dist. Court*, 173 F.3d 713, 724–25 (9th Cir. 1999) (rejecting an employer’s assertion that employees are independent contractors for purposes of eligibility for a stock purchase plan).

<sup>76</sup> See Bureau of Labor Statistics, *Work at Home in 2004*, Sept. 22, 2005, at Table A, *available at* [www.bls.gov/cps](http://www.bls.gov/cps).

percent), Latinos (1.4 percent), and blacks (1.1 percent). Homeworking increases with education: workers without a high school diploma are highly unlikely to work at home (0.8 percent); those with only a high school education are slightly more likely (1.2 percent); those with some college are more likely (2.7 percent), and college graduates are most likely (4.7 percent).<sup>77</sup>

Homework is more prevalent in white collar than blue collar industries. The percentage of workers engaged in homework is highest in the information-related industries (5.4 percent of workers in the industry), financial services (4.8 percent), professional and business services (4.3 percent), and other service industries (2.9 percent).<sup>78</sup> The vast majority of homeworkers use a computer (84.8 percent), a telephone (84.6 percent) and have access to the Internet and e-mail (78.3 percent).<sup>79</sup>

Most homeworkers do not work at home full time. Only half work over 8 hours per week at home, and only 14.8 percent of homeworkers work 35 hours or more per week at home (i.e., full-time).<sup>80</sup> Workers without a high-school diploma are more than twice as likely as all others to work full-time at home.

These statistics suggest that most homeworkers are telecommuters who are well-educated and work in a service or industry. However, those homeworkers are also likely to split time between working at home and working in a traditional office worksite. Full-time homeworkers are likely to be uneducated.

## B. Minimum Wage and Overtime

For purposes of coverage under the Fair Labor Standards Act, the location of the worksite is irrelevant. Thus, the Department of Labor has concluded that “[p]eople who perform work at their own home are often improperly considered as independent contractors. [The FLSA] covers such homeworkers as employees and they are entitled to all benefits of the law.”<sup>81</sup>

The coverage of homeworkers is implied by a statutory grant of authority to regulate industrial homeworkers. The FLSA provides:

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<sup>77</sup> *Id.*

<sup>78</sup> *See id.* at Table 1.

<sup>79</sup> *Id.* at Table 6.

<sup>80</sup> *Id.* at Table 3.

<sup>81</sup> Department of Labor, Fact Sheet #13: *Employment Relationship Under the Fair Labor Standards Act* (FLSA), available at [www.dol.gov/esa/regs/compliance/whd/whdfs13.htm](http://www.dol.gov/esa/regs/compliance/whd/whdfs13.htm) (Fact Sheet 13). *See also* *McComb v. Homeworkers’ Handicraft Co-op.*, 176 F.2d 633 (4th Cir. 1949) (homeworkers were employees covered by the FLSA); *Goldberg v. Whitaker House Co-op.*, 366 U.S. 28 (1961) (homeworkers who were members of a cooperative were employees for the FLSA).

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect.<sup>82</sup>

The Department of Labor has promulgated regulations to enforce the FLSA with regard to homeworkers; however, the regulations are limited to industrial homeworkers. According to the regulations, industrial homework “means the production ... of goods for an employer who suffers or permits such production.”<sup>83</sup> Importantly, the definition only includes goods. Modern telecommuters, who are most likely to provide services and not produce goods, are not covered by this regulation. Therefore, the following specific protections likely only apply to industrial homeworkers although the FLSA’s general coverage does extend to telecommuters.

Employers of industrial homeworkers are required to “maintain and preserve payroll or other records ... with respect to each and every industrial homeworker employed.” In addition, the employer is required to provide a handbook for every employer.<sup>84</sup> The handbook is essentially a timesheet.<sup>85</sup> The employee returns the handbook to the employer as proof of the time worked. The Act requires the employer to preserve the handbook for at least two years and make it available for inspection by the Wage and Hour Division on request.<sup>86</sup>

The other relevant aspect of the FLSA as a statute designed for the industrial economy is the requirement of certification for certain types of homework. Due to the potential for abuse, seven industries were previously forbidden from employing homeworkers.<sup>87</sup> They were: jewelry manufacturing, knitted outerwear, gloves and mittens, buttons and buckles, handkerchief manufacturing, embroideries, and women’s apparel.<sup>88</sup> The ban has been replaced by a highly regulated certification system. Once an employer receives certification, the employer is permitted to hire homeworkers pursuant to the aforementioned provisions.

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<sup>82</sup> 9 U.S.C. §211(d).

<sup>83</sup> 29 CFR 516.31(a)(2). The definition of employment as “suffer[ing] or permit[ing] production reinforces the economic reality test described above.

<sup>84</sup> 29 CFR 516.31(3) (b) & (c).

<sup>85</sup> See *id.*; Department of Labor, *Homeworker Handbook*, available at [www.dol.gov/esa/whd](http://www.dol.gov/esa/whd).

<sup>86</sup> 29 CFR 516.31(c).

<sup>87</sup> Laura Helene Gonshorek, *Crisis after Dole: The Plight of Modern Homeworkers*, 8 Hofstra Lab. L.J. 167, 171 (1990).

<sup>88</sup> 29 CFR 525.15; see also 29 CFR part 530).

### C. Health and Safety

The federal Occupational Safety and Health Act (OSH Act) requires employers to provide “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”<sup>89</sup> The Occupational Safety and Health Administration (OSHA) has issued conflicting interpretations of how this statute applies to homeworkers’ worksites because these worksites are the homeworkers’ individual homes. It is therefore unclear how the OSH Act protects homeworkers. In November 1999, OSHA sent an advisory letter stating that the OSH Act covers homeworkers.<sup>90</sup> OSHA came under public and political criticism and rescinded the letter. Then, on February 25, 2000, OSHA released a Directive which essentially balances individuals’ privacy concerns, employers’ compliance concerns, and the mandates of the OSH Act.<sup>91</sup> The Directive distinguishes between white-collar telecommuters and blue-collar industrial homeworkers.<sup>92</sup> It stated that OSHA will not inspect white-collar “home offices,” which are defined as worksites using electronic office equipment for office work activities. Similarly, OSHA will not hold employers responsible for inspecting such offices, and OSHA will not hold employers liable for accidents occurring in such offices.<sup>93</sup>

Blue-collar home worksites do not always fit the home office definition. These are likely to be manufacturing operations. In contrast to “home offices,” if OSHA receives a complaint or referral indicating that there is a violation, OSHA will inspect blue-collar home worksites.<sup>94</sup> Employers are liable for conditions caused by materials provided or required by the employer. In practice, OSHA has only investigated two home worksites, and both of those investigations involved lead contamination.<sup>95</sup>

Under OSHA, when a work-related injury or illness occurs, employers are required to report the incident, regardless of the type of worksite. According to OSHA’s regulations, an incident is work-

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<sup>89</sup> 29 U.S.C. § 654.

<sup>90</sup> Kelli L. Dutrow, *Working at Home at Your Own Risk: Employer Liability for Teleworkers under the Occupational Safety and Health Act of 1970*, 18 Ga. St. U. L. Rev. 955, 962 (2002).

<sup>91</sup> See Occupational Safety and Health Administration, Directive CPL 02-00-125, February 25, 2000, available at <http://www.osha.gov> (Directive).

<sup>92</sup> See Nicole Belson Goluboff, *Workplace Safety and the Telecommuter*, Trial, June 2002, at 37.

<sup>93</sup> Directive, supra. n. 65.

<sup>94</sup> Id.

<sup>95</sup> Joan Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet’s Impact on Employment Law as it Relates to Teleworkers*, 2001 U. Ill. J.L. Tech. & Pol’y 233, 263 (2001).

related “if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.”<sup>96</sup> The regulation illustrates the rule with a series of examples. One, a white-collar example, stated that an employer must report an injury caused by a box of work files. A blue-collar example stated that an employer must report an injury caused by a sewing machine. It also gave two home-related examples, stating that an employer need not report injuries caused by the family dog or faulty home wiring).<sup>97</sup> These examples indicate that OSHA has decided that the Act regulates the home-work environment; however, due to political reasons, OSHA has adopted a policy of non-enforcement for white-collar home work environments.

In 2000, two bills were proposed in Congress regarding OSHA coverage of home workers. One proposal would have removed white-collar home offices from OSHA’s jurisdiction, and the other would have removed all home worksites.<sup>98</sup> Both bills languished in subcommittee.

#### D. Employment Discrimination

##### *1. Title VII*

There is no statutory reason to exclude homeworkers from nondiscrimination laws. “Congress’ efforts to curb discrimination should apply regardless of whether a workplace has moved into cyberspace. Gender discrimination and, in particular, sexual harassment, are ripe for expansion in cyberspace.”<sup>99</sup> When sexual harassment is present, an employee who works at home can bring both quid pro quo and hostile environment claims.<sup>100</sup> The Supreme Court has made it clear, however, that in a hostile environment claim, an employer can raise an affirmative defense that it is not vicariously liable for a supervisor’s harassment if (1) it had procedures in place to prevent or correct the harassing behavior and (2) that the employee did not reasonably take advantage of the employer’s preventive or corrective opportunities.<sup>101</sup> And a homeworker cannot avoid the second prong of this test by claiming that geographic isolation made it difficult to take advantage of the employer’s corrective opportunities.<sup>102</sup>

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<sup>96</sup> 29 CFR 1904.5.

<sup>97</sup> *Id.*

<sup>98</sup> Gabel & Mansfield, *supra.*, 2001 U. Ill. J.L. Tech. & Pol’y at 264.

<sup>99</sup> Gabel & Mansfield, *supra.*, 2001 U. Ill. J.L. Tech. & Pol’y at 245.

<sup>100</sup> *Id.* at 245-53.

<sup>101</sup> Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Industries Co. v. Ellerth, 524 U.S. 742 (1998).

<sup>102</sup> Montero v. Agco Corp., 192 F.3d 856, 863-64 (9th Cir. 1999).

### *B. The Americans with Disabilities Act*

Federal courts are divided as to whether telecommuting is a reasonable accommodation under the Americans with Disabilities Act (ADA). Two circuit courts have found that telecommuting is almost never a reasonable accommodation.<sup>103</sup> One circuit court and various district courts have come to the opposite conclusion and permit telecommuting as a reasonable accommodation.<sup>104</sup>

The Equal Employment Opportunity Commission has indicated that telecommuting, like other accommodations, is reasonable unless it imposes an undue hardship.<sup>105</sup>

### E. Family and Medical Leave

The Family and Medical Leave Act applies to employees whose employers employ 50 employees within 75 miles of the worksite where the employee requesting leave is employed.<sup>106</sup> The Department of Labor issued a regulation to reduce the ambiguity in defining a homemaker's worksite. The regulation states that "[f]or employees with no fixed worksite ... the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report."<sup>107</sup> Thus, many homeworkers are covered by the FMLA. There is no coverage, however, for homeworkers who work for a geographically dispersed cyberspace-based business; similarly, an employee may not be covered if there is no fixed worksite to which the employee reports.<sup>108</sup>

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<sup>103</sup> Tyndall v. National Educ. Centers, Inc., 31 F.3d 209, 213-14 (4th Cir. 1994) (telecommuting is permissible only if the employee can perform all work-related duties from home); Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995) (Posner, C.J.) (because of the necessity of teamwork, a very extraordinary case would be required to find telecommuting a reasonable accommodation).

<sup>104</sup> Langdon v. Dept. of Health and Human Services, 959 F.2d 1053, 1060 (D.C. Cir. 1992) (permitting computer programmer to telecommute would not impose undue hardship); Hernandez v. City of Hartford, 959 F.Supp. 125, 132 (D. Conn. 1997) (telecommuting can be reasonable under a case-by-case analysis); Young v. Sprint Corp., 173 F.R.D. 309, 310 (D. Kan. 1997) (allegation that telecommuting is a reasonable accommodation is not futile as a matter of law).

<sup>105</sup> Gabel & Mansfield, *supra.*, *On the Increasing Presence of Remote Employees*, 2001 U. Ill. J.L. Tech. & Pol'y at 255.

<sup>106</sup> 29 U.S.C. § 2611(2)(B)(ii).

<sup>107</sup> 29 C.F.R. § 825.111(a)(2).

<sup>108</sup> Gabel & Mansfield, *supra.*, *On the Increasing Presence of Remote Employees*, 2001 U. Ill. J.L. Tech. & Pol'y 256-57 (2001).

## F. Unemployment Compensation

Forty-six states and the District of Columbia share a common definition of employment for their unemployment compensation schemes. Employment is defined as service for remuneration or under a contract for hire.<sup>109</sup> Homeworkers, therefore, are in an employment relationship with their employers for purposes of unemployment compensation.

A frequent issue arises concerning which state's unemployment law covers a homeworke's employment. There are four tests for determining which state's scheme apply, and the four tests are applied successively until a single state can properly assert jurisdiction. The first test, localization, requires that a employee work in only one state; alternatively, if work in a second state is merely incidental to work in the primary state, then the primary state has jurisdiction.<sup>110</sup> If the localization test does not yield a definitive answer, then courts ask if there is a fixed base of operations to which the employee reports. If there is still no clear determination, then a court asks whether the employer directs and controls the employee from a single state. If none of these tests can resolve the issue, then the employee's state of residence asserts jurisdiction.<sup>111</sup> For example, if an employee splits time between worksites in two different states and receives assignments from two different states, then the first three tests would all fail and the employee's state of residence would control.

Even with the four part test, telecommuters may find themselves without coverage. Different states may have differing conceptions of where a telecommuters' work is located. For example, in a recent case, an individual telecommuting from Florida to offices in New York was denied benefits in both states. The Florida court held that the work was not localized in Florida because the work product was received in New York, and the base of operations test would require New York to provide benefits. Conversely, the New York court held that the work was localized in Florida because the telecommuter worked exclusively in Florida.<sup>112</sup> Thus, telecommuters may find themselves without coverage until state courts adopt a unified approach to telecommuting.

## G. Workers' Compensation

As discussed above, workers' compensation provides coverage for workplace accidents, regardless of fault, and notwithstanding the existence of a worker's contributory negligence or the negligence of a fellow worker. To be compensable, an injury must arise arise "out of or in the course of employment." In practice this means that if employment increased the risk of injury, actually caused

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<sup>109</sup> Beverly Reyes, *Telecommuters and their Virtual Existence in the Unemployment World*, 33 Hofstra L. Rev. 785, 790 (2004).

<sup>110</sup> *Id.* at 791.

<sup>111</sup> *Id.* at 791-93.

<sup>112</sup> *Claim of Allen*, 794 N.E.2d 18 (N.Y. 2003).

the injury, or placed the employee in a position to be injured. An injury occurred “in the course of employment” if there is the requisite connection between the injury and the time, place and activity of employment. The injury must be on the employer’s premises or the employee must be engaged in an activity consented to and controlled by the employer.<sup>113</sup>

When homeworkers are injured performing an employment-related task at home, the injury is in the course of employment, especially if the task is specifically at the employer’s request. However, when a homeworker is injured at home, a court must determine whether the injury is more related to work or to the natural home environment.<sup>114</sup> Each injury must be evaluated case by case. If the homeworker is actively engaged in work when the injury occurs, then it is more likely that workers’ compensation will apply.<sup>115</sup> It has been argued that because ordinary workers are covered for accidents occurring during unpaid meal breaks, homeworkers should be covered for accidents occurring in their kitchens or dining rooms during meal breaks.<sup>116</sup> Also, under a doctrine known as the “personal comfort doctrine,” homeworkers should be covered for purely personal acts if they increase efficiency.<sup>117</sup>

Ordinarily, an employee is barred from receiving benefits from injuries occurring while commuting to work by the “going and coming” rule. However, homeworkers likely satisfy the “traveling employee” exception. This exception applies when the employment requires work outside the employer’s premises. The two main factors are (1) the reasonableness of the employee’s conduct and (2) whether it is normally foreseen by the employer. Thus, when a homeworker leaves the home and travels to the employer’s premises, the exception will normally apply. If, however, the employee travels spontaneously and without a valid employment-related reason, then the exception will not apply.<sup>118</sup>

Additionally, some states cover homeworkers for accidents under the “dual-purpose doctrine.” This doctrine imposes liability when a homeworker makes a trip that includes both business and personal purposes so long as the business purpose alone would have compelled the trip.<sup>119</sup> This doctrine

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<sup>113</sup> Matthew B. Duckworth, *The Need for Workers’ Compensation in the Age of Telecommuters*, 5 J. Small & Emerging Bus. L. 403, 409 - 417 (2001).

<sup>114</sup> *See id.* at 419.

<sup>115</sup> *See* Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L.J. 857, 874 (2001).

<sup>116</sup> *Id.* at 882.

<sup>117</sup> *Id.* at 883-84.

<sup>118</sup> *Id.* at 875-76.

<sup>119</sup> *Rau v. Crest Fiberglass Industries*, 148 N.W.2d 149, 150-51 (Minn. 1967) (holding injury covered when claimant bought a sandwich and brandy, transacted business at the bank, and was

is available in a number of states, including Minnesota and New York.<sup>120</sup>

## H. Collective Bargaining

Homeworkers have the same rights as other workers to organize and bargain under the National Labor Relations Act. However, there are practical difficulties organizing homeworkers because they are dispersed and there is no central place to reach them for the purposes of organizing. However, it is important to note that some nontraditional employees--most likely home health care workers--may have their collective bargaining rights protected by state constitutions or statutes.<sup>121</sup>

## I. Retirement Security

### *1. Private Pensions*

Insofar as homeworkers satisfy the test for employee status, they are treated the same as other workers for purposes of ERISA.

### *2. Social Security*

The Social Security Administration (SSA) requires that individuals be “employees” in order to receive Social Security coverage. Both conventional employees and homeworkers are considered employees if they pass the traditional common-law test.<sup>122</sup> Of the eight factors indicating common-law employment, only two could potentially disqualify homeworkers: first, the employer does not provide a place to work (although this only applies to full-time homeworkers); second, the employer might not control the hours of work and restrict other employment. The other six factors are: the employer’s ability to fire the employee; training provided by the employer; performing the work individually; not hiring assistants (except for managers); business and travel expenses are paid by the employer; and payment is received on a regular cycle.<sup>123</sup> All of these are typical of both industrial and telecommuting forms of home work.

Industrial homeworkers receive additional protection through the Social Security regulations, which expressly provide:

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injured after leaving the bank while on her way to buy food for her family).

<sup>120</sup> Swink, *supra.*, *Telecommuter Law*, 38 Am. Bus. L. J. at 877.

<sup>121</sup> See, e.g., OR Const Art. XV, § 11(3)(f).

<sup>122</sup> 20 CFR § 404.1005. *Cf.* 20 CFR § 404.1007.

<sup>123</sup> *Id.*

If you are a home worker and you work according to the instructions of the person you work for, on material or goods furnished by that person, and are required to return the finished product to that person (or another person whom he or she designates), you are an employee.<sup>124</sup>

All homeworkers, therefore, should receive Social Security protections.

#### J. Summary

Homeworkers receive the protections of minimum wage and overtime laws. Occupational safety and health laws theoretically apply to all homeworkers, but as a practical matter, OSHA only applies it to industrial homeworkers. Homeworkers are as entitled as traditional employees to be free from discrimination. Despite the increasing popularity and feasibility of homeworking, the courts are split as to whether homeworking is a reasonable accommodation under the ADA. Homeworkers are covered by unemployment compensation laws, but the discrepancy between telecommuting and a physical worksite can cause jurisdictional issues. Workers' compensation benefits apply broadly to homeworkers, covering accidents occurring in the home and while commuting from home to the employer's worksite. Finally, homeworkers are considered employees for Social Security benefits.

### **III. Independent Contractors**

Independent contractors are a bi-modal group. Some are highly skilled professionals or craftspeople, who work for multiple customers using their own tools and deploying their talents and their entrepreneurial abilities. Others are low skilled individuals who work as essentially day laborers, usually for a single employer on whom they are dependent for work. It is difficult to tell from the available data how many of the 10.3 million independent contractors in the United States are of each group. However, the industry breakdown gives some indication. It shows that almost 40 per cent of independent contractors are in the financial, professional, business, education and health services industries.<sup>125</sup> These individuals are likely to be of the first type of independent contractors – skilled professionals who operate what are essentially small businesses selling their own services. Another nearly 32 per cent – or 3.3 million individuals – are in construction, agriculture, manufacturing, and transportation.<sup>126</sup> These are likely to be what are termed “dependent independent contractors” – those who have little independence or autonomy and depend upon another business for their livelihood.

In contrast to temporary and other types of atypical employees, independent contractors are not eligible for any of the protections provided by the employment law statutes because they are not considered “employees.” Unlike Europe and Canada, in the United States there have not been

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<sup>124</sup> 20 CFR § 404.1008(d).

<sup>125</sup> Bureau of Labor Statistics, *supra* n. 3, *Contingent and Alternative Employment Arrangements*, February 2005, at Table 8.

<sup>126</sup> *Id.*

legislative efforts to create an intermediate category between “employee” and “independent contractor” that would give atypical workers some of the employment protections available for standard workers.<sup>127</sup> Rather in the United States there are only two categories – employee and independent contractor– where the former gets some employment law protections and the latter does not. Increasingly employers attempt to reclassify employees and to vary their employment practices so as to transform their former “employees” into “independent contractors.”<sup>128</sup> Many low paid employees such as janitors, truck loaders, typists, and building cleaners have been redefined as independent contractors even when they are retained by large companies to work on a regular basis. Independent contractors are not covered by minimum wage, workers compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, social security disability, anti-discrimination laws, or any of the other employment protections discussed above.<sup>129</sup>

There has been a great deal of litigation in recent years about whether particular individuals or jobs should be classified as an employee or an independent contractor.<sup>130</sup> Two different tests have been used for distinguishing an employee from an independent contractor. Under the National Labor Relations Act, courts use a restrictive common law agency test that focuses primarily on the employer’s right to control the work tasks of the putative contractor.<sup>131</sup> Under the Fair Labor Standards Act, the courts use a broader “economic realities” test that looks at numerous factors to determine whether the

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<sup>127</sup> For an analysis of the use of the intermediate category in the United Kingdom, see Guy Davidov, ‘Who is a Worker?’ (2005) 34 *Indus. L. J.* 57. See also, Stephen F. Befort, ‘Labor Law at the Millenium’ (2002) 43 *Boston Coll. Law Rev.* 351 (discussing the development of an intermediate category of dependent independent contractors in Canada, Sweden, and Germany).

<sup>128</sup> See, Andrea H. Brustein, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 *Univ. Pa. J. of Labor & Empl. L.* 695 (2005); Patricia Ball, *The New Traditional Employment Relationship*, 43 *Santa Clara L. Rev.* 901 (2003). See also, Lisa Lawlor Graditor, *Back to Basics: A Call to Re-Evaluate the Unemployment Insurance Disqualification for Misconduct*, 37 *John Marshall L. Rev.* 27, 60-61 (2003) (arguing that employers regularly misclassify employees as independent contractors to avoid paying unemployment insurance).

<sup>129</sup> See generally, Lisa Horwedel Barton, *Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as they Relate to Employee Benefit Plans*, 29 *Cap. Univ. L. Rev.* 1079 (2002).

<sup>130</sup> *Mendoza v. Bishop* 2005 WL 123982 (Ohio App. 2005); *Lujan v. Minagar* (21 Cal. Rptr. 3d 861 (2004) ); *Burditt v. Kerr-McGee Chem. Corp.* 982 F. Supp. 404 (N.D. Miss. 1997). For a discussion of misclassification disputes, see Steven J. Arensault, et. al., *An Employee By Any Other Name Does Not Smell As Sweet: A Continuing Drama*, 16 *Lab. Law.* 285 (2000) ; Barton, supra. n. 60, *Cap. U. L. Rev.* at 1079.

<sup>131</sup> *Roadway Package System* 326 NLRB 842 (1998).

individual is in fact dependent upon the employer.<sup>132</sup> For other purposes, some courts developed a hybrid of the two tests that uses a multi-factored economic realities test but gives particular weight to the employer's right to control the employee's work.<sup>133</sup> However, in 1992, the Supreme Court in *National Mutual Insurance v. Darden* rejected the hybrid test and insisted that for ERISA, and by implication for all the employment statutes other than the Fair Labor Standards Act, the common law agency test should be applied.<sup>134</sup> The Court explained that the employer's right to control the work was paramount. It enumerated thirteen factors to use to determine the application of test in any given case. The factors are:

(1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hiring party's discretion over when and how long to work; (8) the method of payment; (9) the worker's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provisions of employee benefits; and (13) the tax treatment of the hired party.<sup>135</sup>

None of these factors looks to the individual's economic dependency on the employing firm. The Ninth Circuit recently applied these factors in *Vizcaino v. Microsoft* to find that Microsoft had deprived numerous individuals of benefits because it had misclassified them as independent contractors when they were, in fact, employees.<sup>136</sup> The large judgment in this case has led many large companies to be careful about avoiding misclassifying employees.

#### **IV. Collapsing the Distinctions**

The decentralization of production has fostered the growth of many types of atypical employment, most notably temporary employment, homework, and dependent independent contractors. We have seen that the labor and employment laws in the U.S. were designed for long-term employees, so that criteria for eligibility and schedules of benefits assume an on-going employment relationship

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<sup>132</sup> *Real v. Driscoll Strawberry Associates, Inc.* 603 F.2d 748 (9th Cir. 1979).

<sup>133</sup> *Spirides v. Reinhardt* 613 F.2d 826, 831 (D.C. Cir. 1979); *Equal Employment Opportunity Comm'n v. Zippo Mfg. Co.* 713 F.;2d 32, 38 (3d Cir. 1983).

<sup>134</sup> *National Mutual Insurance v. Darden* 503 U.S. 318 (1992). See, Stephen F. Befort, 'Labor and Employment Law at the Millenium' (2002) 43 *Bos. Coll. L. Rev.* 351.

<sup>135</sup> *Darden*, supra., 503 U.S. at 323-24.

<sup>136</sup> *Vizcaino v. Microsoft Corp.* 120 F.3d 1006, 1009 - 1010 (9th Cir. 1997).

with a single employer. As the numbers of atypical employees grows, more and more individuals find themselves lacking basic protection for minimum wage, health and safety, retirement security, industrial injury, and collective bargaining rights. The foregoing survey of employment laws demonstrates that temporary workers, homeworkers, and independent contractors face practical as well as legal barriers that prevent them from getting full coverage under existing labor and employment laws.

Yet in today's workplace, it is often difficult to distinguish between "regular" and temporary employees, and between employees and independent contractors. Regular employees today lack the same kind of long-term attachment that is characteristic of temporary employees. For much of the 20<sup>th</sup> century, the prevailing employment paradigm was that employees had a long-term relationship to a firm and enjoyed a large amount of de facto long-term job security. Their firm provided job security, training, social insurance, and orderly advancement opportunities and obtained a loyal and knowledgeable work force in return. The longer employees stayed on the job, the more their wages rose and their benefits vested, giving them a greater stake in the firms over time. While not all employees had the secure and comfortable work life that the model envisioned, many did, particularly blue collar men in basic industry after the great union drives of the 1930s.<sup>137</sup>

The 20<sup>th</sup> century ideal of work has come and gone. Job security in the private sector, in the form of long-term attachment between a worker and a single firm for the duration of the worker's career, is a vestige of the past. New ideas about how to organize work have generated new work practices that are proliferating throughout American enterprises.<sup>138</sup> Today "regular" workers expect to change jobs frequently and employers engage in regular churning of their workplace, combining layoffs with new hiring as production demands and skill requirements shift. "Regular" employment no longer carries the presumption of a long-term attachment between an employee and a single firm with orderly promotion patterns and upwardly rising wage patterns. No longer is employment centered on a single, primary employer. Instead, employees now expect to change jobs frequently. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to manage their own careers and not to expect long-term career-long job security. Indeed, the very concept of the workplace as a *place*, and the concept of employment as involving an *employer*, are becoming outdated. Employers no longer give implicit or explicit promises of job security, and employees no longer expect to work at the same firm for their working careers. Rather, employees expect to, and do, change jobs frequently.<sup>139</sup> At the same time, temporary employees often work alongside regular employees, doing the same tasks in the same location under the same supervision. Hence the distinction between a regular and temporary employee increasingly rest on the narrow thread of who said "you're hired," and who signs the paycheck.

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<sup>137</sup> See Stone, FROM WIDGETS TO DIGITS, *supra* n. \_\_\_\_ at 51 - 63.

<sup>138</sup> *Id.* at 87 - 116.

<sup>139</sup> Richard Sennett, THE CORROSION OF CHARACTER 22 (1998); Cappelli, THE NEW DEAL AT WORK (1999).

Similarly, in today's workplace, the distinction between employees and independent contractors is also becoming blurred. Both are expected to use discretion, to manage their own careers, to move from job to job and project to project. Under the right to control test, "employees" are defined as those whose work tasks are controlled by the employer and "independent contractors" are those whose work tasks are not controlled by the employer. Yet in the new employment relationship, employers grant more and more discretion to lower level employees and attempt to give even the lowest level of employee considerable control over their day to day work tasks. Indeed, the wisdom of modern managerial theories such as total quality management, competency-based organization theory, and other high performance work approaches is that when employees are given discretion to use their judgment, creativity, and knowledge, they develop organizational citizenship behavior and bring valuable ideas to the firm.<sup>140</sup> These approaches attempt to encourage employees to innovate and to have an ownership attitude toward the work process. Therefore the trend toward granting of discretion to employees collapses the distinction between employees and independent contractors under the right to control test. So not only are employers restructuring tasks to turn employees into independent contractors, they are also making the distinction between the two groups almost meaningless. Just as the atrophy of internal labor markets makes all workers "temporary" in a real sense, so too does the employer's quest for OCB render all workers "independent contractors."

As employment tasks are revised and employment relationships are redefined in order to transform more and more employees into independent contractors, more and more individuals are left without the protections of the labor and employment laws. Yet many of these individuals share the vulnerabilities of regular and atypical employees. Their jobs are insecure, their incomes fluctuate, they lack reliable and affordable benefits, and they need to constantly upgrade their skills. Hence any reform in labor law has to include these dependent independent contractors if it is to address the problems of the new workplace.

## **V. Recommendations for Reform**

The employment laws need to be revised in many ways if we are going to address the vulnerabilities of both regular and atypical employees. As I have tried to show, the two groups are quickly becoming indistinguishable, and hence it is necessary to think about legal reforms that do not distinguish between regular and atypical workers, be they temporary workers, part-time workers, independent contractors, or others in dependent employment relationships. Some of the reforms that will be required are described below.

### **A. Expanding Collective Bargaining Rights**

The labor laws need to be reformed so that workers can organize across employer units without limitation by narrow notions of bargaining units, and so that they can assert economic pressure beyond the boundaries of the firm without constraint by secondary boycott laws. Labor laws also need to permit or even promote a form of organization that includes atypical together with regular, employed together with unemployed, part time as well as full time, and independent contractors as well as employees.

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<sup>140</sup> Stone, FROM WIDGETS TO DIGITS, supra. at 87 - 116.

Such an organization might play a representational function in a particular workplace, but its primary role will be as a political and economic force that can protect workers interests and rights on a region or local basis.<sup>141</sup>

### B. Employment Rights for All Employees

Individual employment laws, such as unemployment insurance, workers compensation, minimum wage, family and medical leave, and discrimination protection must be interpreted to apply to all workers, be they regular, temporary, or dependent independent contractors. Thus courts should look to both the temporary agency and the user firm to determine eligibility under the employment laws, and they should adopt an expansive definition of “employee.”

### C. Protection for Independent Contractors

It is necessary to revise the test for independent contractor status so that they come under the labor law protections. One way to accomplish this would be to return to the economic realities test that looks to the degree of dependency of the worker. However, simply instituting the economic realities test is not enough because there is still a danger that workers who have several employers will be deprived of protection. A better approach is to base employee status on the individual’s vulnerability and relative power vis a vis the party who pays for her services. The relevant question to ask is whether the individual is so situated that they require the protections the law provides.

### D. Shoring up the Social Safety Net

In order for individuals to survive and thrive in the new decentralized labor market, they need more protections, not less. They need child care for young children, after-school care programs for school age children, school vacation and snow day coverage, educational activities and homework assistance. Individuals also need affordable and reliable health insurance, disability insurance, and old age assistance. These could be provided by the state and available to everyone. However, if national insurance is not politically feasible, then employers should be encouraged or required to form multi-employer plans that enable workers to keep their benefits as they move amongst employers in a given locality. The state should also require employers to expand eligibility to all who work for them, in any capacity.

### F. Transition Assistance

In the current era, it is inevitable that many will have periods in which they are not in the labor force. Sometimes these will involuntarily be periods of unemployment between jobs. Sometimes individuals will take time out of the workplace to care for a young child or an elderly dependent. Other times, workers will need to retool, learn new skills, or reposition oneself in relation to the changing requirements of work. Thus one of the most pressing needs of workers today is to have income support

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<sup>141</sup> I describe this type of unionism in detail in Stone, *From Widgets To Digits* at 219 - 239.

for these times of transition. To design meaningful employment protections we need to design ways to support workers as they move in and out of the changing, boundaryless workplace. That is, we need to find a way to provide everyone with transition assistance.

There are various approaches we could take to the problem of transition assistance. One would be to expand the welfare system by eliminating the work requirement and time limits. However, given the intense opposition to welfare in any form in the United States, this approach is politically inconceivable. Alternatively, we might consider a proposal that has been much discussed in Europe – a proposal for social drawing rights.

The concept of social drawing rights grew out of a study in 1999, sponsored by the European Commission and conducted by a group of labor relations experts. The group, of which Alain Supiot was the chair, was charged with considering the impact of changes in the workplace on labor regulation in Europe. In 2000 it issued a report, known as the Supiot Report. The Report describes a changing employment landscape in Europe that mirrors changes that have occurred in the United States -- a movement away from internal labor markets toward more flexible industrial relations practices. It found that the new work practices have entailed a loss of job and income security for European workers. The Report called for new mechanisms to provide workers with “active security” by which they mean mechanism that equip individuals to move from one job to another.<sup>142</sup>

The Supiot Report contained a number of suggestions for changes in the institutions regulating work to provide active security. Their most visionary proposal was for the a creation of “social drawing rights” to facilitate worker mobility and to enable workers to weather transitions. Under the proposal, an individual would accumulate social drawing rights on the basis of time spent at work. The drawing rights could be used for paid leave for purposes of obtaining training, working in the family sphere, or performing charitable or public service work. It would be a right that the individual could invoke on an optional basis to navigate career transitions, thereby giving flexibility and security in an era of uncertainty. As Supiot writes, “They are *drawing* rights as they can be brought into effect on two conditions: establishment of sufficient reserve and the decision of the holder to make use of that reserve. They are *social* drawing rights as they are social both in the way they are established . . . and in their aims (social usefulness).”<sup>143</sup>

The concept of social drawing rights is derived from existing arrangements in which workers have rights to time off from work for specified purposes such as union representation, maternity leave, and so forth. The Report makes an analogy to sabbatical leaves, maternity leaves, time off for union

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<sup>142</sup> See Alain Supiot, et. al., *Beyond Employment*(Oxford Press, 2001) 56 ; Alain Supiot, et. al., ‘A European Perspective on the Transformation of Work and the Future of Labor Law’ (1999) 20 *Comp. Lab. L. & Pol. Jo.* 621-628. See also, David Marsden & Hugh Stephenson, ‘Discussion Paper, Labor Law and Social Insurance in the New Economy: A Debate on the Supiot Report’ (London School of Economics, July 2001) Centre for Economic Performance.

<sup>143</sup> Alain Supiot, et. al., *Beyond Employment* at 56.

representatives and training vouchers to observe that “we are surely witnessing here the emergence of a new type of social right, related to work in general.”<sup>144</sup> Social drawing rights, it is said, would smooth these transitions and give individuals the resources to retool and to weather the unpredictable cycles of today’s workplace.

In the United States, we have precedents for the concept of paid time off with re-employment rights to facilitate career transitions or life emergencies. There are well established precedents for paid leaves for military service, jury duty, union business, and other socially valuable activities. Some occupations also offer periodic sabbatical leaves. The concept is also built into the idea of temporary disability in state workers compensation and other insurance programs, which provide compensation and guarantee re-employment after for temporary absences. The recent Parental Leave Act extends the concept of leave time to parenting obligations, although it does not mandate that such leave time be compensated. These programs all reflect and acknowledge the importance of subsidized time away from the workplace to facilitate a greater contribution to the workplace. They could serve as the basis for developing a more generalized concept of career transition leave, or a workplace sabbatical.

## **Conclusion**

The workplace is changing and the employment laws must change as well. Workers today are forced to bear many new risks in the labor market – risks of job loss, of wage variability, of benefit gaps, of skill obsolescence, and of intermittent prolonged periods of unemployment. Our labor laws do not address these problems, either for regular or for atypical workers.

The changing nature of work creates new opportunities for workers, but also new types of vulnerabilities. As employer-employee attachment is episodic rather than long-term, the problem of transitions have risen to the fore. Thus the challenge for regulation today is not to recreate the era of worker-employer attachment, but to find a means to provide workers with support structures to enable them to weather career transitions.

This article has made some proposals for reform that are designed primarily to provide livelihood security and ease transitions as workers move around in the boundaryless labor market. The proposals only scratch the surface of the profound changes in our labor laws that are necessitated by the changing workplace. Simply enumerating these proposals demonstrates both how far-reaching change has to be and how difficult it will be to attain. Yet if we are going to formulate policy that is relevant to the present era, it is necessary to think broadly, no matter how quixotic it may seem.

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<sup>144</sup> Id.