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The Regulatory Future of Contingent Employment: An Introduction

Mark H. Grunewald*

In the pages of the *Washington and Lee Law Review* that follow, a distinguished group of authors explore the critical social and economic issues framed by fundamental change in the American labor market. The articles in this symposium issue grow out of papers presented at a conference this spring entitled, "The Regulatory Future of Contingent Employment," sponsored by the Frances Lewis Law Center in cooperation with the *Law Review*. The conference brought together academicians from a variety of fields as well as leaders from business, labor, and government for the first major interdisciplinary effort to gauge the phenomenon of contingent employment in the United States and to assess the possible need for regulatory intervention.

Contingent employment is a term coined only a decade ago by labor economist Audrey Freedman to describe the range of employment relationships that had developed to meet employers' perceived need for flexible work arrangements to control labor costs in a global economy. The term is generally understood to include part-time, temporary, seasonal, casual, contract, on-call, and leased employees. The utility to employers of the flexibility of such relationships is relatively well accepted and largely non-controversial. The more complex and highly charged issue is at what cost to workers is that flexibility obtained. The answers vary. Not surprisingly, there is agreement that tension exists between flexibility and stability in employment relationships. But the nature and extent of the effect of this tension on the lives of American workers, or particular subgroups thereof, or even worker productivity, is vigorously contested.

We begin with the basic definitional question. What is meant by "a contingent worker"? This leads to further important questions. How many contingent workers are there? Is the number growing or is it declining? In

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what businesses? Among what groups of workers? And perhaps most importantly, why? Seeking answers to these questions is vital. Even understanding where there may be a shortfall in data is useful. But we discover that even these most basic issues turn out to be vigorously contested. And it becomes clear that there is something of fundamental importance in the classification itself.

Traditional, full-time, long-term employment has been, at least in the latter half of the twentieth century, the source for much more than the weekly paycheck: It has been the core for the development of collective bargaining. It has been the institutional base for the assurance of health care. It has bankrolled the private pension system. In short, it has marked most of the important differences between staked members of our society and the economically vulnerable and insecure. If there is substantial movement away from the traditional form, can that be good — the sign of a healthy labor market functioning in a global economy? Or must that be bad — the human tragedy of a short-sighted race to the bottom in labor standards to attain competitive advantage?

What is at stake in these questions is not just workers' livelihoods, but their leisure time and their means to enjoy it, their health both on and off the job, their financial security in hard economic times and at the ends of their working lives, even their sense of self-worth and personal dignity. At the same time, the competitive success — perhaps even the economic viability — of their employers is also at stake. While the stakes then are extremely high, the answers are far from simple. The careful work of the contributors to this symposium, however, makes the task of coming to grips with these questions more manageable and lays the foundation for the future consideration of regulatory policy in this area.

Representative Patricia Schroeder's review of changes in the American work force over the past two decades is punctuated by the jarring statistic that, not General Motors, but rather Manpower, Inc., a temporary employment agency, is today the largest employer in the United States. She surveys the contingent work force, finding a disproportionately high representation of women and minorities who, in turn, bear the lower level of wages and benefits associated with contingent employment. Representative Schroeder proposes the Part-Time and Temporary Workers Protection Act, a bill that would provide pro rata health and pension benefits for employees working less than full time if the employer offers such benefits to full-time employees.

Edward Lenz, Vice President for Legal and Government Affairs of the National Association of Temporary and Staffing Services, takes issue with

Representative Schroeder's assessment of the growth of contingent employment. Mr. Lenz first argues that the types of relationships that are grouped together as contingent employment should be separated into the individual forms for analysis. Viewed separately, the various contingent forms, Mr. Lenz asserts, have not seen growth as dramatic as portrayed by Representative Schroeder. Moreover, as Mr. Lenz sees contingent employment, particularly temporary employment, it serves not only employer interest in flexibility to meet changing market conditions but also employee interests in getting started in the job market, in meeting unexpected need, and in providing a bridge between job loss and new employment. Current employment law, Mr. Lenz argues, provides most of what is necessary to protect contingent employees from abuse. He rejects proposals such as Representative Schroeder's to provide specific protections for contingent employment. Mr. Lenz, however, argues that closer regulation of the classification of workers as independent contractors to avoid tax and benefit liability would protect both contingent employees and their employers from the unfair economic effects of misclassification.

Jonathan Hiatt, General Counsel of the Service Employees International Union, finds ample evidence that contingent employment not only is growing but also is producing unfairness and hardship in the labor market. Through examples in the service employment industry, Mr. Hiatt notes ways in which contingent employment is used to frustrate enforcement of existing protective legislation while producing stark segmentation of the work force, often along racial and gender lines, and weakening collective bargaining. Mr. Hiatt proposes going beyond Representative Schroeder's bill to a six-part agenda that would assign accountability for contingent employees more directly to the business entities that control and benefit from their labors. Proposals such as tightening the joint employer doctrine and mandating a right of first refusal to jobs for contract employees when the contractor changes are not likely to be favored by temporary and leasing agencies. Nevertheless, Mr. Hiatt's proposals to eliminate misclassification of employees as independent contractors suggest some common ground with at least the larger temporary agencies as reflected in the similar proposal from Mr. Lenz.

Arne Kalleberg, Professor of Sociology at the University of North Carolina at Chapel Hill, reports the results of his study of the motivation and job rewards of part-time and full-time workers and brings into focus the social issues raised by contingent employment. Professor Kalleberg finds a high degree of similarity in the employment aspirations of part-time and full-time workers, but he also finds those aspirations fulfilled in the case of part-time workers at a much lower rate. Professor Kalleberg's findings call into

question the assumption that workers choose part-time employment, and in turn lower wages and benefits, largely because of different job aspirations than workers who hold full-time employment. Professor Kalleberg goes on to explore the policy implications of his findings. While he concludes that contingent employment can offer attractive flexibility for employees as well as employers, Professor Kalleberg cautions that where the choice between full- and part-time is not voluntary, regulatory intervention should be undertaken to mitigate the disadvantages of part-time employment.

Dr. Ann Bookman, Policy and Research Director of the Women's Bureau of the Department of Labor, explores further the question of voluntariness in the choice of contingent employment. While Dr. Bookman acknowledges that workers, particularly women, may choose part-time work for the flexibility it offers, she questions whether they in any meaningful sense choose the serious wage and benefit disadvantage it entails. She also reports the findings of the Department of Labor study of women's work experiences and attitudes. This study provides further evidence of a sense of inequitable treatment and economic hardship on the part of women who hold temporary or part-time jobs. Dr. Bookman urges that attention be given not only to the needs of workers that bear on their availability for employment, such as quality child care, but also to the work-related benefits such as health care and pensions.

Maria O'Brien Hylton, Professor of Law at DePaul College of Law, urges caution in responding to contingent employment with regulatory measures. She expresses concern not only with the breadth of the definition of contingent employment but also with the data available to assess the voluntariness of the choice of contingent employment and the benefit and job security differentials in various forms of employment. Professor Hylton suggests that the instinct to regulate contingent employment may both fail to appreciate the advantage to employers and employees in flexible work arrangements and overstate legal restraints on traditional, full-time employment. In fact, if employers are choosing contingent employment at least in part to avoid current employment regulation, expanding coverage may only force employers to use employment arrangements outside the coverage. Or if avoiding benefits coverage is not the principle reason employers use contingent workers, Professor Hylton argues that extending coverage may not reduce the level of contingent employment.

Gwen Thayer Handelman, Professor of Law at Washington and Lee, observes a growing trend away from an employment-based benefit system without corresponding increases in social welfare schemes. Simultaneously, Professor Handelman sees in the combination of involuntariness and

economic inequality of contingent employment a social problem, in need of, but unlikely to receive, direct regulatory attention. She thus proposes a series of self-help measures to achieve improved health and retirement income security for contingent workers. Professor Handelman would place greater reliance on collective bargaining to secure broader protections. At the same time, she urges the pursuit of vigorous, even novel, enforcement theories under existing protective legislation. Noting the important role of tax law for these issues, Professor Handelman also recommends increased lobbying efforts to produce worker-friendly tax legislation.

Dr. Richard S. Belous, Vice-President and Chief Economist for the National Planning Association, reports on his on-going research that tracks the scope and growth in the use of contingent employees. Extending his earlier widely used study of the contingent work force to the current period, Dr. Belous concludes that between 25% and 30% of the American labor force is contingent, that contingent employment is growing 40% to 75% faster than employment for the economy as a whole, and that in the period 1980 to 1993, 40% to 55% of the jobs created were contingent. Dr. Belous goes on to examine the impact of contingent employment. The benefits of flexibility to a business, Dr. Belous argues, must be weighed against the various costs, both social and economic, of a lower degree of attachment to its workers. He proposes that flexibility in the labor market be balanced with flexibility in the social welfare system to meet the needs of workers for whom the traditional benefits of long-term employment are no longer a reality

Mary E. O'Connell, Professor of Law at Northeastern University, traces the rise and present decline of employment-based social welfare. Professor O'Connell notes that health insurance, pensions, and unemployment insurance, as incidents of employment, have all been undermined by the growth of contingent employment. She examines the question of whether this trend can and should be reversed. Professor O'Connell considers the possibility of providing enhanced social insurance, of mandating benefits, or of creating broader (than a single employer) private benefit networks. She also considers the "do nothing" alternative of leaving the problem to the individual worker. Professor O'Connell concludes that it will be not only economic forces but also political ones that will determine the outcome.

Stewart J. Schwab, Professor of Law at Cornell University, suggests that closer attention be paid to the components of the work force that collectively are referred to as contingent employees. Rather than rely on the descriptive categories such as temporary, part-time, leased, and contract, Professor Schwab recommends focusing on employment instances of either

low job security, low pay, or low benefits. When the work force is analyzed in these terms, Professor Schwab believes that the numbers as well as the rate of change may be quite different than the categorical approach would indicate. With a better fix on who the target of policy change should be, Professor Schwab urges the development of a social safety net for the victims of change that preserves the benefits of flexible labor markets. Professor Schwab also reviews the substantial application of current regulation to the contingent work force. Finally, he considers several policy proposals with attention to both preservation of flexibility in the labor market and impact from the existing regulatory structure.

Kenneth G. Dau-Schmidt, Professor of Law at the University of Wisconsin, accepts the view of those who would seek to adapt the social welfare structure to meet the needs of contingent workers rather than restrict the use of contingent employment. At the same time he argues for some regulatory change as well to minimize the growing regulatory-based incentive to use contingent employees. Professor Dau-Schmidt urges broadening the definition of "employee" in a variety of labor regulatory schemes. He also proposes a broad conception of "portability" of benefits, not only in the private pension area but also for public benefits eligibility. Finally, he advocates proportional benefits for contingent workers.

These articles, both in their scope and depth, reflect not only the complexity and importance of this subject but also the success of the conference. It was an occasion when major questions of law and policy arising out of the social and economic milieu of contingent employment were joined and aired vigorously. The published product of the conference represents a resource that should be consulted by anyone with a serious interest in the future of contingent employment. And the exchange of ideas presented here can be expected to provide the framework for future consideration of this vital issue.