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"Contingent Work" — Dispelling the Myth

Edward A. Lenz*

Representative Pat Schroeder has been the most vocal, although virtually the lone, advocate on Capitol Hill for new legislation to deal with what has come to be called "contingent" employment. But the prime vehicle for her advocacy — her proposed "Part-Time and Temporary Workers Protection Act" which mandates that all employers provide pro rata health and pension benefits for part-time and temporary workers working over 500 hours in a year — has never even been the subject of a hearing in the eight years since it was first introduced. It seems fair to conclude from this inaction that the majority of her congressional colleagues believe such legislation to be unnecessary.

Representative Schroeder argues that the growth in the contingent work force demands a change in federal policy.¹ But her call for new employer mandates is based on misconceptions regarding part-time and temporary growth trends, the role such jobs play in the American economy, and the extent to which individuals working in those jobs are protected under existing labor and employment laws. This article examines some of those misconceptions and explains why new regulations are not only unnecessary but are likely to have a detrimental impact on both businesses and workers.

Part-Time, Temporary, and Self-Employment Arrangements Are Neither New nor Growing Significantly

The first misconception is that "contingent" work is a new phenomenon. The term "contingent" in connection with employment arrangements is gen-

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1. Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731 (1995).

erally attributable to labor economist Audrey Freedman. Freedman coined the term in 1985 as a generic way of describing the wide range of flexible employment relationships available in the labor market that could help American businesses compete more effectively in world markets.² However, although Freedman was urging businesses to think new thoughts about labor force flexibility, there was nothing fundamentally new about the part-time, temporary, and self-employment arrangements which she grouped under the term "contingent." Furthermore, those work force segments are extremely diverse in nature³ and should not be lumped together under a common label when considering whether new laws or policies are necessary⁴

The second misconception regarding part-time, temporary, and self-employment arrangements is that they have expanded dramatically. Viewed separately, the three segments are unremarkable either in terms of their growth or as a proportion of total employment. For example, the number of part-time workers — who comprise about 65% of the so-called contingent work force, by far the largest segment⁵ — has been a relatively constant share of the American work force over the past ten years.⁶ In the past *twenty-four years*, the number of part-time workers has risen only 3.3%⁷ Representative Schroeder and others say that the

2. See "Contingent" Work Force Expands Rapidly as Firms Seek Buffers in Economic Downturns, Daily Labor Report (BNA) No. 138, at A-3 (July 18, 1985) (reporting on Ms. Freedman's comments before American Productivity Center).

3. See *Conference on the Growing Contingent Workforce: Flexibility at the Price of Fairness?: Conference Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. 8-9 (1994) [hereinafter *Contingent Workforce*] (statement of Katharine Abraham, Commissioner, Bureau of Labor Statistics, U.S. Dep't of Labor). Ms. Abraham stated that "[t]his thing that people have referred to as contingent work is really a very disparate phenomenon," and that there is "quite a lot that we don't know." *Reich Says New Legislation May Be Needed to Protect Contingent Workers*, Daily Labor Report (BNA) No. 26, at D-16 (Feb. 9, 1994).

4. A new study just released by the Bureau of Labor Statistics in fact concludes that most part-time and self-employed work should not be regarded as "contingent" at all. See generally BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 900, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS (Aug. 1995) [hereinafter REPORT 900].

5. Allison Thomson, *The Contingent Workforce*, OCCUPATIONAL OUTLOOK QUARTERLY, Spring 1995, at 45, 46. Ms. Thomson is an economist in the Office of Employment Projections, Bureau of Labor Statistics (BLS), U.S. Department of Labor. According to BLS, there were 21 million part-time workers in 1993. *Id.* at 46.

6. U.S. DEP'T OF LABOR/U.S. DEP'T OF COMMERCE, COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS [hereinafter Dunlop Commission], FACT FINDING REPORT 21 (1994). The Commission was chaired by former Secretary of Labor John T. Dunlop.

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real problem is that the proportion of *involuntary* part-time workers has increased in recent years.⁸ But the proportion of *all* part-time workers, both voluntary and involuntary, historically has *fluctuated* over time depending on economic cycles. So, for example, the proportion of part-time workers in 1993, 18.8% of all workers, actually was less than in 1982 when it was 20.2%⁹ Similarly, the proportion of involuntary part-time workers in 1993, 5.5% of all workers, was less than the 1982-83 recession high of 6.5%¹⁰ Thus, according to the Employee Benefit Research Institute, "[W]hile the short-run trends remain important to our current economy, *the more important question is whether growth of the part-time work force as a percentage of all workers will continue in the long run such that it surpasses the levels of the early 1980s*"¹¹

A similar picture emerges with regard to the second largest segment — the "self-employed" — who make up about 30% of the contingent work force.¹² This segment includes professionals, such as lawyers or doctors, free-lance workers, such as artists or writers, and a wide range of independent business owners.¹³ According to the U.S. Department of Labor, non-agricultural self-employment has been essentially flat since 1982 and future growth is expected to *lag* the growth in wage and salary positions — that is, those connected to a single employer.¹⁴ Self-employed positions are expected to increase by 15% through 2005 while wage and salary positions will increase by 23% during the same period.¹⁵ Moreover, the largest portion of the growth in the self-employed category is expected to be in executive, administrative, and managerial occupations, which are among the best educated and highest paid.¹⁶

149, CHARACTERISTICS OF THE PART-TIME WORK FORCE: ANALYSIS OF THE MARCH 1993 CURRENT POPULATION SURVEY 5 (1994) [hereinafter EBRI REPORT].

8. Schroeder, *supra* note 1, at 732.

9. EBRI REPORT, *supra* note 7, at 5.

10. *Id.* at 10.

11. *Id.* at 11 (emphasis added).

12. See Thomson, *supra* note 5, at 46. Ms. Thomson estimates that about 10 million individuals were self-employed in 1993. *Id.*

13. *Id.*

14. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2452, THE AMERICAN WORK FORCE: 1992-2005, at 78 (1994) [hereinafter THE AMERICAN WORK FORCE].

15. *Id.*

16. *Id.*

Temporary workers employed by temporary help service firms make up the smallest segment of the contingent work force. Although the rate of growth of temporary employment has been significant in the last ten years, it remains a very small percentage of total non-farm jobs. Average daily temporary employment rose from 407,000 workers in 1982 to about 1.7 million in 1993.¹⁷ But even so, temporary jobs today comprise only about 2% of non-farm employment.¹⁸ Moreover, much of the recent growth can be attributed to the tentative economic recovery that made businesses unusually wary of adding new full-time jobs. Looking to the future, the Bureau of Labor Statistics reports that the average annual growth of 9.5% between 1979 and 1992 in the personnel supply industry — which includes temporary help — is not expected to continue.¹⁹ Estimates are that the personnel supply industry will grow at a much slower average annual rate of 3.6% through the year 2005.²⁰

Reports of the Death of the Full-Time Job May Be Exaggerated

It is clear from the above discussion that the "contingent" work force only begins to take on a noteworthy aspect if one aggregates its disparate segments, gives them a common label, and focuses solely on the growth rate of the smallest segment.²¹ There is simply no credible evidence to support media stories, including assertions by Representative Schroeder, that as much as 50% of all workers will be part-time, temporary, or self-employed by the year 2000.²²

17 See Thomson, *supra* note 5, at 46. Because of the extraordinary turnover among temporary employees, the most meaningful measure of the size of the temporary work force is average daily employment. Representative Schroeder's reference to Manpower, Inc. as "the largest private employer in America," Schroeder, *supra* note 1, at 731, is therefore misleading because, even though a total of 640,000 people were employed by Manpower for some period of time during 1993, only 150,000 were working on any given day. See Mitchell S. Fromstein, President of Manpower, testimony before the Dunlop Commission (July 25, 1994).

18. Annual Update for 1994, Temporary Help Study, *infra* note 34.

19. Cf. *infra* note 20.

20. See THE AMERICAN WORK FORCE, *supra* note 14, at 49. These estimates do not include temporary workers employed directly by businesses rather than by staffing firms. According to Allison Thomson, the number of temporaries hired directly by businesses has been estimated to be equal to the number employed by staffing firms. However, that estimate was based on a study conducted in 1985. See Thomson, *supra* note 5, at 46.

21. See Ida L. Walters, *Tempting Fate*, REASON, April 1994, at 1, 1-3 (discussing contingent work force "myth").

22. Representative Patricia Schroeder Introduces Legislation to Provide Health and

The predictions of dramatic growth in part-time and temporary jobs are in large part based on the headline-grabbing accounts of corporate downsizing, accompanied by warnings that traditional jobs are headed for extinction and that the United States is entering a new age of work characterized by much greater mobility and impermanence.²³ But although large-scale layoffs at giant companies like AT&T, Xerox, and IBM make news, recent studies indicate that there may be less to the "new age of work" phenomenon than these stories suggest.²⁴ These new studies show that workers today are spending about the same number of years at the same job as they always have.²⁵ One explanation is that much of the perceived increase in job mobility is a manifestation of the baby boom cohort passing through the labor market during their twenties and thirties, an age when most people move frequently and have multiple jobs. At a minimum, according to one researcher at the Employee Benefit Research Institute, the new data suggest the need to act on "more than conventional wisdom" in making policy decisions.²⁶

The Role of Flexible Employment in the American Economy

Representative Schroeder states that part-time and temporary employees are treated unfairly and that they are unprotected by current labor and employment laws.²⁷ But, in reality, these arrangements not only offer businesses a way to manage more effectively their labor forces, but also afford workers flexibility, independence, supplemental income, skills training, "safety-net" protection, and, for many, a significant opportunity to move back into the full-time work force.²⁸ Moreover, as even a cursory examination will reveal, these workers are protected in much the same manner as their full-time counterparts by a wide range of federal and state laws designed to protect employees.

Let us examine these propositions in the context of temporary work, keeping in mind that many of the observations and conclusions also may be applicable to part-time jobs and other forms of flexible employment.

Pension Benefits to Part-Time and Temporary Workers, Press Release, May 19, 1993.

23. See, e.g., William Bridges, *The End of the Job*, FORTUNE, Sept. 19, 1994, at 62, 62-74.

24. See, e.g., Albert B. Crenshaw, *The Myth of the "Mobile Worker,"* WASH. POST, Dec. 28, 1994, at A1, A10; *Whistling While They Work*, ECONOMIST, Jan. 28, 1995, at 25.

25. See Crenshaw, *supra* note 24, at A1.

26. *Id.* at A10.

27. See Schroeder, *supra* note 1, at 733-36.

28. See Thomson, *supra* note 5, at 48.

Temporary Help as Management Resource

For over fifty years, temporary help has been a way for American businesses to manage their labor costs more effectively. By using supplemental help as needed, businesses can react quickly and efficiently to fluctuating market conditions, thus providing both needed flexibility and a way to avoid overstaffing.²⁹ Use of temporary help has grown in the last decade as the need for labor force flexibility became increasingly important in meeting domestic and foreign competitive challenges.³⁰ Today, companies retain "staffing" firms. These firms provide a wide range of human resources services such as recruiting, skills assessment, skills training and upgrading, risk management, and payroll and benefits administration, which allow their customers to concentrate on their core businesses.³¹ Staffing firms, in effect, have become partners with American businesses, helping them more effectively manage their increasingly diverse and technically skilled work forces.

Temporary Work as Employment Opportunity, Safety Net, and "Jobs Bridge"

For individuals, temporary work traditionally has been a way for those with special employment needs to find meaningful and profitable work. Parents — in most cases women — with small children who cannot or do not wish to commit to full-time employment, people looking for first-time work who want to "test the waters," older workers looking to stay active and supplement their incomes, and students needing summer work all look to temporary help companies to meet their needs.³² These individuals still constitute the "core" of the temporary work force.

Today, however, temporary jobs play an increasingly important new role in helping people make the transition from one employment setting to another. For employees displaced through downsizing, for example, temporary work can provide a critical safety net that offers income and other benefits, unemployment insurance, and workers' compensation protection until regular full-time work can be found.³³ Moreover, these jobs themselves often are a bridge to full-time employment by giving workers an

29. *See id.* at 46-47

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

opportunity to gain new skills — such as computer training — and experience with a variety of potential employers. Thirty-eight percent of the temporary workers in a 1993 survey conducted for the National Association of Temporary and Staffing Services (NATSS) by Lauer, Lalley & Associates (Lauer, Lalley) reported receiving full-time job offers by the companies to which they were assigned.³⁴

Employers of part-time workers provide similar transitional opportunities. For example, the McDonald's Corporation, in testimony before Congress last year on behalf of a coalition representing part-time, temporary, and seasonal employers, stated that more than 40% of McDonald's corporate executives began their careers as crew members in their restaurants.³⁵

Employers of part-time and temporary workers also have made significant contributions in helping people improve their skills, including those in greatest need of such training. Richard Belous, a participant in this symposium, has stated that temporary help firms like Manpower, Norrell, and Kelly "have done more to train inner-city residents than all the government training programs combined."³⁶ A more recent Lauer, Lalley survey of staffing companies suggests that total expenditures for employee skills training run into the hundreds of millions each year.³⁷

Even the Commission on the Future of Worker-Management Relations (Dunlop Commission) recognized the benefits of flexible employment:

Contingent arrangements allow some firms to maximize workforce flexibility in the face of seasonal and cyclical forces and the demands of

34. Temporary Help Study, conducted by Lauer, Lalley & Assocs. (Feb. 1994) (unpublished survey, on file with the *Washington and Lee Law Review*) [hereinafter 1993 SURVEY]. Lauer, Lalley is a Washington, D.C. economic, market, and public opinion research firm. See also Robert L. Rose, *A Foot in the Door*, WALL ST. J., Feb. 27, 1995, at R7 (citing an Olsten Corporation survey showing that 63% of company human resources executives use outside temporary help firms as way of finding qualified employees).

35. *Contingent Workforce*, supra note 3, at 82 (statement of Rogercarole Rogers, Director, Employment Development, McDonald's Corporation, on behalf of *Advocates for Flexible Employment*).

36. Steven Pearlstein, *Business and the Temp Temptation: A Permanent Solution*, WASH. POST, Oct. 20, 1993, at C11, C15.

37. Industry Training Survey, conducted by Lauer, Lalley (1994) (unpublished survey, on file with the *Washington and Lee Law Review*) [hereinafter INDUSTRY SURVEY]. Lauer, Lalley asked selected NATSS members to estimate their skills training expenditures for 1993. The training costs of the 47 firms that responded, representing about 10% of the industry payroll, were approximately \$45 million. *Id.* Hence, total industry training costs can be estimated in the range of \$450 million annually

modern methods such as just-in-time production. This same flexibility helps some workers, more of whom must balance the demands of family and work as the numbers of dual-earner and single-parent households rise. Workers benefit when a diversity of employment relationships is available. For example, temporary work provides a mechanism for transitions between jobs, affording employers and workers an opportunity to size each other up before deciding to enter into a more stable employment relationship.³⁸

Profile of Temporary Workers

Representative Schroeder's view of the typical part-time and temporary worker is based on a number of negative assumptions that do not stand up to close examination. Again, using the temporary work force as an illustration, the 1993 Lauer, Lalley survey of temporary employees paints a more sanguine picture.³⁹

Gender and Race

Representative Schroeder has asserted that women and minorities are disproportionately represented in the part-time and temporary work force, that they have lower per-hour wages than full-time workers, and that they get reduced or no employment-based health, retirement, and other benefits.⁴⁰ Females historically have made up the largest percentage of temporary workers because most of the available jobs were office and clerical — positions traditionally filled by women — and because of the dramatic increase in the number of women entering the labor force for the first time from 1950 to 1980.⁴¹ Temporary work offered many women opportunities during that time that were not readily available elsewhere in the labor force. Today, the majority of temporary workers still are female according to Lauer, Lalley, but the percentage of males has increased from 20% in 1989 to 28% in 1993.⁴² African Americans are *not* disproportionately represented

38. DUNLOP COMMISSION, REPORT AND RECOMMENDATIONS 35 (1994) [hereinafter DUNLOP COMMISSION FINAL REPORT]. See also EDWARD E. POTTER & JUDITH A. YOUNGMAN, KEEPING AMERICA COMPETITIVE 265-310 (1995).

39. 1993 SURVEY, *supra* note 34. For a comprehensive profile of part-time workers, see EBRI REPORT, *supra* note 7, at 15-29.

40. See Schroeder, *supra* note 1, at 733.

41. See THE AMERICAN WORK FORCE, *supra* note 14, at 1.

42. 1993 SURVEY, *supra* note 34. The increase in male temporary workers has been confirmed in a recent study by economists at the Federal Reserve Bank of Chicago. See Lewis M. Segal & Daniel G. Sullivan, *The Temporary Labor Force*, ECONOMIC PERSPEC-

in the temporary work force. The Lauer, Lalley survey showed that 11% of temporary workers are African Americans, which closely corresponds to their representation in the work force as a whole.⁴³

Reasons for Working as a Temporary

People work as temporaries for many different reasons. Lauer, Lalley showed that one-third work as temporaries because it gives them "*flexibility and time to pursue non-work interests*"⁴⁴ (flexibility is a two-way street). Just over half said they were "*in between jobs and the money from my temporary employment will help make ends meet.*"⁴⁵ Sixty-six percent said they had gained new skills, and almost 30% said they were working as temporaries specifically "*because it provides training and experience which will enhance my career*"⁴⁶ As noted earlier, almost 40% received full-time job offers from the firm to which they were assigned.⁴⁷

Because temporary employees mainly are looking for a short-term income supplement or a way to find a full-time job, their tenure as temporaries tends to be short-term.⁴⁸ This results in extraordinary turnover — one of the chief characteristics of temporary work — *of 400-500% annually*⁴⁹

Wages and Benefits

Wage rates of temporary employees vary widely, but generally are competitive with entry-level wages paid to their regular, full-time counterparts in the same locale. Nationally, average temporary help wage rates are currently estimated to be in the range of \$8.00 per hour.⁵⁰ Temporary

TIVES, March/April 1995, at 1, 10.

43. 1993 SURVEY, *supra* note 34.

44. *Id.*

45. *Id.* This group includes individuals who lost a job for any reason as well as those changing jobs voluntarily. *Id.*

46. *Id.*

47. *Id.*

48. Our survey showed that the median temporary assignment is about 13 weeks. *Id.*

49. See Segal & Sullivan, *supra* note 42, at 14, in which the authors conclude that the high turnover and the opportunities for finding a full-time job negate concerns that temporary work is a low-wage trap. Their study concludes that the "relatively high degree of industrial mobility suggests that a large underclass of temporary workers is unlikely to develop, since there are significant paths for moving out of temporary work." *Id.*

50. See Thomson, *supra* note 5, at 48.

employees tend to be younger workers in entry level positions in which wage rates can be expected to be lower. Their high turnover means they do not stay long enough to move significantly up the wage scale. Those who do work for longer periods, however, can expect to earn higher rates of pay as they gain skills, experience, and tenure. For example, Lauer, Lalley showed that 38% of individuals working on multiple assignments received a higher wage than on their prior assignment.⁵¹

Although temporary workers historically have shown a strong preference for cash income rather than benefits, most temporary employees also have access to a full range of non-wage benefits.⁵² These benefits include vacation and holiday pay, incentive bonuses of various kinds, and health insurance plans, including a national plan offered through NATSS.⁵³ Some temporary help firms also offer pension plans for longer-term workers.⁵⁴

Fifty-three percent of the temporaries surveyed in the 1993 Lauer, Lalley study had health insurance coverage through a spouse, parent, or other source.⁵⁵ In addition, about one-third are in between full-time jobs for short periods and often are covered under a prior employer's health plan.⁵⁶ Those who are not covered are generally young and healthy and do without coverage as a matter of choice, thereby maximizing their cash income. For these reasons and because of their short tenure, temporary employee participation in temporary help company health plans tends to be very low, even when the employer contributes to the premium. Of course, as employers, businesses that hire or assign part-time and temporary employees pay all statutory benefits such as Social Security, unemployment insurance, and workers' compensation.⁵⁷ It seems clear from the foregoing that, given the short-term, supplemental, or transitional role of part-time and temporary work in the lives of the vast majority of individuals, the relatively low rate of coverage under benefit programs normally associated with full-time employment is neither surprising nor alarming.⁵⁸

51. 1993 SURVEY, *supra* note 34.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See Thomson, *supra* note 5, at 47; see generally Edward A. Lenz, *Co-Employment — A Review of Customer Liability Issues in the Staffing Services Industry*, 10 LABOR LAW 195 (Spring 1994) (explaining benefits that businesses provide).

58. It is worth noting that, while Representative Schroeder's bill purports to extend

Occupational Distribution

One of the assumptions underlying Representative Schroeder's proposed legislation is that part-time and temporary workers are engaged almost entirely in low-wage occupations. Temporary payrolls, in fact, reflect significant occupational diversity. In 1993, about 43% of payroll was office or clerical, 30% was industrial, and 27% was technical and professional.⁵⁹ The last group, which is growing, includes engineers, paralegals and lawyers, white-collar managers, and a wide range of health care workers, including laboratory technicians and nurses. Some of these occupations are at the highest end of the wage scale.⁶⁰

Part-Time and Temporary Workers Are Already Protected Under U.S. Employment Laws

Representative Schroeder's belief that there are major gaps in coverage of part-time and temporary employees under the nation's labor and employment laws is unfounded. Employers of part-time and temporary workers must comply with state and federal employment laws applicable to other employees. Although some laws may not cover employees working less than a minimum number of hours per week, virtually all employees are protected by civil rights laws, worksite safety requirements, minimum wage and overtime provisions, and laws relating to collective bargaining, workers' compensation, and unemployment insurance.⁶¹ More recent laws include the Americans with Disabilities Act⁶² and the Family Medical Leave Act.⁶³ Bus-

health and pension benefits to "part-time" employees, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993), already covers individuals working as little as 1000 hours in a year for pension purposes. *Id.* § 1052(a)(3)(A). Hence, someone working part time as few as 20 hours per week already can qualify for those benefits. Representative Schroeder's bill would mandate benefits for those working less than 10 hours per week, which means even those with only a marginal connection to the work force would have to be covered. *See* H.R. 2188, 103d Cong., 1st Sess. (1993) (requiring that employers provide health and pension benefits to employees working 500 or more hours per year).

59. 1993 SURVEY, *supra* note 34.

60. *See, e.g.*, Marc Silver, *The Truth About Temping*, U.S. NEWS & WORLD REP., Nov 1, 1993, at 95, 96; Jerry Flint, *A Different Kind of Temp*, FORBES, Feb. 28, 1994, at 54, 54.

61. *See generally* Lenz, *supra* note 57

62. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

63. 29 U.S.C. §§ 2611-2654 (Supp. V 1993). This act covers employees working as little as 1,250 hours per year. *Id.* § 2611(2)(A)(ii).

nesses using temporary help are, moreover, often held to be joint employers giving workers recourse against *both* the temporary help employer and the worksite employer.

Courts and government agencies have specifically held that temporary employees may bring Title VII actions for discrimination⁶⁴ and that businesses must maintain a safe worksite for employees assigned to them.⁶⁵ The National Labor Relations Board (NLRB) may include temporary workers who have a sufficient "community of interest" with full-time workers in a worksite employer's collective bargaining unit,⁶⁶ or in a separate unit. The NLRB also may hold staffing firms and their customers liable for unfair labor practices directed against staffing firm employees⁶⁷ and jointly liable under the Fair Labor Standards Act.⁶⁸

*Problem of "Independent Contractors" — The Dunlop
Commission's Recommendation*

One serious problem not addressed in Representative Schroeder's bill that deserves attention is the practice of misclassifying employees as "independent contractors" in order to avoid paying payroll taxes and other benefits. This practice harms the employee, significantly reduces tax revenues, and places at a major competitive disadvantage responsible employers that pay Social Security, withhold income taxes, provide unemployment insurance and workers' compensation, and discharge all of the obligations the law imposes on employers.⁶⁹ A number of bills have

64. See *Amarnare v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344, 347-51 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

65. See *Secretary of Labor v Manpower Temporary Servs., Inc.*, No. 76-980, 1977 WL 6891, at *5 (O.S.H.R.C. Jan. 10, 1977).

66. See *NLRB v Western Temporary Servs., Inc.*, 821 F.2d 1258, 1267-69 (7th Cir. 1987).

67. See, e.g., *Capitol EMI Music, Inc.*, 1992-1993 N.L.R.B. Dec. (CCH) ¶ 17,934 (May 28, 1993), *enforcement granted*, 23 F.3d 399 (4th Cir. 1994).

68. 29 U.S.C. §§ 201-219 (1988 & Supp. IV 1992 & Supp. V 1993). See, e.g., *Brock v Superior Care, Inc.*, 840 F.2d 1054, 1059-61 (2d Cir. 1988); Joint Employment Relationship Under Fair Labor Standards Act of 1938, 29 C.F.R. § 791.2 (1992). See Lenz, *supra* note 57, at 209 (providing general overview of laws and regulations applicable to staffing arrangements); H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683, 708-10 (1994) (same).

69. See DUNLOP COMMISSION FINAL REPORT, *supra* note 38, at 36, 40.

been introduced in the past several years to remedy the abuses in this area, but none has been enacted.⁷⁰

According to the Dunlop Commission, the problem of misclassification is the key problem involving contingent work. In its final report, the Commission stated that "*the single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors.*"⁷¹ The Commission makes a number of recommendations to address the problem of misclassification, many of which the staffing industry would not object to in principle.

First, the Commission thinks the definitions of employer and employee should be standardized in all labor and employment laws. It would replace the common law "20 factor" test — which places primary emphasis on who controls the work performed by the individual — with a test based on "economic reality"; in other words, are workers truly in business for themselves or are they really dependent on some other entity?⁷² As employers, staffing firms support efforts to combat the practice of misclassifying employees, and an "economic reality" test would appear to make more sense than the old "20 factor" analysis. However, in our judgment, any test based on subjective factors will be problematic from an enforcement standpoint.

In addition, the Commission recommends modification of the so-called "Section 530" safe harbor rules.⁷³ Section 530 of the Revenue Act of 1978 currently protects employers who, for example, have had past audits upholding their workers' independent contractor status from having to reclassify them if the relationship later changes.⁷⁴ The Dunlop Commission recommends that section 530 be modified to allow the IRS to require reclassification on audit if, based on current circumstances, the workers should be treated as employees.⁷⁵

70. See, e.g., H.R. 510, 104th Cong., 1st Sess. (1995) (introduced by Representatives Christopher Shays (R-Conn.) and Thomas Lantos (D-Cal.)). Among other things, the bill would eliminate the prior audit safe harbor under § 530 of the Revenue Act of 1978 and would expand the IRS's ability to draft regulations defining who is an employee for tax purposes. *Id.*

71. See DUNLOP COMMISSION FINAL REPORT, *supra* note 38, at 37

72. See, e.g., *Brock*, 840 F.2d at 1058-61 (applying five-factor "economic reality" test in determining that medical staffing company was employer of workers it assigned and was therefore liable for overtime wages).

73. DUNLOP COMMISSION FINAL REPORT, *supra* note 38, at 39.

74. *Id.*

75. *Id.*

Other Proposals

Beyond the issue of misclassification, the Dunlop Commission also expressed concern about business's incentive to use, as they put it, "*variations in the corporate form*" to avoid liability under labor laws. Citing the practice of "double breasting" — when a unionized contractor establishes a related subsidiary to do the same work and avoid its collective bargaining agreement — the Commission recommends that all related entities be considered as one employer.⁷⁶ In concept, this might be workable provided that the notion of "related entity" is not expanded beyond traditional legal principles of relatedness — such as the IRS "control group" tests — to include, for example, mere contractual relationships.

Finally, the Commission recommends expanding the "joint employer" doctrine to increase worker protection in contractor situations. For example, where a business exercises minimal control over its contractor's operations or employees, the Commission would require the business to ensure that the contractor complies with applicable worksite safety standards.⁷⁷ Moreover, the Commission would prohibit the business from denying the contract worker's rights under the labor laws.⁷⁸ These recommendations seem reasonable enough, but the Commission goes on to urge the NLRB, in broad and unspecific terms, to "*use its rule-making and adjudication processes*" to deal with a potentially wide range of joint employer issues.⁷⁹ It is unclear what other kinds of "joint employment" rules the NLRB might propose.

Various commenters made other proposals, including mandating equal pay for equal work, giving employees a "right of first refusal" when they are displaced because their employer loses a contract,⁸⁰ and placing a time limit on temporary assignments, after which the employee would have to be hired by the customer. The Commission took no position on these proposals and recommended that any new policy initiatives be deferred until the completion of a comprehensive Bureau of Labor Statistics survey of the contingent work force.⁸¹

76. *Id.* at 40.

77. *Id.* at 41.

78. *Id.*

79. *Id.*

80. Employees working under certain federal contracts already have this protection. Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (1994).

81. DUNLOP COMMISSION FINAL REPORT, *supra* note 38, at 37. The results of the BLS survey, which were just released at the time of publication of this article, show that the contingent work force is much smaller than has previously been reported. See REPORT 900, *supra* note 4. This should significantly reduce the need for any new regulations.

Hence, even the Dunlop Commission, whose largely pro-labor members could have been expected to recommend comprehensive new regulations affecting part-time and temporary employment, acknowledged that not enough information exists to support such regulation. Instead, the Commission focused primarily on the problem of misclassification of employees as independent contractors. This focus makes sense because finding a workable solution to the problem of misclassification would ensure that all employees are protected by the broad range of worker protection laws already in existence.

Summary and Conclusion

Policy makers should not rush to pass new laws or regulations affecting the employment relationship. American employers already face a bewildering array of such rules⁸² and the cost of compliance has become enormous, prompting even Secretary of Labor Robert Reich to ask whether the system of worker protections built up since the 1930s has become "simply too expensive for employers."⁸³ One need only look to Europe to see the effects of overregulation. There, government regulations intended to protect workers' jobs — including restrictions on hiring, firing, and temporary work — have resulted in such dismal job growth that economists have coined the term "eurosclerosis" to describe it.⁸⁴ This trend has not been lost on our own officials.⁸⁵

Even if a sound policy case could be made for legally mandating benefits for part-time and temporary workers as Representative Schroeder proposes, her basic premise — that those jobs are growing disproportionately and will soon outnumber full-time jobs — is unfounded. Part-time and temporary work historically has fluctuated with economic cycles and there

82. On June 21, 1993, the Department of Labor issued a list of over 150 federal laws that affect employment, each of which has its own set of regulations. *State* laws and regulations are not included — nor are the tax and accounting issues, environmental or transportation statutes and regulations, or criminal laws that affect workers, employers, and their places of work. See OFFICE OF THE ASS'T SEC'Y OF LABOR FOR POLICY, OUTLINE OF STATUTES AND REGULATIONS AFFECTING THE WORKPLACE (1993) (prepared for the Dunlop Commission).

83. See Janice Castro, *Disposable Workers*, TIME, March 29, 1993, at 43, 47

84. See, e.g., David Henderson, *The Europeanization of the U.S. Labor Market*, 113 THE PUBLIC INTEREST 66, 67 (Fall 1993).

85. Secretary Reich has warned that European government intervention in the wage-setting process and their efforts to preserve, through regulation, existing patterns of employment "have retarded the creation of new jobs." See Robert Reich, *Workers of the World, Get Smart*, N.Y. TIMES, July 20, 1993, at A19.

is far too little data to support predictions of a long-term upward trend. Indeed, the most recent data show that the proportion of part-time employment, which makes up the great majority of so-called "contingent" jobs, has *declined* since 1990 — and that the future rate of growth of temporary jobs, which after a decade of significant increases still represent only 2 percent of total employment, is expected to slow ⁸⁶

If the United States follows the European path and increases the cost of part-time and temporary labor, the outcome is predictable: less labor market flexibility and fewer part-time and temporary jobs. Moreover, without the skills training and transitioning opportunities those jobs provide, many more Americans might have no jobs at all.

86. See THE AMERICAN WORK FORCE, *supra* note 14, at 49.