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# On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment

Gwen Thayer Handelman\*

## I. Introduction

Employment has served as the primary institutional mechanism through which the United States has met the population's basic social welfare needs, and the employment relationship has been the principal determinant of social welfare.<sup>1</sup> Dr. Richard S. Belous notes that much of American social welfare comes through the private sector in the form of health care coverage, pension programs, and employer-sponsored retirement savings plans.<sup>2</sup>

The employment-based social welfare system grew out of postwar collective bargaining addressed to the anomaly noted in 1949 by then United Steelworkers President Philip Murray: "Every well-operated company sets aside money for depreciation, repair, and replacement of machinery. Only infrequently, however, does it make similar provisions for the care of its employees — human beings."<sup>3</sup> The alternative to recognizing employee

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1. See Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 876 (1995); Eileen Appelbaum, *Structural Change and the Growth of Part-Time and Temporary Employment*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 1, 12 (Virginia L. duRivage ed., 1992) [hereinafter NEW POLICIES]; Françoise J. Carré, *Temporary Employment in the Eighties*, in NEW POLICIES, *supra*, at 45, 80; Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1425-40 (1993).

2. Belous, *supra* note 1, at 876.

3. Alan Derickson, *Health Security For All? Social Unionism and Universal Health Insurance, 1935-1958*, 80 J. AM. HIST. 1333, 1349 (1994) (quoting PHILIP MURRAY, THE STEELWORKERS' CASE FOR WAGES, PENSIONS, AND SOCIAL INSURANCE AS PRESENTED TO PRESIDENT TRUMAN'S STEEL INDUSTRY BOARD 20 (1949)); see Edmund F. Wehrle, "For a Healthy America" — Labor's Struggle for National Health Insurance 1943-1949, 5 LAB.'S HERITAGE 28, 42 (1993).

welfare as a business cost was to provide for the general welfare through social insurance to protect "against the common misfortunes of industrial society," as West European nations had by then established.<sup>4</sup> However, unsuccessful in achieving either a significant liberalization of Social Security or national health insurance, the labor movement pursued privatization. Unionized workers "advanced toward the ideal of comprehensive benefits, fully financed by their employers."<sup>5</sup> By the end of the 1950s, the spread of benefits decelerated among rank-and-file workers, "coming to a complete stop in the mid-1980s."<sup>6</sup>

The trend since has been for businesses to shift labor cost responsibilities and risks to workers. Defined benefit pension plans have been replaced by defined contribution savings plans yielding an uncertain retirement income. Other fixed benefit entitlements, such as specified health coverage, have given way to defined contribution spending accounts that allow benefit cost increases to be allocated entirely to employees. Many employers have altogether disavowed responsibility for maintenance of the welfare of their work force.

Employment relations have become increasingly attenuated due to expanded use of independent contractors and other contingent employment arrangements. Recent years have seen fragmentation, polarization, and atomization in the workplace. The portion of the work force covered by collective bargaining agreements has declined, contributing "to growing inequality"<sup>7</sup> Contingent workers are particularly disadvantaged, rarely being extended "fringe benefits," a misnomer belying the centrality to worker well-being of health insurance and retirement income security plans that have formed the core of employment-provided benefits.

Professor Arne L. Kalleberg shows that much part-time work is involuntary and inequitable.<sup>8</sup> Other studies have reached similar conclusions about temporary employment arrangements.<sup>9</sup> Many "part-timers, temps and free-lancers" may be secondary earners, but "a growing number depend on

4. Derickson, *supra* note 3, at 1335.

5. *Id.* at 1355; see O'Connell, *supra* note 1, at 1438; AMERICAN BAR ASS'N SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW lxx-lxxii & 4-5 (Steven J. Sacher et al. eds., 1991) [hereinafter EMPLOYEE BENEFITS LAW].

6. Derickson, *supra* note 3, at 1355.

7. BENNETT HARRISON, LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY 195 (1994).

8. See generally Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV 771 (1995).

9. See generally Carré, *supra* note 1.

these jobs to support families."<sup>10</sup> Moreover, even if some workers voluntarily forego benefits from their own employment and depend on benefits received through a spouse's employment, family coverage raises the labor costs of the covered spouse's employer, increasing that employer's economic incentive to shift work to involuntary contingent employees. Thus, traditional work and family welfare delivery structures have made women "the leading edge of the degradation of the work force."<sup>11</sup>

Employers that provide health insurance to employees subsidize the labor costs of those that do not — directly, by covering spouses and dependents who work for those firms, and also indirectly, through higher doctor and hospital bills that include the cost of providing uncompensated care to the employees of firms that fail to provide medical coverage.<sup>12</sup> Businesses that provide coverage, subject to unfair competition from those that do not, are under tremendous pressure to cut back labor costs in order to remain competitive. Ultimately, the labor costs of employers who do not provide benefits are being subsidized by the employees of those who do in the form of reduced wages.

For this reason, the continued growth of contingent employment in its present form threatens the economic security of the entire American work force. Employment relations have "entered a new era in which the responsibilities for health care insurance, an adequate wage, and indeed, even job creation," have been shifted to individual employees and the family,<sup>13</sup> the institution through which social benefits from the workplace

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10. Sue Shellenbarger, *Work & Family: Flexible Workers Come Under the Umbrella of Family Programs*, WALL ST. J., Feb. 8, 1995, at B1.

11. Barbara P Noble, *Women Seeking a Working Agenda*, N.Y. TIMES, Feb. 5, 1995, at F23 (quoting Heidi Hartmann, head of Institute for Women's Policy Research, speaking at Center for Policy Alternatives' Women's Voices for the Economy Commission meeting).

12. In 1991, employers who sponsored health insurance for their employees indirectly paid \$10.8 billion for uncompensated care and directly paid \$26.4 billion to cover spouses (and other dependents) employed by noninsuring firms. See Press Statement of Senator Tom Daschle, Co-Chair, United States Senate Democratic Policy Committee (Mar. 9, 1994). UAW President Owen Bieber testified before Congress that 15% of the health care costs of the Big Three automakers are attributable to coverage of spouses who are employed but not covered by their employer for health insurance: "In some cases companies are indirectly paying for the health care costs of their competitors." *The Impact on Negotiations*, 28 UAW AMMO (UAW, Detroit, Mich.), Jan. 1994, at 10-11.

13. Virginia L. duRivage, *New Policies for the Part-Time and Contingent Workforce*, in NEW POLICIES, *supra* note 1, at 89, 90; see Belous, *supra* note 1, at [20] (reporting that "rise of contingent work forces in the United States has contributed significantly to the relative decline in health care coverage and pension coverage for typical American workers").

have been broadly distributed. In short, employers increasingly have forced workers who are in no position to protect their own economic security to assume a portion of the employers' business costs without any corresponding right to business profits. Employers increasingly treat employees, particularly part-time and temporary workers, as if they were independent entrepreneurs or outsource work to independent contracting firms that pay lower wages and benefits.<sup>14</sup>

Professor Kalleberg is among those who recognize that the "[l]aws and institutions intended to provide worker protection were established mainly for full-time, permanent employees."<sup>15</sup> These laws and institutions assume, for example, that "most families will receive health insurance through a steadily employed head, while Medicare and Medicaid take care of the rest."<sup>16</sup> To address the needs of the increasing number of those for whom continuous attachment to a single employer is no longer realistically possible, "we need to rethink the U.S. system for provision of social benefits."<sup>17</sup> The policy response to contingent employment should not preclude workers from pursuing alternative work schedules but should ensure that workers individually and as a whole do not lose key social benefits as a result.

In the recent debate over national health reform, the choice seemed to be between either replacing employment-provided benefits with government-provided social insurance<sup>18</sup> or legislating employer responsibility to provide for worker welfare. However, in the new U.S. political environment we do not have much choice but to explore the possibilities of worker self-help.

We have been here before. The story of the labor movement's first campaign for social insurance in the 1940s reflects "the difficult choices faced by organized labor, forever operating in an antagonistic atmosphere."<sup>19</sup> Despite strong ties to the White House, "conservative opposition forced

14. Harrison, *supra* note 7, at 196. Those properly classified as independent contractors are distinguished by their capacity to "suffer a loss or make a profit from the services provided." *Bill Seeks to Establish Standard for Defining Independent Contractors*, 13 Employee Rel. Wkly (BNA) No. 7, at 176 (Feb. 20, 1995) (citing proposed legislation).

15. Kalleberg, *supra* note 8, at 773.

16. Chris Tilly, *Short Hours, Short Shift: The Causes and Consequences of Part-Time Employment*, in *NEW POLICIES*, *supra* note 1, at 15, 39; see Belous, *supra* note 1, at 876.

17. Carre, *supra* note 1, at 80.

18. Many countries "that have high part-time employment levels have developed an advanced social safety net" so that the "lack of employer-provided health benefits may not be a real problem." Belous, *supra* note 1, at [17].

19. Wehrle, *supra* note 3, at 44.

organized labor to rely on its tradition of voluntarism and self-reliance through economic power as the most immediate and perhaps only avenue" to secure economic security for workers.<sup>20</sup>

By worker self-help I mean: (1) negotiating protections through collective bargaining; (2) tapping technical expertise to enforce expansive interpretations of existing protective laws; and (3) lobbying for bipartisan, worker-friendly tax legislation to respond to the "individual responsibility" being thrust on workers in this brave, new, every-man-for-himself world. This paper offers some illustrative strategies to achieve improved health and retirement income security for contingent workers in response to the coercive and degraded employment environment that Professor Kalleberg and others have described.

## II. The Problem

According to Ellen Bravo, President of 9to5, National Association of Working Women, an affiliate of the Service Employees International Union (SEIU), part-time and temporary job options "should be voluntary and equitable. [But] in many cases, they are neither."<sup>21</sup> As Professor Kalleberg notes, "If people voluntarily choose to work part time, then presumably they are getting what they want and there are fewer problems in need of legislative and regulatory remedies."<sup>22</sup> That is not to say that there are not important questions as to how public policy can facilitate, rather than obstruct, voluntary contingent employment arrangements. The federal income tax "marriage penalty" and the structure of Social Security discourage married secondary earners from entering the work force as part-time or temporary workers.<sup>23</sup> Joint income tax filing rates tax the second earner's entire income at a high marginal rate, and a married person filing a separate return pays a higher tax than a single worker.<sup>24</sup> Further, secondary earners pay Social Security taxes that do not increase the benefits to which they are already entitled, without entering the work force, as dependents.<sup>25</sup>

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20. *Id.*

21. Shellenbarger, *supra* note 10, at B1.

22. Kalleberg, *supra* note 8, at 793.

23. See generally Richard C. Beck, *Joint Return Liability and Poe v Seaborn Should Both be Repealed*, 49 TAX NOTES 457 (1990); Jonathan B. Forman, *A Strategy for Middle-Class Tax Relief to Help Families*, 65 TAX NOTES 127 (1994); Deborah A. Geier, *Restoration of the Two-Earner Couple Deduction: Why?*, 65 TAX NOTES 497 (1994); Marjorie E. Kornhauser, *Abolish the Joint Return!*, 65 TAX NOTES 921 (1994).

24. I.R.C. § 1(a), (d) (Supp. V 1993).

25. Social Security Old Age and Survivors Insurance (OASI) provides benefits to

However, the greater public policy challenges are posed by involuntary contingent employment arrangements. As Professor Kalleberg observes, "[P]eople who do not choose to work part time are presumably less able to satisfy their needs and wants."<sup>26</sup> Professor Kalleberg's and other studies show that contingent employment is in fact leaving basic economic security needs unmet.

Five years ago, 4.5% of the total work force, representing 25% of part-time workers, worked part time involuntarily, and involuntary part-time work is expanding at twice the rate of voluntary part-time work.<sup>27</sup> In 1992, close to one-third of those working part time were doing so involuntarily.<sup>28</sup> Professor Kalleberg notes that the numbers actually may be higher than reported because the number of "voluntary" part-time workers may include those who want, but are not able, to work full time, for example due to lack of adequate child care or transportation.<sup>29</sup> Professor Kalleberg's analysis contradicts the comfortable assumption that part-time employment has mushroomed to satisfy a demand generated by women's participation in the work force and preference for flexibility.

Other studies indicate that women are taking temporary work because of their "lack of bargaining power and limited employment alternatives."<sup>30</sup> Women accept temporary work because employers are creating more

protect elderly spouses and widows of covered workers. When an individual is entitled to benefits both as a covered worker and as the spouse of a covered worker, Professor Jonathon B. Forman explains that "the so-called 'dual entitlement rule' prevents her from receiving both her full worker benefit and her full spousal benefit. Instead, only the larger of the two benefits is paid. Consequently, at retirement, a woman can discover that her career-long payments of OASI taxes get her absolutely no additional OASI benefits." Forman, *supra* note 23, at 127.

26. Kalleberg, *supra* note 8, at 793.

27. *Id.* at 772.

28. See Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge for the Future*, 10 LAB. LAW 143, 145 (1994) (citing U.S. Department of Labor statistics).

29. See Kalleberg, *supra* note 8, at 776; see also Sue Shellenbarger, *Work & Family: When Workers' Lives Are Contingent on Employers' Whims*, WALL ST. J., Feb. 1, 1995, at B1 (reporting that "many contingent workers face daunting child-care and family problems, without any of the usual safety nets such as paid sick or personal days"); duRivage, *supra* note 13, at 111 (citing 1980 Presser and Baldwin finding that nearly 35% of women working part time or looking for work reported they would work more hours if good child care were available).

30. Appelbaum, *supra* note 1, at 4; see Belous, *supra* note 1, at 871 (reporting conscious corporate strategy to use contingent workers).

temporary positions, not because contingent employment meets their needs.<sup>31</sup>

Indeed, Professor Kalleberg's work shows that contingent employment is spawning an underclass of working Americans by contributing to polarization in income, benefits, and noneconomic job rewards.<sup>32</sup> Others agree that, for too many workers, "flexibility breeds social and economic insecurity."<sup>33</sup> Professor Kalleberg reports that part-time workers earn roughly half the hourly cash wages of full-time workers.<sup>34</sup> A breakdown by occupational category showed the same 50% differential in wages.<sup>35</sup> Temporary workers earn 20% less on average than permanent employees.<sup>36</sup>

Most part-time workers are not covered under employment-provided health or retirement income plans, with involuntary part-time workers being "nearly three times as likely not to have health insurance as voluntary part-time workers."<sup>37</sup> For Professor Kalleberg, the "pattern of disadvantage for part-time workers with regard to fringe benefits is clear. Persons working part time obtain fewer fringe benefits than those working full-time, even after controlling for their education, age, race, length of experience with their employer, occupational level, authority position, whether they are self-employed, and the size of their employing establishment."<sup>38</sup> Although some contingent workers have health insurance under the family coverage provided through the employment of a spouse or other family member, studies show that close to half of part-time workers have no direct or indirect employment-based health coverage.<sup>39</sup> Temporary workers are similarly disadvantaged.<sup>40</sup> Among temporary employees, the

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31. Appelbaum, *supra* note 1, at 4.

32. Kalleberg, *supra* note 8, at 793.

33. duRivage, *supra* note 13, at 89.

34. Kalleberg, *supra* note 8, at 780.

35. Belous, *supra* note 1, at 874 tbl. 5; *see* Hiatt & Rhinehart, *supra* note 28, at 148 (reporting that studies show that part-time worker who is identical to full-time worker in industry, occupation, sex, age, and other characteristics still earns average of 10-15% less per hour).

36. *See* Hiatt & Rhinehart, *supra* note 28, at 148-49.

37. *Id.* at 149; *see* Kalleberg, *supra* note 8, at 782.

38. Kalleberg, *supra* note 8, at 782-83.

39. *See* Belous, *supra* note 1, at 875 tbl. 6 (reporting that 48-49.5% of part-time workers have no coverage under employer plan); Tilly, *supra* note 16, at 22 (citing Employee Benefits Research Institute report that approximately 42% of part-time workers have no direct or indirect employment-based health coverage).

40. *See* Hiatt & Rhinehart, *supra* note 28, at 149.



Employee Benefits Research Institute has estimated that 30% lack any health insurance.<sup>41</sup>

Professor Kalleberg's analysis demonstrates that these differences are not justified by differential work motivations of part-time and full-time workers. His data show that full-time and part-time workers are about equally committed to their employers<sup>42</sup> and that part-time workers are just as likely to designate work as a person's most important life activity<sup>43</sup>. In sum, contingent work arrangements have evolved not to accommodate a less committed component of the work force but to unfairly disadvantage many workers who have no other choice.<sup>44</sup>

### III. Strategies

In 1946, a time not unlike the present, following a calamitous election and failed health reform effort, then United Auto Workers (UAW) President Walter Reuther announced that "[i]n the immediate future, security will be won for our people only to the extent that the union succeeds in obtaining such security through collective bargaining."<sup>45</sup> Private contract is the regulatory vehicle of choice in the new employment and political regime, and contract negotiations are a means of mandating employer responsibility for worker welfare. The new egoistic brand of individualism is, of course, the antithesis of union solidarity and mutuality. Nevertheless, the new realities and the old values may be partially reconciled through collective bargaining by which "workers themselves can flexibly negotiate changes in the terms of employment, rather than counting on government policies that are often rigid and difficult to enforce."<sup>46</sup>

There is also, of course, the individualistic vehicle of private litigation to enforce employment rights. Often, denying benefits to workers classified as part-time, temporary, or independent contractors violates the

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41. See Carré, *supra* note 1, at 56.

42. Kalleberg, *supra* note 8, at 790.

43. *Id.* at 777.

44. See Hiatt & Rhinehart, *supra* note 28, at 147-48.

45. Derickson, *supra* note 3, at 1344 (citing Walter Reuther, Announcement of UAW-CIO Social Security Program (Nov 15, 1946), *quoted in* Frank G. Dickmson, *The Trend Toward Labor Health and Welfare Programs*, 133 JAMA 1285, 1286 (1947)); see Gwen T. Handelman, *Health Care Reform and Workers: Which Stories Do You Believe?*, in AMERICAN BAR ASS'N SECTION OF LABOR AND EMPLOYMENT LAW 1994 ANNUAL MEETING PROGRAM PAPERS Tab 8 (May 31, 1994); Wehrle, *supra* note 3, at 36.

46. Tilly, *supra* note 16, at 40.

requirements of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA),<sup>47</sup> or the Internal Revenue Code of 1986, as amended (Code).<sup>48</sup> Individual lawsuits are a means of enforcement. As one labor lawyer has observed, "Prosecuting or proposing to prosecute such lawsuits should dissuade employers, at least in marginal situations"<sup>49</sup> However, litigation is a costly one-by-one approach that fails to address workplace unfairness systematically.<sup>50</sup> To the extent that the success of claims turns on individual facts and circumstances, as is often the case, class actions will be unavailing. Well-informed advocates of workers' rights, willing and able to publicize violations and seek enforcement by the Department of Labor or Internal Revenue Service (IRS), may avert the need to vindicate rights through litigation.

Legislative lobbying efforts also may make the difference between success and failure of closely contested legislative proposals that would affect workers for good or ill, such as worker classification reform and taxes on employment-provided health benefits.

#### A. Organizing and Collective Bargaining

Unions such as the SEIU, UAW, Communications Workers of America (CWA), and United Food and Commercial Workers (UFCW) are seeking improved status for contingent workers.<sup>51</sup> The goal is to expand "hard-won social benefits and employment rights — which are currently tied to traditional forms of employment — to cover workers in new employment arrangements."<sup>52</sup> Equalization efforts may take diverse forms to fit the particular employment environment, perhaps including offering workers a menu of diverse benefits from which to choose.<sup>53</sup> However, employers often have used flexible benefit arrangements to bail out of their

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47. 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993).

48. Title 26 of the U.S.C.

49. Marsha S. Berzon, *Employer Evasion of Collective Bargaining and Employee Protective Statutes Through Independent Contractor Status*, 13 LAB. L. EXCHANGE 1, 2 (1994).

50. See generally Michael F. Marmo, *Is There Justice for EMPLOYERS? Employment Litigation and Its Increasing Burden on the Judicial System — It's Time for ADR!* (Aug. 8, 1993) (presented at session on "Advancing Justice: Is There Justice for ALL?", ABA Annual Meeting, New York, N.Y.) (on file with author).

51. Shellenbarger, *supra* note 10, at B1.

52. Carré, *supra* note 1, at 81.

53. See, e.g., I.R.C. § 125 (Supp. V 1993) (governing tax treatment of flexible benefit arrangements).

health benefit responsibilities, capping their obligation at a set dollar amount and leaving employees to contend with health cost inflation on their own. Benefits arrangements for contingent workers "will have to ensure that the costs of these benefits [will] not be borne solely by individual workers."<sup>54</sup>

The UAW has included part-time workers in agreements, and unions representing service workers have successfully negotiated hourly wage parity, seniority rights, and prorated and full benefits for contingent workers.<sup>55</sup> Those organizing and bargaining for contingent workers, however, face legal and practical obstacles.

### 1. *Legal Considerations*

Employee representatives should be aware of potential legal issues and plan accordingly. Including contingent workers in a collective bargaining unit allows unions to extend group health insurance and retirement plan participation and to negotiate the right of temporary workers to move to permanent status.<sup>56</sup> However, collective bargaining on behalf of contingent workers is difficult to achieve under current labor law. The National Labor Relations Board (NLRB) determines "appropriate bargaining units" and has been "inconsistent in its rulings as to whether part-time and contingent workers should vote along with full-time employees in representational elections."<sup>57</sup>

The NLRB has included short-term hires in the bargaining unit by using, on a case-by-case basis, the criterion of "community of interests" between the permanent and temporary work forces.<sup>58</sup> A union may include temporary employees who establish a sufficient connection with the pre-existing work force and, depending on state law, may negotiate to require that workers supplied by temporary help and staffing firms belong to the union.<sup>59</sup> The NLRB has been willing to find both the temporary agency and the client-employer jointly responsible for violations of temporary workers' rights under the National Labor Relations Act (NLRA).<sup>60</sup>

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54. Carre, *supra* note 1, at 81.

55. duRivage, *supra* note 13, at 117.

56. Carre, *supra* note 1, at 79.

57. duRivage, *supra* note 13, at 117.

58. Carré, *supra* note 1, at 79.

59. See, e.g., Edward A. Lenz, *Co-Employment — A Review of Customer Liability Issues in the Staffing Services Industry*, 10 LAB. LAW 195, 206-08 (1994).

60. *Id.* at 206 (citing *NLRB v. Western Temporary Servs., Inc.*, 821 F.2d 1258 (7th Cir. 1987)).

Nevertheless, "leased employees," who may have an even greater interest in joining a union because they work on an ongoing basis for the client employer, may be effectively denied the right to union representation. "As presently interpreted, the [NLRA] places little responsibility on clients that effectively dictate the economic conditions of their contractors' employees, or even on those that closely control the labor relations of their contractors."<sup>61</sup> The NLRB may recognize joint employer status, although this is a difficult test to meet,<sup>62</sup> but deny "inclusion of the joint employer's workers in the existing bargaining unit because employer consent [is] lacking."<sup>63</sup>

Similarly, the NLRA does not ensure the right of independent contractors to bargain collectively. Indeed, organizing nonemployee independent contractors is an unfair labor practice.<sup>64</sup> Union organizing efforts are unlawful unless directed toward the labor relations between an employer and employees. However, the designation of the employer is not dispositive. Rather, the common-law test applies to distinguish employees from independent contractors.<sup>65</sup> Legislative history of the enactment of common-law standards under the NLRA explains:

"Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is upon profits.<sup>66</sup>

Potential adverse tax consequences also impede the organization of independent contractors. Under section 501(c)(5) of the Code, "labor organizations" generally are exempted from federal income taxes. IRS

61. Hiatt & Rhinehart, *supra* note 28, at 154; *see also* Gregory L. Hammond, *Flexible Staffing Trends and Legal Issues in the Emerging Workplace*, 10 LAB. LAW 161, 173-75 (discussing Capitol EMI Music, Inc., 311 N.L.R.B. No. 103 (May 28, 1993)).

62. It must be shown that the staffing firm and the host employer codetermine essential terms and conditions of employment. Hiatt & Rhinehart, *supra* note 28, at 154 (citing NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1125 (3d Cir. 1982)).

63. *Id.* at 155 (citing Brookdale Hosp. Med. Ctr., 313 N.L.R.B. No. 74 (Nov 26, 1993); Flatbush Manor Care Ctr., 313 N.L.R.B. No. 73 (Nov 26, 1993); Greenhoot, Inc., 205 N.L.R.B. 250 (1973)).

64. *See* Berzon, *supra* note 49, at 1 (citing Local No. 221 v. NLRB, 899 F.2d 1238 (D.C. Cir. 1990)).

65. *Id.* at 8-9

66. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947).

interpretive rulings have indicated that the inclusion of a "small percentage" of independent contractors in the membership does not affect a labor organization's exempt status, implying that larger percentages would.<sup>67</sup> One ruling in fact denied tax exempt status to a "labor organization," defined as "an organization that primarily serves the interests of employees as distinguished from serving the interests of either employers or self employed persons."<sup>68</sup>

The organization at issue in the ruling included entrepreneurs and employers, but the broad language of the ruling could extend to organizations that include independent contractors, who, although essentially wage laborers, are classified as self-employed. Unions either should include workers classified as independent contractors in a local in which they will not constitute a majority or, if that is not feasible, be prepared to argue the economic realities of the independent contractors as individuals who exchange their labor for wages rather than as entrepreneurs or employers.<sup>69</sup>

Another legal question for unions is whether organizing independent contractors will run afoul of the federal antitrust laws. The most important provisions to consider are section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy" that unreasonably restrains interstate or foreign commerce,<sup>70</sup> and the statutory exemption under section 6 of the Clayton Act, which provides that "[t]he labor of a human being is not a commodity or article of commerce."<sup>71</sup> The statutory exemption does not apply when labor unions act in combination with "nonlabor groups."<sup>72</sup>

The Supreme Court has held that independent contractors constitute a "labor group" so long as there is "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors."<sup>73</sup> The Court

67 Robert J. Jones, *Employees and Independent Contractors: The Tax Consequences for Labor Unions*, 13 LAB. L. EXCHANGE 15, 16 (1994) (citing Rev. Rul. 77-154, 1977-1 C.B. 148; Rev. Rul. 74-167, 1974-1 C.B. 134).

68. *Id.* at 17 (citing Gen. Couns. Mem. 37,035 (Mar. 7, 1977)).

69. *Id.* at 18.

70. 15 U.S.C. § 1 (Supp. V 1993) (as construed by *Standard Oil Co. v. United States*, 221 U.S. 1 (1911)).

71. 15 U.S.C. § 17 (1988).

72. Peter J. Kadzik, *Antitrust Concerns in Labor Union Organization of Independent Contractors*, 13 LAB. L. EXCHANGE 31, 33 (1994).

73. *American Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968); see Kadzik, *supra* note 72, at 33-35.

found such a presence of economic interrelationship between the union members and the "independent" workers when the union that sought to organize the independent members of the occupations involved had already organized employee members of the occupation. Thus, unions seeking to organize workers who are classified as independent contractors should determine whether there is a group of employees who perform similar work and seek to organize the employees first if they are not already organized.<sup>74</sup> A union that does not organize the employee members of the occupation "should attempt to characterize the independent contractors as employees or the equivalent of employees in a practical economic sense."<sup>75</sup> The more that "so-called independent contractors" look like employees selling only the labor of a human being and less like "independent economic enterprises," the stronger is the argument for treating them like employees.<sup>76</sup>

## 2. Practical Considerations

The practical obstacles to organizing and bargaining for contingent workers may be more problematic than the legal ones. Employers are hiring sparingly and announcing layoffs. This situation has affected the bargaining climate, making many employees reluctant to discuss their own wage and benefit improvements at the bargaining table. With many people out of work and looking for jobs, job security is a bargaining priority.<sup>77</sup> Also, the job lock resulting from a worker's inability to replace employer-sponsored health coverage (due to a pre-existing condition or to the unavailability of affordable coverage through alternative employment or in the individual insurance market) has seriously impaired worker mobility and underscored the dependent status of full-time employees.

The escalating cost of health care also has undercut full-time workers' ability to bargain effectively over wages. Health care issues have proved a valuable organizing tool for unions, but increased levels of funding have gone principally to retaining, not improving, benefits. Thus, bargaining to extend fringe benefits to contingent workers may be met with strong opposition not only from employers but from full-time workers as well. For

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74. Kadzik, *supra* note 72, at 38.

75. *Id.* at 40.

76. *Id.* at 39.

77. See Ethel R. Nance, *Bargaining '93*, AFL-CIO REVIEWS THE ISSUES (AFL-CIO, Washington, D.C.) No. 66, 1993, at 1, Robert J. Rabin, Book Review, 10 LAB. LAW 761, 762 (1994) (reviewing THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION (Matthew W Finkin ed., 1994)).

employers, any bargaining session over health benefit costs is not only about adding to business costs but also about potentially lightening the load of competitors. Health benefits have been at the center of labor-management tensions for the past ten years and are the sticking point responsible for more strikes than any other issue.<sup>78</sup>

However, the issue of employer coverage of basic welfare benefits comes down to whether employers will be required to internalize and spread the costs of their labor supply or instead be allowed to continue shifting to workers costs that employers properly should bear. As explained by Senator Donald Riegle (D-Mich.) in the course of the health reform debate, employees' good health creates an economic benefit over time to the employer by ensuring that employees will be able to work.<sup>79</sup> Because a major impetus behind contingent employment trends has been avoidance of labor costs, bargaining for employers to bear the full labor costs of the enterprise by extending benefits to contingent workers is in the interests of all union members so as not to be displaced by "cheap" labor.

With respect to including temporary hires in the bargaining unit, unions need to manage two goals that at times might seem contradictory. One objective is to protect the temporary workers; the other is to prevent the wholesale conversion of permanent full-time jobs into temporary work. "The challenge is to protect the jobs and living standards of workers who remain part of the permanent work force, while at the same time ensure that contingent workers receive the stability and protection that they need and deserve."<sup>80</sup> Unions are accustomed to balancing interests under their duty of fair representation,<sup>81</sup> and union involvement ensures that "workers' interests are represented in how employment relationships are structured within the firm."<sup>82</sup>

Contingent workers represent valuable organizing potential for unions and constitute a vulnerable and exploited population, which is precisely the

78. See generally SEIU, *OUT OF CONTROL, INTO DECLINE: THE DEVASTATING 12-YEAR IMPACT OF HEALTHCARE COSTS ON WORKER WAGES, CORPORATE PROFITS AND GOVERNMENT BUDGETS* (1992); AFL-CIO, *DANGER AHEAD* (1992); AFL-CIO, *BARGAINING FOR BENEFITS* (1992).

79. *Senators Push Shared Responsibility As Means To Achieve Universal Coverage*, 2 Health Care Pol'y Rep. (BNA) 492 (Mar. 14, 1994).

80. Hiatt & Rhinehart, *supra* note 28, at 147

81. A union has a duty to represent members of its bargaining unit in good faith, without arbitrariness, hostility, or invidious discrimination. *Vaca v Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v Huffman*, 345 U.S. 330 (1953).

82. Carre, *supra* note 1, at 79

constituency unions have existed to serve. "Historically, unions have been a major force working to eliminate secondary labor markets and improve job quality"<sup>83</sup> As Professor Kalleberg points out, "[T]he lower pay, fewer benefits, lesser job security, and lack of advancement opportunities given to [contingent workers] may signal both the opportunity and need for unions to increase their representation of this group."<sup>84</sup> Professor Kalleberg's research shows that part-time workers are equally (if not more) likely as full-timers to want union representation,<sup>85</sup> thus seeking empowerment through group association. The labor movement cannot afford to overlook this source of "new recruits,"<sup>86</sup> whose isolation may be relieved by group commitment. Contingent employment conditions and the threat of degradation these conditions pose for the entire work force are strong evidence that American workers still need unions and that organized labor has a role in the twenty-first century

### B. Utilizing Technical Expertise

Union representation is most attractive and collective bargaining most effective if employee representatives are well informed. In many cases the laws applying to "the murky world" of contingent employment are "hazy, definitions and regulations are easily stretched, and enforcement mechanisms are often very weak."<sup>87</sup> Probably many employers have made a "utility-maximizing decision to violate [employment laws] when the probability of punishment is often very low"<sup>88</sup> Workers' rights under these laws may not depend upon unions for their enforcement. "Help may come in the person of a lawyer or a government agent rather than a shop steward or business agent."<sup>89</sup> However, there are not "enough judges and courthouses to make common law litigation the modal institution of employee grievance processing."<sup>90</sup> Employee representatives may make the creation of exploitive contingent employment relationships less attractive by raising these issues in collective bargaining and, when necessary,

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83. Tilly, *supra* note 16, at 40.

84. Kalleberg, *supra* note 8, at 791-92.

85. *Id.* at 791.

86. *Id.*

87. Belous, *supra* note 1, at 2.

88. *Id.*

89. Rabm, *supra* note 77, at 761.

90. *Id.* at 762 (quoting Professor Alan Hyde).



"inducing courts and agencies to look more closely" at some of these arrangements.<sup>91</sup>

Examples of legal provisions that may be used as tools to extend benefits to contingent workers are (1) Code section 410, which the IRS has indicated restricts employers' ability to deny part-time employees participation in retirement plans;<sup>92</sup> (2) ERISA section 510,<sup>93</sup> which prohibits employers from interfering with a worker's attainment of employee benefit rights; and (3) IRS worker classification rules that identify which workers should be classified as employees for tax and ERISA purposes.<sup>94</sup>

### *1 Plan Participation Rules*

Retirement plans that meet certain requirements under the Code are qualified for favorable tax treatment. First, employer contributions to "qualified plans" are not taxable to the employee until distributed (usually years later, after retirement).<sup>95</sup> Second, the employer is allowed an immediate deduction.<sup>96</sup> Third, investment earnings on plan assets accumulate tax-free in a tax-exempt trust.<sup>97</sup> There is no blanket requirement that plans cover all employees of the employer, and employers usually limit coverage to reduce plan costs. However, plans may not discriminate in favor of "highly compensated employees,"<sup>98</sup> as defined in the Code.<sup>99</sup>

Some Code rules set minimum standards for plan operation, such as participation, vesting, and accrual rules, which are replicated under Title I of ERISA.<sup>100</sup> If a plan fails to satisfy the standards, the plan will lose its qualified status, and highly compensated employees will be taxed on the

91. Berzon, *supra* note 49, at 13.

92. I.R.C. § 410(a) (1988 & Supp. V 1993).

93. Employee Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (1988).

94. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885-2886 (extended indefinitely by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 269(c), 96 Stat. 324, 552-553); Treas. Reg. § 31.3121(d)-1(c)(2) (as amended 1980).

95. I.R.C. § 402 (Supp. V 1993).

96. *Id.* § 404 (1988 & Supp. V 1993).

97. *Id.* § 501.

98. *Id.* § 401(m) (1988).

99. *Id.* § 414(q) (1988 & Supp. V 1993).

100. EMPLOYEE BENEFITS LAW, *supra* note 5, at 74. "In general, the Code rules relating to nondiscrimination with respect to coverage, nondiscrimination in contributions or benefits and to limits on benefits and contributions are not found in Title I." *Id.*

value of their vested plan benefits. In addition, compliance with a minimum standard can be enforced through private litigation by a plan participant or by the Department of Labor under Title I of ERISA. A proven violation of an ERISA minimum standard results in the plan's being required to comply with the rule both prospectively and retroactively.<sup>101</sup>

ERISA section 202<sup>102</sup> and Code section 410<sup>103</sup> establish minimum standards for coverage and participation, including maximum age and service requirements for participation and tests to determine whether the plan covers a sufficiently broad group of employees. Although Code section 410(b) requires broad coverage, a plan may arbitrarily exclude a certain percentage of employees under the "ratio test,"<sup>104</sup> and greater rates of exclusion are allowed under the "average benefits test." The average benefits test has two prongs: the "average benefits percentage" test<sup>105</sup> and the "nondiscriminatory classification" test, under which the classification of employees covered must be reasonable, reflect a bona fide business classification of employees, and not discriminate in favor of highly compensated employees.<sup>106</sup>

A number of plan sponsors exclude part-time employees from participation on the theory that "full-time employees" is an acceptable classification under section 410(b). According to the IRS, excluding part-time employees may be permissible under section 410(b), but the exclusion of part-time employees may violate section 410(a).<sup>107</sup> Section 410(a) prohibits a qualified plan from requiring as a condition of participation that an employee complete more than one (in certain cases, two) year(s) of service, defined as a 12-month period during which the employee has at

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101. In some cases, the IRS also will allow retroactive amendment or correction. *Id.* at 74-75.

102. 29 U.S.C. § 1052 (1988 & Supp. V 1993).

103. I.R.C. § 410 (1988 & Supp. V 1993).

104. A plan meets the ratio test if it benefits a percentage of nonhighly compensated employees which is at least 70% of the percentage of highly compensated employees covered. Treas. Reg. § 1.410(b)-2 (as amended in 1993).

105. A plan meets the "average benefits percentage test" if the "average benefits percentage" of nonhighly compensated employees is at least 70% of the "average benefits percentage" of highly compensated employees. Treas. Reg. § 1.410(b)-5 (as amended in 1993).

106. I.R.C. § 410(b)(2) (1988).

107. Tech. Adv. Mem. 95-08-003 (Nov 10, 1994); see *IRS Issues Field Directive on Employee Plan Exclusion of Part-Time Employees*, [1994] Daily Tax Rep. (BNA) No. 224, at G-1 (Nov 23, 1994).

least 1,000 hours of service. Recent IRS guidance concludes that exclusion of a class of part-time employees imposes an indirect service requirement on plan participation. The requirement is impermissible if it could exceed one year of service (or two years, where applicable). "A plan may not exclude any part-time employee where it is possible for that employee to complete one year of service (or two)."<sup>108</sup> The IRS's interpretation of the section 410(a) participation rules, taken together with ERISA section 510's prohibition of interference with attainment of employee benefits rights, should be useful in representing part-time employees.

## 2. ERISA Section 510

An employer may exclude from plan participation any employee who never completes one year of service, that is, an employee who works less than 1,000 hours a year.<sup>109</sup> Employers often attempt to keep yearly total hours below this threshold for employees supplied by staffing firms. It also has become increasingly common for large corporations to establish an in-house pool of contingent workers maintained to meet irregular and fluctuating periods of labor demand. The Travelers Insurance Company, for instance, reportedly "has a well-publicized on-call pool of retirees," whose work hours are kept at or below 960 hours per year "to prevent them from accruing additional pension credits that would increase their pension income."<sup>110</sup>

However, manipulating part-time work schedules to ensure that workers log less than 1,000 hours a year may violate ERISA. Section 510 makes it unlawful:

for any person to discharge, fine, suspend, expel, discipline, or discriminate, against a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.<sup>111</sup>

Section 510 confers protection on a "participant" as defined under ERISA section 3(7).<sup>112</sup> The statutory definition of "participant" includes a person who may become eligible for plan participation, and several courts have held

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108. *Id.*

109. 29 U.S.C. § 1052 (1988 & Supp. V 1993).

110. Carré, *supra* note 1, at 78-79 (citing 1986 9to5 study).

111. 29 U.S.C. § 1140 (1988).

112. 29 U.S.C. § 1002(7) (1988).

that section 510 covers claims that an employer's conduct prevented an employee from becoming a participant.<sup>113</sup>

Nearly every employment action affects benefit entitlements, and loss of benefits as a "mere consequence" of an employment action will not support a section 510 claim.<sup>114</sup> However, it is unlawful for an employer to take an adverse employment action if interference with employee benefit rights is the "determinative"<sup>115</sup> or "motivating"<sup>116</sup> factor. *Seaman v Arvida Realty Sales*,<sup>117</sup> a 1993 Eleventh Circuit case, explained that the standard does not require a showing that "interference with ERISA rights was the sole reason but does require plaintiff to show more than the incidental loss of benefits."<sup>118</sup>

Hiring workers for positions specifically designed to prevent their ever becoming entitled to benefits, if it could be proved,<sup>119</sup> might be sufficient. Denying a worker's request to work additional hours to keep the worker below 1,000 hours presents an even stronger case because refusal to extend a worker's hours may be seen as an employment action more analogous to termination, which has been the subject of cases like *Seaman*. *Seaman* held that section 510 applies to claims of vested plaintiffs that they were terminated and re-employed as independent contractors to prevent additional

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113. See Report of the Subcommittee on Benefit Claims and Individual Rights, in AMERICAN BAR ASS'N SECTION OF LABOR AND EMPLOYMENT LAW EMPLOYEE BENEFITS COMMITTEE 1995 MID-WINTER MEETING PROGRAM PAPERS Tab 1, at 51 (1995) (citing Stephen Allen Lynn, P.C. Employee Profit Sharing Plan and Trust v Stephen Allen Lynn, P.C., 25 F.3d 280 (5th Cir. 1994); Vartanian v Monsanto Co., 14 F.3d 697 (1st Cir. 1994)); ABA SECTION OF LABOR AND EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 169-70 (Supp. 1994) [hereinafter EMPLOYEE BENEFITS LAW SUPPLEMENT].

114. See Ronald Dean, Recent Section 510 Developments 6 (Jan. 27, 1995) (prepared for ABA Section of Taxation 1995 Midyear Meeting in Los Angeles, Cal.) (citing Meredith v Navistar Int'l Transp., 935 F.2d 124 (7th Cir. 1991); Gavalik v Continental Can, 812 F.2d 834 (3d Cir. 1987)).

115. *Id.* at 7

116. *Id.* (citing Clark v Coats & Clark, 990 F.2d 1217 (11th Cir. 1993); Dytrt v Mountam State, 921 F.2d 889 (9th Cir. 1990); Dister v Continental Group, 859 F.2d 1108 (2d Cir. 1988)).

117. 985 F.2d 543 (11th Cir.), *cert. denied*, 114 S. Ct. 308 (1993).

118. *Seaman v Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir.), *cert. denied*, 114 S. Ct. 308 (1993).

119. Nominally, the Title VII shifting burdens of proof and production apply. See Dean, *supra* note 114, at 7; EMPLOYEE BENEFITS LAW SUPPLEMENT, *supra* note 113, at 169-70; Report of the Subcommittee on Benefit Claims and Individual Rights, *supra* note 113, at 53-54 (citing DeVoll v Burdick Painting, Inc., 35 F.3d 408 (9th Cir. 1994)).

benefit accruals.<sup>120</sup> The court found that the action, taken to eliminate pension and health plan costs, violated section 510. This reasoning may be extended to find that employment practices like the Travelers Insurance Company's<sup>121</sup> constitute unlawful interference with the attainment of employee benefit rights if the employer refuses to allow an employee to work additional hours so as to prevent additional pension accruals.

Further, *Seaman* raises the question whether the decision to outsource or to hire workers with independent contractor status can constitute discrimination prohibited under section 510 if the action would not have been taken "but for" the savings on benefits. Alternatively, workers might challenge their classification as independent contractors and claim coverage under the terms of an employer's fringe benefit plans.

### 3. Worker Classification Rules

Many employers, either intentionally or unintentionally, misclassify their workers as independent contractors rather than as employees<sup>122</sup> for tax advantages, to avoid responsibility for providing them fringe benefits, and perhaps also to construct barriers to union organizing. For tax purposes, businesses report payments to, but do not withhold employment taxes from, independent contractors. This relieves the employer of liability for the employer's share of Federal Insurance Contributions Act (FICA)<sup>123</sup> and Federal Unemployment Tax Act (FUTA)<sup>124</sup> taxes. FICA payments are for Social Security benefits and Medicare.<sup>125</sup> Misclassifying employees allows employers to "cut their labor costs by as much as 25[%]."<sup>126</sup> These costs are shifted to the independent contractor, who is liable not only for payment of estimated taxes because income tax is not being withheld but also for all

120. See 1994 Report of the Subcommittee on Civil Procedure, in AMERICAN BAR ASS'N SECTION OF LABOR AND EMPLOYMENT LAW EMPLOYEE BENEFITS COMMITTEE Tab 11, at 5 (1995) (citing *Seaman v Arvida Realty Sales*, 985 F.2d 543, 545 (11th Cir.), cert. denied, 114 S. Ct. 308 (1993)).

121. See *supra* note 110 and accompanying text (describing practices of Travelers).

122. See *Taxleads: Section 1099 Compliance Crackdown*, [1995] Daily Tax Rep. (BNA) No. 5, at H-1 (Jan. 9, 1995) (citing PrO Unlimited consulting firm figures that IRS has reclassified more than 400,000 workers since 1987 and that one out of seven companies is incorrectly treating part of its employee population as independent contractors).

123. I.R.C. §§ 3101-3128 (1988 & Supp. V 1993).

124. *Id.* §§ 3301-3311.

125. Berzon, *supra* note 49, at 12.

126. *No Consensus at Small Business Hearing on Worker Status Issue*, [1995] Daily Tax Rep. (BNA) No. 13, at G-4 (Jan. 20, 1995) (quoting Rep. Tom Lantos (D-Cal.)).

Social Security and Medicare payments under the Self Employment Contributions Act (SECA).<sup>127</sup> Additionally, these workers are left entirely unprotected by unemployment compensation. Misclassification can have a "devastating effect on the unsuspecting worker," who may be unaware of the tax obligations.

Employers also save on retirement and health benefits by creating the appearance of independent contractor status. Independent contractors need not be counted in calculating whether plans comply with the statutory coverage requirements, which apply to employees.<sup>128</sup> Further, employers generally are not required under the terms of their plans to provide pensions and benefits to independent contractors.<sup>129</sup> Plan contributions generally are made only on behalf of "employees."<sup>130</sup>

Simply designating a worker as an independent contractor is not enough to avoid benefit costs legally. For both employment tax and ERISA purposes, employment status is determined under the "usual common law rules applicable in determining the employer-employee relationship,"<sup>131</sup> subject to various exceptions for employment tax purposes, notably the "safe harbor" provisions of section 530 of the Revenue Act of 1978.<sup>132</sup> Treasury regulations explain that a worker is an employee if the "person for whom services are performed has the right to control and direct" the worker "not only as to the result to be accomplished but also as to the details and means by which that result is accomplished."<sup>133</sup> Actual control is not necessary as long as the *right* to control is present.<sup>134</sup> Under the IRS test, twenty factors are to be considered in determining, on a case-by-case basis, whether sufficient control and direction exist to establish an employer-employee relationship.<sup>135</sup> The more factors that are present, the more likely it is that

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127 I.R.C. §§ 1401-1403 (1988 & Supp. V 1993).

128. See *supra* notes 106-13 and accompanying text. However, contract employees who qualify as "leased employees" deemed to have performed services at any organization on a substantially full-time basis are required to be taken into account under I.R.C. § 414(n). See generally Hammond, *supra* note 61.

129. See Jones, *supra* note 67, at 19.

130. See *id.*

131. See I.R.C. § 3121(d)(2) (1988); *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992).

132. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2763, 2885-2886 (extended indefinitely by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, § 269(c), 96 Stat. 324, 552-553).

133. Treas. Reg. § 31.3121(d)-1(c)(2) (as amended in 1980).

134. *Id.*

135. See Rev. Rul. 87-41, 1987-1 C.B. 296.

an employer-employee relationship exists. However, no one factor is dispositive.

Because the common-law test is somewhat unpredictable and subjective, section 530 of the Revenue Act of 1978 originally was enacted as a temporary measure to relieve employers from the threat of potentially ruinous assessment of taxes, interest, and penalties. However, it has had the effect of allowing employers to misclassify workers indefinitely without liability for employment taxes if:

1. the employer did not treat the worker as an employee during any period;
2. the employer has filed applicable information returns, *i.e.*, Form 1099, on a basis consistent with independent contractor status;
3. the employer classified the worker in the same way it classified all other workers holding substantially similar positions; and
4. the employer has a reasonable basis for the classification.<sup>136</sup>

Three "safe harbors" satisfy the "reasonable basis" requirement if reasonably relied upon by the employer:

1. treatment of the worker as an independent contractor is sanctioned by judicial precedent or IRS ruling;
2. the employer was subject to a prior IRS audit which did not result in an assessment attributable to the employer's classification of workers as independent contractors, and the positions of current workers are substantially similar to those held by workers in the years audited; or
3. treatment of the worker as an independent contractor is consistent with longstanding, recognized practice of a significant segment of the industry in which the worker is engaged.<sup>137</sup>

To protect taxpayers' reasonable expectations, section 530 also prohibited the IRS from issuing clarifying regulations or rulings on the proper classification of workers.<sup>138</sup> Therefore, subjectivity and unpredictability have persisted.

Section 530 has resulted in considerable, unrectified misclassification, particularly under the second safe harbor, which allows continued misclassi-

136. Revenue Act of 1978, § 530(a)(1) & (3).

137. *Id.* § 530(a)(2).

138. *Id.* § 530(b).

fication even if the issue was not raised, or even considered, in a prior audit and regardless of when the audit occurred. As one writer observes, "Critics charge that the prior audit safe harbor produces arbitrary results, since two employers in exactly the same circumstances may receive diametrically opposite treatment on their employment taxes, based solely on the happenstance that one of them was audited in the past, even if the worker classification issue was never considered by the IRS at that time."<sup>139</sup>

Nevertheless, many employers do not qualify for section 530 relief, and an employer that misclassifies workers may thus still be liable for back taxes, interest, and substantial penalties.<sup>140</sup> Employers may not consider the risk of detection to be great given the low IRS audit coverage, and economic incentives thus too often have been seen to outweigh the risks. However, unions and individual workers can act as deterrents and agents of administrative enforcement.

For example, the AFL-CIO Building and Construction Trades Department is looking for test cases to file under state worker misclassification laws, although no suits had been filed by unions as of August 1994.<sup>141</sup> The Building and Construction Trades Department also is participating in the IRS "market segmentation" program, which concentrates resources along industry lines so that IRS personnel can develop expertise in particular industries and develop with them "market segment agreements" defining appropriate classification guidelines. "The IRS views the market segment agreements primarily as a means to increase voluntary compliance by reducing complexity"<sup>142</sup> Although nonbinding, the agreements may be useful in deterring abuses, for example, by identifying the "industry practice" and thus reducing opportunities for employers to abuse the section 530 safe harbor.

Those employers who are playing the "audit lottery"<sup>143</sup> depend upon the IRS's lack of awareness of their activities. The realization that knowledgeable bargaining representatives are monitoring employment activity may systematically curb misclassification. Additionally, workers misclassified as independent contractors can sue for coverage under an employer's benefit plans. For example, in a case argued by University of Alabama Law School Professor Norman Stein at the request of the Washington, D C. based

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139. Jones, *supra* note 67, at 23.

140. See I.R.C. §§ 3509, 6651, 6656, 6721, 6722 (1988 & Supp. V 1993).

141. Jones, *supra* note 67, at 25.

142. *Id.*

143. *Id.* at 18.



Pension Rights Center, a laid-off Honeywell employee was rehired within a few months as a "consultant" for a year and a half.<sup>144</sup> The Eleventh Circuit upheld the worker's claim for "employee" benefits under the terms of the plans for the period during which she performed services as a consultant because she proved she was an employee under the common-law test. For this purpose, of course, the section 530 safe harbors do not apply

If an employer has misclassified a substantial number of workers, upon reclassification the employer's retirement plan may be found to discriminate in favor of highly compensated employees and lose its valuable tax qualification.<sup>145</sup> Unfortunately, because of the facts-and-circumstances nature of the inquiry, suits challenging worker classification for ERISA purposes are not likely to qualify as class actions.<sup>146</sup> However, instances of misclassification can be brought to the attention of the Department of Labor for more systematic resolution. "[U]nions may have a part to play, for example, in guiding employees to the appropriate administrative agency"<sup>147</sup>

### C. *Damage-Control Lobbying*

Although a certain amount of contingent employment "regulation" can be accomplished through collective bargaining and pursuing rights under current law, current law is defective in many respects, in addition to erecting legal obstacles to union organization. The employment-based social welfare system under ERISA provides inadequate health coverage and retirement income security for even full-time workers. Nevertheless, there is little chance that the 104th Congress will produce much better law. "Management is generally content with the status quo"<sup>148</sup> However, at least two subjects of proposed legislation may be worth raising here. First, there is a fair chance that advocates for workers could influence the choice among alternative proposals for legislation that clarifies the worker classification rules. Second, some incremental health reform may be attempted, including taxation of health benefits,<sup>149</sup> which workers-rights advocates should oppose.

144. *Daughtrey v Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993).

145. I.R.C. § 410(b) (1988).

146. *See, e.g., Fietsam v Connecticut Gen. Life Ins. Co.*, No. 93-C916, 1994 WL 323313 (N.D. Ill. June 27, 1994) (denying class certification because individual questions predominated).

147. Rabin, *supra* note 77, at 761.

148. Samuel Estreicher, *Win-Win Labor Law Reform*, 10 LAB. LAW 667, 667 (1994).

149. *See, e.g., Kerrey, Danforth Propose Payroll Tax Cut, Cap on Break for Employer-Paid Insurance*, [1994] Daily Tax Rep. (BNA) No. 235, at G-3, G-4 (Dec. 12, 1994) (reporting proposal of Bipartisan Commission on Entitlement and Tax Reform that would cap

As to the latter, many progressive reformers have accepted as intellectually unassailable that the federal tax treatment of health benefits is a tax "subsidy" and have therefore been receptive to taxing benefits.<sup>150</sup> The abstract theoretical proposition that nontaxation of health benefits is a subsidy has been advanced with an entirely inappropriate degree of certainty.<sup>151</sup> Therefore, I conclude this discussion by challenging the premise that employment-derived health benefits are "subsidized"<sup>152</sup> and by explaining why tax equity for workers requires nontaxation.

### 1. Worker Classification Reform

Congressional interest in deficit reduction may find expression through tightening the definition of "employee" for tax purposes even though the

deduction for employer-paid health insurance or include in employees' income amounts in excess of average premium). See generally Joseph M. Dodge, *A Democratic Tax Manifesto*, 66 TAX NOTES 1313, 1326 (1995) (proposing taxation of fringe benefits); B.J. Hickert, *Health Care: A Simple Prescription*, 66 TAX NOTES 1193 (1995) (proposing tax cap).

150. See, e.g., O'Connell, *supra* note 1, at 1505-09; Jonathan B. Forman, *Synchronizing Social Welfare Programs and Tax Provisions*, 59 TAX NOTES 417, 423 (1993). But see duRivage, *supra* note 13, at 98 (recommending liberalizing deduction of health care costs, although only for expenses in excess of 3% of adjusted gross income).

151. For example, Professor O'Connell has imported from the tax literature the conclusion that nontaxation of employment-derived health benefits is "special treatment" that is the equivalent of a government "subsidy" in the form of tax relief, otherwise known as a "tax expenditure." O'Connell, *supra* note 1, at 1505-09. The dictionary defines a "subsidy" as financial assistance granted by the government to an individual or business. THE SCRIBNER-BANTAM ENGLISH DICTIONARY 908 (1979). A "tax subsidy" occurs when people are excused from paying what they ought to pay in taxes. The assertion that nontaxation of health benefits is a "subsidy" is a relatively minor point in Professor O'Connell's excellent argument that employment-derived health benefits are not entirely "earned," a point on which we agree. However, the term "subsidy" is loaded, incorporating presuppositions that elsewhere she indicates she does not in fact accept. Arthur Goldberg relied on observations similar to Professor O'Connell's in explaining why health benefits should *not* be taxed:

We regard the provision of minimum insurance coverage for employees and their dependents as a responsibility of the employer of precisely the same character as the responsibility to provide safe working conditions, adequate lighting, reasonable safety devices, etc. The provision of this insurance coverage is not compensation and the benefits are not provided on a compensation basis but on a service basis irrespective of the cost as to any particular employee.

STANLEY S. SURREY ET AL., 1 FEDERAL INCOME TAXATION: CASES AND MATERIALS 139 (1972) (identifying Arthur Goldberg as General Counsel for Congress of Industrial Relations).

152. For a more extensive analysis, see Gwen T. Handelman, *The Truth About Tax Subsidies for Health Benefits*, 61 TAX NOTES 353 (1993).

current Congress is likely unwilling to liberalize the definition under the NLRA or other employee protective statutes. Billions of dollars in income and payroll taxes are lost annually due to misclassification.<sup>153</sup> Numerous reform proposals, some offered by Republicans and traditionally Republican constituencies, are circulating.<sup>154</sup> The proposals tend to be designed either primarily to reclassify independent contractors as employees, which would afford maximum protection to workers, or to facilitate independent contractor compliance with tax laws. The American Institute of Certified Public Accountants' (AICPA) proposal is of the latter variety. Nevertheless, the AICPA proposal would benefit workers by denying employers some of the incentive to classify workers as independent contractors when inconsistent with the economic realities of the employment relationship.

The AICPA's Small Business Taxation Committee has proposed a "mechanical" four-prong "safe harbor" providing that an individual would be treated as an independent contractor for tax purposes if all of the following requirements were met:

1. prior to performing services, the individual and the business executed a written agreement including:
  1. a description of services;

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153. See *Tax Gap Among Service Providers Between \$21 and \$30 Billion, Says GAO*, [1994] Daily Tax Rep. (BNA) No. 247, at G-6 (Dec. 29, 1994) (citing GAO report estimating that 9.2 million sole proprietors who provide services to customers and do not sell any goods as part of their businesses owe at least \$21 billion dollars in taxes on unreported earnings); duRivage, *supra* note 13, at 106 (reporting 1989 GAO estimates that 38% of employers misclassify employees, thus avoiding payroll taxes).

154. See, e.g., *Advisory Panel Suggests Hike in FUTA Wage Base, End of 0.2 Percent Surcharge*, [1995] Daily Tax Rep. (BNA) No. 3, at G-3 (Jan. 5, 1995) (reporting recommendation of Advisory Council on Unemployment Compensation that "safe harbor" and restriction on IRS's authority to address ambiguity under classification guidelines be eliminated); *No Consensus at Small Business Hearing on Worker Status Issue*, [1995] Daily Tax Rep. (BNA) No. 13, at G-4 (Jan. 20, 1995) (discussing hearing on H.R. 510, cosponsored by Reps. Shays (R-Conn.) and Lantos (D-Cal.), which would repeal "safe harbor" and restriction on IRS's authority to draft clarifying regulations, require prime contractors to notify legitimate independent contractors of their tax obligations and other statutory rights and protections, and provide amnesty for one year); *Taxleads: Independent Contractors*, [1995] Daily Tax Rep. (BNA) No. 29, at H-1 (Feb. 13, 1995) (reporting on American Institute of Certified Public Accountants Small Business Taxation Committee's proposed "mechanical" four-part test, which would be unavailable if worker had ever performed similar services for business, and requirement that businesses remit to IRS 20% of payments to independent contractors); *Taxleads: New Standard for Independent Contractors*, [1995] Daily Tax Rep. (BNA) No. 34, at H-1 (Feb. 21, 1995) (reporting that H.R. 582, introduced by Rep. Kim (R-Cal.), would create "clear, objective test" and allow IRS reclassification if prior audit had not included examination of employment status).

- ii. remuneration to be paid;
  - iii. a provision assuring that the individual would be responsible for federal and state income taxes and Social Security taxes;
  - iv. a stipulation that the business would not provide fringe benefits to the individual;
  - v. acknowledgement that the individual complied with applicable business licensing requirements;
  - vi. acknowledgement that the individual maintained a proper set of books and records; and
  - vii. acknowledgement that the individual did not have an exclusive agreement for services with the signatory business.
2. the business withheld and remitted monthly to the IRS 20% of all payments to the individual (which would be allowed as a credit for withholding on the individual's tax return);
  3. the individual had never performed similar services as an employee for the business signing the agreement; and
  4. the business reported the individual's income and withholding on the appropriate Forms 1099 to the IRS and the individual.<sup>155</sup>

The AICPA proposal properly redirects the focus away from physical control, which is the hallmark of the common-law test but is irrelevant to the determination of economic dependence and is the source of considerable ambiguity

The fewer the differences that turn on worker classification, the less incentive an employer would have to misclassify workers. The AICPA proposal would help by requiring income tax withholding on independent contractors. However, a better test would focus more on the worker's economic and entrepreneurial independence and on whether "the economic resources exist to provide insurance and other forms of economic security independently"<sup>156</sup> Factors should relate to the "opportunity for profit and loss; investment in equipment or materials; employment of or partnership or other economic association with others; the degree of continuity of the relationship; and whether the service rendered is an integral part of the employer's business."<sup>157</sup>

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155. *AICPA Committee Proposes Independent Contractor Safe Harbor*, [1995] Daily Tax Rep. (BNA) No. 18, at G-9 (Jan. 27, 1995).

156. Berzon, *supra* note 49, at 13.

157. *Id.* at 12.

Representative Jim Kay (R-Cal.) has proposed a test that approximates an economic independence test, but it principally is an add-on to the current safe harbors. Representative Kay's test aims to shift the IRS focus from reclassifying independent contractors to enforcing independent contractor compliance. Under this measure, service providers would meet the independent contractor definition if they provide services pursuant to a written agreement stating the specific services to be provided and the duration of and remuneration for the services.<sup>158</sup> In addition, service providers must satisfy any one of the following criteria:

1. the service provider can suffer a loss or make a profit from the services provided;
2. the service provider has a principal place of business other than the business for which services are performed and has significant investment in tools or facilities;
3. the service provider makes services available to the general public and has provided those services as an independent contractor to at least one other recipient during the current year or the previous year; or
4. the service provider is paid exclusively on commission and either (i) has a principal place of business other than the premises of the recipient business, or (ii) pays fair market value for rent or lease of business space from the business.<sup>159</sup>

The bill would repeal the current safe harbor that permits employers to continue misclassifying workers solely because the business was previously audited. It would allow the IRS to reclassify independent contractors prospectively as employees if the business qualified for a safe harbor based on a prior audit that did not include an examination of employment status.

An alternative to these proposals would be for Congress to borrow the concept of "dependent" contractors from Canadian law<sup>160</sup> Such workers deserve the same protections as common-law employees for purposes such as Social Security and unemployment benefits because they are not in fact entrepreneurs with substantial financial resources at stake or profit potential.<sup>161</sup> Using the "dependent" contractor concept, businesses might be

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158. *Bill Seeks to Establish Standard for Defining Independent Contractors*, 13 Employee Rel. Wkly (BNA) No. 7, at 176 (Feb. 20, 1995).

159. *Id.*

160. Berzon, *supra* note 49, at 12 (citing Ontario Labour Relations Act, R.S.O. ch. 228, § 1(1)(h) (1980) (as amended)).

161. *Id.* at 2.

required to withhold income taxes, transmit them to the government, and pay FICA and FUTA taxes, perhaps based on the proportion of the time spent working for a particular employer and the hourly or monthly rate of compensation. The justification would be that it is fair to cast the administrative and partial economic burden of tax compliance for such individuals upon the enterprise that derives the major benefit of and profit from their labor.

Although employers who claim a deduction for the services are well positioned to assume responsibility for income tax withholding and a pro rata share of employment taxes, it is politically improbable that "dependent" contractor status will be recognized if payment of FICA and FUTA taxes is required. Still, the AICPA proposal, and perhaps others, would likely be more beneficial to workers than current law and thus a more effective tool for advocates of worker interests. The best test having any realistic chance of passage is likely one that clarifies the distinctions based on economic realities and that imposes an income tax withholding requirement.

## 2. Taxing Benefits

As entrepreneurial risks, although not entrepreneurial profits, are being shifted to workers under the new employment and political order, tax reform should, but likely will not, equalize the tax treatment of entrepreneurs and wage earners. As Professor O'Connell has observed, "Risks that were once collective are becoming individual," particularly health protections for workers.<sup>162</sup> For contingent workers, "unfair tax policies exacerbate their economic situation."<sup>163</sup> The cost of health insurance and medically necessary care should be fully deductible from taxed income for all workers. Adequate medical attention to maintain one's fitness for employment ought to be recognized as a cost that offsets earnings from labor equally as maintenance expenses on a manufacturer's capital equipment or the utility bills of a shopkeeper offset their business income.

Business and investment outlays are entitled to deduction because not doing so would result in "double taxation" of amounts taxed as income when originally received.<sup>164</sup> For example, if \$100 is taxed at a 15% rate, \$85 remains. If the taxpayer buys materials for \$85 to produce a product that sells for \$90, the taxpayer has a taxable gain of only \$5 (\$90 in receipts minus \$85 in expenditures made to generate receipts). The taxpayer should

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162. O'Connell, *supra* note 1, at 1525.

163. duRivage, *supra* note 13, at 91.

164. Dodge, *supra* note 149, at 1314-15.

not have to pay tax again on the \$85. *Income* tax should be imposed only on *increases* in wealth.

Any expenditure to secure health insurance represents a *loss* of wealth — an immediate loss to avert a later potentially catastrophic loss. Also, any expenditure for medically necessary care is a *decrease* in wealth and so should be deducted in assessing taxes. Correspondingly, workers should continue to pay no income or employment taxes on the value of health coverage provided through employment<sup>165</sup> because not including an amount in the first place yields the same result as taking a deduction from income subject to tax. Health care costs need not be "extraordinary" for deduction or exclusion from income to be justified. Accordingly, no "floor" is appropriate. Nor should this tax treatment be regarded as a "subsidy," with the implication that deduction (or exclusion, which produces the same result) is somehow a government giveaway.

It is beside the point to note that exclusions and deductions from taxable income save more tax dollars for those with higher incomes who are taxed at higher tax rates. This observation of the effect of progressive tax rates is irrelevant unless the amount being excluded or deducted from taxable income actually represents increases in the taxpayer's economic power and thus properly should be taxed. "Economic power" is a shorthand term for the measure of ability to pay taxes, which is the extent of people's actual discretionary control over the resources around them. Some types of expenditures labeled "medical" may in fact be for personal consumption, such as examination or treatment at luxury resorts, but the expenses of medically necessary care are not exercises of economic power. Adherence to an academic definition of "economic power" that includes health benefits wrongly ignores both control as an issue in determining whether an increase has been experienced and human capital losses in determining whether a decrease has occurred.<sup>166</sup>

A proper determination of whether nontaxation of health benefits is a subsidy must consider the practical experiences and perspectives of wage earners. As a practical matter, health benefits do not improve one's financial capacity to pay taxes. Although health benefits "provide access to money or services, they are intended not to augment wealth, but to insulate the recipient from economic calamity"<sup>167</sup> Indeed, the money or

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165. I.R.C. §§ 105(b), 106 (1988 & Supp. V 1993).

166. See generally Mary L. Fellows, *A Comprehensive Attack on Tax Deferral*, 88 MICH. L. REV 722 (1990).

167 O'Connell, *supra* note 1, at 1423.

services may be "accessed" only in the rather narrow circumstance of seeking treatment for a medical condition, "precipitated by circumstances rather than free choice, against the taxpayer's will or at least in spite of the taxpayer's wishes."<sup>168</sup> Utilizing coverage to *prevent* rather than treat illnesses or accidental injuries is no greater an exercise of dominion and control. Instead, it is an action taken under the duress of threat of harm from disease.

Thus, neither the availability nor the utilization of health coverage increases economic power. Obtaining coverage through employment is not a gain transaction but merely serves to preserve the status quo, as do expenditures to restore health. Because there is no *increase* in economic power, there should be no tax on coverage. Likewise, the cost of health insurance and medically necessary care should be fully deductible from gross income for workers not covered through employment. Currently, they may deduct only costs of medical care that exceed 7.5% of income, although Congress has retroactively reinstated the 25% deduction for health insurance costs of independent contractors and others who are "self-employed" and increased the deduction to 30% for tax years after 1994.<sup>169</sup>

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168. Gwen T. Handelman, *Employer-Provided Health Benefits Not an Asset to Be Taxed*, HOUSTON CHRON., Apr. 11, 1993, Outlook section at 4, reprinted in ROANOKE TIMES & WORLD-NEWS, April 13, 1993, at A5 (titled *Don't Tax Health-Care Benefits*).

169. See generally H.R. REP. NO. 12, 104th Cong., 1st Sess. (1995) (reporting Conference agreement on H.R. 831). The House of Representatives passed the measure in February, rejecting a Democratic amendment that would have extended the 25% deduction to employees not covered by employer-provided health insurance. *House Passes Permanent Extension of Health Deduction for Self-Employed*, [1995] Tax Bull. (RIA) No. 8, at 1 (Feb. 23, 1995). A Joint Committee on Taxation report explained the state of the law before reinstatement:

Under present law, the tax treatment of health insurance expenses depends on whether the taxpayer is an employee and whether the taxpayer is covered under a health plan paid for by the employee's employer. An employer's contribution to a plan providing accident or health coverage for the employee and the employee's spouse and dependents is excludable from an employee's income. The exclusion is generally available in the case of owners of a business who are also employees.

In the case of self-employed individuals (i.e., sole proprietors or partners in a partnership [or independent contractors]) no equivalent exclusion applies. However, prior law provided a deduction for 25[%] of the amount paid for health insurance for a self-employed individual and the individual's spouse and dependents.

Other individuals who purchase their own health insurance (e.g., someone whose employer does not provide health insurance) can deduct their insurance



For workers who receive no health coverage through employment or who face co-insurance and co-payment costs, a full deduction would reduce health care costs by their tax rate (likely 15 or 28% at the federal level).<sup>170</sup>

Wage labor is disadvantaged under the existing income tax system. Professor Kalleberg has shown that a majority of both full-time and part-time workers regard work as their primary life activity.<sup>171</sup> Thus, the primary purpose of an individual's investments in human capital is what tax practitioners would call a "business purpose." Generally, expenses motivated primarily by a business purpose may be deducted from taxed income because such expenditures are necessary costs of producing income analogous to the cost of materials to make a product, which should not be subject to double taxation. For example, if the primary purpose of travel is business, tax law allows deductions for the cost of the trip.<sup>172</sup>

Further, employers may deduct their costs of recruiting, training, and retaining a work force and can deduct through depreciation their investment in a "workforce in place."<sup>173</sup> Disallowing deductions for similar investments in oneself disadvantages workers' investment in their human capital relative to financial capital investments and disadvantages workers relative to employers. Under current law, employers need not make human capital investments in their work force, but are considered entitled to a deduction for this cost of generating profits if they do.<sup>174</sup> Meanwhile, workers, who have no choice but to invest a certain amount in their well-being to function as workers, are either denied the deduction<sup>175</sup> or allowed an exclusion and told that it is government largesse.

Elimination of the medical expense deduction "floor" is probably not on the horizon, but resisting taxation of benefits is essential. A tax on

premiums only to the extent that the premiums, when combined with other unreimbursed medical expenses, exceed 7.5[%] of adjusted gross income.

Joint Committee on Taxation Staff Description (JCX-6-95) of H.R. 831, To Extend Deduction for Self-Employed Individuals' Health Insurance Costs, *reprinted in* [1995] Daily Tax Rep. (BNA) No. 27, at L-1 (Feb. 9, 1995).

170. I.R.C. § 1 (1988 & Supp. V 1993).

171. Kalleberg, *supra* note 8, at 777

172. I.R.C. § 162(a)(2) (1988).

173. *Id.* § 197 (Supp. V 1993). For a discussion of the law prior to the enactment of Code § 197, see *Ithaca Industries, Inc. v Commissioner*, 17 F.3d 684 (4th Cir.), *cert. denied*, 115 S. Ct. 83 (1994).

174. I.R.C. § 162(a) (1988).

175. *Id.* § 262.

benefits would further discourage employers from providing benefits and profoundly affect collective bargaining. Economists agree that employees will end up paying whether the tax is imposed on employees or employers.<sup>176</sup> Maintaining current benefit levels would be made prohibitively expensive by adding to the cost of employer-paid health care. It is unjustly punitive to increase the cost of medically necessary care. Wasteful or extravagant medical care expenditures (such as spa treatments, lavishly appointed health facilities, or elective cosmetic surgery), which represent simply personal indulgence in the guise of medical care, ought to be recognized as taxable under current law

Policy analysts should appreciate the difference between eliminating a subsidy and imposing a penalty on those who are currently covered by employment-derived insurance for medically necessary care. Such taxation would largely serve as punishment for the sin of effective collective bargaining.

#### *IV Conclusion*

Professor Kalleberg and others have shown that much contingent employment is coercive and inequitable and that it is contributing to the degradation of the American work force and to the deterioration of our employment-based social welfare system. Most contingent workers accept inadequate compensation and typically no health insurance or retirement benefits because they have no choice. "Voluntary" contingent employment also is problematic to the extent that contingent workers forego "fringe benefits" from their own employment and depend on benefits received through their spouses' employment. This raises the labor costs of the spouses' employers, increasing the employers' economic incentive to shift work to contingent employees who will not be covered.

Businesses that provide health coverage subsidize the labor costs of those that do not by covering spouses and dependents who work at firms that fail to provide medical coverage and by paying medical bills that include a surcharge for the cost of providing uncompensated care to the uninsured employees of those firms. Thus, businesses that currently provide coverage are under competitive pressure to cut back health benefits and to shift that portion of the employer's labor costs to workers who are in no position to protect their own economic security. These are costs that properly should be internalized by the enterprise and borne by investors,

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176. See generally SEIU, *supra* note 78.

but instead are forced on workers without any corresponding right to business profits.

For the present, the best chance of extending health and retirement benefits to contingent workers is through collective bargaining and collective and individual litigation, rather than through legislation. New employment rights can be created by contract through collective bargaining, and rights under current law can be enforced. Vindication of employment rights through private suit is costly and disruptive and may be unnecessary. Both employers and employees will benefit from organizing the contingent work force so that workplace issues can be resolved on a systematic basis through contract negotiation and grievance procedures.

Progressive academics need to find ways to channel expertise into the organizing and bargaining processes, and into litigation when necessary. We must also collaborate with federal and state regulators to assist administrative enforcement of worker-protective laws. In all these efforts, however, the realities of life for working people must instruct theoretical insight. If we are indeed on the side of workers, we must listen and respond to workers' experiences to produce meaningful and effective reform.