



Summer 6-1-1995

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Recommended Citation

Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 Wash. & Lee L. Rev. 915 (1995).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol52/iss3/14>

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The Diversity of Contingent Workers and the Need for Nuanced Policy

Stewart J Schwab*

The contingent work force is rising. Policymakers and analysts must respond. These are the central themes of Dr. Belous's paper in this symposium.¹ Twenty-five to thirty percent — his current upper- and lower-bound estimates of the size of the contingent work force — are the basic statistics underpinning his call to arms.² Dr. Belous includes in the contingent work force all workers who are temporary, part-time, self-employed, or in business services.³ The spread comes from different methods of handling double counting. The figures update similar estimates he published in 1989 in his well-known book, *The Contingent Economy*.⁴ Dr. Belous has done a great service in attracting attention to the problems of contingent workers. His estimates are perhaps the statistics most frequently cited by scholars writing in this area.⁵ A group

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1. See generally Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863 (1995).

2. See *id.* at 868 tbl. 2.

3. *Id.* at 867 tbl. 1.

4. RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* 15-17 (1989).

5. Perhaps the only datum in this field of study more frequently cited than Dr. Belous's counts is the "fact" that Manpower, Inc. (Manpower), a temporary-help agency, has recently surpassed General Motors as the nation's largest employer. See Janice Castro, *Disposable Workers: America's Growing Reliance on Temporary Staffers Is Shattering a Tradition in Which Loyalty Was Valued and Workers Were Vital Parts of the Companies They Served*, TIME, Mar. 29, 1993, at 43, 43. Castro apparently first reported that, in 1992, Manpower had 560,000 workers while GM had only 367,000 workers. *Id.* As was explained at the Washington and Lee conference by Joel Biller, Senior Vice President of Manpower, this "fact" is only partially true. Manpower does issue W-2 forms for more employees each year than any other American employer, including General Motors. Telephone Interview with Joel Biller, Senior Vice President, Manpower, Inc. (May 17, 1995). This comparison

of workers comprising 25 to 30% of the work force is worthy of serious attention.

I. The Variety of Contingent Work

Jobs labelled contingent are extremely diverse. Policy responses must therefore be cautious and nuanced. These are the central themes of my comment.

To highlight the diversity theme, let me begin my comments on Dr. Belous's useful paper at the beginning. I will comment on a little word in his title, *The Rise of the Contingent Work Force*.⁶ I will pass over the word "Rise," although Dr. Belous's own upper-bound estimates suggest that the contingent work force has not risen in percentage since 1988, remaining at 30% of the labor force. Even if the explosive growth is over, the contingent work force has become a major segment of the whole. I will also pass over the word "Contingent," although the negative connotation is unfortunate. While many contingent jobs are "bad" jobs, others are "good" jobs that allow a worker flexibly to combine work with school or family responsibilities. An umbrella term should be neutral on this basic point while capturing the sense that these jobs are different from "core" jobs. Professor Katharine Abraham, currently the Commissioner of the Bureau of Labor Statistics, has proposed calling these jobs "market-mediated work arrangements."⁷ For anyone other than an economist, however, "market-mediated" is not catchy enough. Unfortunately, I have no better suggestion. "Peripheral" or "disposable" have negative connotations, while "flexible" is too upbeat. Thus, I will pass over the word "contingent."

I will comment instead on the definite pronouns in the title, *THE Rise of THE Contingent Work Force*. The first definite pronoun suggests a single rise of contingent workers; in fact, however, some types of contingent jobs are booming while others are stable or declining. Employment with temporary-help agencies is booming, but it accounts for only a small fraction

of cumulative employees during a year is the basis for *Time*'s statement that Manpower is the nation's largest employer. However, employee turnover at Manpower is extremely high, with the average tenure being a few weeks. *Id.* During any particular day in 1992, Manpower had only about 110,000 employees, not 560,000. *Id.* (The numbers for 1994 are 140,000 and 740,000. *Id.*) While still a large number, this is well below the number of employees at General Motors.

6. Belous, *supra* note 1.

7 KATHARINE G. ABRAHAM & SUSAN K. TAYLOR, FIRMS' USE OF OUTSIDE CONTRACTORS: THEORY AND EVIDENCE 1 (National Bureau of Economic Research Working Paper No. 4468, 1993).

of contingent workers.⁸ Part-time workers make up the bulk of contingent workers, but their fraction of the labor force has increased only modestly since 1970.⁹ For women workers, the proportion who are part-time has fallen since 1970.¹⁰

The second definite pronoun in the title is more misleading. Labelling these workers as *the* contingent work force connotes an image of a single type of worker, different from a core worker. This masks the diversity among workers typically labelled contingent. They are contingent for different reasons and these reasons produce different policy concerns. Worrying about *the* contingent work force, I fear, gives impulse to sweeping policy recommendations when nuance and subtlety are required.

Dr. Belous includes in his basic count of the contingent work force all workers who are part-time, temporary, self-employed, or in business services.¹¹ This definition is sensible because these are workers about whom we can make a plausible count from national data. Other categories are sometimes brought within the contingent "family." These categories include part-year workers, on-call workers, leased workers, independent contractors, subcontractors, flex-time workers, job-sharing workers, self-employed workers, and home workers. Double-counting problems become immense as the categories increase. Many part-time workers are temporary workers,¹² and independent contractors are self-employed. We do not yet have the data to assess the significance of these many types of workers.¹³ Perhaps the only inclusive definition of contingent workers is that they differ in some way from full-time, on-location, career, wage and salary workers.

8. See Belous, *supra* note 1, at 867 tbl. 1 (showing that temporary workers comprise less than 5% — 1.6 million out of 38.5 million — of all contingent workers).

9. See EMPLOYEE BENEFIT RESEARCH INST., CHARACTERISTICS OF THE PART-TIME WORK FORCE: ANALYSIS OF THE MARCH 1993 CURRENT POPULATION SURVEY, Special Report & Issue Brief No. 149, at 10 tbl. 10 (1979) [hereinafter EBRI] (showing that part-time workers constituted 16.4% of work force in 1970 and 18.8% of work force in 1993).

10. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 122 tbl. 23 (1989) (showing that women with part-time schedules constituted about 27.5% of all women at work in 1970 and about 26.8% of all women at work in 1988).

11. Belous, *supra* note 1, at 866.

12. See *id.* (suggesting that about 40% of temporary workers are also part-time workers).

13. Data help is on the way. In its January 1995 Current Population Survey, the Bureau of Labor Statistics for the first time asked detailed questions about contingent work. See January 1995 Contingent Work Supplement, 59 Fed. Reg. 59,251 (1994) (providing notice of public information collection requests to Office of Management and Budget for review and clearance).

Whether all these workers should be labelled "contingent," however, depends on the reason for analyzing contingent workers. One should not count contingent workers until one knows the reason for counting them. Most policy discussions about contingent workers emphasize one of three issues: (1) low job security, (2) low pay, or (3) low benefits. Policymakers should address these issues directly rather than use "contingent" work as an indirect target. Some contingent jobs implicate all three issues, but many jobs do not. Further, many core jobs have low job security, low pay, or low benefits.

For many analysts, low job security is the key identifier of contingent work.¹⁴ Belous emphasizes the flexibility, from the employer's perspective, of contingent jobs.¹⁵ Increasingly, companies have a stable core work force and add or terminate contingent workers when times are good or bad. Audrey Freedman, who coined the term "contingent work" in 1985, similarly emphasized a transitory employment relationship because employers' demand for workers fluctuates.¹⁶ Independent contractors, under this analysis, are clear examples of contingent workers because of their low job security. Many part-time workers, however, are not contingent in this sense.¹⁷ Importantly, nearly all workers in the private, nonunion sector are at-will workers, meaning they can be fired for a good reason, a bad reason, or no reason at all. Thus, even core workers have no contractual assurances of job security. From a legal perspective, therefore, the contrast between core and contingent workers does not accurately divide workers who have job security from those who do not.

The low pay of many contingent workers is the major issue for poverty analysts. Many contingent workers are underemployed in the sense that they want to, but cannot, find jobs that could more fully use and pay for their skills. Temporary and part-time workers are of prime concern because these workers usually receive less pay than permanent or full-time workers.¹⁸

14. See, e.g., Anne E. Polivka & Thomas Nardone, *On the Definition of "Contingent Work,"* MONTHLY LAB. REV., Dec. 1989, at 9, 10.

15. See Belous, *supra* note 1, at 873.

16. See Polivka & Nardone, *supra* note 14, at 9-10.

17. Chris Tilly has coined the term "retention" part-time workers to cover workers who want part-time work and with whom the employer wants to maintain a permanent relationship. See Chris Tilly, *Short Hours, Short Shrift: The Causes and Consequences of Part-Time Employment*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 15, 20 (Virginia L. duRivage ed., 1992).

18. See Belous, *supra* note 1, at 874 tbl. 5 (documenting that part-time workers receive dramatically less pay than full-time workers in variety of occupations).

Still, many workers labelled contingent are well paid. For example, many doctors, dentists, and lawyers are self-employed.¹⁹ Even many low-paid, part-time workers are members of families with substantial incomes. Teenagers comprise a disproportionately large number of part-time workers, but many are not a part of low-income families and thus should not be labelled "contingent workers" if the policy concern is poverty. Similarly, many older workers supplementing pension and Social Security income with part-time work are not low-income workers and thus are not contingent for this purpose. Finally, policymakers concerned with the underemployment aspects of contingent work should keep firmly in mind the unemployed. Unemployment is not as "hot" a topic as contingent work, but the tragic dimensions of unemployment remain huge policy issues.²⁰

Inadequate access to health care insurance or pension benefits is perhaps the greatest policy concern for contingent workers. Dr. Belous emphasizes that nearly 80% of full-time, full-year workers have health insurance from their own employers, whereas fewer than one-third of part-time workers are covered by their own employers.²¹ Of course, as Dr. Belous points out, dramatically more part-time workers have health insurance from another source.²² The Employee Benefits Research Institute has estimated that in 1992, considering coverage from all sources, 21% of part-time workers were without health insurance.²³ This is barely above the 16% of uninsured full-time workers.²⁴ Numerically, the number of full-time workers without any health insurance far exceeds the number of part-time workers — 16.4 million

19. See ROBERT L. ARONSON, SELF-EMPLOYMENT: A LABOR MARKET PERSPECTIVE 86 (1991). As of 1980, 62.4% of male dentists, 42.4% of male lawyers and judges, and 29.1% of male physicians were self-employed; the corresponding numbers for females were 25.0%, 14.9%, and 17.5%. *Id.* at 86 tbl. 4.9. All of these percentages are substantially lower than in 1970. See *id.* Aronson reports that, in general, self-employed persons earn less than wage and salary employees comparable in age, education, gender, and race. See *id.* at 42-59. Further, self-employed persons have an above-average incidence of poverty. *Id.* at 90-91.

20. See generally H. G. KAUFMAN, PROFESSIONALS IN SEARCH OF WORK: COPING WITH THE STRESS OF JOB LOSS AND UNDEREMPLOYMENT (1982) (documenting financial, social, and psychological problems of unemployed).

21. Belous, *supra* note 1, at 875 tbl. 6. Belous gives a similar comparison for pension coverage. Nearly 60% of full-time, full-year workers are covered by their employers' pension plans, whereas fewer than 20% of part-time workers are covered. *Id.* at 877 tbl. 7.

22. See *id.* at 875 tbl. 6.

23. EBRI, *supra* note 9, at 22 chart 10.

24. See *id.*

full-time uninsured to 5.9 million part-time uninsured.²⁵ A story similar to that of part-time workers exists for health coverage for temporary workers. Many, but not all, temporary workers are ineligible for employer-provided health insurance. For example, 23% of Manpower's temporary workers are eligible for health insurance.²⁶ Many others are covered by spouse or parent insurance policies. Thus, if health coverage is the issue, Belous's estimate of contingent workers is too large. It also ignores the larger number of core workers who lack health insurance.

In short, figures based on *the* contingent work force should be treated with caution. Policy analysts who worry about low job security, low pay, or low benefits perhaps should directly address those concerns rather than focus on contingent jobs.

II. *Contingent Work and the Social Safety Net*

As Dr. Belous emphasizes,²⁷ policymakers seeking to regulate contingent jobs face a dilemma. On the one hand, flexibility in labor markets is good, and the flexibility of contingent work has helped business firms meet the competitive challenges of our times. On the other hand, some members of a fast-changing, flexible economy inevitably will be hurt and left behind, and contingent workers are prime targets. Society has a duty to help these casualties.²⁸ The policy challenge is to provide the safety net without destroying the many benefits of flexible labor markets.

The United States, far more than other industrialized countries, provides much of the social safety net through the workplace rather than through government tax-and-spend programs. The policy debate over whether employers or the government should bear this burden has been around for a long time — half a millennium or more. The Elizabethan Statute of

25. *Id.* at 53 tbl. 17

26. Françoise J. Carré, *Women Workers in Temporary and Contingent Employment: Problems, Policies and Possible Models for Representation* 7 (Oct. 14, 1993) (unpublished paper presented at Women's Bureau Symposium, Labor Law Reform: Viewpoints from Working Women, revised Jan. 1994, on file with the *Washington and Lee Law Review*) (citing *Rising Use of Part-time and Temporary Workers: Who Benefits and Who Loses?*, *Hearings Before the Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 110, 111 (1988) (statement of Mitchell Fromstein, President, Manpower, Inc.)).

27. See Belous, *supra* note 1, at 876-78.

28. One cannot assume as blithely as one could twenty years ago that a general consensus exists that society should help its least fortunate. Still, I take it as a basic assumption that society should ensure some sort of safety net for its members. Contemporary debate rightfully centers on how to provide it, not whether to provide it.

Artificers of 1562,²⁹ for example, required employers to retain workers for a full year unless they had "reasonable and sufficient cause" to dismiss them.³⁰ One reason for this mandate was to shift from local parishes to employers the burden of caring for the poor during times of slack work.³¹ For most Americans today, access to health insurance, adequate retirement income, and unemployment benefits requires a stable job.

Mandating that employers extend the social safety net can be a valid rationale for regulating contingent work if the regulation will truly extend the net without undue loss of flexibility. Assuming that society must care for displaced workers one way or another, employers providing jobs without the usual safety-net benefits create spillover costs or externalities for others. Curbing externalities is a classic rationale for regulation. Examples of such regulation might include providing unemployment insurance for part-time workers or mandating health insurance and pension coverage for leased workers. Whether a proposed regulation is appropriate under this rationale requires a weighing of the benefits of extending the social safety net to contingent workers against the loss of workplace flexibility.

Two other considerations are critical before one blithely recommends regulation of contingent work. First, most employment regulation does not have social insurance as its goal. Thus, extending most employment regulation to contingent workers requires another rationale. Second, a function of some contingent work is the avoidance of employment regulation. As policymakers force greater regulation upon contingent jobs, these jobs may dry up. To the extent these jobs are "good" jobs, that is unfortunate.

The goal of most workplace regulation is to mandate minimum standards or to monitor who is chosen to work rather than to provide social insurance. Occupational safety and health laws, minimum wage and overtime laws, and laws against sexual harassment are important examples of laws whose goals are not social insurance but mandates of minimum workplace standards. Legal prohibitions against hiring or firing on the basis of race, sex, religion, age, or disability are examples of laws whose functions are to monitor the criteria for choosing who gets the benefits of work rather than to provide a social safety net. Extending minimum standards to contingent workers is often straightforward. The law should not let contingent

29. 5 Eliz., ch. 4 (Eng.).

30. Statute of Artificers, 1562, 5 Eliz., ch. 4, § 5 (providing that no person who retains servant may lay off such servant and that no person retained according to this provision may depart from his master or mistress except for "some reasonable and sufficient cause").

31. See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW* 13 (1993).

workers breathe more benzene than other workers breathe or work for less than the minimum wage. Thus, the Occupational Safety and Health Act of 1970 (OSHA)³² and the Fair Labor Standards Act of 1938 (FLSA)³³ should apply to contingent work, and generally they do apply.³⁴ Similarly, employers should hire contingent workers without regard to race or sex absent valid affirmative action grounds and, thus, Title VII of the Civil Rights Act of 1964 (Title VII)³⁵ should apply. However, the policymakers must make clear the rationale for regulating contingent work. A law that cannot be justified on grounds of social insurance, minimum standards, or entrance regulation is a questionable law. For example, as I discuss below, a law mandating equal hourly pay for part-time or full-time work would be a bad law. It cannot be justified on social insurance grounds, nor does it apply general minimum standards to contingent workers, nor does it monitor who should get a job.

To the extent employment laws do not apply to contingent jobs, these jobs become more attractive to employers. Indeed, the suspicion of some policymakers is that employers create contingent jobs to avoid regulation. Contingent jobs are "bad" jobs under this suspicion, and one goal of policy should be to eliminate them. Many contingent jobs, however, are "good" jobs. Part-time work is the best arrangement, all things considered, for many workers.³⁶ Similarly, temporary work is "good" work for many workers, particularly when it gives them a foot in the door and a chance to show their worth. Policymakers must be concerned, therefore, that regulation of contingent work will reduce the number of "good" contingent jobs rather than improve the lot of "bad" contingent jobs. Particularly

32. 29 U.S.C. §§ 651-678 (1988 & Supp. V 1993).

33. 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993).

34. Some analysts might object to extending FLSA or OSHA requirements to contingent work because they find these requirements to be misguided. Such an objection is really a quarrel with the minimum standard itself rather than with its application to contingent work. Assuming agreement with the policies underlying the minimum standard, one must point to something unique about contingent work that makes the application of those policies to contingent work inappropriate.

35. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

36. Professor Kalleberg's paper in this symposium reports survey responses to the question, "If you were to get enough money to live as comfortably as you would like for the rest of your life, would you continue to work or would you stop working?" Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV 771, 778 fig. 3 (1995). My own response, and I suspect that of many others, would be, "I would continue to work, but only part-time and part-year." This introspection suggests to me that part-time or part-year work is not inherently "bad" work.

suspect are laws that specifically regulate contingent work rather than apply general employment standards equally to contingent and core jobs.

Additionally, as Dr. Belous aptly explains, a major function of the contingent work force is to buffer core workers from the vagaries of the market.³⁷ If regulation diminishes the contingent work force, core workers will face greater instability and the harm will be great. It is one thing for a temporary worker to lose a job early when job loss was foreseeable from the outset. It is quite another for someone on a career track for fifteen years, for example, to lose a job. The financial and emotional loss to the family is devastating.³⁸ Policymakers should recognize that much of their regulation simply shifts the costs of competition from one group to another rather than reduces costs. Shifting greater uncertainty to core workers is bad policy

III. Current Regulation of Contingent Work

Discussions of contingent work sometimes give the impression that current law does not regulate these jobs. In this section I try to erase that impression by sketching how pension and health plan regulation applies to contingent work. As we shall see, the Employee Retirement Income Security Act of 1974, as amended (ERISA)³⁹ encourages employers to extend pension benefits to many contingent workers. Just as health insurance is less regulated than pension benefits for core workers, ERISA provides for less regulation of health benefits for contingent workers.

A. Pension Law

The Social Security system is extremely protective of contingent workers. Social Security covers employees and self-employed workers, and both must pay Social Security taxes. To qualify for retirement benefits, a worker must have forty quarters of earnings above a minimum amount, which in 1994 was \$620 per quarter.⁴⁰ Part-year workers can earn four quarters of qualified work in a single quarter as long as their earnings are

37 See Belous, *supra* note 1, at 873-74.

38. For vivid portraits of the suffering that comes when career employees are terminated early, see generally KATHERINE S. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* (1988).

39. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., 31 U.S.C., and 42 U.S.C.).

40. See PETER MARTIN, *SOCIAL SECURITY* § 300, *available in* SOCIAL SECURITY PLUS (1995) (CD-ROM); SOCIAL SEC. ADMIN., *SOCIAL SECURITY BULLETIN, ANNUAL STATISTICAL SUPPLEMENT* 20 (1994).

four times the minimum threshold. With these low thresholds, Social Security covers almost all persons who have worked for ten years during their careers. Retirement benefits for low-wage workers greatly exceed the amounts paid in Social Security taxes. Still, Social Security alone provides minimal retirement income.

Most large employers offer their employees a defined-benefit or defined-contribution pension plan that supplements Social Security retirement income. In 1990, employer pension contributions amounted to 4.3% of all wages and salaries.⁴¹ No employer must offer a pension plan, but to qualify for favorable tax treatment, a pension plan must meet the detailed requirements of ERISA.

Of particular importance for contingent workers are the eligibility, nondiscrimination, and vesting requirements of ERISA for qualified plans. A qualified pension plan must make eligible every employee over twenty-one years old with a year of service.⁴² ERISA defines a year of service as at least 1000 work hours within twelve months.⁴³ Thus, ERISA explicitly ignores teenagers and those working less than half-time, but explicitly protects workers over these thresholds. ERISA also mandates that a pension plan spread benefits beyond highly compensated employees.⁴⁴ Finally, ERISA protects short-term employees by requiring that pension benefits completely vest after five years of service or gradually vest over three to seven years.⁴⁵ When initially enacted, ERISA mandated complete vesting only after ten years or gradual vesting over seven to fifteen years.⁴⁶ Congress shortened the vesting requirements to protect employees who change jobs frequently, which is a common characteristic of contingent employees.

ERISA also protects full-time leased workers by requiring the employer to treat them like regular employees for pension purposes.⁴⁷ ERISA defines a leased employee as any nonemployee providing services pursuant to an agreement between the recipient and another person if the worker per-

41. WILLBORN ET AL., *supra* note 31, at 587

42. See I.R.C. § 410(a)(1)(A) (1988).

43. *Id.* § 410(a)(3)(A).

44. See *id.* § 410(b)(1) (mandating that qualified plan meet one of three minimum coverage standards: (1) it benefits at least 70% of nonhighly compensated employees; (2) percentage of nonhighly compensated employees that benefit from plan is at least 70% of percentage of highly compensated employees that benefit; or (3) average benefits for nonhighly paid employees are at least 70% of average benefits paid to highly compensated employees).

45. *Id.* § 411(a)(2)(A)-(B).

46. Pub. L. No. 93-406, § 1012(a)(2)(A)-(B), 88 Stat. 901, 902 (1974) (repealed 1986).

47. I.R.C. § 414(n)(1)(A) (1988).

forms the services on a substantially full-time basis for at least a year and the services are of the type historically performed by employees in that business.⁴⁸

In sum, ERISA tries to extend pension coverage beyond highly compensated, long-term employees by including within its scope half-time employees, full-time leased workers, and workers with at least three to five years of service and by demanding nondiscrimination against nonhighly compensated employees. In so doing, ERISA creates a sharp line that excludes teenagers, those working fewer than twenty hours per week, and those who will leave their jobs within three to five years.

B. Health Care Coverage

The nondiscrimination principle of pension law would seem to apply as well to health insurance benefits, and from 1986 to 1989 it did. As part of the Tax Reform Act of 1986,⁴⁹ the now-repealed section 89 required that any employer-provided health insurance receiving tax preferences not discriminate against nonhighly compensated employees.⁵⁰ If the plan was discriminatory, all highly compensated employees had to declare the "excess benefit" as gross income subject to federal income tax.⁵¹ The basic method to make a plan nondiscriminatory under section 89 was to include at least 80% of all nonhighly compensated employees in the health insurance plan.⁵² However, section 89 excluded many contingent employees from this calculation. Excluded employees included those who had less than one year of service, those who normally worked less than 17.5 hours per week, those who normally worked less than six months per year, or those who were younger than twenty-one years old.⁵³ Section 89 protected part-time and part-year workers above these thresholds.⁵⁴ Responding to the complaints of businesses, particularly small employers, Congress retroactively repealed section 89 in 1989.⁵⁵ Since then,

48. *Id.* § 414(n)(2) (1988 & Supp. V 1993).

49. Pub. L. No. 99-514, 100 Stat. 2085 (1986).

50. *See* I.R.C. § 89(a)(1) (1988) (repealed 1989).

51. *See id.*

52. *See id.* § 89(f).

53. *Id.* § 89(h)(1)(A)-(D).

54. *See id.* § 89(j)(5).

55. *See* Pub. L. No. 101-140, § 202(a), 103 Stat. 830 (1989) (repealing I.R.C. § 89). Narrower nondiscrimination rules currently apply to self-funded health plans and to cafeteria plans. *See* I.R.C. § 105(h) (Supp. V 1993). *See generally* Allen R. Norris, *Discrimination Rules Affecting Health Benefits and Group Term Life Insurance After the Repeal of Section 89*, 16 J. PENSION PLAN. & COMPLIANCE 147 (1990).

employers have been free to exclude part-time workers from health insurance coverage.

The Consolidated Omnibus Reconciliation Act of 1985 (COBRA),⁵⁶ which amended ERISA, does protect the health insurance benefits of some part-time workers. In its continuation requirements, COBRA provides that a worker whose hours are reduced so that the worker is no longer eligible for health benefits may continue for eighteen months in the health insurance plan if the worker pays the premiums, which cannot exceed 102% of the employer's average cost.⁵⁷

The tax code also gives a limited tax break for health insurance premiums paid by self-employed workers, who are sometimes categorized as contingent workers. Normally, individuals may only deduct medical expenses, including health insurance premiums, if they exceed 7.5% of gross income.⁵⁸ A self-employed person, however, may deduct 25% of health insurance premiums for himself, his spouse, and his dependents, despite the 7.5% floor.⁵⁹

IV Future Policy Applications

In this section, I will discuss three specific policy proposals for contingent work: the good — unemployment insurance for contingent workers; the bad — equal pay for part-time workers; and the complicated — extending health care coverage to contingent workers. The overall point is that the appropriateness of regulation of contingent work depends on the specific policy at issue.

A. Unemployment Benefits for Part-Time Workers

The unemployment insurance (UI) program in the United States is a complex blend of federal and state laws that began in the 1930s. The paradigmatic worker covered by the UI program is an experienced, full-time breadwinner who loses his job through no fault of his own. The UI system has had problems in recent decades accommodating contingent workers. Difficult cases for the UI system include whether to cover part-time workers

56. Pub. L. No. 99-272, 100 Stat. 82 (1986) (codified as amended in scattered sections of 5 U.S.C., 7 U.S.C., 10 U.S.C., 12 U.S.C., 15 U.S.C., 16 U.S.C., 19 U.S.C., 20 U.S.C., 23 U.S.C., 26 U.S.C., 29 U.S.C., 31 U.S.C., 33 U.S.C., 38 U.S.C., 39 U.S.C., 40 U.S.C., 42 U.S.C., 43 U.S.C., 44 U.S.C., 45 U.S.C., 46 U.S.C., 47 U.S.C., and 49 U.S.C.).

57. See 29 U.S.C. §§ 1161-1168 (1988 & Supp. V 1993).

58. See I.R.C. § 213(a) (1988).

59. See *id.* § 162(L)(1).

who refuse a job with increased hours, whether to cover workers who miss work due to child care problems, and whether to cover workers who quit their jobs to move with their spouses.

Many states exclude casual workers, small-farm workers, and domestic workers from UI protection. Every state except California excludes self-employed workers from UI benefits. Still, UI coverage is expansive, covering approximately 97% of wage and salary employees and approximately 88% of all employed persons.⁶⁰ Nevertheless, fewer than one-third of all unemployed persons receive UI benefits.⁶¹ New entrants and re-entrants to the labor force rarely have sufficient base-period eligibility, and job leavers are generally ineligible because they are not considered involuntarily unemployed. Job losers are generally eligible, but only approximately one-half of job losers receive UI coverage.⁶² Many job losers do not apply for benefits. Part-time and temporary job losers may not have met the earnings and length-of-service requirements. These requirements vary dramatically by state. In the 1980s, thirty-five states raised their minimum earnings requirement and eighteen states changed their earnings formulas, significantly reducing the number of unemployed workers eligible for UI benefits.⁶³

Because of UI's eligibility requirements, compared to all unemployed persons, UI beneficiaries are disproportionately higher income, prime-aged white males who hold full-time jobs. For example, in 1983, males constituted 58.2% of all unemployed persons and 64.5% of all persons receiving UI benefits, and whites constituted 82.3% of all unemployed persons and 87.6% of those receiving benefits.⁶⁴ Similarly, in 1985, part-time workers made up 23% of all unemployed persons, but only 13% of UI recipients.⁶⁵

Unemployment insurance is a major part of the social safety net in this country. UI benefits enable workers to obtain better paying jobs because they are not forced by financial need to take the first available opening.⁶⁶

60. See BRUCE VAVRICHER, CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, UNEMPLOYMENT INSURANCE: FINANCIAL CONDITION AND OPTIONS FOR CHANGE 5 (1983).

61. WILLBORN ET AL., *supra* note 31, at 538, 540 tbl. 14-2.

62. See *id.*

63. Virginia L. duRivage, *New Policies for the Part-Time and Contingent Workforce*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 89, 106 (Virginia L. duRivage ed., 1992).

64. WILLBORN ET AL., *supra* note 31, at 539.

65. duRivage, *supra* note 63, at 107.

66. See, e.g., Ronald G. Ehrenberg & Ronald L. Oaxaca, *Unemployment Insurance*,

The UI system should adjust to modern realities. Families today can be devastated when a long-term, part-time worker is terminated if the family needs the second income to maintain a decent standard of living. Such workers generally should be eligible for prorated UI benefits and should not be disqualified for refusing an offer of full-time work that may be incompatible with family or academic responsibilities.⁶⁷ Similarly, the financial strain on families today is great when day care problems force a worker to quit work. Allowing UI benefits in such a setting is an appropriate broadening of the social safety net to contingent workers.

Policymakers must be careful, however, before transforming unemployment insurance into general insurance available to anyone looking for work. Much of the success of unemployment insurance, compared to other labor market or welfare programs, is that its focus is limited to prime workers. Thus, UI tenure requirements of a year or so of continuous work may be appropriate. Unemployment insurance, as opposed to welfare or job-training programs, may be inappropriate for casual or temporary workers who enter and exit the work force frequently.⁶⁸

B. Equal Pay for Part-Time Workers

The Equal Pay Act of 1963 (EPA)⁶⁹ mandates that an employer pay men and women equally for equal work.⁷⁰ Similarly, Title VII bans pay discrimination based on race or sex.⁷¹ Some scholars have urged that

Duration of Unemployment, and Subsequent Wage Gain, 66 AM. ECON. REV. 754, 754 (1976). This study, using late 1960s census survey data of older men who were laid off and who changed employers, found that raising the UI benefit rate from 40% to 50% of income would prolong unemployment by 1½ weeks but would increase post-unemployment wages by 7%. *Id.* at 757. This job search effect did not apply for men who returned to their previous employer or who quit voluntarily. *See id.* at 756-77. Older women responded similarly but less dramatically to increases in UI benefits. *See id.* at 759-60. Younger workers increased the length of unemployment slightly when UI benefits were increased, but did not receive higher post-unemployment wages as a result. *See id.* at 761, 764.

67. Thus, I support the thrust of § 2(a) of the proposed Part-Time and Temporary Workers Protection Act of 1993. *See* H.R. 2188, 103d Cong., 1st Sess. § 2(a) (1993). Section 2(a) would prohibit states from disqualifying workers who were not available for, or were searching for, jobs with more weekly hours than their previous jobs. *See id.*

68. *See* Joseph M. Becker, *The Location of Financial Responsibility in Unemployment Insurance*, 59 U. DET. J. URB. L. 509, 541-43 (1982) (elaborating argument that unemployment insurance should stay away from war on poverty or manpower programs).

69. 29 U.S.C. § 201-219 (1988 & Supp. V 1993).

70. *See id.* § 206(d) (1988).

71. *See* 42 U.S.C. § 2000e-2(a)(1) (1988).

Congress amend the list of prohibited classifications by banning pay discrimination against part-time workers as well.⁷² This would be unwise.

As the Belous and Kalleberg papers in this symposium document, part-time workers are paid a substantially lower hourly wage than full-time workers even after controlling for age, experience, race, sex, and education.⁷³ The residual indicates discrimination against part-time workers in the sense that employers pay them less simply because they are only part-time employees. So what? Part-time discrimination does not begin to approach the policy concerns of race or sex discrimination. Part-time status is not an immutable characteristic, and the differentiation is not stigmatizing or invidious. Part-time workers may differ from full-time workers in effort and other indicia of commitment;⁷⁴ full-time workers may demand compensation for the loss of flexibility and leisure time. One would need a good demonstration of why the market cannot appropriately value these competing components of full-time and part-time work before mandating equal hourly pay. I know of no such demonstration of market breakdown here.

More generally, extending the EPA to part-time workers is not an appropriate type of extension of employment regulation to contingent work. First, the EPA is not part of the social safety net. This basic rationale for regulating contingent work, therefore, does not apply. Second, unlike the minimum wage laws, the EPA does not provide minimum standards; whereas an employer can pay more than the minimum wage, an employer cannot go beyond the EPA. Thus, one cannot advocate equal pay for part-time workers as simply an extension of basic minimum workplace standards to contingent work. Finally, the EPA does not monitor whom employers will choose for part-time or full-time work, and thus does not enjoy the rationale of Title VII and other antidiscrimination laws. The EPA is admirable in its demand that employers give equal pay to men and women for equal work. Its extension to equal pay for part-timers and full-timers, however, can be justified only on the sloppiest rhetoric of equality.

72. See, e.g., Kalleberg, *supra* note 36, at 794-95.

73. See Belous, *supra* note 1, at 874 tbl. 5; Kalleberg, *supra* note 36, at 794-95.

74. Kalleberg, in his interesting article in this symposium, generally concludes that part-time workers are remarkably similar to full-time workers in work commitment and loyalty. See Kalleberg, *supra* note 36, at 790. He does report that full-time workers are more likely to say they are "willing to work harder than they have to in order to help their companies succeed," and notes that effort is closely linked to job performance. *Id.*

C. Mandating Health Insurance Options for Contingent Workers

Many policymakers advocate extending health care benefits to part-time or other contingent workers. For example, Representative Schroeder's proposed Part-Time and Temporary Workers Protection Act of 1993⁷⁵ would give health insurance protection to part-time workers and leased employees. Importantly, this bill does not mandate that employers provide health insurance to employees. Rather, if an employer provides health insurance to some employees and wants a tax deduction, the employer must offer insurance with pro rata premiums to part-time workers.⁷⁶ Compared to previous laws, the proposed bill considerably liberalizes the definition of "covered part-timer," protecting all employees who work at least 500 hours per year.⁷⁷ Thus, the bill would protect full-year workers working ten hours per week. On the other hand, the bill requires employers to pay only a pro rata share of premiums for part-time workers and considers thirty hours per week to be full time.⁷⁸ Thus, if the employer paid \$100 in premiums for a full-time worker, the bill would only require the employer to pay \$33 for an employee working ten hours per week, with the employee paying the rest. Part-time employees could opt out of health insurance if they did not want to pay the premiums.⁷⁹

Extending health plan protection to part-time workers is an obvious example of extending the social safety net to contingent workers. This is a major, legitimate justification for the proposed bill. Uninsured workers create a spillover burden on other health plans or on taxpayers because someone will pay for their coverage. The only caution with extending safety-net protection to contingent workers, as expressed above, is the cost burden it places on these jobs.

For many workers, the costs of health insurance are greater than the benefits. These workers would prefer higher wages to the benefits, and presumably the employer is indifferent between paying compensation in the form of insurance premiums or wages. For example, many part-time workers are already covered under another health plan⁸⁰ and so would not

75. H.R. 2188, 103d Cong., 1st Sess. (1993).

76. See Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV 731, 736-37 (1995).

77. See *id.* at 737.

78. H.R. 2188 § 4(b), 103d Cong., 1st Sess. (1993).

79. See Schroeder, *supra* note 76, at 737.

80. Dr. Belous indicates that one-third to one-half of all part-time workers receive health insurance from someone else's employer or a nonemployer plan. See Belous, *supra*

greatly value additional coverage. Further, part-timers who are low-paid often prefer wages to health benefits because they need cash for immediate consumption and because the tax benefits of receiving employer health insurance are not worth much to them. Finally, many part-time workers are young and healthy and thus less in need of health insurance. To counter this potential burden, the proposed bill sensibly allows part-time workers to opt out of coverage. The bill only mandates an offer of coverage; it does not mandate coverage.⁸¹

Two problems suggest that, even with an opt-out provision, a mandated offer will add costs to part-time jobs. First, perhaps ERISA will not permit an individual part-time worker who waives insurance coverage to receive higher pay because of that waiver.⁸² To get the higher wages that accompany lower health insurance, such part-time workers would have to choose an employer who did not offer a health plan. Of course, as the portion of the premium that the part-time worker must pay rose, the part-time worker would be unlikely to choose to participate, which would reduce the health insurance burden of part-time jobs. An employer, calculating that many part-time workers would decline coverage, would feel less financial pressure from the mandated offer and could raise part-time wages accordingly.

This raises the second problem — that of adverse selection. Because part-time workers pay a larger fraction of the premium — the bill only mandates that employers pay a pro rata portion of the employer premium for part-time workers — and because many part-time workers place a relatively low value on health benefits, many of these workers will decline coverage. But those part-time workers who anticipate large health expenditures would be most likely to stay in the plan. Thus, workers with the highest risks would stay in, and average expenses per participating worker would rise.⁸³

note 1, at 875 tbl. 6.

81. See Schroeder, *supra* note 76, at 737.

82. ERISA § 510 makes it "unlawful for any person to discriminate against a participant for exercising any right to which he is entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140 (1988). It is unclear whether § 510 would allow an employer to pay lower wages to a part-time employee who chooses to participate in the health plan than to a part-time employee who opts out. Cf. I.R.C. § 125 (1988 & Supp. V 1993) (allowing health insurance as part of cafeteria plan in which employees who decline benefits can receive higher pay); *Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1368-69 (2d Cir. 1991) (remanding for determination of whether older worker knowingly and voluntarily waived right to participate in pension plan in return for job at particular wage).

83. The magnitude of the adverse-selection problem can be expected to be large. An analogous decision made by workers as to whether large health insurance premiums are worth

This adverse-selection problem does not arise under current law because an employer can force all workers to participate in the plan.⁸⁴

Because of the adverse-selection problem that this mandated offer would create, this bill will make employers more reluctant to hire part-time workers, especially those, such as the elderly or disabled, who are the greatest health risks. ERISA § 510,⁸⁵ the Age Discrimination in Employment Act of 1967,⁸⁶ and the Americans With Disabilities Act of 1990⁸⁷ exist to guard against discriminatory hiring on such a basis. The need for these extra laws merely highlights the complexity and potential burden of the proposal.

V Conclusion

The common perception is that career employment, whereby a full-time worker has a stable relationship with a single employer for the bulk of his working life, is on the wane.⁸⁸ Contingent work, in one form or another, is on the rise. But analysts must avoid thinking in polar terms of core or

the coverage occurs in COBRA continuation coverage. A terminated worker is entitled to continue in a health plan if the worker is willing to pay the premiums, which cannot be more than 102% of the total premium charged other participants. *See supra* note 57 and accompanying text (discussing COBRA continuation requirements). One would expect that terminated workers in good health would decline COBRA continuation coverage while workers who are bad health risks would pay the premiums. Indeed, studies have shown that, on average, COBRA participants receive about \$3,500 in benefits for every \$1,000 they pay in premiums, even though nominally they pay the entire premium for their coverage. *See WILLBORN ET AL.*, *supra* note 31, at 571.

84. A plan may permit an employee to opt out, and many dual contribution plans do this. In addition to the adverse-selection problems, self-insured employers hesitate to allow opt-outs because, if low-paid people disproportionately opt out, the plan may be held to be discriminatory under I.R.C. § 105(h) and, therefore, disqualify employers from favorable tax treatment. *See* I.R.C. § 105(h) (Supp. V 1993). In determining whether discrimination exists under § 105(h), however, employers need not consider part-time workers.

85. 29 U.S.C. § 1140 (1988).

86. *Id.* §§ 621-634 (1988 & Supp. V 1993).

87. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

88. *But see* HENRY S. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES: 1973-1993 (Indus. Relations Section, Princeton Univ Working Paper No. 341, 1995). In this major empirical study of job security, Professor Farber concludes that "[n]o systematic change has occurred in the overall distribution of job duration over the last two decades." *Id.* at 2. Farber's data do suggest that men with little education are less likely to have long-duration jobs today than they were 20 years ago, while educated women are substantially more likely to be in long-duration jobs today than they were 20 years ago. *Id.*

contingent. The work force includes a wide variety of jobs currently lumped together as contingent. Some are on the rise; others are stable or even declining. Some are good jobs; others are bad jobs; and many lie somewhere in between. Many jobs labelled contingent provide little job security, low pay, or few benefits, but the label "contingent" rather than "core" imprecisely tracks these concerns.

Contingent jobs provide our labor markets needed flexibility. The problem arises because our society provides much of its social safety net through employment, and contingent jobs can be holes in this net. Massive regulation of contingent jobs is not the answer. Not only would regulation ossify the flexibility our labor markets need, but it could reduce the growth of good, flexible jobs. Rather, what we need is a nuanced approach to policy, focusing on the particular reasons for extending workplace regulation and the effect it will have on contingent jobs.

Much employment regulation already applies to contingent work. This article sketched how ERISA regulates pension and health care coverage of part-time and leased workers. This article then speculated on future regulation of contingent work, emphasizing the need for nuanced regulation. Extension of unemployment insurance benefits to some part-time workers is appropriate; extending EPA protection to part-time workers is unwise; and mandating that employers offer health insurance on a pro rata basis to part-time workers has both good and bad features. As our empirical understanding of contingent work increases, policy recommendations can become sharper.

ARTICLES
