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# Policy Issues Concerning the Contingent Work Force

Jonathan P. Hiatt\*

The growing problem of abuse and marginalization of what has become known as the "contingent work force" is no longer a secret. More and more, conferences like this one are addressing the issue. An increasing number of popular press and academic articles are also bringing the topic into the mainstream. Representative Patricia Schroeder's persistence in introducing legislation and holding hearings on the subject has played a major role in increasing the understanding of the plight of contingent workers, as well as the social and economic implications of this trend.

Indeed, it is a measure of Representative Schroeder's success that within the last year the contingent work force issue has been at the forefront in four other governmental arenas. First, Senator Howard Metzenbaum introduced a Contingent Workforce Equity Act<sup>1</sup> that not only addressed the part-time and temporary categories of contingent workers covered in Representative Schroeder's bill,<sup>2</sup> but also covered other contingent work force categories such as independent contractors, contract employees, and leased employees.<sup>3</sup> Second, the Presidential Commission on the Future of Worker-Management Relations (Dunlop Commission) developed a strong interest in the problems of the contingent work force. The Dunlop Commission devoted several days of hearings to the subject and issued various related recommendations in its final report, issued last December.<sup>4</sup> Third, Labor Secretary Robert Reich announced a series of surveys and other projects designed to investigate and

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1. S. 2504, 103d Cong., 2d Sess. (1994) [hereinafter Senate Bill].

2. See H.R. 2188, 103d Cong., 1st Sess. (1993) [hereinafter House Bill] (giving protection to part-time and temporary workers).

3. See Senate Bill, *supra* note 1 (extending federal labor and civil rights protections to independent contractors, part-time, temporary and leased employees, and other contingent workers).

4. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS 35-42, 67 (Dec. 1994).

develop more concrete information about contingent employment trends. He also reaffirmed the U.S. Department of Labor's (DOL) commitment to increased enforcement of worker classification guidelines.<sup>5</sup> The DOL's Bureau of Labor Statistics and Women's Bureau continue to focus seriously on these concerns. Finally, Bill Gould, Chairman of the National Labor Relations Board (NLRB), issued several public statements about the need for new NLRB policies with regard to the application of the National Labor Relations Act (NLRA)<sup>6</sup> to contingent workers.<sup>7</sup>

Thus, the contingent work force's major role in our economy is a secret no more. Discussing the root of the problem in its interim Fact Finding Report last May, the Dunlop Commission stated:

The growing number of "contingent" and other non-standard workers poses the problem of how to balance employers' needs for flexibility with workers' needs for adequate income protections, job security, and the application of public laws that these arrangements often preclude, including labor protection and labor-relations statutes.<sup>8</sup>

The Commission highlighted the fact that the current legal framework of collective bargaining is "somewhat ill-suited" to the task of protecting the economic and personal rights of contingent workers.<sup>9</sup> Presently, collective bargaining is based on the nonanalogous model of "a group of employees who work together for a single employer."<sup>10</sup>

Making the problem more complex is the fact, also recognized by the Dunlop Commission, that "these contingent work relationships now encompass many more workers and take ever more forms."<sup>11</sup> Although Representative Schroeder focuses on two of the most prevalent forms of contingent employment — part-time and temporary work<sup>12</sup> — the term

5. See, e.g., *Reich Suggests New Law To Protect Contingent Workers*, 21 Pens. & Ben. Rep. (BNA) 372 (1994) (reporting administrative response to problems of contingent work force).

6. 29 U.S.C. §§ 151-169 (1988).

7. See, e.g., Laurence E. Gold, *Revitalized NLRB Ready To Take Action*, CONN. L. TRIB., Nov 21, 1994, at 24 (reporting Gould's views for future of NLRB).

8. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, FACT FINDING REPORT 22 (May 1994) [hereinafter FACT FINDING REPORT].

9. *Id.* at 94.

10. *Id.*

11. *Id.* at 93 (citing Françoise J. Carré, Virginia duRivage & Chris Tilly, *Piecing Together the Fragmented Workforce*, in UNIONS AND PUBLIC POLICY ON FLEXIBLE EMPLOYMENT (Lawrence G. Flood ed., forthcoming) and Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, RUTGERS, Oct. 1993).

12. See House Bill, *supra* note 2 (encompassing part-time and temporary workers).

generally is understood also to encompass independent contractors, leased employees, seasonal or casual employees, and contract employees.

Before discussing these other forms of contingent work, I will address Edward Lenz's analysis of part-time and temporary contingent work.<sup>13</sup> Mr. Lenz disputes the growth of the contingent work force in recent years.<sup>14</sup> He also questions whether there is any reason to assume that the percentage of involuntary part-time or temporary workers has increased.<sup>15</sup>

The DOL's surveys provide powerful evidence on both points. Consider the following: As of 1992, more than 20 million U.S. workers worked part time.<sup>16</sup> Involuntary part-time work increased by 178% between 1970 and 1992, while voluntary part-time employment increased by 53% during the same period.<sup>17</sup> In 1992, more than 6 million workers involuntarily worked part time for economic reasons,<sup>18</sup> a 26% increase since 1990.<sup>19</sup> Similarly, temporary work has grown ten times faster than overall employment since 1982.<sup>20</sup>

More significantly, whether workers voluntarily or involuntarily choose to work on a part-time or temporary basis, surely few of them voluntarily opt to forego health insurance, unemployment compensation eligibility, and hourly wage rates commensurate with full-time hourly rates. Representative Schroeder's legislation would address these inequities.

The Service Employees International Union (SEIU) has over 1.1 million members and represents primarily low-wage workers in a variety of service industries throughout the United States and Canada. SEIU is continually discovering new forms of "contingent work" that creative, but often unscrupu-

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13. See generally Edward A. Lenz, "Contingent Work" — *Dispelling the Myth*, 52 WASH. & LEE L. REV. 755 (1995) (addressing misconceptions that surround contingent work and questioning need for government regulation).

14. See *id.* at 755-58 (discussing growth of contingent work force).

15. See *id.* at 758-59 (discussing reported decrease of full-time jobs).

16. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT & EARNINGS, Jan. 1993, at 211, tbl. 32.

17. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 121 (1989); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT & EARNINGS, Jan. 1993, at 211.

18. *Id.*

19. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT & EARNINGS, Jan. 1991, at 201.

20. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT, HOURS & EARNINGS, US, 1909-90, VOL. II 848 (1991); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, Mar. 1993, at 17. The work force as a whole grew by 21% while employment in "help supply services" grew by 246%.

lous, employers devise to suit their particular short-term needs. For example, the SEIU discovered one Seattle cleaning contractor who established himself as the lowest bidder on commercial office building cleaning contracts. That contractor then "sold" franchises for the right to clean floors of downtown office buildings for \$4,000 to \$7,000 a floor — mostly to Central American and Asian immigrants. As a franchisor, the contractor disclaimed responsibility for Social Security and unemployment compensation payments, minimum wages and overtime premiums, and tax withholdings of any kind.

Contingent work arrangements have not been limited to the private sector. For instance, 50,000 California Homecare workers in Los Angeles County sought to unionize with SEIU a few years ago. Initially, they assumed their employer was the State, which gave them their paychecks each week. The State said, "not us, perhaps the County." So the homecare workers looked to the County which assigned them to clients and set their hours. The County said, "not us, perhaps the clients themselves." Three years of litigation later, with no entity willing to admit to being their employer, these minimum-wage Los Angeles homecare workers were told by the court that they were all "independent contractors" having no one to bargain with.<sup>21</sup>

Whatever the contingent work arrangement, responsibility does not lie solely with the entities who fail to pay proportionate wages and benefits, fail to remit unemployment compensation premiums, and fail to withhold taxes, thereby abusing their part-time, seasonal, and casual employees. Responsibility also rests with entities who, under traditional right-of-control standards, are not the contingent workers' juridical employers, but who certainly would be viewed as their employers under a more realistic "economic realities" test. Under an economic realities test, the label of "employer" would attach to the clients of organizations that supply labor, including the clients of contract employers, employee leasing companies, temporary agencies, and other entities that supply the labor but possess very little ability to affect actual working conditions.

The SEIU's experience with janitors who cleaned Toyota's facilities in Los Angeles last year represents a case in point. Initially, the janitors were employed by, and received paychecks bearing the name of, Advance Building Maintenance, the contractor retained by Toyota. As the janitors tried to organize and improve wages and benefits, the name on their pay-

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21. See *Service Employees Int'l Union, Local 434 v. County of Los Angeles*, 225 Cal. App. 3d 761, 773 (Cal. App. 2 Dist. 1990), *review denied* (1991).

checks changed to Stafcor, an employee leasing company based in Texas. The Advance principals claimed to be only contract brokers. Toyota claimed to be unaware that Stafcor was even on its premises. By the end of the campaign, the janitors did not know for whom they were working. Although they were always considered someone's employees, the entity in true control — Toyota — continued to disclaim any responsibility for their conditions.

The use of contract, leased, and temporary agency employees is, in many instances, a labor relations strategy rather than a matter of economic efficiency. Certainly there are instances where a contractor, for reasons of economies of scale or expertise, can do a better or cheaper job. However, there are many other instances where contracting or leasing is used primarily to evade either the letter or the spirit of labor laws and employment contracts.<sup>22</sup> A number of serious policy concerns are implicated by this problem.

### *I. Policy Implications*

#### *A. Inadequate Enforcement of Federal and State Protective Laws*

Typically contractors, leasing companies, and temporary agencies are less visible, smaller, and less capitalized operators than their clients. Often, these operators go in and out of business and are difficult to find. This is true, for example, in agriculture, building services, the garment trades, and landscaping. Contractors in these industries are much more likely than their clients to incur liability under federal labor and employment laws or fail to pay minimum-wage and then disappear.<sup>23</sup>

#### *B. Splintering of Internal Labor Markets*

Contracting work splinters internal labor markets, exposing workers to the harshest features of the external market. The more benign aspects of an internal labor market — internal bidding and advancement according to seniority — are replaced with full-scale competition. Particularly in the

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22. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS 35-36 (Dec. 1994) (discussing how contractors use contingent work relationships to evade federal and state law mandates).

23. Evidence of this fact can be garnered from the DOL's recent decision to utilize "hot goods" provisions of the Fair Labor Standards Act to convince garment manufacturers to police their contractors. See Stuart Silverstein, *Fashion Firms Told to Police Contractors*, L.A. TIMES, June 11, 1993, at D1 (describing crackdown on Southern California apparel industry).

service sector where contracts typically can be cancelled on short notice and labor costs are the predominant cost of performance, competitive bidding forces contractors to reduce wages and benefits, often to the point of violating protective standards legislation.<sup>24</sup>

### C. *Segmentation of the Work Force*

Additionally, contracting allows employers to segment the work force. The economic realities of employment are more and more becoming a tale of two cities. Employers are increasingly employing higher wage, higher skilled employees while using the labor of lower skilled, lower wage workers through contracting, leasing, or temporary agency arrangements.<sup>25</sup> As a result, low-wage workers are kept out of internal labor markets where they would gain benefits, such as health insurance, that they are unable to obtain in the external labor market. Furthermore, these arrangements allow publicly visible employers to distance themselves from the exploitation of low-wage workers while still benefitting from their exploitation.<sup>26</sup> Thus, the use of contractors is creating two labor markets — one in which workers are motivated by prospects of advancement, participation, and job security, and the other in which workers are motivated by insecurity and fear.

Disturbingly, this segmentation is often along racial, ethnic, and gender lines. For example, minority workers make up the majority of building service work forces.<sup>27</sup> Similarly, two-thirds of temporary workers are women.<sup>28</sup>

### D. *Frustration of Labor-Management Cooperation*

Contracting, leasing, and temporary agency arrangements frustrate labor-management cooperation. The high-performance, cooperative work-

24. See *The Economy and the Labor Movement, Report #1* (SEIU/Comm. on the Future, Washington, D.C.), 1994, at 12 (describing expansion of contingent work force).

25. See FACT FINDING REPORT, *supra* note 8, at 14-23 (explaining dual tiering of labor market).

26. For example, the City of Los Angeles includes its janitors in the wage scale and benefit plans provided to other city workers and could not justify paying them minimum wages and no benefits. However, it is willing and able to contract with cleaning contractors who pay only minimum wages and provide no benefits.

27. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *1990 Census of Population Supplementary Reports: Detailed Occupation and Other Characteristics from the EEO File for the U.S.* 6 (1990).

28. CONTINGENT WORKFORCE WORKING GROUP, REGIONAL ECON. JUST. NETWORK, *Contingent Workforce* 69 (1992) (on file with author).

places currently envisioned for our society are not consistent with the realities of the contract work force. In low-wage, labor-intensive contract industries, workers and employers are in a highly adversarial relationship because contractors must drive wages and benefits down to win contracts.<sup>29</sup> The workers, who often earn the bare minimum wage and have no benefits, do not have the economic or job security that is a prerequisite to meaningful cooperation. Moreover, the client, who has the economic power to assist workers and the greatest interest in the quality of their work, does not deal directly with the workers.

### *E. Frustration of Collective Bargaining*

These buffer contracting arrangements frustrate collective bargaining. If contract employees win a union election, the result effectively can be nullified by the cancellation of their employer's contract. Even if the contract is not canceled, because only the employees' direct employer has an obligation to bargain, the system of competitive bidding effectively bars the newly unionized contractor from making any economic concessions. In many industries, labor constitutes at least 80% to 90% of a contract's cost.<sup>30</sup> Capital requirements are virtually nonexistent. Contractors, therefore, lack the effective capacity to improve their employees' wages unless their clients are willing to bear the increased labor costs.

Few barriers exist to impede new contractors from entering the market. Moreover, union contractors can easily transform themselves into nonunion contractors. Thus, clients can usually find alternative, cheaper contractors. Unless the contractor's clients are willing to refrain from terminating a contractor who has unionized and are also willing to accept the higher costs that result from collective bargaining agreements, the processes of bargaining and organizing are seriously frustrated.

## *II. Solutions*

To address fully the problems of the contingent work force, then, it would seem necessary to go beyond the proposals contained in Representative Schroeder's bill.<sup>31</sup> Certainly, pay and benefit equity for part-time and

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29 See Memorandum from the ILGWU Legal Department submitted to the Commission on the Future of Worker-Management Relations 4 (Apr. 29, 1994) (on file with author) (stating that contractors must compete by offering lower prices).

30. See Statement of the SEIU before the Commission on the Future of Worker-Management Relations 7 (July 25, 1994) (on file with author) (stating that labor constitutes at least 80-90% of cost of contract).

31. See House Bill, *supra* note 2 (proposing protections for temporary and part-time



temporary workers should be mandated, but the solutions cannot stop there. Rather, we must redefine and broaden our notions of the employer/employee relationship so that accountability is more properly apportioned among those entities that effectively dictate the terms of, and that most clearly benefit from, the labor of the contingent worker. Such a process should include the following measures.

*A. Hold Client Companies Responsible as Joint Employers of Contract, Leased, and Temporary Agency Employees*

A joint-employer test based on economic realities should be applied across all relevant statutes and agency enforcement guidelines. In some cases, statutory change may be necessary. In others, the laws as presently drafted are susceptible to an appropriate agency interpretation and enforcement policy.<sup>32</sup>

At present, agencies apply varying definitions to determine responsibility under the joint-employer principle.<sup>33</sup> As a result, employees have no true

workers).

32. See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993).

33. For example, the NLRB purports to use the following standard for determining joint-employer status:

[W]here two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act. [T]o establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.

TLI, Inc., 271 N.L.R.B. 798 (1984) (citing *NLRB v Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982)). *Accord* *Lee Hospital*, 300 N.L.R.B. 947, 948 (1990). Yet, in reality, the NLRB often places principal importance on whether the client has direct supervisory control over the employees in question or has enmeshed itself in the collective bargaining process. See, e.g., *Executive Cleaning Servs., Inc.*, 315 N.L.R.B. 227 (1994) (discussing client intervention in collective bargaining); *International Transfer of Florida, Inc.*, 305 N.L.R.B. 150 (1991) (discussing supervisory control). By contrast, when the DOL considers joint employer status under the FLSA or the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), it looks to the extent that employment by one entity is "disassociated" from employment by the other. See 29 C.F.R. § 791.2(a) (1995) and 29 C.F.R. § 500.20 (1995), respectively. DOL's FLSA regulations identify a joint employment relationship to exist when two or more employers (1) either are under common control or have an arrangement to share an employee's services and (2) simultaneously benefit from the work performed by the employee. 29 C.F.R. § 791.2(b) (1995). See *Bonnette v California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983); *EEOC v Blast Intermediate Unit 17*, 677 F. Supp. 790 (M.D. Pa. 1987). The MSPA regulations reference the FLSA

measure to determine whether the entity for whom they perform services is responsible to them under the various employment laws. The NLRB, for example, uses a constrained right-of-control test.<sup>34</sup> This test, however, essentially allows the client company to set the terms and conditions of employment for the contract workers (via the agreement with the contractor), but the test also allows the client company to shield itself from legal responsibility for those terms of employment by having the contractor maintain a thin level of supervisory oversight.<sup>35</sup>

A revised definition of "joint-employer" should mandate joint and several liability against both the client and the contractor, at least for those contracted employees who perform work that is an ongoing component of the client's enterprise and where one or more of the following situations exists:

- (1) the contractor's employees are required to follow the client's instructions concerning the specifics of how and when the services are to be performed;
- (2) the contractor's employees perform the services on a regular basis on premises owned or managed by the client; or

regulations but more narrowly identify a set of five, nonexclusive, factors that may be considered in arriving at the determination of whether an entity is a joint employer: (1) the nature and degree of control, (2) the degree of supervision, (3) the power to determine pay rates or payment methods, (4) the right to hire, fire or modify employment conditions and (5) the preparation of payroll or payment of wages. 29 C.F.R. § 500.20 (1995). Under current OSHA policy, employers who exercise a certain level of control over the workplace are deemed liable both to their own employees and those of subcontractors for hazards created by a subcontractor. *See* OSHA FIELD OPERATIONS MANUAL, ch. V, § F(2) (6th ed. 1994).

34. *See, e.g.,* SEILL, Local 87, 312 N.L.R.B. 715 (1993). Moreover, even when joint-employer status is found, the NLRB will not automatically impose liability on both employers without a further finding of culpability with respect to the unlawful act. *See* Capitol-EMI, 311 N.L.R.B. 997 (1993).

35. *See, e.g.,* Southern Cal. Gas Co., 302 N.L.R.B. 456 (1991); International Bhd. of Teamsters v. Cotter & Co., 691 F. Supp. 875, 880-83 (E.D. Pa. 1988); TLI, Inc., 271 N.L.R.B. 798 (1984), *enforced*, 772 F.2d 894 (3rd Cir. 1985). In these cases, the client had extensive involvement in work assignments, supervision, and other aspects of employment, but the NLRB or court did not find joint employment. The joint-employer issue is less of a problem for temporary employees because of the NLRB's willingness to find both the temporary agency and the host employer liable for violations of the NLRA. *See, e.g.,* NLRB v. Western Temporary Servs., Inc., 821 F.2d 1258, 1266-67 (7th Cir. 1987) (finding that where temporary agency hires and fires employees, but host employer controls day-to-day activities of workers, parties are joint employers); Continental Winding Co., 305 N.L.R.B. 122 (1991) (finding joint-employer status but holding that temporary employees should be excluded from bargaining unit because of insufficient evidence that temporary employees were "regular" employees who shared community of interest with other employees).

(3) the capital goods used by the contractor's employees in performing the services in question are provided, or substantially financed, directly or indirectly by the client.

Acknowledging the close contractual nature of client/contractor relationships and imposing joint-employer liability likely would result immediately in practices that would relieve some of the administrative burdens currently carried by agencies. For example, it can be expected that client companies would require contractors to provide wage bonds. These wage bonds would obviate the need for employees of fly-by-night contractors to seek recourse from the DOL. The threat of liability would also provide an economic incentive for clients to ensure that contractors comply with the law, mirroring the way that the threat of mechanics' liens encourage general contractors in the construction industry to monitor compliance by their subcontractors.

*B. Mandate Displacement Laws Requiring Contract Employees to Be Given a Right of First Refusal to Jobs When a Contractor Changes*

Absent some right to maintain a steady employment relationship, contract employees will never be in a position to avail themselves of statutory protections. Indeed, the SEIU is continuously witness to a single, disheartening pattern in the American workplace: Voicing employment concerns today often results in contract employees being "fired" by the client tomorrow. Even more troubling is the problem that job security for employees of contractors is always tenuous. Even if the employees come together to organize a union or to establish better working conditions, the workers can have all of their achievements nullified by the arrival of a new contractor.

The simplest and, in truth, the only effective way of correcting this problem is to mandate a right of priority hiring for such employees. The right of priority would give employers the flexibility they seek in contracting for services while providing the affected work force with the job security needed to access national workplace rights and protections. The Canadian province of Ontario has enacted a law ensuring priority hiring for contract employees in the janitorial, security guard, and food service industries.<sup>36</sup> In the United States, President Clinton last year signed an Executive Order that extends a right of first refusal to Service Contract Act<sup>37</sup> building service

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36. Ontario Labour Relations and Employment Statute Law, R.S.O. §§ 56.6, 56.7, 56.9, 64.2 (1992) (amending Labour Relations Act, R.S.O. §§ 56, 63 (1990)).

37. 41 U.S.C. §§ 351-358 (1988).

employees who wish to retain their employment in the event of contractor turnover.<sup>38</sup> The District of Columbia also approved such an ordinance,<sup>39</sup> which was recently upheld by the D.C. Circuit Court of Appeals.<sup>40</sup>

### *C. Narrow Loopholes Allowing Misclassification of Employees as Independent Contractors*

The misclassification of employees who are not in a position to function as entrepreneurs or "independent contractors," but rather have a dependent employment relationship with the entity for whom they perform services, is another problem that flows directly from a constrained definition of employee. At present, the Internal Revenue Service employs a twenty factor common-law test to determine whether an individual is an "employee," for whom the employer must make FICA and other contributions, or an "independent contractor," for whom it has no such obligations.<sup>41</sup> Limitations imposed by Section 530 of the 1978 Revenue Act prohibit the IRS from issuing guidelines to clarify the definition of employee. What makes matters worse is that Section 530 also bars the IRS from collecting back taxes from employers who misclassified employees as independent contractors.<sup>42</sup> Thus, in addition to the financial incentives employers enjoy for misclassifying employees through avoidance of benefit and worker compensation premiums, employers are also given a financial incentive by the tax system to engage in such unlawful misclassification.

Fake independent contractor scams are rampant throughout the low-wage work force sectors.<sup>43</sup> They exist in agriculture, building services, clerical and support services, food services and catering, the garment

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38. Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (1994).

39. D.C. CODE ANN. §§ 36-1501 to 36-1503 (Supp. 1995).

40. See *Washington Serv Contractors Coalition v District of Columbia*, Nos. 94-7143 & 94-7144, 1995 WL 275952 (D.C. Cir., May 12, 1995), *vacating and remanding*, 858 F Supp. 1219 (D.D.C. 1994).

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

42. Section 530, scheduled to terminate at the end of 1979, was extended through 1980 by P.L. 96-167 and through June 30, 1982, by P.L. 96-541. The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (P.L. 97-248) extended section 530 indefinitely.

43. One gauge of the extent of this problem is the Coopers & Lybrand Report commissioned by the Coalition for Fair Worker Classification, which projects that the federal government will lose \$3.3 billion in revenues because of misclassification of employees. See Testimony of Terry G. Bumpers, given before the Commission on the Future of Worker-Management Relations on July 25, 1994, at 3-4 (on file with author) (discussing results of Coopers & Lybrand Report).

industry, and health care, to name just a few. The worker in these low-skill, high-turnover jobs rarely enters the scam voluntarily. Signing on to work as a "contractor" is often the only choice if a worker wants a paying job in the industry. Regulating such contractor relationships for what they are should not be lost in the rhetoric that this regulation will dampen entrepreneurial enterprise. Such regulation is crucial to forcing client companies to own up to their responsibilities as employers of the work force on which they depend.

Minimally, there should be a coordinated agency interpretation of the term "independent contractor" for labor and employment laws that employs the economic-realities test used by courts in Fair Labor Standards Act (FLSA) suits.<sup>44</sup> Under this test, the dominant question is whether the individual is economically dependent on the party for whom the work is performed.<sup>45</sup> Courts have considered a variety of factors to determine "economic dependence," including the degree of control exercised over the individual, the skill required to perform the job, the location of the work, and the control over compensation.<sup>46</sup>

Ideally, there should be a single definition applicable in all employment and labor law contexts that would recognize the distinction between an employee and an independent contractor in a more direct, less manipulable manner. SEIU has proposed a definition that more appropriately recognizes the voluntary and entrepreneurial nature of a true independent contractor:

An individual shall be deemed an *independent contractor* if he or she (1) bears the economic risk of loss concerning the business in which he or she is engaged, (2) performs work that is not an integral component of the client's enterprise, (3) schedules or otherwise controls the time during which such services are to be performed and the manner of payment, and (4) holds himself or herself out to the public as available to render services by means of an established business presence.<sup>47</sup>

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44. See, e.g., *Goldberg v Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961) (noting that economic reality governs whether entity is considered employer); *Bonnette v California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983) (same).

45. *Id.*

46. *Bonnette*, 704 F.2d at 1470; *Hodgson v Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *reh'g denied*, 472 F.2d 1405 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

47. See *Statement on Changes to Current Labor Laws Necessary to Address the Critical Needs of the Contingent Workforce*, submitted to the Commission on the Future of Worker-Management Relations, at 6-7 (Oct. 7, 1994) (on file with author) (proposing definition of independent contractors).

Further, agencies should presume that individuals who are employed in certain low-wage, low-skilled sectors of the economy, such as agriculture, building services, clerical services, and the garment industry are "employees." The employer should have a heavy burden to prove otherwise.

*D Regulate the Misuse of "Temporary" Employees in Long-Term Positions*

Without limitation, employers have every incentive to continually classify positions as temporary with the full expectation that individuals will perform the tasks on a long-term basis. Representative Schroeder and others have recommended a maximum length of time for "temporary" status, noting that the U.S. government's current practice of employing temps for years at a time has been clearly recognized by the public as an abuse.<sup>48</sup>

The use of temporary employees should be limited to true "temporary" needs — the replacement of employees who are on temporary leave or assignment to certifiably short-term work projects. Otherwise, the employee filling the position should be deemed "permanent" with the same benefits and protections afforded other permanent employees.

*E. Require Clients to Invest in the Training of Temporary and Other Contingent Workers*

Work site safety training is as important for temporary, leased, and contract workers as it is for those who have more traditional employment relationships with client employers. However, current law does not obligate clients or contractors to provide minimum safety training to these workers.<sup>49</sup>

The entity in charge of the physical plant and equipment that a contingent work force uses should be responsible for training. That entity should also be held accountable under OSHA and other applicable health and safety statutes for injuries suffered by the workers. The burden of ensuring safe working conditions would then fall on the parties who directly benefit from the work done by these employees and who are in a position to control, directly or by contract terms, conditions at the work site. The burden would also fall on the temporary agencies and other contract employers who send workers out to unsafe employment sites.

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48. See House Bill, *supra* note 2.

49. See Polly Callaghan & Heidi Hartmann, *A Chart Book on Part-Time and Temporary Employment*, 1991 ECON. POL'Y INST. 13 (finding that OSHA has not issued regulations to cover contingent work arrangements).

*F Register and Regulate Intermediaries Such as Temporary Agencies, Day Labor Pools, Employee Leasing Companies, and Contractors*

At present, very few regulations apply to temporary help agencies and employee leasing companies. As a result, many have been permitted — in the SEIU's experience — to engage in questionable, and often abusive, payroll and employment practices. Accordingly, state governments or the federal government should require the registration and regulation of employment intermediaries in a manner similar to existing state and federal law treatment of farm labor contractors. Such regulation should include recordkeeping requirements, a speedy complaint procedure, some form of financial security, and a licensing fee or bonding requirements to ensure payment of amounts to which employees are entitled under the various employment laws.<sup>50</sup>

Another possibility is a mandated "bill of rights" for temporary employees. This bill of rights could require the temporary agency to apprise temporary employees, in writing, of their status as employees of the intermediary, the job requirements of the client, the identity of the client and the intermediary, the hourly fee paid by the client for their services, the wages and benefits which they will be paid, the duration of the employment arrangement, the full nature of any hazardous materials with which they will be expected to work, their rights under labor and employment laws, and legal channels for reporting violations of such laws.

Both the client and the temporary or leasing agency should be held jointly liable for violations of civil rights, anti-discrimination, safety, and other employment laws. Further, temporaries and other leased employees should be paid a minimum percentage of the hourly rate paid by the client company to the referring agency. Finally, state and federal agencies that oversee civil rights and employment laws should target these industries for heightened enforcement.

### *III. Conclusion*

The problems of the contingent work force are numerous and varied. Any one fix, standing alone, will simply encourage the development of new forms of contingent work. Reform must be comprehensive in nature to have any effect on low-wage working conditions. Mandating fair treatment for

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50. See, e.g., ARK. CODE ANN. §§ 23-92-301 to 23-93-315 (Michie 1992 & Supp. 1993); FLA. STAT. ANN. §§ 468.520-468.535 (West Supp. 1995); ME. REV. STAT. ANN. tit. 32, §§ 14051-14058 (West Supp. 1994); TENN. CODE ANN. §§ 62-31-101 to 62-31-209 (1990 & Supp. 1994); UTAH CODE ANN. §§ 58-59-101 to 58-59-601 (1994 & Supp. 1995).

employees — whether full or part-time, seasonal or casual — by way of equal wage and benefit opportunities gives employers a reason not to directly hire "employees," but instead to hire "temps," lease workers, or engage "independent contractors" for whom they deny any responsibility

Limiting the use of independent contractors encourages the use of intermediary entities who serve as the contract employers but who truly do not control the principal employment relationship. Contract employment means that a large number of workers have no employer with whom they can engage in collective bargaining negotiations designed to improve wages and working conditions. Further, the workers are subject to arbitrary dismissal based solely on client whim and have no recourse under the law

Policymakers must recognize the inexorable synergy of the issues facing contingent workers. To address these problems successfully, a holistic approach is called for, one that would combine the solutions contained in the Schroeder and Metzenbaum bills. We must design and implement measures that will preclude unscrupulous employers from simply turning to new forms of contingent employment in the false name of flexibility and efficiency in order to evade fundamental labor protections for a substantial portion of our work force.



