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The Case Against Regulating the Market for Contingent Employment

Maria O'Brien Hylton*

I. Introduction

The current discourse about the great poverty-related problems of our day, from welfare reform to employment opportunities for low-skilled workers, is itself so impoverished that we should all welcome the opportunity afforded by this symposium for some frank and careful thinking about contingent employment. Contingent employment — defined by Professor Arne L. Kalleberg in his thoughtful paper as the absence of "an explicit or implicit contract for long-term employment or [a job] in which the minimum hours worked can vary in a nonsystematic manner"¹ — is an especially timely subject. Proposals to regulate contingent employment are inextricably bound up with general concerns about mandated employee benefits, such as the recent proposal by President Clinton to increase the minimum wage.² I have gone on record on several occasions opposing mandated employee benefits of various kinds and increased regulation of the labor market in general.³ I will argue for restraint in the face of anecdotal claims that the

* I am grateful to Keith N. Hylton, Jane Rutherford, and Michael Jacobs, for critically reading earlier drafts of this paper, to Robert Michaelis for research assistance, and to the DePaul College of Law Research Fund for generous support.

1. Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV 771 (1995) (quoting Anne E. Polivka & Thomas Nardone, *On the Definition of "Contingent Work"*, MONTHLY LAB. REV., Dec. 1989, at 9, 11).

2. See Bruce Bartlett, *Tell-Tale Minimum Wage Data*, WASH. TIMES (D.C.), Mar. 13, 1995, at 19 (reporting President Clinton's proposed increase in federal minimum wage from \$4.25 per hour to \$5.15 per hour over next two years).

3. See generally Maria O'Brien Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off*, 52 U. PITT. L. REV 475 (1991) (asserting possibility that poor, low-skilled working women will bear costs of mandated parental leave benefits); Maria O'Brien Hylton, *Working and Poor: The Increasingly Popular Practice of Excluding Disabled Employees from Health Care Coverage*, 3 KAN. J.L. & PUB. POL'Y 92 (1994) (opposing mandated benefits as way to increase coverage of disabled employees).

contingent work force is in dire need of help and that, implicitly, the federal government is the best qualified entity to provide the allegedly much needed assistance. I argue in favor of restraint based on the absence of evidence to support the existence of a serious problem unique to the contingent work force. In addition, I will argue that the specific proposals Professor Kalleberg makes do not look promising, as they are designed simply to increase the cost of hiring contingent workers without regard to consequences.

II. Addressing Threshold Issues

The problems inherent in regulating the market for contingent employment begin with the definition of "contingent employment." Professor Kalleberg's definition technically covers a very broad group of people. Indeed, except for tenured academics and union members, neither of whom makes up a substantial part of the U.S. work force, virtually everyone who is employed at-will⁴ is also, under his definition, a member of the contingent work force. Clearly, this is not the target group for those urging regulation. In spite of such an overly broad definition, the regulatory impulse today is in fact targeted at the following types of employees: those who work part time (less than forty hours per week); those who work on a temporary basis; and contract employees, who are sometimes called independent consultants.⁵ Each category includes both "high end" (well paid) and "low end" (poorly paid) workers,⁶ as well as employees whose contingent status is voluntary.⁷

4. The employer's view of the employment-at-will doctrine was described in an early case:

May I not refuse to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them?

Payne v Western & Atl. Ry., 81 Tenn. 507, 518 (1884).

5. For further discussion of the heterogeneous nature of the contingent work force, see Kalleberg, *supra* note 1, at 771 (noting part-time, temporary, contract, and independent consultant categories) (citing RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989)); Kalleberg, *supra* note 1, at 773 (noting heterogeneous nature of contingent work force); *id.* at 779 (distinguishing between short-time, secondary, and retention contingent jobs) (citing Chris Tilly, *Short Hours, Short Shrift: Causes and Consequences of Part-Time Employment*, in *NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE* (Virginia L. du Rivage ed., 1992)).

6. See Kalleberg, *supra* note 1, at 779 (noting distinction between low-paying "secondary" part-time jobs and relatively higher-paying "retention" part-time jobs).

7 See *id.* at 776 (noting existence of both voluntary and involuntary part-time workers).

No one doubts that some contingent employees would like to move into the "core" group — that group which Dr. Belous describes as "part of the corporate entity"⁸ Also, many employers undoubtedly use part-time workers, temporary employees, or contract employees solely to further their own economic interests.⁹ Indeed, there is anecdotal evidence that appears to support the contention that some employees have been forced from core to contingent status in order to eliminate their benefits, enhance employer flexibility, and reduce wages.¹⁰ It is important to keep in mind, though, that some contingent workers presumably find other contingent attributes attractive: scheduling flexibility and control over hours, working conditions, and job assignments.

Implicit in the move to regulate the contingent market are several false premises. First, it is simply not true that workers in the "core" group enjoy relatively more job security. While the shrinking unionized sectors represent an obvious exception, the vast majority of American workers are at-will employees who can be fired for any nondiscriminatory¹¹ reason or for no reason at all. Second, it is also not true that contingent employees are completely ineligible for benefits. In the United States, we have a system which has traditionally provided benefits via employment. These benefits are of two types: mandated benefits — such as Medicare, Social Security

8. Richard S. Belous, *How Human Resource Systems Adjust to the Shift Toward Contingent Workers*, MONTHLY LAB. REV., Mar. 1989, at 8. See also RICHARD S. BELOUS, THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE 5-6 (1989) (discussing characteristics of core and contingent work forces).

9. Why the pursuit of economic self-interest automatically requires a counterbalancing regulatory response is unclear.

10. See, e.g., Bennett Harrison, *The Dark Side of Flexible Production*, TECH. REV., May/June 1994, at 39, 45 (stating that "[t]he growing use of outside subcontractors sharpens the divisions between insiders and outsiders and reinforces the long-term trend toward the polarization of American earnings"); Karen Judd & Sandy M. Pope, *The New Job Squeeze*, MS., May/June 1994, at 86 (discussing growth in contingent employment, with emphasis on women); Laura McClure, *Working the Risk Shift*, 58 PROGRESSIVE 23, 26 (1994) (stating that "[c]ontingent employment is, by definition, insecure. Turnover is high and protections are few. Workers are often afraid to complain about or organize against poor conditions. And so employers get away with murder.").

11. The at-will status of most employees has been modified by the various civil rights statutes that address employment (ADA, Title VII, ADEA) and by federal and state laws that, in effect, create a host of illegal grounds for termination. See generally Richard Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984) (noting that despite regulation directly regulating employer-employee relations, common-law rules govern large portions of employer-employee relationship, and arguing that regulation cannot match benefits of contract at will).

(public pension and long term disability), workers' compensation, unemployment insurance, and minimum wage guarantees under the Fair Labor Standards Act;¹² and nonmandated, or discretionary benefits — such as health insurance, long- and short-term disability insurance, life insurance, and vacations. Employers are often required to provide all mandated benefits to an employee, whether or not the employee works a full forty hours per week and irrespective of the employee's length of service.¹³ Contingent workers, it is true, often do not receive health insurance and other discretionary benefits.¹⁴ However, the same can be said for so-called "core" employees because these benefits are by definition discretionary. The point is that with respect to both job security and discretionary benefits, many "core" workers have no more right to their employment or to health insurance than members of the contingent work force.

The question is, in a country that links only minimal benefits and job security to both core and contingent employment, why should we focus regulatory energies on contingent workers alone? The regulatory proposals before us today¹⁵ would do nothing to increase the ability of a "core" worker without health or disability insurance to obtain those protections or even to hold on to a job. Furthermore, given that some unknown percentage of contingent workers voluntarily embrace contingent status, presumably demonstrating a desire for more flexibility than the traditional labor market

12. 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993).

13. Social Security, workers' compensation, and unemployment insurance are common examples of these types of benefits.

14. See Kalleberg, *supra* note 1, at 782-85 (comparing fringe benefits of part-time and full-time workers and finding part-time workers receive fewer benefits).

15. The other papers from this symposium include: Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV 863 (1995); Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV 799 (1995); Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV 879 (1995); Gwen Thayer Handelman, *On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment*, 52 WASH. & LEE L. REV 815 (1995); Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV 739 (1995); Arne L. Kalleberg, *Part-Time Work and Workers in The United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV 771 (1995); Edward A. Lenz, *"Contingent" Work — Dispelling the Myth*, 52 WASH. & LEE L. REV 755 (1995); Mary E. O'Connell, *Contingent Lives: The Economic Insecurity of Contingent Workers*, 52 WASH. & LEE L. REV 889 (1995); Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV 731 (1995); Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV 915 (1995).

offers, there is no justification for singling out contingent employment for increased regulation.

The case for regulating the contingent employment market, assuming one can generate a reasonable working definition, is weak at best. The apparent negatives associated with contingent status are also negatives for many who enjoy core status. Perhaps we should seriously consider uncoupling benefits from employment altogether in order to avoid the double threat of simultaneous loss of employment and benefits. For those unable to obtain the basic minimum of benefits on an extra-employment basis, vouchers or a like mechanism to enable low-income individuals to purchase those benefits would seem to make sense.

III. *Considering Policy Issues*

Professor Kalleberg correctly notes that some contingent workers voluntarily choose this status while others do not.¹⁶ If the market is dominated by people in the voluntary category, the case for regulating the market is harder to make. 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."¹⁷ Involuntary contingent status is another matter. Thus, one issue concerns the actual size of the involuntary contingent group. If involuntariness is defined narrowly, the group may be insufficiently large to warrant special regulation.

The Bureau of Labor Statistics attempts to determine what portion of part-time workers are voluntary. However, as Professor Kalleberg points out, the voluntary category may be tainted by the presence of those who are *unable* to work full time because of disability or lack of child care or transportation.¹⁸ The important question remains whether to treat these individuals as voluntary or involuntary contingent workers because the size of the truly involuntary contingent work force has obvious implications for political judgments about the need for regulation. For example, should a parent who works twenty hours per week because she has a young child at home be classified as a voluntary part-time worker? How should we classify a woman who would work forty hours per week if she could find superior child care, but takes part-time employment because she believes the available child care is only "adequate," and she does not want

16. Kalleberg, *supra* note 1, at 776-77

17. *Id.* at 793.

18. *Id.* at 776-77

to place her child there for extended periods of time? What about the worker for whom the marginal cost of the additional care exceeds the extra earnings she can generate with the additional commitment of time to the work force?

Those familiar with the voluntary-involuntary debate regarding work availability in unemployment compensation law no doubt hear familiar echoes. In the unemployment context, state officials have grappled for ages with workers who claim they are involuntarily unavailable for work because they lack transportation,¹⁹ lack child care,²⁰ or want to pursue an education full time.²¹ In order for a claimant to receive benefits, state unemployment statutes generally require a showing that job separation was either involuntary or with "good cause" and that the claimant continues to be available for work.²² Not surprisingly, in a decentralized system such as ours, the outcomes are mixed. For example, Massachusetts has taken the position that the loss of transportation previously provided by a co-worker results in a personal, albeit *involuntary* separation from employment which entitles a claimant to receive benefits.²³ California has taken the position that a full-time law student with children to care for is nonetheless "available" for paid work.²⁴ On the other hand, Idaho and Minnesota have a conclusive presumption that

19. See *Raytheon Co. v Director of Div of Employment Sec.*, 307 N.E.2d 330 (Mass. 1974) (finding woman who left work because of lack of transportation involuntarily unavailable for work).

20. See *Jones v Review Bd. of the Ind. Employment Sec. Div.*, 399 N.E.2d 844, 845 (Ind. Ct. App. 1980) (finding employee who terminated employment because changed work hours conflicted with child-care responsibilities was not entitled to good-cause status because employee agreed to change prior to termination); *Gray v Dobbs House, Inc.*, 357 N.E.2d 900, 903-05 (Ind. Ct. App. 1976) (determining that parental obligations are not good cause within meaning of Indiana unemployment benefits law).

21. See *Glick v Unemployment Ins. Appeals Bd.*, 591 P.2d 24, 28-29 (Cal. 1979) (determining that claimant law student had good cause for not accepting work that conflicted with school requirements).

22. Massachusetts, for example, requires an individual, *inter alia*, to "[b]e capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted" in order to be eligible for unemployment benefits. MASS. GEN. LAWS ANN. ch. 151A, § 24(a) (West. Supp. 1994).

23. *Raytheon Co. v Director of Div of Employment Sec.*, 307 N.E.2d 330 (Mass. 1974). For an excellent discussion of the varied treatment by the states of involuntary separations, see Dahm & Fineshriber, *Disqualification for Quits to Meet Family Obligations*, in 1 UNEMPLOYMENT COMPENSATION: STUDIES AND RESEARCH 9, 13-14 (National Commission on Unemployment Compensation 1980).

24. *Glick v Unemployment Ins. Appeals Bd.*, 591 P.2d 24 (Cal. 1979).

full-time students are unavailable for work and therefore ineligible for benefits.²⁵

I have believed for some time that a narrow construction of "involuntariness" would best serve the states in evaluating these kinds of unemployment cases. The same can be said for contingent employment claims. A part-time worker who does not want to work full time because of a personal circumstance beyond the control of the employer, such as child-care responsibilities, transportation problems, or a decision to return to school, ought to be placed squarely in the voluntary contingent category. This is not a political judgment designed to limit the number of involuntary contingent workers. Rather, it is a practical decision that fairly reflects the wide range of choices employees are free to make. For example, with respect to the perennially touchy subject of child care, no one can seriously contend that choosing to spend time caring for a small child is an involuntary act, particularly in the qualified, post-*Roe* regime in which employers currently operate.²⁶ Although Professor Kalleberg does not make an explicit claim for including such persons in the "involuntary" category, others might wish to do so. Labelling employment decisions influenced by personal choices about transportation, children, and so forth "involuntary" is dangerous because the "involuntary" label creates a class of "victims" whose "subordinated" status is a function of purely voluntary decisions.

Several of Professor Kalleberg's other observations merit comment in this context. The data on work as a central life interest,²⁷ earnings,²⁸ flexibility,²⁹ union representation,³⁰ and reported effort are consistent with other findings and with anecdotal sources.³¹ Professor Kalleberg's finding that

25. See *Idaho Dep't of Employment v Smith*, 434 U.S. 100 (1977) (holding that conclusive presumption that persons attending school other than night school are not unemployed and thus cannot receive unemployment benefits does not violate Equal Protection Clause of Fourteenth Amendment); *Shreve v Dep't of Economic Sec.*, 283 N.W.2d 506 (Minn. 1979) (holding that irrebuttable presumption that students are unavailable for work does not violate Due Process Clause of state or federal constitutions).

26. By this I simply mean to suggest that I am inclined to take pro-*Roe*, pro-choice rhetoric seriously. The decision to have a child, when one could opt instead to terminate a pregnancy, should be respected as a *voluntary* choice, no different from any other.

27. Kalleberg, *supra* note 1, at 777-78.

28. *Id.* at 780-82.

29. *Id.* at 787

30. *Id.* at 791-92.

31. See, e.g., *Conference on the Growing Contingent Workforce: Flexibility at the Price of Fairness?: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 103d Cong., 2d Sess. (1994); *Toward a Disposable Workforce: The*

more men than women view work as a "person's most important activity" may account for the disproportionate number of women in the contingent market.³² The General Social Survey data on earnings that Professor Kalleberg reviews is consistent with every other source that I know of in its conclusion that part-timers earn less than "core" workers.³³ Some of the lower earnings can be explained by the heavy concentration of part-timers in low-wage sectors of the economy — Dr. Kalleberg points to sales and food service jobs.³⁴ Professor Kalleberg's data on flexibility, an attribute that he describes as a "major advantage of part-time work,"³⁵ is similarly consistent.

It is not surprising that employers reward full-time employees with a higher mean hourly wage³⁶ given the corresponding data on their higher reported effort.³⁷ Professor Kalleberg suggests that the difference in reported effort between full- and part-time females "points to a drawback of employers' reliance on part-time and other forms of contingent work. The 'low road' approach to decreasing labor costs by reducing payroll may lower worker effort, thereby resulting in less productivity and poorer product quality"³⁸ If employers are indeed observing reduced rates of productivity and poorer quality outputs from part-time workers, they may implicitly incorporate the generally inferior work product of contingent employees into the relative wage scales. However, employers may not observe the reduced effort that employees report. In that case, there may be a valid alternative explanation for the wage differential: In some cases the lower wages paid to contingent workers are the functional equivalent of a

Increasing Use of "Contingent" Labor: Hearing on Examining the Use and Growth of a "Contingent" Work Force in the United States, which Consists of Part Time, Temporary, and Leased Employees, Including Independent Contractors, and Its Impact on the Nation's Standard of Living, Productivity and Competitiveness Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 103d Cong., 1st Sess. (1993); BUREAU OF LABOR STAT., U.S. DEP'T OF LABOR, BULLETIN NO. 2441, EMPLOYEE BENEFITS IN SMALL PRIVATE ESTABLISHMENTS, 1992 (1994); BUREAU OF LABOR STAT., U.S. DEP'T OF LABOR, BULLETIN NO. 2422, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1991 (1993); Harrison, supra note 10; McClure, supra note 10.

32. Kalleberg, *supra* note 1, at 777-78 (noting that irrespective of full- or part-time status, men were more likely than women to agree that work is person's most important activity).

33. *Id.* at 780-82.

34. *Id.* at 780.

35. *Id.* at 787.

36. *Id.* at 780.

37. *Id.* at 790-91.

38. *Id.* at 791.

subminimum training wage.³⁹ Some temporary agencies take on low-skill workers, provide free training, and help "transition" them into "core" employment. The cost of the training — both pre- and post-job placement — may be reflected in the lower wage paid to the worker who is gaining skills and experience.

IV *Evaluating Specific Proposals*

I take issue with Professor Kalleberg in those sections of his paper in which he outlines the policy implications of the data he reviews. He recognizes that contingent employment has both positive and negative aspects and that it creates opportunities for flexibility for both parties. However, his policy prescriptions focus on the negatives in a way that suggests that these negatives are unique to contingent workers.

His specific proposals include: a substantial increase in the minimum wage⁴⁰ (to address the wage differential problem); legislation such as Representative Schroeder's bill to prorate benefits to contingent workers⁴¹ (to address the lack of benefits); and encouraging unions to organize contingent workers (to address both the wage and benefit problems).⁴² The explicit rationale for these proposals is to "make the option of creating contingent part-time jobs more expensive for employers,"⁴³ and, in fairness, the proposals appear to be designed to do just that.

However, his proposals may have some additional, unintended consequences. For example, the Schroeder bill only requires that benefits be offered to contingent workers if they are made available to core workers.⁴⁴ An employer who is required to offer prorated benefits consistent with the Schroeder bill may opt to discontinue benefits for *all* employees.

39 This observation is based upon the author's discussions with personnel managers at various temporary agencies. Symposium participants reported similar experiences at their companies.

40. Kalleberg, *supra* note 1, at 794.

41. *Id.* at 795.

42. *Id.* at 797

43. *Id.* at 798.

44. See Part-Time and Temporary Worker Protection Act of 1993, H.R. 2188, 103d Cong., 1st Sess. § 4(b)(1)(B) (providing in part that "[t]he employer-provided premium under a group health plan with respect to any employee for any period of coverage, after the reduction permitted under section (a), shall not be less than a ratable portion of the employer-provided premium *which would be provided under such plan for such period of coverage with respect to an employee who completes 30 hours of service per week*") (emphasis added). This legislation treats 30 hours of work per week as full-time work. See *id.*

If this were to happen, it is hard to see how any of the employees — contingent or core — would be made better off.

Alternatively, an employer facing increased labor costs associated with hiring contingent workers may do what Professor Kalleberg would like to see done — reduce the number of contingent employees.⁴⁵ There is no guarantee, however, that the employer would substitute core workers for contingent workers under these circumstances. If the employer did elect to consolidate the work of several contingent employees into one core worker, one must still inquire as to whether this is a desirable outcome. A conclusion that this is a superior outcome requires one to accept that the current full-time employment of one core employee and the simultaneous unemployment of several formerly contingent employees are more attractive than the contingent employment of all of them. Given how little we can say about the subjective desirability of contingent employment, such a conclusion does not appear warranted.

V Possible Justifications for a Nuanced Regulatory Impulse

There are three principal advantages of contingent workers to employers: lower payroll costs because of lower wages and benefits ineligibility; tremendous flexibility regarding personnel and staffing needs without the expense of cyclical hiring and lay-off periods; and reduced administrative burdens associated with recruiting, training, and terminating employees and with maintaining benefit and compensation plans. In pursuit of any or all of these advantages, an employer may be influenced by the existing regulatory framework, in particular the "trigger levels" in major employment legislation. The term "trigger level" refers to the minimum number of employees an employer must have for a particular statute to apply to the employer. For example, Title VII of the Civil Rights Act of 1964⁴⁶ applies only to employers with at least fifteen employees.⁴⁷ An employer seeking to avoid Title VII coverage, thereby preserving the ability to discriminate on the basis of race, color, sex, religion and national origin, might seriously consider hiring contingent workers once there are thirteen or fourteen core employees. Properly structured, the contingent workers would not "count" as employees

45. Kalleberg, *supra* note 1, at 798.

46. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

47. Title VII of the Civil Rights Act of 1964 "covers not only all private employers affecting interstate commerce with fifteen or more employees, but also all governmental employers — federal, state and local — as well." SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP 25 (1990).

for purposes of the statute, and the employer would remain free from Title VII's dictates. The relatively new Americans with Disabilities Act (ADA),⁴⁸ the Family and Medical Leave Act (FMLA),⁴⁹ and the Age Discrimination in Employment Act (ADEA)⁵⁰ are similarly susceptible to coverage avoidance via manipulation of the number of "employees." So long as an employer can plausibly assert that the employer has no "control" over a worker, the employer is not employing that person, but merely contracting for services with an independent agent.⁵¹

Additionally, the existence or absence of a traditional ("core") employment relationship affects liability under both the National Labor Relations Act (NLRA)⁵² and the various state workers' compensation

48. 42 U.S.C. §§ 12101-12213 (Supp. V 1993). The ADA provides that:

In general, the term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

Id. § 12111(5)(A).

49. 29 U.S.C.A. §§ 2601-2619, 2631-2636, 2651-2654 (Supp. V 1993). The FMLA provides that "[t]he term 'employer' means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each of 20 or more calendar workweeks in the current or preceding calendar year." *Id.* § 2611(4)(A)(i).

50. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993). The ADEA provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.* § 630(b).

51. As one practitioner has noted,

[a]ll modern day social and civil rights legislation governing the broad array of legal obligations and duties owed by an employing entity to its employees can directly be traced back to common law rules governing the "master/servant" relationship. At common law, a "master" was defined as: A principal who employs an agent to perform services and who controls or has the right to control the conduct of the agent in the performance of those services. A "servant," in turn, was defined as: An agent employed by a master to perform services and whose conduct is controlled by the master or is subject to the right of control by the master. As a result, courts and administrative agencies charged with enforcement of [employment] laws have continued to apply the common law "right of control" test to determine whether an employer/employee relationship exists.

Kenneth R. Dolin, *Hiring and Use of Temporary or Leased Employees: Practical and Legal Considerations* 4-5 (Nov. 8-9, 1994) (citations omitted) (unpublished manuscript, on file with the *Washington & Lee Law Review*).

52. 29 U.S.C. §§ 151-169 (1988).

acts.⁵³ For example, for businesses that use temporary or leased employees, if both the leasing entity and the subscribing employer control wages and terms and conditions of employment, either may be liable as an employer under the NLRA.⁵⁴ Indeed, several practitioners that I know routinely advise clients to pay contingent workers a lower wage rate in part because the wage distinction increases the likelihood of a nonjoint-employer finding. The obligation to self-insure or obtain third-party coverage for workers' compensation belongs to the core employer — that is, to the temporary agency — not to the leasing employer.⁵⁵ Thus, an employer may perceive an ability to cut insurance costs by substituting contingent workers for core workers. However, one would expect to see temporary agencies passing on these costs to subscribing employers.

This discussion suggests that the *existing* regulatory climate in our labor market may be partially responsible for the move away from the traditional core employment relationship. If this is true, we ought to evaluate proposals for additional regulation with extreme care. Instead of explicit increases in the cost of hiring contingent workers — Professor Kalleberg's stated agenda — we might first want to consider lowering the various trigger levels in existing regulations. Such a measure would reduce the incentives to hire contingent workers in order to maintain working environments infected by bias. However, I am unaware of any data which purport to measure the scope of the trigger-level problem. Researchers should address this question before existing statutes are amended.

In addition, if one could document that employers are hiring contingent workers in order to circumvent obligations under existing legislation, the solution may lie in eliminating the opportunities for avoidance by removing the current mandates which are imposed on employers. I emphasize that this

53. In general, employer liability is limited to injuries sustained by employees during the course of their employment. In addition to independent contractors, who are not employees, some states also exclude from workers' compensation act coverage, *inter alia*, employees of charitable or religious employers, domestic servants, casual employees, and agricultural workers. MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW §§ 7 4-7.6 (1994).

54. See *Southern Servs., Inc. v NLRB*, 954 F.2d 700 (11th Cir. 1992) (sustaining NLRB order that contracting employer cannot wholly restrict subcontract employee's right to distribute union literature on contracting employer's premises).

55. State workers' compensation acts cover employees injured during the course of employment; they do not cover leased employees or independent contractors. California, for example, provides that "[l]iability for the compensation provided by this division shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment " CAL. LAB. CODE § 3600(a) (West 1989).

proposal remains a distinctly separate task from that proposed by Representative Schroeder. It is important to remember that neither contingent nor core employees are entitled to nonmandated or discretionary employee benefits such as health insurance. Forcing employers who opt to offer certain nonmandated benefits to expand the pool of beneficiaries would lead to a curious result: Only a portion of the core and contingent work force would enjoy nonmandated benefits. One may properly infer from the existence of, for example, the ADA and Title VII, that a national consensus exists about the importance of bias-free workplaces — that is, about the availability of employment without discrimination to all Americans. One cannot draw the same conclusion about benefits from, for example, ERISA,⁵⁶ which only applies to employers who on their own make the threshold decision to offer health or pension plans.⁵⁷ This is a critical distinction. It makes no sense to push for nonmandated benefits for contingent workers while many core workers continue to do without these benefits themselves.

VI. Conclusion

The impulse to regulate perceived deficiencies in the labor market is usually informed by the best of intentions — chiefly, a desire to improve the lot of working people whose subordinated status is troubling. For example, people (as opposed to labor unions)⁵⁸ who favor periodic increases in the minimum wage usually believe they can increase the wages of the working poor without any disemployment effect. I suspect that the same kinds of charitable concerns exist concerning contingent employment.

56. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993).

57. See EMPLOYEE BENEFITS COMMITTEE, AMERICAN BAR ASSOCIATION, *EMPLOYEE BENEFITS LAW* 19 (Steven J. Sacher et al. eds., 1991) (stating that ERISA applies to established plans, funds, or programs).

58. Organized labor's long support for the minimum wage has been based on ripple effects on its own wages:

The accepted political-economic theory of minimum wages is one based on the intensity of preferences of the benefitting union sector and also those industrial sectors whose technology uses relatively skilled labor. In both cases, consumer substitution toward products produced by firms using low-productivity, low-wage workers is limited by legally elevating the wages paid by these firms. Generally these politically based, pressure-group explanations for the political popularity of minimum wages are specific to the United States.

Keith B. Leffler, *The Unanswered Question: Why are Minimum Wages Popular with the Poor?*, in *THE ECONOMICS OF LEGAL MINIMUM WAGES* 531, 532 (Simon Rottenberg ed., 1981).

In summary, there are several problems with increasing the cost of hiring contingent employees. The definition of who is a contingent employee is insufficiently precise. Most core employees have no more job protection or right to nonmandated benefits than the typical contingent worker. Many contingent employees may voluntarily choose contingent status and we know little about the relative sizes of the voluntary/high-end and involuntary/low-end contingent markets. Contingent workers' lower wages may be operating as a subminimum training wage in some cases. Finally, it is not at all clear that employers will convert contingent workers to core workers if the benefits differentials are eliminated.

These problems imply the need for a cautionary impulse to act as a counterweight to the regulatory impulse. No one benefits from a simple increase in the cost of hiring contingent workers. Unless the increased cost translates into concrete improvement in the lives of the affected employees in the form of increased job security, wages, and the like, it is meaningless. At this point we do not have evidence sufficient to make the case for regulating the market for contingent employment.