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The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force

Kenneth G. Dau-Schmidt*

Since World War II, the American labor market has been transformed. The U.S. economy has changed from predominantly a manufacturing economy to predominantly a service economy.¹ Women have entered the paid labor market in record numbers, and women and African Americans have enjoyed increased opportunity to enter professions from which they previously were barred.² Finally, the U.S. economy has become much more integrated into an international economy in which its businesses and workers are subject to intense international competition.³

An important facet of this transformation has been the recent increase in the number of employees working in temporary, part-time, or sub-contracted positions. Probably no one has done more to document the recent increase in this contingent labor force than Dr. Richard S. Belous.⁴ As Dr.

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1. RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 27 (4th ed. 1991).

2. *See id.* at 24 (noting dramatic increase in labor force participation rates for women).

3. *Id.* at 126-27

4. *See generally* Richard S. Belous, *How Human Resource Systems Adjust to the Shift Toward Contingent Workers*, *MONTHLY LAB. REV.*, Mar. 1989, at 7; Richard S. Belous, *Human Resource Flexibility and Equity: Difficult Questions for Business, Labor, and Government*, *J. LAB. RES.*, Winter 1989, at 67; Richard S. Belous, *Flexible Employment: The Employer's Point of View*, in *BRIDGES TO RETIREMENT: OLDER WORKERS IN A CHANGING LABOR MARKET* 111 (Peter B. Doeringer ed., 1990).

Belous points out in his current work, by 1993, between 25% and 30% of the American labor force were contingent workers, and the contingent work force was growing considerably faster than the rest of the work force with between 40% and 55% of the jobs created between 1980 and 1993 going to contingent workers.⁵ Although contingent employment has increased within every demographic group and within almost all sectors of the economy, as Dr. Belous observes, contingent workers are disproportionately female, disproportionately African-American, and disproportionately service industry workers.⁶

Although our regulation of the employment relationship in the U.S. has kept pace, in some instances, with the transformation of the U.S. economy,⁷ and, in some cases, even prompted the transformation,⁸ as Dr. Belous has documented in his article, our regulation of the employment relationship has not kept pace with the rise of contingent workers. Contingent workers often are excluded explicitly from the definition of "employees" covered by protective legislation. For example, subcontractors typically are excluded from coverage under workers' compensation statutes, unemployment insurance statutes, and the National Labor Relations Act (NLRA).⁹ Even when contingent employees are included among those "employees" governed by protective legislation, the nature of their employment relationship often proves a barrier to the receipt of protection or benefits under these acts. For example, temporary workers are less likely to meet statutory recency or vesting requirements¹⁰

5. Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV 863, 867 (1995).

6. *Id.* at 869-70.

7. For example, although perhaps overdue, the Family and Medical Leave Act of 1993 §§ 1-404, 29 U.S.C. §§ 2601-2654 (Supp. V 1993), is a recent response to the growing number of women in the paid work force and the corresponding increase in the number of two-earner families.

8. See Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2000e-17 (1988) (requiring equal employment opportunities).

9. For example, see the definition of "employee" in the Massachusetts Workers' Compensation Act, MASS. GEN. LAWS ANN. ch. 152, § 1(4) (West 1994), the California Unemployment Insurance Code, CAL. UNEMP INS. CODE § 621 (West 1986), and the National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1988).

10. See 42 U.S.C. §§ 501-504, 1101-1109, 1321-1324 (1988) (outlining recency requirements for unemployment insurance benefits); 42 U.S.C. §§ 420-433 (1988) (listing recency requirements for Social Security disability benefits); and Employee Retirement Income Security Act of 1974 (ERISA) § 203, 29 U.S.C. § 1053 (1988) (outlining vesting requirements).

and, thus, are less likely to qualify for such benefits as unemployment insurance, Social Security disability payments, and pensions.¹¹ As Dr. Belous's article demonstrates, contingent workers also are less likely to receive benefits such as health insurance and pensions, which have been left largely to private voluntary provision under our system of regulation.¹² As Dr. Belous has noted, although the rise of contingent employment has made the U.S. labor market more flexible in terms of the number of hours of work that employees supply and employers purchase, our social welfare system of regulatory protection, government benefits, and private benefits has not achieved similar flexibility in covering contingent workers.¹³

I agree with Dr. Belous that the solution to this problem is not to restrict or discourage contingent employment, but instead to try to adapt our social welfare system to better meet the needs of contingent workers.¹⁴ In this essay, I hope to elaborate on Dr. Belous's arguments in favor of extending our social welfare system to contingent workers. I accept his basic argument that contingent workers need the protections and benefits of our social welfare system as much, or even more, than core employees.¹⁵ However, I would argue also that, by failing to extend regulatory protection to contingent workers, our laws create artificial incentives for employers to employ more contingent workers, needlessly exposing employees to the risks of unemployment and denying them valuable training. I also will discuss the issues that must be addressed to extend our social welfare system to contingent workers. Dr. Belous's article provides some tantalizing insights in this regard when he discusses multi-employer benefit schemes and the promotion of defined-contribution pension plans.¹⁶ However, I would like to discuss further three key issues in this enterprise: the definition of "employee" used to define the scope of our protective legislation, the portability of employee benefit plans from one employer to another, and the provision to contingent workers of benefits that are proportionate to those benefits provided to core workers.

11. See Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV 1421, 1455-56, 1461 (1993).

12. Belous, *supra* note 5, at 875 tbl. 6, 877 tbl. 7

13. *Id.* at 876.

14. *Id.*

15. See *id.* at 873-78.

16. *Id.* at 877-78.

I. Including Contingent Workers in the American Social Welfare System

Dr. Belous joins Professor Mary E. O'Connell on this panel in arguing that our social welfare system should be extended to contingent workers for the benefit of those workers.¹⁷ Just as core employees need the protection of the Occupational Safety and Health Act (OSHA) regulations and the NLRA and the benefits of workers' compensation, unemployment compensation, Social Security, pensions, and health insurance, so do contingent workers. Indeed, it can be argued persuasively that contingent workers need such protections even more than core workers because their employers have less long-term interest in their health and safety and because contingent workers are more subject to the whim of their employers and the fluctuations of the labor market.¹⁸

I agree with these arguments, but would also argue that it is desirable to extend our system of regulation and benefits to contingent workers to prevent our regulatory system from encouraging more contingent employment than would otherwise be desirable. The regulation of the workplace and workplace benefits, whether that regulation is provided by OSHA, the NLRA, workers' compensation, unemployment compensation, or whatever, imposes costs on employers. If we impose these costs on employers only for core workers and not for contingent workers, this obviously creates incentives for employers to employ more contingent workers than they otherwise would employ. Although contingent employment can provide desired job flexibility for some workers (for example, those actively engaged in child rearing), as Dr. Belous has established,¹⁹ contingent employment has a variety of undesirable characteristics, including low wages and benefits, greater risk of unemployment from fluctuations in the labor market, and low investment in human capital. Accordingly, I do not believe that it is desirable to have government policy actively promote contingent employment, either intentionally or unintentionally.

However, the extension of our social welfare system to contingent workers will not be an easy matter. There are a variety of issues and problems that must be addressed. Chief among these issues, I believe, are the definition of "employee" used to define the scope of our protec-

17 *Id.* at 876-78; Mary E. O'Connell, *Contingent Lives: The Economic Insecurity of Contingent Workers*, 52 WASH. & LEE L. REV 889 (1995).

18. See O'Connell, *supra* note 11, at 1476-77

19 Belous, *supra* note 5, at 879

tive legislation, the portability of employee benefits from one employer to another employer, and whether or how to provide contingent workers with benefits proportionate to those benefits provided to core employees.

*A. The Definition of "Employee" Time to Revisit the
Hearst Publications Definition?*

Under our social welfare system, the receipt of statutory protection or benefits is dependent on a person meeting the definition of "employee" under the relevant statute. For example, section 2(3) of the NLRA defines which persons are "employees" under that Act and, therefore, entitled to its protections.²⁰ Similarly, OSHA, state workers' compensation laws, unemployment compensation laws, and other protective legislation limit the scope of their protection with their definitions of "employee."²¹ The problem is that, invariably, the definition of "employee" under these statutes excludes certain contingent workers. For example, all of the statutes above exclude subcontractors from the definition of "employee."²² Moreover, even if a contingent worker is an "employee" of someone under the relevant statute, that person may not be the one ultimately responsible for the problem addressed by the protective legislation.

An example of this problem has cropped up in the enforcement of OSHA regulations concerning exposure to toxic chemicals.²³ Suppose that a major manufacturer suffers a spill of a dangerous chemical during the manufacturing process. It may be cheaper for the manufacturer to subcontract the clean-up work rather than maintain core employees to do such work because such work is intermittent and the subcontractor may have special expertise or equipment to handle such spills. Unfortunately, it also may be cheaper to subcontract such work because the subcontractor does not follow existing OSHA regulations, exposes his or her workers to dangerous levels of the chemical, and is under-capitalized so that future OSHA liability is not a concern. Workers' compensation liability also will

20. Labor-Management Relations (Taft-Hartley) Act § 2(3), 29 U.S.C. § 152(3) (1988).

21. Occupational Safety and Health Act of 1970 (OSHA) § 3(6), 29 U.S.C. § 652(6) (1988); see also *supra* note 9.

22. See *supra* notes 9 and 10 and accompanying text.

23. I would like to thank Mark Rothstein and Lance Liebman for this example. MARK A. ROTHSTEIN & LANCE LIEBMAN, *CASES AND MATERIALS ON EMPLOYMENT LAW* 742-43 (3d ed. 1994).

not provide adequate incentives for the subcontracting employer to act responsibly because workers' compensation is not fully compensatory and no system that I know of is truly, fully experience-rated.²⁴

If a disaster occurs, for example, and several subcontracted clean-up workers die from exposure to the chemical during the clean-up process, and the under-capitalized subcontractor disappears, what will be the responsibility of the manufacturer for the death of the workers under OSHA? The answer is "none." Although the manufacturer created the spill, the subcontracted employees are not its employees under OSHA, and the manufacturer did not "expose" them to the hazard because it was the subcontractor who brought the workers to the manufacturer's plant and asked them to clean up the spill. Again, workers' compensation would not remedy the problem because the subcontracting employees would not be the employees of the manufacturer under the workers' compensation statutes. This state of affairs encourages irresponsibility because irresponsible subcontractors always can deal with a toxic spill most cheaply and they afford the manufacturer immunity from OSHA and workers' compensation liability

To solve this problem and the other definitional problems contingent employees suffer, we need a definition of "employee" in our protective legislation that includes temporary and part-time employees and that looks at the actual relationships of responsibility and dependency between the parties, in light of the purpose of the particular protective statute, to include appropriate subcontracting employees whether or not they directly subcontract from the principal manufacturer or are the employees of a subcontracting employer. The form and rationale for such a definition might follow those set forth in the old "economic facts" test developed under the NLRA in the *Hearst Publications* case.²⁵ There the Supreme Court held that where the "economic facts" of two parties' relationship brought them within the purpose of the Act, the parties would be considered employer and employee even if the traditional "right of control" test would classify the parties as principal and independent contractor.²⁶ This

24. A workers' compensation system is "experience-rated" if the employers' insurance charges under the system depend on the amount of their claims (or their "experience") under the system. A workers' compensation system is "fully experience-rated" only if the employers' insurance charges fully reflect all, and only, those costs attributable to their respective claims.

25. See *NLRB v Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944).

26. See *id.*

"economic facts" test was overruled by Congress with the passage of the Taft-Hartley Act,²⁷ but I would argue that it is time to legislatively revisit this issue not only with respect to the NLRA but also with respect to other protective legislation. At the very least, principal manufacturers must be made jointly liable for the health and safety violations of their subcontractors under OSHA. This will give principal manufacturers incentive to ensure that they hire only responsible subcontractors that are properly capitalized.

It should be noted that this expanded definition of "employee" would not be all bad for employers. Under workers' compensation statutes, the definition of "employee" is a two-edged sword. Workers' compensation statutes provide compensation benefits to people covered by the definition of "employee," but also provide tort immunity to manufacturers for injuries to those people covered by the definition. Accordingly, although principal manufacturers might incur greater OSHA liability and workers' compensation liability for contingent workers under this broadened definition, they would also receive immunity from tort suits by these contingent workers for injuries that occur in furtherance of the principal manufacturers' interests. Such tort liability for injuries to subcontractors and the employees of subcontractors has been a growing problem for American manufacturers.²⁸

B. The Portability of Employee Benefits

Contingent workers, or at least those whose employment is temporary in nature, lose out on the benefits of our social welfare system because statutes and private employment rules prevent employees from carrying credits for hours of employment and benefits from one job to the next. For example, temporary employees are less likely to meet minimum requirements for recent work under state unemployment insurance plans or the Social Security Disability Act and, thus, are more likely to be denied benefits under those laws despite significant past employment.²⁹ Similarly, temporary workers are less likely to meet waiting periods or vesting periods for private benefits and, therefore, are less likely to qualify for private benefits such as sick leave, vacation time, and pensions. Thus,

27. Labor-Management Relations (Taft-Hartley) Act § 2(3), 29 U.S.C. § 152(3) (1988).

28. See ROTHSTEIN & LIEBMAN, *supra* note 23, at 850-51 (describing tort actions against third parties).

29. O'Connell, *supra* note 11, at 1460-61.

temporary employees can be denied state and private employment benefits despite a history of significant past employment due to the intermittency of that employment.

Government policy can seek to reduce this problem through a number of means. First, federal and state governments can amend their own laws to reduce recency requirements for Social Security disability benefits, unemployment insurance, and other statutorily provided benefits. Second, states or the federal government could enact laws encouraging or requiring shorter waiting and vesting periods for private benefits. The most obvious candidate for this strategy is the five-year maximum vesting requirement under the Employee Retirement Income Security Act (ERISA).³⁰ Finally, as Dr. Belous suggests, the federal government could enact legislation encouraging the use of defined-contribution pension plans with quick or immediate vesting rather than defined-benefit pension plans. "Defined-contribution plans," in which the employer makes specified contributions to an account in each employee's name each pay period, have tremendous advantages in portability over the more traditional "defined-benefit plans," in which a specified number of years of service entitles the employee to some percent of his or her average annual income as a pension upon retirement. The personal retirement accounts associated with defined-contribution plans are much more amenable to multi-employer contributions and portability with the employee from job to job than the years of service credits earned under defined-benefit plans.

These changes will, of course, raise the costs of government and private benefits by raising utilization and administrative costs. However, society will be more than compensated for these costs by the extension of these employment benefits to contingent workers.

C. The Provision of Proportional Benefits to Contingent Workers

The final, and perhaps the most controversial, issue that must be addressed in the extension of our social welfare system to contingent workers is the issue of proportionality in the delivery of social welfare benefits. As Dr. Belous's statistics show, contingent workers are entitled to receive far fewer private benefits from their employers than corresponding core employees.³¹ The most obvious examples of this deficiency are

30. Employee Retirement Income Security Act of 1974 (ERISA) § 203, 29 U.S.C. § 1053 (1988).

31. Belous, *supra* note 5, at 875 tbl. 6, 877 tbl. 7

health and pension benefits, but there are other examples, including sick leave, vacation days, and disability benefits. One could argue that contingent workers receive fewer of these benefits merely because their productivity and, thus, their bargaining power are lower than core employees. Requiring employers to provide proportionate benefits to such workers would be akin to increasing the minimum wage for such workers and may discourage their employment.³² On the other hand, to the extent that society is not willing to allow contingent workers to go without minimal health care and retirement benefits, the cost of such benefits merely is transferred to society at large when those benefits are not provided by the private sector. It is beyond the scope of this comment to say precisely how society should address this problem, whether through encouraging or requiring greater private benefits or through expanding current government programs. However, it seems appropriate to point out that the development of a rational national health insurance policy and the maintenance of a mandatory retirement income system, such as Social Security, are important steps in addressing these problems.³³

II. Conclusion

Dr. Belous has produced a very useful empirical study of the contingent work force. In that study he has documented the following: the recent and continuing growth of this work force as a percentage of the total work force, the composition of the contingent work force and the variety of jobs that contingent workers do, and the disadvantages that contingent workers suffer relative to core workers in employment stability and the acquisition of employment benefits. Dr. Belous's study establishes the rise of the contingent work force as an important phenomenon in the continuing postwar transformation of the American economy and as a phenomenon to which our laws governing the employment relationship must be adapted.

32. Recent empirical work on the employment effects of the minimum wage calls this conclusion into doubt. See generally David Card, *Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage*, INDUS. & LAB. REL. REV., Oct. 1992, at 22.

33. One proposal for ensuring retirement income that I find intriguing is to require employers and employees to contribute an equal share of an employee's pay, say 2.5%, to a tax-free individual retirement account that could be invested as the employee sees fit. This money could serve as a supplement to the Social Security system, would be retained as a guarantee of at least some retirement income regardless of the performance of financial markets, and would have the advantage of increasing the country's saving rate. JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 67 (1990).

The question that is left for practitioners, legal scholars, and policymakers such as those present at this conference is how best to adapt our labor and employment law to the needs of the burgeoning contingent work force.