The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers From the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them

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THE NEW TRADITIONAL EMPLOYMENT RELATIONSHIP: AN EXAMINATION OF PROPOSED LEGAL AND STRUCTURAL REFORMS FOR CONTINGENT WORKERS FROM THE PERSPECTIVES OF INVOLUNTARY IMPERMANENT WORKERS AND THOSE WHO EMPLOY THEM

Patricia Ball*

I. INTRODUCTION:

As the world economy evolves, so too does our perception of a "typical" American employee. As compared to the previous generation, today few Americans envision retiring from the same company that they began their careers in. In addition to developing new jobs, industrialization and technology have altered many traditional job descriptions, leading to a decrease in the number of "regular" full-time workers. Increasingly, employers fill job vacancies with "contingent workers." But who exactly is a contingent worker?

Although definitions vary among scholars, the term

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2. See id.


4. See Kathleen Barker & Kathleen Christensen, Charting Future Research, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITIONS 306 (Kathleen Barker & Kathleen Christensen eds., 1998). The Bureau of Labor Statistics defines contingency primarily in terms of perceived job security:

Contingent workers are defined as individuals who do not perceive themselves as having an explicit or implicit contract for continuing employment. . . . [T]he BLS relied on three factors to determine whether workers perceived themselves as contingent: whether they considered their present jobs to be temporary or unlikely to continue, how long they expected to hold their jobs, and how long they had held them.
"contingent worker" serves as a catch-all phrase for persons employed through non-traditional, intentionally impermanent work arrangements, such as independent contractors, leased employees, consultants, on-call workers, part-time workers, and temporary employees. This comment encompasses three types of "contingent workers" into its discussion: independent contractors—persons who contract with a company for their services and are "business person[s] hired for a specific result;"

5. See Baker & Daniels, supra note 3. See also Stephen S. Mead, A Guide for Employers Contemplating the Use of the Contingent Worker, ALL REGIONS (August 2001):

An independent contractor is a business person hired for a specific result. Generally, the person is in business for himself... and is working to achieve a profit, not a wage... [is] usually not eligible for unemployment, workers' compensation or employer sponsored benefits. Likewise the employer is not responsible for paying any federal or state imposed payroll taxes on behalf of an independent contractor. Significantly, individuals who meet the true definition of an independent contractor are not considered employees of the company receiving their services for any purpose, including anti-discrimination laws and laws governing payment of employee benefits.

6. See Mead, supra note 5.

[L]eased employees are individuals employed by a 'leasing company' which rents the employees to a second employer.... The leasing company is then responsible for paying the employee, including bearing the burden of payroll taxes. When the second employer no longer has a need for the leased employee, the employee reports back to the leasing company for reassignment. In the leased employee scenario, the employee is considered an employee of the leasing company, yet the leasing company and the second employer can frequently be considered to be 'joint employers' for many purposes, including liability under state and federal non-discrimination statutes.


8. See Baker & Daniels, supra note 3. See also Mead, supra note 5.

The temporary worker... has a relationship to the second employer similar to that of the leased employee. The major difference between the leased employee and the temp is that while the leased employee may be employed by the second employer for what is often career length duration, most temps are hired with an expectation that they will be assigned to the second employer for a limited duration assignment. The temp is most often employed to supplement the second employer's work force in situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

9. Mead, supra note 5. See supra note 8. The work of temporary workers
temporary employees—workers, usually hired through temporary agencies, for a limited duration or assignment, and part-time workers—persons directly employed by an employer but who work less than a forty-hour work week.\footnote{10}

Today, contingent workers constitute a substantial percentage of the American workforce\footnote{11} and their prevalence has continued to rise with impressive speed during the past two decades.\footnote{12} Most employers are drawn to contingent workers because they enhance workplace flexibility; as the need for labor fluctuates, an employer can alter his staff accordingly without experiencing severe disruption.\footnote{13} Additionally, corporations use contingent workers to increase overall efficiency, save money by avoiding employee benefit costs, and limit their tax and statutory liability under federal and state employment laws.\footnote{14} Recent cases, however, have challenged some of these advantages.\footnote{15}

Accompanying this developing new perception of what is "typical" in the American workforce is a need to reevaluate the extent to which U.S. employment and labor laws protect the workers they intend to cover.\footnote{16} "Employment laws by their very includes supplementary coverage of primary employees, e.g. for "employee absences, temporary skill shortages, seasonal workloads, and special assignments." Mead, supra note 5.

10. See Mead, supra note 5.


14. See Mead, supra note 5.


16. According to the law, employees do not have permanent job tenure and can be fired for any reason, unless an employer bases its decision on a limited number of considerations deemed to be against public policy or contractual limitations. However, the experience of many employees from 1945 until recently has been uninterrupted job tenure until the employee
terms depend on the identification of an employee and an employment relationship.” While contingent workers may qualify for coverage under discrimination statutes, many federal laws exclude most contingent workers from their protection because they are based on the common law definition of “employee.” For example, the Fair Labor Standards Act (FSLA), is typical of employment laws, because it defines “employee” as “any individual employed by an employer.” Similarly, the Employment Retirement Income Security Act (ERISA) revolves around the common-law agency control test to determine who is an employee, and thus who the law protects. Modern courts consider the actual nature of the employment relationship under the “economic realities test” to determine employee status. The Equal Employment

resigns; economic theory about the organization of the labor market has also been premised on the de facto regime of permanent employee.


18. This is also similar with state laws; this comment focuses primarily on ERISA and Internal Revenue Code.

19. See Forster, supra note 13, at 544. Although the United States regulates the workplace less than other economically advanced countries do, there are laws that protect workers from abuse and discrimination by employers. Some of these laws apply to contingent workers and regular employees alike (e.g., worker’s compensation, health and safety, and minimum wage laws. Many do not apply to most contingent workers, however, due to restrictive eligibility requirements (e.g. Family and Medical Leave Act, unemployment insurance, pension laws). Others nominally cover contingent workers but prove virtually unenforceable, or allow employers to escape coverage under the statute altogether by manipulating overall employment levels ( antidiscrimination laws). Finally, many of the problems that disproportionately affect contingent workers are not addressed by statute at all, for anyone, including permanent employees (e.g lack of benefits such as health insurance, retirement plans, vacation and sick pay).

Id. at 543-44 (citations omitted). This comment refers to federal laws such as ERISA and the Internal Revenue Code.

20. Carlson, supra note 17, at 296.


23. See Carlson, supra note 17, at 342-44. Some of the economic realities that are taken into consideration include employee compensation, exclusivity of the employment relationship, employer’s control, and the difference in treatment between those who were independent contractors and those who were regular employees. See id. at 310-11. See also Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (finding that the court must use the common law test in ERISA cases);
Opportunities Commission's (EEOC) Guidance on Contingent Workers also advocates the consideration of all relevant factors and circumstances to determine the nature of an employment relationship.\textsuperscript{24} Most state laws reflect a similar exclusion.\textsuperscript{25} In any event, a substantial and growing segment of the workforce remains ineligible for benefits that their full-time counterparts enjoy, such as health care and pension plans even when they participate in similar work.\textsuperscript{26} While many contingent workers voluntarily choose to waive these benefits in exchange for higher compensation or flexibility, many others remain "involuntary impermanent"\textsuperscript{27} contingent workers. The majority of involuntary impermanent workers are women and minorities, left either to seek benefits on their own—if they can afford them—or to go without.\textsuperscript{28} Nor are employers under any legal obligation to provide these pension or health care benefits to contingent workers.

Narrow statutes not only detrimentally affect workers, but also leave employers to decipher vague or ambiguous laws.\textsuperscript{29} Like ERISA, courts have interpreted the Internal Revenue Code definition of "employee" through the common law standard.\textsuperscript{30} As demonstrated in the highly publicized Microsoft v. Vizcaino,\textsuperscript{31} Daughtrey v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993).

\textsuperscript{24} See Karen Winegardner, Who Are Your Employees? Contingent Workers on the Rise, THE ENTERTAINMENT GUIDE (Annapolis, MD), Apr. 1 2001, at 10. "This so-called totality of circumstances or economic reality test is used to determine employee status under protection statutes, including Title VII of the 1964 Civil Rights Act, Age Discrimination in Employment Act, Family and Medical Leave Act, and Americans with Disabilities Act." Id.

\textsuperscript{25} See Forster, supra note 13, at n.102. See also Mead, supra note 5.

\textsuperscript{26} The law, as it stands presumes that an important difference exists between non-employees and regular employees. See Carlson, supra note 17, at 355-56. See also Christopher D. Cook, Temps Demand a New Deal, THE NATION, Mar. 27, 2000, at 15-16. See generally National Alliance for Fair Employment, supra note 7.

\textsuperscript{27} See Silverstein & Goselin, supra note 16.

\textsuperscript{28} See id. at 10. The number of involuntary part-time workers is increasing. "Many of these workers in fact work full-time hours (thirty-five per week or more), but they do so through holding down two or more part-time jobs, and thus are without the protection of full time work." Middleton, supra note 11, at 565.

\textsuperscript{29} See Carlson, supra note 17, at 342-43. The problem with the modern test is that is too broad and unpredictable as "there [is] no guarantee[] that judges will strike any particular alliance between 'economic realities' and the traditional factors of direct, physical, control or contractual rights of control." Id. at 343. See also Gartland, supra note 15, at 511-13; infra Part II.E.


companies learned that classifying workers as contingent, once seen as a means of avoiding costs, could now result in both monetary penalties and legal liability. A line of recent federal and state cases has led to more confusion regarding the legalities of contingent workers, prompting a consensus among many scholars that the law is outdated and ineffectual. In essence, this uncertainty causes contingent workers to work with minimal or no benefits, while requiring corporations to walk a thin line between legal employment practices and legal liability.

Although this uncertainty can create perilous consequences for both workers and employers, this comment will narrow its focus to two problems: (1) the benefit inequalities such as pension and health care contingent workers experience, particularly “involuntary impermanent” workers, in comparison to permanent employees and (2) the dilemma employers face in determining whether to include or exclude workers as employees under the Internal Revenue Code.

In order to analyze the aforementioned uncertainty, Part II provides background on the rise of contingent workers, their significance in the working economy, and the advantages and disadvantages facing each affected party. Next, Part III identifies the particular problems facing workers and employers as a result of the law’s failure to provide a clear, useful statutory definition of “employee.” Part IV provides a survey of possible solutions that scholars have set forth to resolve the absence of clear laws for contingent workers. In particular, the comment analyzes the following proposals: modifying statutory interpretation; improving employer education to prevent legal liability; reforming laws to better represent contingent workers; and unionizing nonstandard employees, either through existing unions and resources or by developing new professional decision as Vizcaino I. The case is discussed in greater detail in Part II. This comment discusses the decision and effects of Vizcaino II.

32. See generally STANLEY NOLLEN & HELEN AXEL, MANAGING CONTINGENT WORKERS: HOW TO REAP THE BENEFITS AND REDUCE THE RISKS 1-26, 183-223 (1996). See also Mead, supra note 5; Carlson, supra note 17, at 297-99.


34. See infra Part II.C.

35. See infra Part II.D-E.

36. See infra Part II.

37. See infra Part III.

38. See infra Part IV.
organizations. Also, Part IV includes a brief examination of recent attempts to unionize contingent workers. Finally, Part V advocates unions acting as agents for contingent workers, as most deserving of extended research and investment. In addition, it includes a brief comparison of unionizing contingent workers with the Screen Actors Guild (SAG), as a potential model for reform.

II. BACKGROUND

A. The Increase in the American Contingent Workforce

As the number of contingent workers increase, a resolution of their legal status becomes all the more necessary. In 1995, estimates placed the number of contingent workers in the United States between thirty-two and thirty-seven million, equaling 25% of the working population. Additionally, over 90% of U.S. companies use temporary workers and agencies. From 1982 to 1998, the use of temporary employees rose to astounding proportions. Indicative of how commonplace contingent workers have become, the largest U.S. private employer is currently Manpower, Inc., a temporary employment agency.

The use of contingent workers touches all sectors of the American economy, partially explaining its strong and growing
In fact, contingent workers can be found "doing everything from cleaning homes to writing computer code and practicing law." These numbers are not only large, but they continue to grow. In 1997, the number of temporary workers in manufacturing alone rose from 34,000 in 1972 to 707,000 in 1997. This increase translates into a jump in working billable hours from fifty-three million to 1.3 billion. Nor does this trend seem to be diminishing as the nation steps into the new millennium. In light of the unstable national economy following September 11, the fall of the dot-com phenomenon, and high unemployment rates, another substantial increase in the number of contingent workers appears likely.

B. The Advantages and Disadvantages of Contingent Work: The Workers' Perspective

Contingency offers both advantages and disadvantages to workers. People are drawn to being independent contractors for a variety of reasons, including "a desire among employees to be free of the permanence of the employer-employee relationship, and the attractiveness of being one's own boss." Additionally, contingent work has its strategic advantages: even during times of company cut backs, independent contractors and temporary workers often thrive. Such a trend is

47. See Schill Rives, supra note 13, at D03.
48. Id.
49. See generally id.
51. See id. (comparing numbers from 1972).
52. See id. After new methodology developed, it is assumed that previous numbers of these manufacturing temporary workers were underestimated as reported by the Bureau of Labor and new studies have a higher degree of accuracy. See id.
53. See National Alliance for Fair Employment, supra note 7. "And this trend threatens only to increase in the future: surveys indicate that two-thirds of U.S. firms plan to expand their contingent staffs in the next five years." Id.
54. Cf. NOLLEN & AXEL, supra note 32, at 222 (predicting that the growth of the contingent workforce as moderate and limited).
55. See generally Baker & Daniels, supra note 3.
56. Mead, supra note 5. See also Winegardner, supra note 24. "An increasing number of workers prefer contingent employment because of the flexibility and autonomy it affords. Temping is no longer only something people do en route to a regular job, but a way of life for an increasing segment of the labor force." Id.
57. See Schill Rives, supra note 13, at D03. See also Low Skill Workers, supra note
particularly prevalent in the biotechnology and clinical research industries.\textsuperscript{58}

Many workers prefer the contingent category of temporary employment over traditional full-time positions.\textsuperscript{59} According to the Employment Policies Institute, temporary agencies can provide significant benefits to their workers while simultaneously aiding the labor market during rapidly changing economic times.\textsuperscript{60} As the Institute’s chief economist explains, the people in the best position to take advantage of these temporary opportunities are “new labor force entrants, displaced workers, and those who prefer flexible work arrangements.”\textsuperscript{61} Since the typical temporary job lasts three to five months,\textsuperscript{62} both employee and employer benefit from short-term commitments when a particular employment arrangement fails.\textsuperscript{63}

Despite these attractive qualities, contingent work also possesses disadvantages.\textsuperscript{64} Moving from permanent employment to a temporary or part-time job can mean “a shift to markedly lower average wages, the loss or absence of health care benefits and pensions, and an end to employment security, opportunities for training, and career development.”\textsuperscript{65} Additionally, contingent workers have no means of health coverage, benefits, or pension accrual.\textsuperscript{66}

Employees are often willing to sacrifice benefits such as medical coverage and pension plans for contingent work’s flexible hours, autonomy and sometimes higher wages.\textsuperscript{67} Relevant statutes generally permit unequal treatment of contingent and permanent employees, as these two types of workers do not enjoy status equal.\textsuperscript{68} Corporate employers increasingly hire these workers because employers are not under

\begin{thebibliography}{68}
\bibitem{58} See Schill Rives, supra note 13, at D03.
\bibitem{59} See generally Low Skill Workers, supra note 50; Jorgensen & Riemer, supra note 12.
\bibitem{60} See Low-Skill Workers, supra note 50.
\bibitem{61} Id.
\bibitem{62} See Schill Rives, supra note 13.
\bibitem{63} See Silverstein and Goselin, supra note 16.
\bibitem{64} See generally Kellogg, supra note 30.
\bibitem{65} Silverstein & Goselin, supra note 16, at 2.
\bibitem{66} See Cook, supra note 26, at 15-16; Jorgensen & Riemer, supra note 12, at 38.
\bibitem{67} See Forster, supra note 13, at 541-43. Usually this trend is applicable to independent contractors, but not applicable to the other categories of workers such as part-time and temporary employees. See id.
\bibitem{68} See Silverstein & Goselin, supra note 16, at 9.
\end{thebibliography}
the same obligations to contingent workers as they are to permanent employees.69

Part-time and temporary workers not only average wages lower than permanent full-time employees, but also frequently work with few or no employee benefits.70 Independent contractors, often do not suffer this same inequality.71 On average, contingent workers earn approximately $100 less per week than traditional full-time employees.72 Despite varying sectors and job descriptions, most contingent workers are united through their receipt of lower pay and benefits despite doing the same work as permanent workers.73

While wages can vary slightly, virtually all contingent workers are denied the benefits that permanent employees enjoy.74 In all categories, statistics demonstrate that contingent workers are less likely to receive health or pension benefits from their employers.75 Only 12% of all contingent workers receive health insurance coverage through their employers, compared with 53% of all employees.76 Twenty-two percent of part time workers have employer-provided health insurance, while 78% of full time employees do.77 Forty-two percent of part-time workers have no access to health care whatsoever.78 As for pension plans, 13% of contingent workers compared to 47% of all employees receive coverage.79 Some larger temporary agencies offer employee benefits, however, eligibility is often based on hours worked, effectively excluding a significant proportion of workers.80 For example, in 1988 less than 23% of

69. See id. Employers can avoid "the high cost of both the liability and expenses of providing benefits-health care, insurance, stock options to name a few." Id. at 9. See also infra Part II.D.

70. See Silverstein & Goselin, supra note 16, at 9. The inequality appears even worse for temporary workers who engage in similar work activity. See id. at 9-10. In 1997, median weekly earnings of temp workers were $329 per week, as compared to $510 per week for workers in traditional jobs. See also National Alliance for Fair Employment, supra note 7.

71. See generally Silverstein & Goselin, supra note 16.

72. See Cook, supra note 26, at 15.

73. See National Alliance for Fair Employment, supra note 7.

74. See Silverstein & Goselin, supra note 16, at 9. See also Cook, supra note 26, at 15.


76. See National Alliance for Fair Employment, supra note 7.


79. See National Alliance for Fair Employment, supra note 7.

Manpower Inc.'s workers qualified for its health care program.81

Many companies often use "temps" on a permanent basis, with the effect that contingent workers are denied the equal rights given to permanent employees, despite having identical responsibilities.82 Employers often accomplish this illegal practice through "payrolling," or permanently employing workers through temporary agencies.83 Historically, corporations intentionally misclassified regular employees as temporary or independent contractors.84 This practice enables employers to avoid providing equal pay and benefits,85 and to avoid responsibilities covered under various workplace safety and wage laws.86

Currently, contingent workers lack an organization similar to the Screen Actors Guild (SAG) that can collectively address these benefit issues. SAG acts as a labor organization that represents over 90,000 actors in various mediums under collective bargaining agreements and self-governance.87 SAG's central goal over the last sixty-five years has been providing its members with a range of basic rights and benefits, such as pension and health care that, due to the nature of their employment, actors previously had no access.88 For example, SAG concerns include "guaranteeing a living wage and a safe, supportive working environment where the performing arts can flourish."89 The organization traditionally has provided actors with career advice and assistance.90 If an actor works on a certain amount of projects or hours, then upon paying a

81. See id. (Statistic taken from 1988 study). "Similarly, while 75% of temporary agencies reportedly offer some form of vacation benefit, many temps do not work the minimum number of hours required within the designated time period." Id.
82. See Jorgensen & Riemer, supra note 12, at 38.
83. See National Alliance for Fair Employment, supra note 7.
84. See id.
85. See id.
86. See National Alliance for Fair Employment, supra note 7.
88. See Guild Benefits and Member Participation, at http://www.sag.org/benefits.html (last visited Mar. 1, 2003). "With the implementation of the Pension and Health Plan...and residual gains, SAG's role [has been] filling the studio system void and finding the means to empower its members." Id.
89. See Guild Benefits and Member Participation, supra note 88.
membership fee, he is entitled access to certain benefits. Such a program is voluntary, not mandatory; those performers who desire its protections can obtain them after fulfilling minimal requirements. Since contingent workers generally do not have a comparable organization, they continue to lack a means of accruing a pension or health care benefits.

Under the current statutes, differential treatment in overall compensation can be legally justified even when workers do the same work for the same company. Critics claim this disparity violates the fundamental fairness of "equal pay for equal work." The reason for this legally permissible action is that "contingent workers stand outside the traditional permanent, full-time employment relationship upon which the framework of employment and labor law was built in the 1930s and 1940s and thus lack the basic protections." Under that historic structure, contingency then did not exist as we know it today. Thus, the law intervenes only when an individual "employee" works directly, permanently, exclusively, and on a full-time basis for an "employer." When economic arrangements involving work are not between "employer" and "employee," the current statutes "do not apply because the law entertains a cluster of reinforcing assumptions that deem regulation unnecessary."

Additionally, as evidenced by a recent Cisco Systems layoff announcement, temporary workers are most likely the first to feel the effects when companies downsize. In response to the slowing economy, the tech giant recently laid off an estimated

91. See Guild Benefits and Member Participation, supra note 88.
92. See id.
93. See National Alliance for Fair Employment, supra note 7.
94. Id.
95. Virginia L. duRivage et al., Contingent Workers and Employment Law, in CONTINGENT WORK, supra note 4, at 264.
96. See id. at 23, 27.
97. Id. at 23.
98. See Schill Rives, supra note 13, at D03.
3,000 contract workers, equaling 60% of its temporary workers.99 Higher unemployment rates, such as those the United States is currently experiencing, mean longer waiting periods between jobs for temporary workers.100

The range of promotional and training opportunities is also extremely limited in most contingency assignments.101 In the current system, employers lack the motivation to train most temporary workers because they will lose their training investment when the employee leaves.102 Thus, many long-term temporary employees are left with little opportunity for advancement or skill enhancement.103

Contingent workers face yet another disadvantage: they may feel like second-class citizens, inferior to regular employees, because they do not enjoy the same benefits and securities.104 Employers may also treat them as inferiors, as evidenced by a Cisco spokesman’s statement: “Temporary workers are just that: temporary. . . . [W]e want to make sure we take care of our full-time workers first.”105

C. “Involuntary Impermanent” Contingent Workers: The System Disproportionally Harms Women and Minorities

Government surveys indicate that between 60%-70% of contingent workers “wish for something more stable.”106 While one-third of “temp” workers prefer their temporary status over a permanent job,107 a 1998 U.S. Department of Labor study reported “that only one-third of temporary workers wanted to remain contractors”108 and “hoped that they would eventually land permanent jobs.”109 Unfortunately, this dissatisfaction does not signify merely that people do not hold their ideal jobs, but also reflects that many individuals lack benefits because they

99. See id.
100. See id.
101. See Silverstein & Goselin, supra note 16.
102. See id. at 18.
103. See id.
104. See Baker & Daniels, supra note 3. See Forster, supra note 13, part I(C), at 550-51.
105. Schill Rives, supra note 13, at D03.
107. See Schill & Rives, supra note 13, at D03.
108. Id.
109. Id.
simply possess no other alternative.\textsuperscript{110}

Because minorities and women are overrepresented in the contingent workforce, these inequalities affect them more adversely than others.\textsuperscript{111} This disproportionate representation is due to a variety of factors, including women choosing part-time work to attend to their childrearing responsibilities\textsuperscript{112} and the more limited access to employment opportunities historically endured by minorities and women.\textsuperscript{113} Compounding this problem, future employment advancement for women and minorities stagnates because most part-time and temporary positions lack promotional and training opportunities:\textsuperscript{114}

Involuntary part-time and temporary workers include disproportionate numbers of white female and African-American workers, which suggests that contingent employment moves considerable number of workers who were already experiencing significant differentials in wages, benefits and employment opportunities, into relationships where the prospects are even more bleak, especially since contingent employees are largely excluded from the protections of the laws regulating job security, compensation, and equality at the workplace.\textsuperscript{115}

Additionally, as few contingent workers receive health insurance, women and minorities are further disadvantaged.\textsuperscript{116} These workers desperately need to find protection in laws more friendly to contingent workers.

D. The Advantages and Disadvantages of Contingent Work from the Employer's Perspective

As for employers, the contingent labor workforce offers a variety of benefits including: cost savings, increased efficiency, an ability to provide better job security to the permanent

\textsuperscript{110} See Silverstein & Goselin, supra note 16 (discussing involuntary impermanent). See also Forster, supra note 13.
\textsuperscript{111} See Barker & Christensen, supra note 4, at 308. See also Silverstein & Goselin, supra note 16, at 10-11.
\textsuperscript{112} See ROTHSTEIN & LIEBMAN, supra note 1, at 79. See also Silverstein & Goselin, supra note 16, at 2.
\textsuperscript{114} See id.
\textsuperscript{115} Silverstein & Goselin, supra note 16, at 2.
\textsuperscript{116} See Silverstein & Goselin, supra note 16, at 2.
workers, enhanced recruitment and talent, and flexibility.  

Until recently, employers also preferred contingent workers as a means of reducing their legal responsibilities and liabilities.

One of the most attractive aspects of hiring contingent workers for employers relates to cost savings. These savings are derived in a variety of ways. For example, salaried employees are paid for productive and nonproductive time, while contingent workers are generally not reimbursed for their non-productive hours. Employers are also under no obligation to offer contingent workers common employee benefits, such as vacation, holidays, sick leave, and health insurance. Independent contractors also are not covered under workers' compensation and unemployment insurance, which are costs regularly afforded to full-time employees. Companies are not required to pay social security taxes under FICA, unemployment taxes, or Medicare taxes for most contingent workers. Rather, independent contractors pay their own social security taxes and report quarterly estimated income tax payments. Unlike full-time workers, temporary employees and independent contractors do not receive severance packages when they leave the company.

These aspects of the costs of contingent workers can translate into potentially tremendous financial savings for employers. Despite possible higher wages for contingent workers as compared to regular employees, companies can potentially save 20% to 40% on labor costs by employing contingent workers. Employers can also save because independent contractors are often the only type of contingent worker that receives higher wages as a substitute for benefits.

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117. See Baker & Daniels, supra note 3. See also Mead, supra note 5, at 6.
118. See infra Part II.F. See also Middleton, supra note 11, at 559.
119. See Baker & Daniels, supra note 3; Forster, supra note 13, at 552-53. Cf. NOLLEN AND AXEL, supra note 32 at 222-23. "In the future, the frequently mentioned goals... of using contingent workers to cut labor costs and ease management tasks will largely have to be abandoned. Neither is a sure bet." Id.
120. See Baker & Daniels, supra note 3.
121. See id.
122. See Jeffrey S. Klein, Weighing the Legal Considerations, in MANAGING CONTINGENT WORKERS (1996).
123. See id. (for independent contractors and temporary employees).
124. See Baker & Daniels, supra note 3.
125. See NOLLEN & AXEL, supra note 32, at 131-47.
126. See Schill Rives, supra note 13, at D03.
while part-time and temporary workers do not.\textsuperscript{128}

Increased efficiency also drives companies to hire contingent workers.\textsuperscript{129} There are various means by which contingent labor increases efficiency: it allows employers to hire employees on an as-needed basis, while giving them the liberty to discontinue employment during times of low production;\textsuperscript{130} it decreases administrative burdens; and it enables companies to terminate contingent workers more flexibly than long-term employee termination affords.\textsuperscript{131} In short, companies rely on contract workers because it costs less to get rid of them when demand is low.\textsuperscript{132}

While job security is viewed as a negative for contingent workers, contingency can effectively improve job security for permanent workers.\textsuperscript{133} Since contingent workers depend on fluctuations of the market, "core employees may feel an increased sense of job security" particularly during "difficult economic times, when core employees often develop a perception that the contingent workers will be first to go if job cuts are made."\textsuperscript{134}

Other benefits to employers using a contingent workforce include better recruitment and talent.\textsuperscript{135} By employing contingent workers, a company can increase the quality and range of its applicant pool.\textsuperscript{136} The contingent workforce generally develops into a valuable base of workers from which a company can recruit for regular employment positions, again saving money as well as time.\textsuperscript{137} This situation also allows an employer to evaluate a worker's on-the-job performance without making any long-term commitment.\textsuperscript{138}

Contingent workers also pose risks for employers,\textsuperscript{139} including decreased loyalty and productivity,\textsuperscript{140} negative

\begin{enumerate}
\item See id.
\item See \textit{generally} Baker & Daniels, \textit{supra} note 3.
\item See id.
\item See id.
\item See Schill Rives, \textit{supra} note 13, at D03.
\item See Baker & Daniels, \textit{supra} note 3.
\item \textit{Id}.
\item See id.
\item See id.
\item See id.
\item See id.
\item See \textit{generally} Baker & Daniels, \textit{supra} note 3; Silverstein & Goselin, \textit{supra} note 16.
\item See Baker & Daniels, \textit{supra} note 3. See \textit{also} Silverstein & Goselin, \textit{supra} note
employee impact, confidentiality risks, and increased training costs.\textsuperscript{141} Presumably, productivity decreases with contingent workers because permanent employees have more at stake in their company’s success and “thus tend to work harder to achieve management objectives.”\textsuperscript{142} In connection with this lack of loyalty, contingent workers are assumed to have lower morale than permanent employees, which can affect others.\textsuperscript{143}

Of all the risks, the legal risks that accompany misclassifying regular employees as contingent workers demand the most immediate attention from employers.\textsuperscript{144} Misclassification\textsuperscript{145} can pose severe consequences for employers in the form of tax liability, Fair Labor Standards Act (FLSA) liability, liability under employment discrimination laws, and workers compensation and benefits liability.\textsuperscript{146}

E. Current Employment Laws: The Virtual Legislative Absence of the Contingent Worker

Although contingent workers are covered under certain federal discrimination statutes such as Title VII of the Civil Rights Act of 1964, the American Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA),\textsuperscript{147} federal employment laws\textsuperscript{148} generally only cover full-time, permanent employees.\textsuperscript{149} “These laws, designed to regulate labor-management relations and to guarantee a worker’s right to

\textsuperscript{16} “There is virtual consensus among labor leaders . . . that continuous employee training is critical to increased productivity.” Id. at 3-4.  
\textsuperscript{141} See Baker & Daniels, supra note 3.  
\textsuperscript{142} Forster, supra note 13, at 553.  
\textsuperscript{143} See id. “Their presence is often interpreted with suspicion and hostility by permanent workers who feel their own jobs are threatened.” Id.  
\textsuperscript{144} See Garland, supra note 15, at 506-07.  
\textsuperscript{145} See Baker & Daniels, supra note 3. See also Garland, supra note 15, at 505-06. “Misclassification occurs when businesses classify workers as independent contractors, but the Internal Revenue Service (IRS) considers them employees. Doing so can create grave tax liabilities.” Id. at 505.  
\textsuperscript{146} See Baker & Daniels, supra note 3. See also Middleton, supra note 11, at 569; infra Part II.F (for a more in-depth discussion of these negative consequences).  
\textsuperscript{147} See NOLLEN & AXEL, supra note 32, at 196-98. See also Forster, supra note 13, at 543-45.  
\textsuperscript{148} Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, and the Worker’s Adjustment and Retraining Notification Act; as discussed by Anthony P. Carnevale, Lynn A. Jennings, & James M. Esenmann, Contingent Workers and Employment Law, in CONTINGENT WORK, supra note 4, at 281.  
\textsuperscript{149} See id. at 281.
choose union representation (in order to improve their working conditions) serve the new ‘flexible’ workforce poorly.”

Among other advantages, U.S. labor and employment laws grant fundamental protections such as minimum standards for compensation and hours for traditional employees. The law currently presumes significant differences between employees and non-employees and assumes that regular workers are more in need of legislative protection than contingent workers. Due to restrictive eligibility requirements stemming from these assumptions, contingent workers are excluded from coverage under federal statutes that would entitle them to unemployment insurance and pension benefits.

For example, [contingent workers] are less likely than other workers to meet the qualifying requirements for unemployment compensation in at least half of the states. They are also less likely to meet the requirements for Social Security retirement and disability benefits. They have more difficulty qualifying for leave under the federal Family and Medical Leave Act (FMLA), and are impeded from earning pensions because of high minimum participation and vesting standards in the Employee Retirement Income Security Act (ERISA).

Currently, there exists a "virtual exclusion of contingent workers from the regulatory ambit of existing law."

F. Current Employment Laws: Employers Left Without Clear Guidelines in the Classification of Contingent Workers

Despite the rise in the number of contingent workers, "courts have struggled to define the legal status of such workers under the patchwork of federal statutes that affect the workplace." The test to define who is an employee under

150. duRivage et al., supra note 95, at 263.
151. See Silverstein & Goselin, supra note 16, at 22.
152. See id. at 23.
153. See id.
154. Id. at 4.
155. Id. at 4.
156. Jeffrey S. Klein & Nicholas J. Pappas, Worker Classification Under Title VII, N.Y. LAW J., Feb. 16, 2001, at 3. "The importance of the employee status issue increased dramatically with the wave of New Deal federal legislation, especially the new law of collective bargaining, which affected the employer's relationship with its workers." Carlson, supra note 17, at 315. Also, Nat’l Labor Relations Board v. Hearst affected this change. One of the biggest preventative measures for independent contracts began when Congress passed the Taft-Hartley Act, which
these statutes generally revolves around the common law agency employee test, known as the “right-to-control test.”

The modern approach also considers the “economic realities” of a particular situation, but its uneven application has enhanced the unpredictability of case decisions. Intent contributes to this uncertainty. Even if an employer and employee agree that a worker is an independent contractor, the court may disregard their intent.

explicitly excluded independent contractors from the NLRA’s definition of “employee.” See id. 321-25.

157. See generally West v. Clarke Murphy, Jr. Self-Employed Pension Plan, 99 F.3d 166 (4th Cir. 1996) (holding employee status under ERISA is determined by the common law of agency not the Internal Revenue Code).

158. See Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997). See also Klein, supra note 122, at 185.

The IRS has identified twenty factors derived from the common law to indicate whether sufficient control exists to establish an employer-employee relationship. These factors serve only as guidelines—the degree of importance of each factor depends on occupation and contact. In general, workers who are considered employees can be expected to:

1. Comply with instructions about when, where, and how work is done
2. Receive on-the-job training or formal instruction
3. Perform services that are integrated into business operations
4. Render services personally
5. Rely on the employer to hire, supervise, and pay assistants
6. Maintain a continuing relationship with the business where services are performed
7. Comply with set hours of work
8. Devote full time to the business
9. Work on the employer’s premises or in locations sanctioned or required by the employer
10. Perform services in a set order or sequence
11. Submit oral or written reports
12. Receive payment by salary or time, not by job or commission
13. Receive reimbursement for business and/or traveling expenses
14. Look to the employer to furnish tools, materials, and equipment
15. Lack significant investment in the business
16. Realize no profit or loss from work performed
17. Work for one company at a time
18. Not make services available to the general public
19. Be subject to discharge at will by the employer
20. Have the right to terminate the employment relationship at any time.

Id. at 186.

159. See Silverstein & Goselin, supra note 16, at 6. Courts used to consider the statutory purpose test, but that test is virtually outdated with decisions such as Nationwide Mutual v. Darden, 503 U.S. 318 (1992); Daughtrey v. Honeywell, 3 F.3d 1488 (11th Cir. 1993); and Vizcaino, 120 F.3d at 1006. See also infra Part IV (further discussion on the statutory purpose test).

160. See NOLLEN & AXEL, supra note 32, at 194. This fact is precisely why the
Court and EEOC interpretations have resulted in varying legal standards as to how employees are distinguished from contingent workers, particularly independent contractors.\textsuperscript{161} While the "common law" test appears deceivingly simple, in its application, courts "have generally failed to articulate any consistent rule or test"\textsuperscript{162} while perpetuating "an ever-expanding catalogue of 'factors'" to consider.\textsuperscript{163} "After nearly two hundred years of evolution, the multi-factored 'common law' test begs the question of employee status as much as answers it."\textsuperscript{164}

Misclassification of workers has recently been the subject of litigation, particularly since the Court's 1992 decision, \textit{Nationwide Mutual Insurance v. Darden}.\textsuperscript{165} In that case, the Court was faced with a legislative failure to define "employee" in the statute at issue, leaving it to choose between the common law control test (which would prevent the plaintiff from suing), and a more expansive approach.\textsuperscript{166} "The Supreme Court remanded the case to allow the lower courts to reconsider Darden's status under the traditional test, begging the question, what is the traditional test?"\textsuperscript{167}

Although the Court's intention was perhaps to create a clear guideline in these cases, "the \textit{Nationwide Mutual} test is quite possibly even less predictable than the oldest and simplest control test."\textsuperscript{168} While the Court restored "the common law test for purposes of federal statutory coverage, its description... included every aspect of the economic realities test."\textsuperscript{169}

\textsuperscript{161} \textit{Vizcaino} case has received so much attention. Courts look at the practice, not intent of the parties. \textit{See id.} at 194.
\textsuperscript{162} \textit{See generally} \textit{Klein \\& Pappas}, \textit{supra} note 156.
\textsuperscript{163} \textit{Id.} "The legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability." \textit{Middleton}, \textit{supra} note 11, at 568-69.
\textsuperscript{164} \textit{Carlson}, \textit{supra} note 17, at 299.
\textsuperscript{165} \textit{Nationwide Mutual Insurance v. Darden}, 503 U.S. 318 (1992). "[A]ttempts at enforcement of tax regulations by the Internal Revenue Service (IRS) demonstrate massive fraud on the part of employers... Based on a 1984 study, the IRS estimated that, among 5.2 million businesses both small and large, fifteen percent misclassified 3.4 million employees as independent contractors." \textit{Middleton}, \textit{supra} note 11, at 569.
\textsuperscript{166} \textit{See Carlson}, \textit{supra} note 17, at 333.
\textsuperscript{167} \textit{Id.} at 334.
\textsuperscript{168} \textit{Id.} at 338.
\textsuperscript{169} \textit{Id.} at 334. \textit{See also supra} Part II.C&E.
In case of any lingering doubt whether it had rejected the simple control test of the past, the Court recalled its words from earlier days that the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighted with “no one factor being decisive.”

The unpredictable standard test is particularly worrisome when distinguishing between employees and independent contractors. The uncertainty as to where to draw the line between contingent worker and regular employee requires “a fact sensitive inquiry,” often varying depending upon the circumstances of each case. An agreement between the employer and employee, even supplemented with a contract, does not necessarily safeguard either party from the courts’ interpretation.

This lack of clear standards has caused “continued wasteful litigation of the employee status issue, manipulation of working relations by employers seeking to avoid employment regulations, and never-ending uncertainty about the status of the growing number of workers who toil in the gray area between ‘employee’ and ‘independent contractor.’”

There is a fine line separating employee status from contingent worker status. Notwithstanding the employer and the worker’s view of the employment relationship, should it later be determined by either the IRS or a court that the various legal requirements needed to establish the employer-contingent worker relationship have not been met, the employer may be liable for substantial and unexpected monetary penalties under tax and other employment-related statutes.

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170. Carlson, supra note 17, at 334 (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)).
171. See id. at 335. See generally Gartland, supra note 15.
172. Mead, supra note 5, at 5.
173. See, e.g., Daughtrey v. Honeywell, 3 F.3d 1488 (11th Cir. 1993) (holding that the plaintiff, a computer programmer, was entitled to benefits under ERISA despite a contract stating she was an independent contractor. The court held that she was a common law employee due to some of the control factors exhibited in her working relationship with Honeywell). See also NOLLEN & AXEL, supra note 32, at 194. “If you ‘flip’ your employees to independent contractors, changing only the label and not the essence of the relationship, you may find yourself obligated to provide benefits to them because they remain your common law employee.” Id.
174. Carlson, supra note 17, at 301. See generally Klein & Pappas, supra note 156.
175. Mead, supra note 5, at 5. See also Vizcaino v. Microsoft Corp., 120 F.3d 1006
Employers using independent contractors have traditionally enjoyed significant protection from lawsuits such as wrongful discharge and discrimination, while assuming "minimal or no responsibility for traditional human resource functions on behalf of the contingent workers." In general, independent contractors lack an employment relationship that would qualify them for coverage and have no alternative laws particular to their status. Recently, however, the misclassification of workers has been the subject of a great deal of litigation.

Misclassifications, whether made in bad faith or not, could cost employers substantial IRS penalties if they fail to pay employment taxes. "When employers incorrectly classify common-law employees as independent contractors, they do not merely owe back taxes on the employees, but also risk disqualification for preferential tax treatment with respect to

(9th Cir. 1997).

176. See Mead, supra note 5, at 6.
177. Klein & Pappas, supra note 156.
178. See Mead, supra note 5, at 6.
179. See Middleton, supra note 11, at 558.
180. See Carlson, supra note 17. See also Gustafson v. Bell Atl. Corp., 171 F. Supp. 2d 311 (S.D.N.Y 2001) (concluding that a chauffer was an employee of the company under the FLSA because the company exercised a great deal of control; further defendants failed to demonstrate good faith compliance with FLSA). Although not discussed in this comment, another common problem is the definition of employer: "the staffing agency, the client company, or increasingly both." Winegarder, supra note 24.

181. There has been a line of cases also dealing with the intentional misclassification of workers as independent contractors when they were treated as employees. A recent case was Maxley v. Texaco, Inc., No. 00-1518 CM (BQRx), 2001 U.S. Dist LEXIS 3930 (C.D. Cal. 2001) (holding that the defendants did not intentionally misclassify and did not act wrongfully, thus the motion for summary judgment was granted). In Herman v. Time Warner, 56 F. Supp. 2d 411 (1999), the Department of Labor sued under ERISA, challenging the media corporation of illegally misclassifying hundreds of workers such as writers, photographers and freelance artists who worked for major magazines. See National Alliance for Fair Employment, supra note 7.

The Labor Department has estimated that as a result of the alleged misclassification, as many as 1,000 individuals have been unlawfully excluded from participation in certain company benefit programs. Also named as defendants were several company subsidiaries and a number of individuals who have had responsibility for administering the company's benefits plans.

Id.

182. See Klein, supra note 122, at 190. See also Gartland, supra note 15, at 507 ("[E]ven disqualification for preferential tax treatment with respect to pension plans.").
pension plans."  

The risks misclassification pose are even more substantial as the IRS "has recently intensified its scrutiny of employment records." 

The leading case, *Vizcaino v. Microsoft Corp.*, demonstrates the uncertainties involved in classifying a worker either as an employee or independent contractor, as well as the consequences when errors occur. Not only is an employer exposed to liabilities upon a court's misclassification finding, but also "liability may be imposed on the employer for past benefit payments under the employer's employee benefit plans." 

Microsoft originally classified workers as independent contractors, but after the IRS investigated it determined that this class of workers qualified as common law employees. Therefore, despite a signed written contract explicitly stating that Microsoft hired these plaintiffs as independent contractors, the Ninth Circuit Court of Appeals found that the plaintiffs were retroactively entitled to benefits, including a stock option program. "Where Microsoft failed, however, other employers

184. *Id.* at 506.
185. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).

*[Microsoft first classified as "independent contractors" certain workers whose compensation was not subject to tax withholding, unemployment taxes, or the employer's share of social security taxes.]* Perhaps even more importantly to Microsoft, the decision to classify these workers as independent contractors led to their exclusion from pension and other employee benefits plans."

Carlson, *supra* note 17, at 297.
186. *See Carlson, supra* note 17, at 297-98.
187. "Just last year Microsoft settled the resulting eight-year class action lawsuit for $96.9 million." Marcia Heox Pounds, *Temporary Help Have Rights, Too*, SUN-SENTINEL (Fort Lauderdale), Dec. 24, 2001, at 5.
189. *See Gartland, supra* note 15, at 507-08. *See also Jorgensen & Riemer, supra* note 12. "Until recently ... nearly 35 percent of Microsoft's U.S. workers were not on the Microsoft payroll. Microsoft hired them ... through temp agencies that provide limited benefits and inferior wage scales." *Id.*
190. *See Gartland, supra* note 15, at 508. "The IRS determines whether a worker is an employee or an independent contractor by using a twenty-factor common-law test, commonly referred to as the right-to-control test." *Id.* at 505-06.
191. *See Carlson, supra* note 17, at 297. Additionally, the error potentially exposed Microsoft to liability for discrimination, sexual harassment, and work-related injuries. *See id.; contra Capital Cities/ABC Inc. v. Ratcliffe, 141 F.3d 1405 (1998)* (granting summary judgment to publisher in a class action suit filed by newspaper delivery persons who were denied participation in ERISA plan from company as they were considered independent contractors and not employees).
have frequently succeeded, and this success continues to tempt
others." 192 Although it would appear that the above decision
clarified the definition of independent contractor, "the
distinction between employees and independent contractors is
no clearer after Vizcaino than before." 193

This problem is not isolated to independent contractors.
Temporary workers who are employed indefinitely ("Permatemps"), have successfully litigated cases in which they
have proven their status was actually that of regular employees,
entitling them to recover all benefits and entitlements as if they
were full-time workers. 194 An employer acquires potential
liability when he "intentionally prevents a part-time employee
from becoming a full-time employee to avoid covering that
worker under its benefits plan." 195 Using other contingent
workers such as leased and temporary employees also poses
problems that employers may not consider when entering into
such employment relationships. 196 Similarly, part-time
employees also have raised some litigation issues regarding
benefit entitlement. 197

192. See Carlson, supra note 17, at 336.
193. Id. at 298.
194. See Baker & Daniels, supra note 3, at 4. See also National Alliance for Fair
Employment, supra note 7. "Permatemps" have won precedent-setting lawsuits
recognizing their employee status against the city of Seattle; King County,
Washington; and Microsoft." Recently, the National Labor Relations Board "ruled
that longer-term temporaries, so-called 'permatemps,' may join unions and
negotiate for benefits." Id. "Even though 'permatemps' are typically employed by
a staffing agency, the NLRB has ruled that for unionizing purposes they are
considered employees of the client if they do the same work as core employees, in
the same location and under the same supervision." Id.
196. See Mead, supra note 5, at 6. See Bronk v. Mountain States Tel. & Tel., Inc.,
140 F.3d 1335 (10th Cir. 1998) (reversing a lower court decision which said that
ERISA made the inclusion of leased workers who met the common law employee
test mandatory in terms of pension). The court held that the employer did not need
to include in its pension plans the leased workers who met the test of common law
employees because ERISA allowed distinctions between categories of employees.
See id.
197. See Klein, supra note 122, at 183-208. "In Rush v. McDonald's
Corporation, a part time employee claimed that McDonald's had violated
section 510 [of ERISA] by not providing her with benefits of a full-time
employee.... The court rejected her claim, stating that ERISA did not bar
employers from distinguishing between full-timers and part-timers for benefits
purposes." Id. at 195.
III. IDENTIFICATION OF THE PROBLEM

As one author asserts, “contingent working is a flawed employment practice in need of some repairs.”198 “Action by government, unions, business, and workers is needed to address the problems raised by the growth of contingent work.”199 Just as laws changed during the Industrial Age to reflect a changing economy,200 once again, the time is ripe to modify employment statutes.201 The law remains undeveloped in reflecting the new rise in contingent workers, and it must be modified to respond accordingly.202 Many workers are left without protection under the law and employers are left with uncertainty about their legal obligations, which could cost them severe economic penalties.203

While aimed at establishing adequate compensation and working conditions, current regulation excludes one-third of the workforce.204 When it created these protective laws, Congress did not foresee contingent workers playing a significant role in the modern economy.205 Rather, legislators focused solely on the needs of “full-time, permanent employees under the direct control of a single employing enterprise.”206 Therefore, contingent workers currently lack the protections afforded to their regular employee counterparts.207 While this fact is acceptable for those who voluntarily choose to trade security for the flexibility of contingent work, many others, particularly

198. NOLLEN & AXEL, supra note 32, at 223.
200. See Carlson, supra note 17, at 304.

By the mid-nineteenth century, industrialization had produced a number of new or newly important issues that required differentiation between categories of workers whose degree of dependence made them more or less needful of protection . . . . The most important of these issues was whether an employer was liable to third parties injured by the worker’s negligence.

Id. “The classification of individual workers as employees and non-employees seems to have mattered very little before lawmakers sought extensively to protect workers with collective bargaining laws, social security benefits, minimum wage regulations, and anti-discrimination rules.” Id. at 301.

202. See duRivage et al., supra note 95, at 264.
203. See supra Part II.D-F.
205. See id. at 26.
206. Id.
207. See supra Part II.C-E.
minorities and women,\textsuperscript{208} are "involuntary impermanent," left without basic protections and benefits.

Courts determine workers' classification on a case-by-case basis, often irrespective of any understanding between the parties.\textsuperscript{209} This "legal uncertainty encourages and rewards employer conduct that tests the limits of the law, ultimately to the detriment of both employers and their employees."\textsuperscript{210} As evidenced by the \textit{Vizcaino} case, companies have a lot at stake.\textsuperscript{211} In response, they have gone to extreme measures to separate contingent workers from regular employees\textsuperscript{212}--which may ultimately jeopardize a working arrangement that has become the foundation of our national workforce.\textsuperscript{213}

\textbf{IV. ANALYSIS}

While most scholars agree that there is a problem with the current system, no consensus exists as to the proper solution. This comment examines different solutions including changing how the law is interpreted, improving employer-employee preventative education, extending existing worker protection laws or developing new regulation aimed specifically at contingent work,\textsuperscript{214} and unionizing workers either with the development of new union-type organizations or by increasing the role existing unions play in contingent employment.

The divergence of the parties involved makes reform a difficult task. Voluntary contingent workers resist altering a working arrangement that they are currently content with,\textsuperscript{215} while involuntary contingent workers desire changes that would increase their statutory protection and job security, and restrict employer exploitation of their labor.\textsuperscript{216} In order to best serve

\begin{itemize}
\item \textsuperscript{208} See Dex, \textit{supra} note 113, at 164-68. See also Middleton, \textit{supra} note 11.
\item \textsuperscript{209} See Mead, \textit{supra} note 5, at 6.
\item \textsuperscript{210} Carlson, \textit{supra} note 17, at 336.
\item \textsuperscript{211} See \textit{supra} Part II.E-F.
\item \textsuperscript{212} See Forster, \textit{supra} note 13, at 565-66.
\item \textsuperscript{213} See \textit{id}. If employers become so fearful of litigation, perhaps they will stop using contingent workers altogether, despite its many advantages for both worker and employer. See \textit{id}.
\item \textsuperscript{214} See \textit{id}. at 545.
\item \textsuperscript{215} See \textit{id}. at 543. "Many working families depend on one full-time and one part-time job to survive. Students and other workers who need or want flexibility also need nonstandard jobs." National Alliance for Fair Employment, \textit{supra} note 7.
\item \textsuperscript{216} See Cook, \textit{supra} note 26, at 13. See generally Jorgensen & Riemer, \textit{supra} note 12.
\end{itemize}
contingent workers' interests, reform should create access to benefits and training for those who desire them.\textsuperscript{217} Such access could improve workers' skills, motivation, and morale, while increasing their worth to their employer.\textsuperscript{218} "[T]he problem is how to preserve the benefits of contingent work for those who want it, while eliminating (or at least decreasing) its burdens on those who do not."\textsuperscript{219}

Employers' concerns for eliminating legal uncertainty must be reconciled with the needs of contingent workers.\textsuperscript{220} Ideally, an employer wants to retain effective control over their contingent workforce without any of the obligations or liabilities of an employment relationship.\textsuperscript{221} These desires may conflict with contingent workers' interest in retaining a degree of autonomy and gaining access to benefits.\textsuperscript{222}

A. \textit{Keep the Laws as They Stand: Modify Statutory Interpretation and Educate Employers}

One approach is to keep the law as it is,\textsuperscript{223} but change how it is interpreted, using the statutory purpose test.\textsuperscript{224} Rather than cause legislative havoc, courts have "focus[ed] on the purpose of a law, and provide[d] for its application irrespective of traditional distinctions of status, and without the need for identifying a particular employment relationship."\textsuperscript{225} Though it is worth looking into the statutory purpose test, for all intents and purposes, it has been overruled.\textsuperscript{226} In light of recent litigation, looking at legislative intent alone appears circular, ineffective, and outdated. In the early part of the twentieth century, contingent workers were not as integral a part of the

\textsuperscript{217} See Forster, supra note 13, at 571-72. Not only can increasing training help workers, but employers might find increased productivity. See id.

\textsuperscript{218} See id.

\textsuperscript{219} Id. at 543.

\textsuperscript{220} See generally id.

\textsuperscript{221} See Carlson, supra note 17, at 336.

\textsuperscript{222} See supra Part II.B.

\textsuperscript{223} See Forster, supra note 13, at 567-68.

\textsuperscript{224} See supra Part II. See also Daughtrey v. Honeywell, 3 F.3d 1488 (11th Cir. 1993).

\textsuperscript{225} Carlson, supra note 17, at 297-302. See also NLRB v. Hearst Publications, 322 U.S. 111 (1944).

\textsuperscript{226} See Carlson supra note 17. "The effect of \textit{Nationwide Mutual} was merely to eliminate once and for all the 'statutory purpose' factor." Id. at 338. Also returning to a statutory purpose test risks stark differences between state and federal courts. See id. at 355.
workforce as they are today.227

In the immediate future, employers should educate themselves on what proper classification of workers entails and how to distinguish employees from contingents.228 As Stanley Nollen and Helen Axel advise, in order to avoid liability, "the best action for [a] company is to plan carefully."229 To ensure a contingent worker's proper classification, employers should carefully structure their relationships with regard to the degree of control exercised over workers, using the IRS factors230 as their guideline.231 Employers should eliminate informal staffing practices and conduct self-auditing measures to ensure "permatemps" and erroneously categorized independent contractors are placed on the company payroll.232 Signed contracts should not be the only factor governing independent contractor relationships. In addition, in everyday practice clear distinctions233 must be drawn between employees and contingent workers.234

Improving education and taking as many preventative measures as possible is only a temporary solution to a now undeniable and growing problem. Some commentators promote a "do nothing" approach, insisting that unions and new laws are unnecessary, because employers should have the right to choose whether they should grant particular worker benefits.235 However, without any legal or structural changes, contingent workers' access to benefits remains poor and employers run the risk of hefty liability.

B. Congressional Action: Broadening the Definition of "Employee" and Creating New Laws for the Contingent Worker

While many agree that the common law employee test is not an adequate modern standard for legislative coverage, the courts will continue using it until Congress and state legislatures

227. See infra Part V.A. See generally NOLLEN & AXEL, supra note 32.
228. See NOLLEN & AXEL, supra note 32. See also Gartland, supra note 15, at 527-32.
229. See Klein, supra note 122, at 203.
230. For a list of these factors in their entirety, see supra note 159.
231. See Mead, supra note 5, at 6.
232. See Klein, supra note 122, at 203.
233. See id. at 204-05 for an excellent list of suggestions as to how to set these "boundaries."
234. See NOLLEN & AXEL, supra note 32, at 223.
235. See Cook, supra note 26, at 15.
enact clearly stated definitions of what an employee is. Legislative proposals take two forms: they either create new laws to cover contingent workers through a "wholesale restructuring of the labor and employment laws," or they broaden the current definition of employee to include contingent workers "either by explicitly including contingent workers or by redefining the term 'employee.'" Since many contingent workers frequently appear indistinguishable from permanent workers based on their duties and work, some commentators suggest that the workers deserve equal protection. The multi-factor analysis for determining who is an employee, supports the idea "that there is nothing inherent in the character of either employees or independent contractors that makes one group more or less deserving of protection than the other."

A common reform proposal is to extend federal labor and employment laws to all hired workers, regardless of job title. "Employers should be able to establish who is (and is not) eligible for their benefits plans without worrying that courts will second-guess them." Although previous legislative extension attempts have failed, this proposal remains attractive due to its relative simplicity and elimination of disparate treatment for workers who engage in the same work. Recent studies show that American voters might support this legislative reform to better represent contingent workers, despite potentially sweeping changes:

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236. See Carlson, supra note 17, at 300.
237. Silverstein & Goselin, supra note 16, at 4. See also Carlson, supra note 17.
[A] better solution is to rethink the necessity of using employee status as a basis for coverage, and to ask whether there are other entirely different ways of determining the reach of the law. For nearly every so-called employment law, an alternative rule of coverage, not dependent on status, would fulfill the lawmakers' goals better and with much less uncertainty. Id. at 356.
238. Forster, supra note 13, at 568. See also duRivage et al., supra note 95, at 269-70. See generally Silverstein & Goselin, supra note 16, at 22-36.
239. See Carlson, supra note 17, at 300.
240. Id. at 300. For an explanation of the multi-factored approach, see supra note 158, which discusses the IRS factors used in determining sufficient control over an employee. The Massachusetts Workplace Equity Bill "require[s] equal pay and benefits for contingent workers who do the same work as permanent employees." Cook, supra note 26, at 16.
242. Forster, supra note 13, at 572.
243. See id. at 568.
244. See Silverstein & Goselin, supra note 16, at 27.
A groundbreaking new poll shows that most Americans reject such [pay] inequity and are willing to vote to change it. Three out of five Americans have had to work in a contingent job or know someone who has taken a contingent job while preferring standard employment. More than two-thirds of Americans believe that unequal pay and benefits for workers in contingent jobs is unfair. Six out of ten would be more likely to vote for a Congressional candidate who supports legislation to guarantee workers in nonstandard jobs the same benefits and pay as other workers.\textsuperscript{245}

However, many warn against extending the definition of employee, viewing legislative reform as unfair to both employers and contingent workers.\textsuperscript{246} Previous regulatory and protective laws that the government has placed on employers have been justified by the fact that employers would be rewarded through an expectation of "a future return on investment later on, when the employees' increased skill and experience would add to the company's profits."\textsuperscript{247} However, because of the very nature of part-time and temporary work, contingent workers do not offer the same loyalty and investment return to employers as traditional employees.\textsuperscript{248} Disregarding these distinctions may create unfair training costs from which employers would not reap benefits.\textsuperscript{249}

While in theory broadening the law to encompass the rising number of contingent workers sounds ideal, the risks involved in such a dramatic change are troubling. With many contingent workers happy with the status quo, extending the law to those people who want no part in the expansion, could be a grave injustice and potentially exacerbate the problem. Another criticism is that an extension effort may be futile and ineffectual:

[T]he mechanisms for aiding the fully employed may not

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\textsuperscript{245} National Alliance for Fair Employment, supra note 7.
\textsuperscript{246} See Silverstein & Goselin, supra note 16, at 28-33.
\textsuperscript{247} Id. at 28.
\textsuperscript{248} See id.
\textsuperscript{249} See id. at 29. "A diverse group of economists charged with evaluating proposals to tie compensation to productivity independently reached the 'unexpected' finding that enhanced participation, more than pay, may lead to increased productivity." Id. at 33. "Mere extension of existing law to contingent workers is unlikely to increase union density and resultant productivity gains." Id. "A stronger case against extension can be made because of the relationship between participation, productivity and loyalty. Extension may actually be counterproductive to and harm economic development." Silverstein & Goselin, supra note 16, at 34.
\end{flushleft}
work as effectively for the excluded third [contingent workers]. Mere extension of the requirement that health and pension plans, once offered, must be made available to all employees, regardless of the time worked, will be of little benefit to part-time employees. Episodic contributions by a series of employers to different pension plans is unlikely to add up to a socially adequate pension at retirement.250

Voluntary contingent workers most likely will reject revising legislation as it threatens the autonomy they prefer,251 while involuntary contingent workers may welcome such action as it could translate into important benefits access.252 Therefore, legislatures are now "testing the waters" before making drastic changes through enacting or proposing legislation that "require[s] officials to study and evaluate the impact of the shift to nonstandard work on their communities." 253

C. Unionizing Contingent Workers Through Enhancing the Role of Existing Unions or Creating New Union-Like Organizations

Many commentators recommend structural reform should take place from within the workplace rather than in the legislative arena.254 Unionizing contingent workers represents a plausible proposal.255 In the wake of the rising number of contingent workers, "a need for employees' collective voice in

250. Id. at 29. In addition, it is difficult to measure job performance of a part timer.

251. See Forster, supra note 13, at 568.

252. See id.


Massachusetts and Washington have introduced legislation that would require comprehensive studies of the nonstandard workforce. The Massachusetts Act to Provide a Report on Job Quality would require a research report examining quantitative data on the characteristics of nonstandard jobs, including wages, benefits, and training requirements. The Washington bill would establish a Contingent Work Force Task Force made up of public officials (and advised and monitored by an advisory committee of labor and employer groups), and charged with conducting a comprehensive review of the growth in nonstandard work and making recommendations to the state legislature. The first attempt to pass this bill was narrowly defeated.

Id.

254. See generally Forster, supra note 13; Silverstein & Goselin, supra note 16; Carlson, supra note 17.

255. See Forster, supra note 13, at 568-69, 574-76.
the workplace” has emerged. Employees could create this voice in two ways. They could form separate unions or professional associations specific to contingent workers, or they could instill more responsibility in current unions and associations to act as agents for contingent workers’ rights.

Generally, unions can voice the needs of modern workers who currently lack a place in the industrial model. The foreseeable benefits derived from unionizing contingent workers include improved wage equality and access to pension and other benefits. In addition, unions create a means for self governance, mutual problem solving, enhanced employee-member participation in bargaining and governing processes, and addressing members’ needs for promotion and career advancement opportunities. Contingent workers could unionize not just locally, but also nationally.

However, creating entirely new unions is highly criticized, primarily because reform would be extensive, impractical, and perhaps even detrimental, causing animosity with traditional unions. Creating and regulating new forms of unions, particular to contingent needs, would also result in extensive delays. Furthermore, unionization may substantially alter work experience and legal regulation to a degree undesirable for all parties involved. Many contingent workers want to be permanent employees and may “resist committing to contingent solidarity when they see themselves... as possibly becoming permanent in the near future.”

The very nature of contingent work as temporary and flexible often makes unionization difficult, if not impossible. The idea of unionization runs contrary to many reasons employers list for using contingent workers. Often employers

257. See Silverstein & Goselin, supra note 16, at 34-36.
258. See id. at 35.
259. See id.
260. See id.
261. See id.
262. See id.
263. See Forster, supra note 13, at 569.
264. See id.
265. See id.
266. Id.
267. See id. at 551; see Cook, supra note 26, at 15.
specifically use contingent workers to avoid unionization. 268 “It’s no coincidence that the rise of contingency has paralleled the decline of unionization—to the point where a stunning 90 percent of all private-sector workers are non-union.” 269

The simple fact that contingent workers are a difficult segment of the workforce to unionize does not necessarily translate into an absolute bar for success. A comparison with the Screen Actors Guild’s (SAG) successes and failures may prove helpful. 270 The parties involved in both contingency and the entertainment industry, possess a strong similarity in that they are difficult sectors to unionize. Both contingent workers and actors encompass a variety of different work arrangements and interests. 271 Also, their employment rates depend upon their industries’ demand fluctuation. 272 Further, SAG membership is not mandatory, but voluntary. 273 Actors can join SAG, gaining access to benefits they would not otherwise have, but they are not forced to join. A voluntary program would appear essential to contingent workers since not all contingent workers are dissatisfied in the lack of benefits because they are content with better wages as a substitute. 274

SAG’s goals of providing basic rights and benefits such as pension and health care mimic those that many have cited as currently lacking for involuntary impermanent contingent workers. 275 “The [Screen Actors’] Guild has empowered its members [through] its dual capacity of nurturing employment opportunities while maintaining an active vigilance in member protection.” 276 SAG helped to deflate the dominant studio powers and replace them with “actors who have more tools and opportunities for self-empowerment.” 277 Allowing a way to unite these actors has produced what the organization describes as its “greatest asset”: “collective wisdom, experience and

268. Forster, supra note 13, at 551. “Unions decrease flexibility and increase costs by introducing their internal rules, layers of bureaucracy, and potential legal complications into the process of making business decisions.” Id.

269. Cook, supra note 26, at 15.

270. See supra Part II.B.

271. See supra Part II.

272. See supra Part II.

273. See generally Screen Actors Guild Website, supra note 90.

274. See supra Part II.B.

275. See supra Part II.B.


277. Guild Benefits and Member Participation, supra note 88.
energy of SAG members." Among the primary privileges of SAG membership are the right to vote in Guild elections and contract ratifications, join in membership meetings, serve on committees and run for Guild office. According to the National Constitution and Membership Rules, the highest policy-making body of the Guild is the National Board of Directors, which is elected by the membership, from the membership. SAG officers are volunteers and are not paid for their service. All members in good standing for at least two years are eligible to run for the Board, and any member may serve on its many advisory committees where Guild policies are hammered out through democratic debate.

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...
for career advancement and enrichment; a voice in setting the terms and conditions of their labor; and the ability to articulate grievances." 286

Advocates claim that this proposal is the best way to motivate employers as it capitalizes on employers’ desire for productivity, while encouraging investment in their employees—something currently lacking in the business organizational structure. 287 “[U]nions and professional associations have inherent advantages, since they are already in the business of educating and training their members.” 288 Employers can save money by having unions compete for the lowest prices while maintaining a quality product. 289 Admittedly, union advocates recognize that this reform would substantially transform the contingent worker employment relationship in a positive manner, providing substantial benefits to both employer and employee. 290

Whichever union form the laws espouse, modest goals are mandatory in order to succeed. 291 If membership is offered solely for “professional development opportunities and access to group benefits discounts,” contingent workers might be more apt to utilize union services without interfering with traditional unions. 292

D. Preliminary Union/Professional Organization Attempts

A few advocacy groups and unions “are experimenting with a tactically and politically diverse range of approaches.” 293

In Chicago, one non-profit organization tries to form coalitions for temporary workers to negotiate better wages and conditions. 294 In New York City, a non-profit organization aims at obtaining affordable and portable healthcare and other benefits for self-employed and other independent contractors,

286. Id. at 41.
287. See supra Part II.F. See generally Silverstein & Goselin, supra note 16.
289. See id. at 33.
290. See id. at 51.
291. See Jorgensen & Riemer, supra note 12, at 569.
292. Id. “Such an organization would complement their role in the workplace rather than overtake it, and the organization would not threaten management’s autonomy to set the terms and conditions of employment.” Id.
293. Cook, supra note 26, at 13.
294. See id. at 14.
and advocates nationally for policy reform. In Silicon Valley, the San Jose South Bay Labor Council created Together@Work, a nonprofit temp firm that offers health insurance and provides more stable employment to contingent workers through hiring halls. In the Northwest, contingent high-tech workers formed Washtech, which targets thousands of high-tech workers "employed for years through temp agencies and denied access to company healthcare and pensions, as well as stock options." A common thread between these organizations is a narrow, modest focus.

Unique, national organizations such as Working Partnerships USA are also slowly developing. This organization "emphasizes tangibles like a temp-worker healthcare plan with income-adjusted premiums and a type of temp-hiring hall." Even with its national efforts, the organization retains narrow goals, recognizing, "When you ask people why they want to join this organization, . . . [t]hey say, I want portable benefits, I want a job."

V. PROPOSAL

A. Experiment with Existing Form and Structure of Unions

Experimenting with existing unions and professional organizations offers a sound proposal deserving more research and possible investment. The other aforementioned solutions are inferior in that they are either too ambitious or that they fail to address the problem. With the constant stream of litigation, employers, even when attempting to stay within the confines of

295. See id. See also National Alliance for Fair Employment, supra note 7.
296. See National Alliance for Fair Employment, supra note 7. In some industries, "unions serve as a job referral service" through hiring halls. "An employer needing work would merely contact the union." ROTHSTEIN & LIEBMAN, supra note 1, at 115-16.
297. Cook, supra note 26, at 18 (including 3,000 contingent workers from Microsoft alone). See also Jorgensen & Riemer, supra note 12, at 3.
298. See Cook, supra note 26, at 18-19. "Emphasizing membership services, it occupies one end of a spectrum of new organizations for contingent workers, rising up both within and outside unions, that are giving voice and structure to a growing chorus of temp-worker frustrations." Id.
299. Id.
300. Id. at 16. The agency has initially experienced its share of difficulties such as low enrollment, training needs, etc. But the ultimate goal is to "be a self-sustaining firm providing pensions and benefits to all its temps," and create educational and training opportunities. Id.
legal practices, are readily exposed to liability.\textsuperscript{301} Attempts must be made to ameliorate the discrepancies.

B. \textit{Make Participation Voluntary}

Attempting to unionize workers in a voluntary manner, appears a wiser, more modest first step rather than immediately undertaking legislative change.\textsuperscript{302} Without conjuring up new structures to create professional organizations and unions that would require extensive trial and error, I propose beginning with current resources. For example, by increasing current organization and union involvement with contingent workers. Not only is this form familiar to many, but existing unions are well-equipped to handle the situation and can benefit both employer and worker.\textsuperscript{303}

C. \textit{Educate Employers as to Who Is A Contingent Worker and How to Treat Them}

In the immediate future, employers must proactively educate themselves on appropriate classification of their workers and follow through in practice.\textsuperscript{304} Combining employer education with any reform measures will potentially alleviate much of the uncertain responsibilities and pressures upon employers.\textsuperscript{305}

D. \textit{Maintain Modest Goals}

Looking at the success of Working Partnerships and other unionizing efforts, the key is to maintain modest goals while providing union access to as many people as possible. However, unions should emphasize the voluntary and limited nature of new union-sponsored programs.\textsuperscript{306} In doing so, the new organizations will help only those contingent workers who want assistance and will create a valuable resource for employers. Modifying unions with modest goals of providing fundamental benefits to contingent workers can potentially make the most people happy.\textsuperscript{307}

\textsuperscript{301} See supra Part II.D-F.
\textsuperscript{302} See supra Part IV.C.
\textsuperscript{303} See supra Part IV.C.
\textsuperscript{304} See supra Part IV.A.
\textsuperscript{305} See supra Part IV.A.
\textsuperscript{306} See supra Part IV.D.
\textsuperscript{307} See supra Parts IV & V.
E. **Focus on Benefits and Training**

Reform should revolve around benefits and training for employees. Improving contingent workers' benefits would give them what they currently lack while reducing pressure on employers to provide benefits—a pressure currently threatening contingent workers' viability.

F. **Use SAG as a Potential Model for Reform: Learn from Its Success as Well as Its Failures**

In order to determine how best to create or modify existing unions for contingent workers, SAG serves as a learning tool.\(^{308}\) Both contingent workers and SAG members contain diverse interests and people, from which a significant portion want a means of gaining access to benefits while working in a non-traditional working arrangement.\(^{309}\) Examining how SAG and similar organizations have failed, as well as thrived, can help successfully mold a professional association that best protects those in need of protection while affording employers more predictability and minimizing their legal liabilities.

Surely, SAG has had its share of problems and litigation.\(^{310}\) Precisely due to these failures and successes, the organization serves as an excellent model for reformers to prevent repeating history. Learning what worked for SAG and what did not, may help employers and workers save both time and money.

VI. **CONCLUSION**

The dramatic increase in contingent workers has altered the traditional employer-employee relationship.\(^{311}\) Contingency will remain attractive to employers and workers alike due to its flexibility and various other advantages.\(^{312}\) Modern law has failed to adapt with changing employment relationships, creating problems for both employers and employees.\(^{313}\) In order to avoid legal liability, employers need more consistent

\(^{308}\) See supra Part IV.C.

\(^{309}\) See supra Part IV.C.


\(^{311}\) See supra Part II.A.

\(^{312}\) See supra Parts II.B & II.D.

\(^{313}\) See supra Part II.
guidelines in determining who is an employee. Simultaneously, contingent workers, in light of their growing presence in the U.S. workforce, should be taken into account when considering legislative and strategic reforms to employment laws.

While most commentators agree that the legal tests currently used no longer reflect a substantial percentage of the American workforce, the reforms proposed have not led to a clear solution.\textsuperscript{314} Reform proposals drastically vary—from modifying the manner in which courts interpret statutes to changing existing laws to altering the role unions play in organizing contingent workers.\textsuperscript{315}

In order to solve this legal dilemma, legislators must balance the diverse interests of contingent workers and their employers.\textsuperscript{316} Any proposal must remain modest, but as far-reaching as possible, in order to prevent disrupting a trend in the working economy that offers many advantages to workers and employers alike.\textsuperscript{317}

Prior to any legislative reform which runs the risk of making the current situation worse, stronger attempts should be made to utilize current resources. I propose that experimenting with union structures for contingent workers can potentially give them access to benefits and training opportunities, as well as a collective voice that is currently silent. However, participation in these unions must be voluntary and modest in order to afford contingent workers access to benefits they currently lack while preserving the flexibility and attractive qualities the contingent workforce currently offers.

Improving the quality of contingent workers’ compensation will not only decrease pressures on employers to provide it but also decrease the temptation for employers to misclassify these workers.\textsuperscript{318} In addition to any reform, employers must make efforts to educate themselves about what is the appropriate classification and treatment of contingent workers in order to avoid liability. As a result, outdated American legal and workplace models may begin to more adequately reflect the new face of the American workforce.

\textsuperscript{314} See supra Part IV.
\textsuperscript{315} See supra IV.B.
\textsuperscript{316} See supra Part II.
\textsuperscript{317} See supra Parts IV.D, II.B & II.D.
\textsuperscript{318} See infra Part II.D-E.