
NOTES

STRATEGIC REFORM OF CONTINGENT WORK

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INTRODUCTION

American companies are increasingly using contingent workers,¹ instead of hiring traditional, “permanent” employees.² Contingent workers

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1. E.g., Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 866–69 (1995); Thomas C. Kohler & Matthew W. Finklin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. 379, 400 (1998); Thomas Nardone, Jonathan Veum & Julie Yates, *Measuring Job Security*, MONTHLY LAB. REV., June 1997, at 26, 26; Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1, 1 (1996); Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 504 (1997); *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1647–48 (1996) [hereinafter *Employment Discrimination*]; Carl T. Camden, *Free Agents by Choice*, NEW DEMOCRAT, Mar./Apr. 1998, at 16; Linda Davidson, *Maximize the Return on Temp Staff Investments*, WORKFORCE, Nov. 1999, at 58, 58 [hereinafter Davidson, *Maximize Return*]; Jennifer Laabs, *Global Temps Fill the Workforce Void*, WORKFORCE, Oct. 1998, at 60, 60.

2. The term “permanent” may appear problematic at first glance. Most employees are retained at will, so in a technical sense it is a misnomer. See MARK A. ROTHSTEIN & LANCE LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 30 (4th ed. 1998) (“[T]he employer [is] free to impose any conditions of employment, to discharge an employee at any time for any reason, and to effect the discharge in virtually any manner.”) Anyone who agrees contingent employees face a specific set of workplace problems, however, has to have a label for the rest of the work force that does not face those specific problems. Since this Note argues that impermanence is one of the most important hallmarks of

allow employers greater flexibility in staffing levels, so companies can expand when labor needs are high, and shrink rapidly—with minimal legal and economic consequences—when needs drop.³ The contingent work force also allows employers to improve profit margins by cutting costs, and in some instances, by improving market share through focusing on “core competencies.”⁴

This boon for employers comes at a considerable cost to contingent workers. On average, contingent workers make less money, receive fewer benefits, and enjoy fewer opportunities for advancement than their permanent counterparts do.⁵ Despite these disadvantages, however, some people choose contingent work over regular work.⁶ Voluntary contingent workers consider flexibility paramount, and they resist any long-term commitment to a particular job or a particular company. Since employers also benefit from using contingent workers, this is a win-win situation, a fortuitous match of employer and employee preferences.

Many working in contingent jobs, however, are doing so involuntarily.⁷ For these workers, in addition to the tangible disadvantages

contingent work, “permanent” seems a reasonable choice. The terms “regular,” “traditional,” and “core” are also used herein to refer to permanent employees.

3. *Infra* notes 50–51 and accompanying text.

4. *Infra* notes 52–53 and accompanying text.

5. Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 880–81 (1995); Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 74–75 (1998); Summers, *supra* note 1, at 510; *infra* Part III. See generally Mary E. O’Connell, *Contingent Lives: The Economic Insecurity of Contingent Workers*, 52 WASH. & LEE L. REV. 889 (1995) (surveying the economic hardships associated with contingent work).

6. Linn Van Dyne & Soon Ang, *Organizational Citizenship Behavior of Contingent Workers in Singapore*, 41 ACAD. MGMT. J. 692, 693 (1998); Maria O’Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849, 853–55 (1995); Edward A. Lenz, “Contingent Work”—Dispelling the Myth, 52 WASH. & LEE L. REV. 755, 760–62 (1995); Summers, *supra* note 1, at 512; Camden, *supra* note 1; Shari Caudron, *Workers’ Ideas for Improving Alternative Work Situations*, WORKFORCE, Dec. 1998, at 42, 42; Rick Melchionno, *The Changing Temporary Work Force: Managerial, Professional, and Technical Workers in the Personnel Supply Services Industry*, OCCUPATIONAL OUTLOOK Q., Spring 1999, at 24, 27; Trista Morin, “Temping’ Has Become a Growth Industry: No Longer a Stigma, It’s Become for Many Workers a Career Choice,” MILWAUKEE J. SENTINEL, Nov. 25, 1998, Careers, at 4.

7. Lester, *supra* note 5, at 75; Linda Davidson, *Temp Workers Want a Better Deal*, WORKFORCE, Oct. 1999, at 44, 46 [hereinafter Davidson, *Better Deal*]; Ilana DeBare, *Organizing Tech Temps: Labor Groups Seeks [Sic] Benefits, Security for Microsoft “Permatemps”*, S.F. CHRON., July 16, 1999, at B1; Merrill Goozner, *Longtime Temps Want Some Perks: Now Some Are Suing Companies for Benefits*, CHI. TRIB., June 22, 1999, at N1; Kirstin Downey Grimsley, *Revenge of the Temps: Independent Contractors’ Victory in Microsoft Case May Have Wide Impact*, WASH. POST, Jan. 16, 2000, at H1; C. Bruce Kavan, Carol Stoak Saunders & Reed E. Nelson, *virtual@virtual.org*, BUS. HORIZONS, Sept. 1999, at 73, 79; Sandra Livingston, *Getting a Job One Day at a Time: Every Morning*

noted above, contingent work brings intangible harms from what amounts to temporary status. They do not enjoy the same level of job security, real or perceived, as regular employees do.⁸ In addition, over time, the stigma of contingency grows; they come to feel inferior to regular employees, and prospective employers view them as inferior as well.⁹ Sometimes they experience actual declines in productivity, which hurts employers as well as the contingent workers themselves and their fellow employees.¹⁰ Those seeking to help this segment of the work force, however, should consider how reform might affect voluntary contingent workers.¹¹ Thus, the 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.

Although the United States regulates the workplace less than other economically advanced countries do,¹² there are laws that protect workers from abuse and discrimination by employers. Some of these laws apply to

They Line Up at Hiring Halls to Do a Day's Worth of Work at Factories, PLAIN DEALER (Cleveland), June 21, 1998, at A1; Melchionno, *supra* note 6, at 30.

8. Dau-Schmidt, *supra* note 5, at 882; Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 256 (1995); Lester, *supra* note 5, at 75; Kavan, Saunders & Nelson, *supra* note 7, at 78; Melchionno, *supra* note 6, at 31. While this is an important issue for American contingent workers, it is an even bigger concern in countries with more protectionist labor policies. See, e.g., Vai Io Lo, *Atypical Employment: A Comparison of Japan and the United States*, 17 COMP. LAB. L.J. 492, 496 (1996) (“[N]onregular employees are the most vulnerable to layoffs in the event of an economic downturn.”); Ruth E. Thaler-Carter, *Euro-Temping*, HR MAGAZINE, June 1999, at 122.

9. Lester, *supra* note 5, at 116, 133; Maria L. Ontiveros, *A Vision of Global Capitalism That Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 31 (1999) (“[C]ontingency is a method of commodification and dehumanization.”). See Lo, *supra* note 8, at 503 (“[N]onregular employees . . . are considered deficient in corporate commitment [and] professional skills.”); Summers, *supra* note 1, at 520; Livingston, *supra* note 7; Melchionno, *supra* note 6, at 31–32. See also Steven L. Willborn, *Leased Workers: Vulnerability and the Need for Special Legislation*, 19 COMP. LAB. L.J. 85, 92–93 (1997) (describing how leased employees can become permanently excluded from core labor markets).

10. Lester, *supra* note 5, at 133; Silverstein & Goselin, *supra* note 1, at 19–22. Commentators are far from reaching consensus on this point, however; some argue that contingent workers are more productive than regular employees are because they hope to secure permanent jobs. See, e.g., Van Dyne & Ang, *supra* note 6, at 701. Still others speculate that contingent work may adversely impact productivity, but refrain from drawing conclusions given the dearth of hard data and the lack of attention the topic has received in the literature. See, e.g., Hylton, *supra* note 6, at 856–67; Summers, *supra* note 1, at 520.

11. See Belous, *supra* note 1, at 877 (“U.S. policy should encourage labor market flexibility.”); Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV. 915, 932–33 (1995) (“Massive regulation . . . could reduce the growth of good, flexible jobs.”); Grimsley, *supra* note 7, at H7.

12. See Breen Creighton, *Employment Security and Atypical Work in Australia*, 16 COMP. LAB. L.J. 285, 303 (1995) (describing Australian legislation to protect workers from arbitrary termination); Lo, *supra* note 8, at 522–25 (noting greater resistance to labor regulation in United States than in Japan); Laabs, *supra* note 1, at 65; Thaler-Carter, *supra* note 8.

contingent workers and regular employees alike (e.g., worker's compensation, health and safety, and minimum wage laws).¹³ 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).¹⁴ 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).¹⁵ 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).¹⁶

Reforming contingent work has become more complicated in the wake of recent court decisions such as *Vizcaino v. Microsoft Corp.*¹⁷ Courts have determined that some contingent workers are "employees" at common law, even though the employer does not consider them employees. As a result, some workers have become retroactively eligible for employer-sponsored benefits plans.¹⁸ The direct costs of benefits coverage and the indirect costs of legal uncertainty introduced by such decisions have caused employers to rethink the way they treat contingent workers. Many have responded by taking additional measures to demarcate the contingent work force, reinforcing a two-tiered workplace with core workers at the top and contingents at the bottom. Thus, helping contingent workers now means addressing employer uncertainty as well as the more familiar burdens of contingent work. Strategic reform would seek to preserve the most important advantages of contingent work while minimizing its inherent disadvantages as well as those created by decisions like *Vizcaino*.

The first step in considering targeted, strategic reform is defining the scope of the term "contingent work force." Part I argues for a narrower definition than is typically used in the existing literature. This narrower definition highlights the specific problems of contingent employment, as

13. *Infra* Part III.A.

14. *Infra* Part III.B.

15. *Infra* Part III.B.

16. *Infra* Part III.B.

17. 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1098 (1998).

18. See Donald G. Aplin, *Outside Payrolling, Temps Used to Cut Costs; Unions Opposed, Employees Sue for Benefits*, 27 *Pens. & Ben. Rep. (BNA)* 70, 70 (2000) ("In one recent decision, a class of long-term workers at the King County, Wash., Department of Public Works who were paid through temporary and staffing firms which contracted with the county—a practice called payrolling—were ruled to in fact be public employees entitled to benefits.") (citing *Clark v. King County*, No. 95-2-29890-7 (Wash. Super. Ct. Nov. 23, 1999)).

contrasted with the general problems associated with low wage, low- or no-benefits jobs. It also recognizes the important differences between the interests of voluntary contingent workers on the one hand and involuntary contingent workers on the other. Part II refines the problem of contingent work, reviewing its benefits and costs from the employer's point of view, and then from the worker's perspective. Part III briefly surveys existing worker protection laws and how, or whether, they apply to the contingent work force. Part IV focuses more particularly on *Vizcaino*, management reaction to the decision, and its ramifications for reforming contingent work.

Part V briefly considers reform proposals advanced by previous commentators and legislators. Essentially, previous responses fall into four categories: doing nothing; extending the reach of existing worker protection laws; collective bargaining; and new regulation aimed specifically at contingent work. Finally, Part VI recommends a three-part strategy to eliminate the forces driving the two-tiered workplace: congressional action to restore legal certainty to contingent work relationships; a wage differential to ensure higher pay for contingent workers, partially offsetting the disadvantages of contingent work; and collective action by contingent workers to secure benefits and professional development opportunities.

I. DEFINING THE CONTINGENT WORK FORCE

A. DEFINITIONS PREVIOUSLY ADVANCED IN THE LITERATURE

Commentators are not in agreement as to what the contingent work force really looks like.¹⁹ Some advance a broad-based definition of the contingent work force that includes temporary workers of all kinds,²⁰ contract workers,²¹ leased workers,²² independent contractors,²³ employees

19. Some commentators assert that the various forms of contingent work are so diverse that any attempt to group them is futile. See Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663 (1996) ("[T]he position of contingent workers is a mixed bag . . . that varies profoundly from one work arrangement to another. Indeed, there are few things as resistant to useful generalization as the contingent workforce."); Schwab, *supra* note 11, at 917 ("Labelling these workers as the contingent work force connotes an image of a single type of worker, different from a core worker. This masks the diversity among workers typically labeled contingent.").

20. Temporary workers include those who work directly for companies on a temporary basis, and those who work for temporary employment agencies and perform short-term assignments. Summers, *supra* note 1, at 509–11.

21. Contract workers are employed by a third-party agency, and typically have a renewable fixed-duration contract to perform a specific task or work on a specific project. See Daniel J. Roy, *Non-*

of service contractors,²⁴ and all part-time workers,²⁵ including students and stay-at-home parents who want to work, but whose other life commitments make full-time work unattractive or impossible. Thus, the contingent work force includes all those who have a “weak affiliation with a specific employer and do not have a significant stake in a company.”²⁶ This definition, described by Richard Belous as the “liberal upper boundary” of the contingent work force,²⁷ has taken root in various forms with many academic commentators.²⁸

Other widely adopted definitions of the contingent work force are narrower. For example, the Bureau of Labor Statistics (BLS) characterizes contingent workers as “those who have no explicit or implicit contract and expect their jobs to last no more than a year.”²⁹ This approach is appealing to researchers because the government uses it in collecting and reporting

Standard Employment Arrangements Work for Businesses, Employees, Study Finds, 25 Pens. & Ben. Rep. (BNA) 360, 361 (1998) (describing contract workers as being “employed by a contract company and . . . work[ing] for a customer”) [hereinafter Roy, *Non-Standard Employment*]. The presence of a renewable fixed-duration contract differentiates contract workers from temporary employees.

22. Leased workers are similar to temporary workers, but with two distinctive characteristics. First, the ultimate user of the labor typically chooses the worker, then the worker is hired by the leasing company and leased to the user. Second, leasing is usually reserved for long-term or permanent assignments. Summers, *supra* note 1, at 514.

23. Independent contractors, properly defined, work for themselves and bargain to provide services to a company for a certain price, just like any other business. *Id.* at 517. The independent contractor classification has been widely misused by employers, particularly in the high-technology sector. See *infra* Part IV (discussing Microsoft’s misclassification of “independent contractors”).

24. This term refers to employees of companies that provide services such as janitorial services, data processing, and the like to other companies on a contract basis. See Summers, *supra* note 1, at 515 (“The essential common element is the provision of labor by a contractor to perform services for another enterprise when that work might normally be performed by the user’s own employees.”).

25. Part-time workers are typically defined as those who work fewer than thirty-five hours per week. Roy, *Non-Standard Employment*, *supra* note 21, at 361. See also Summers, *supra* note 1, at 506 n.5.

26. Belous, *supra* note 1, at 865. Other categories or subcategories of workers might fall under this broadly inclusive definition, such as seasonal workers, on-call workers, flex-time workers, job-sharers, and home workers. Schwab, *supra* note 11, at 917.

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

28. See Felicia Jefferson & Don Bohl, *CBR Minisurvey: Part-Time and Temporary Employees Demand Better Pay and More Benefits*, COMPENSATION & BENEFITS REV., Nov./Dec. 1998, at 24 n.1 (adopting a “broader, more conventional definition of ‘contingent’ and includ[ing] all . . . forms of adjunct contract employment not covered by ‘part-time’ and ‘temporary’”); Klare, *supra* note 8, at 256 (defining contingent work to include “part-time work; work relationships styled as subcontracting, leasing, or independent contractor arrangements; temporary work; day-labor; seasonal work; and illegal work”) (citations omitted); Lo, *supra* note 8, at 492; O’Connell, *supra* note 5, at 889; Summers, *supra* note 1, at 505.

29. Robert J. Grossman, *Short-Term Workers Raise Long-Term Issues*, HR MAGAZINE, Apr. 1998, at 81, 82.

data, which is in short supply in this area of study.³⁰ Polivka and Nardone, however, make a convincing case that the BLS definition is in some senses too narrow, since some jobs last more than one year but are still not expected to continue indefinitely—and these should be included in the definition of contingent work.³¹ Polivka and Nardone would expand the BLS definition to encompass those whose “minimum hours worked can vary in a nonsystematic manner.”³² This would include permanent part-time employees whose hours vary unpredictably, but it would exclude those part-timers with regular schedules.³³

None of the above definitions, however, focuses narrowly enough on the unique characteristics of contingent work to be useful for considering strategic reform. The next Section proposes a new definition that does.

B. A NEW PROPOSAL FOR DEFINING THE CONTINGENT WORK FORCE

A more meaningful definition of the contingent work force would adopt the first prong of Polivka and Nardone’s approach. Thus, workers whose jobs are not expected to last indefinitely would certainly fit within the definition. Alone, this prong encompasses much of the contingent work force, and excludes most of those who cannot properly be called contingent. For example, doctors, consultants, and other professionals who have built a practice and are independent contractors in the true sense would be excluded, because they do expect their jobs to last indefinitely.³⁴ The main focus of this prong is the temporary nature of contingent work—that is, contingent workers do not receive from their employers the same implicit promise of indefinitely continuing employment as regular employees.³⁵ Thus, contingent workers either know the outer limit of the

30. The BLS is “the principal fact finding agency for the Federal Government in the broad field of labor economics and statistics. . . . [It] also serves as a statistical resource to the Department of Labor.” Demetrio Scopelliti, Bureau of Labor Statistics, Mission Statement, at <http://stats.bls.gov/blsmissn.htm> (last modified May 5, 1997). Many commentators have noted how the lack of useful data limits opportunities for thoughtful reform. See, e.g., Kohler & Finklin, *supra* note 1, at 399–400; Lenz, *supra* note 6, at 756 & n.4.

31. See Anne E. Polivka & Thomas Nardone, *On the Definition of “Contingent Work”*, MONTHLY LAB. REV., Dec. 1989, at 9, 10–11.

32. *Id.* at 11.

33. *See id.*

34. There is still some uncertainty inherent in such jobs, but no more than there is for an employee in a stable, traditional employment relationship. In short, independent contractors have about as much job security as a typical at-will employee. See *id.* at 10. Such individuals also do not experience the operational/legal attachment dichotomy discussed *infra* notes 39–44 and accompanying text.

35. As Polivka and Nardone indicate, this lack of job security is implicit in the very term “contingent,” especially as used by its originator, Audrey Freedman. Freedman coined the term at an

timeframe during which they can expect to be employed, or alternatively, have no fixed end date but expressly signed on for “temporary” work as opposed to a regular job. This prong includes workers for temporary employment agencies, contract employees, leased employees, and temporary employees hired directly by the company that needs help. It also includes highly skilled, highly marketable contingent employees, such as those in information technology, who are in a better position than most to withstand the uncertainty of contingent work because their wages are high enough to make up for its disadvantages.³⁶ While these workers are not likely to need (or to want) much regulatory help,³⁷ reform should take account of their special situation and try to preserve the advantages of their arrangements. Thus, these workers form an important part of the voluntary contingent work force.³⁸

Contingent workers share another distinctive characteristic, however, that Polivka and Nardone’s impermanence prong does not take into account: inconsistency between their *legal* employment status on the one hand, and their *experiential* employment status on the other. In other words, contingent workers are not employees from a legal standpoint, but they function that way (alongside legal employees) in the workplace. Consider employees of a service contractor—for example, workers at a company that offers printing and reprographic services to other companies on a contract basis. Generally speaking, these employees would not be considered contingent workers. Where the continuing performance of a contract with a certain client company dictates their employment status, however, and they work onsite at the client company, they may in fact be contingent workers. Service contract workers often work alongside core employees in an organization, and are subject to some control by the client company. This provides a day-to-day sense of attachment to the enterprise, or “operational attachment.”³⁹

employment conference in 1985, stating that it was intended to “connote conditionality.” Polivka & Nardone, *supra* note 31, at 10–11. Other commentators have also emphasized the relational consequences of temporariness as distinctive of contingent work. *See, e.g.*, Klare, *supra* note 8, at 256 n.39 (“‘Contingent’ suggests uncertainty, insecurity, and conditionality.”); Kohler & Finklin, *supra* note 1, at 398–402.

36. I believe Polivka and Nardone would include these workers as well, provided they are not true independent contractors. *See generally* Polivka & Nardone, *supra* note 31.

37. Although such employees would seem to have little reason to complain, they have been among the most vocal segment of the contingent work force, attempting to improve their working conditions through collective action. *See infra* note 166 and accompanying text.

38. *See infra* notes 45–46 and accompanying text.

39. At first glance, this seems to contradict Belous’ weak-affiliation thesis. Belous however, does not distinguish between operational and legal attachment. If “weak affiliation” refers to the

Operational attachment is not present, however, and workers should not be considered contingent, when service contractor employees provide services offsite or their employer assigns them to many different client companies. This makes sense from an economic standpoint:⁴⁰ When a company has several contracts, work tends to be more readily available in the event of a fallout with one particular client, and workers are more apt to be reassigned than fired. In addition to economics, however, there is a strong psychological element in the concept of operational attachment. Those employees who are not operationally attached do not have the day-to-day bonding experiences with their client companies that distinguish contingent work. Regular employees of service contractors do not identify strongly with the people and practices of myriad client companies they serve regularly, or of companies they serve from a remote location. Thus, while they often share the low-wage, no-benefits plight of contingent workers, they do not experience the same degree of employment uncertainty or its various effects, nor do they share the operational attachment typical of the truly contingent worker.

Equally distinctive to contingent workers are the limits of operational attachment, and again, these are shared by some service contract workers. Contingent workers as I define them are operationally attached to the client company, but legally attached to another company or to themselves.⁴¹ This can be a source of conflict and frustration for contingent workers when it results in being treated differently than permanent coworkers are,⁴² and it creates a legal minefield for employers trying to classify workers appropriately.⁴³ Since this dichotomy between operational and legal attachment is distinctive of contingent work, I exclude all permanent part-time employees from my definition of the contingent work force, no matter how unpredictable their work schedules. On this point, I diverge from

absence of *legal* attachment, then I agree with Belous that it is a necessary criterion of contingent work; however, I do not agree that it is sufficient.

40. Indeed, the economic affinity contingent workers share with regular employees is at the heart of the “economic realities” test used in some contexts to distinguish independent contractors from employees at common law. *See generally Employment Discrimination, supra* note 1, at 1658 (“This standard defines ‘employees’ as ‘those who as a matter of economic reality are dependent upon the business to which they render service.’”) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

41. The latter are independent contractors. Note, however, that not all independent contractors are contingent—only those who are operationally attached to another entity. In the case of an independent contractor, the operational attachment analysis would be as follows: Is the worker’s continued employment dependent on a continuing contract with a single client company? Does the individual work onsite at that company alongside permanent employees who are subject to some control by that company?

42. *See infra* Part II.B (discussing the costs of contingent work for workers).

43. *See infra* Part II.A (discussing the costs of contingent work for employers).

Polivka and Nardone—they would include part-time workers whose hours vary nonsystematically, but I exclude them all because they have matching operational and legal attachments.⁴⁴ A mismatch of attachments is distinctive of contingent work, and along with impermanence, it forms a focal point for strategic reform.

C. VOLUNTARY VERSUS INVOLUNTARY CONTINGENT WORKERS

Another important goal of reform is to retain the benefits of contingent work for those who desire it, so it is important to distinguish between voluntary and involuntary contingent workers. People enter the contingent work force for a number of reasons, some of them driven by personal preferences, others by market forces. Those who choose contingent work because it offers them benefits they cannot get from permanent employment are voluntary contingent workers. Examples of workers who might prefer contingent work include students, some homemakers, people planning to move in the foreseeable future, and anyone else with shifting and possibly unpredictable responsibilities.⁴⁵ Some others, particularly those with highly valued skills that are in strong demand, might choose contingent employment for the freedom it offers.⁴⁶ For these workers, the lack of long-term commitment by either party forms an ideal arrangement.

For many others, however, contingent employment is not a choice in any meaningful sense. These people take contingent jobs because they cannot obtain other employment.⁴⁷ Perhaps they could get permanent work if they had ample financial resources to sustain themselves while engaging in an extensive job search.⁴⁸ Most people cannot realistically sustain long periods of unemployment, however, and the demoralizing effects of unemployment can occur even without extreme financial pressure. Even those who can afford and choose to search full time for a job for many months may have difficulty, as a good match of applicant and job may not always exist. If a job that is temporary, but otherwise perfect, becomes

44. Note, however, that I *would* include part-time workers who happen to be contingent by my definition, i.e., those who work part-time as contractors, leased workers, temporary employees, or operationally attached service contractors.

45. Melchionno, *supra* note 6, at 27. *See also* Morin, *supra* note 6.

46. Melchionno, *supra* note 6, at 27.

47. *See id.* (noting that some people “seek” contingent work while “between permanent jobs”); Livingston, *supra* note 7.

48. *Cf.* Livingston, *supra* note 7 (describing temporary work as “a necessary evil” and quoting one worker as saying “it’s better than starving”).

available,⁴⁹ a person may choose to take the job, but is still an *involuntary* contingent worker. The costs of contingent work are much higher for those taking part involuntarily, although recent court decisions have ensured that voluntary contingent workers and employers also share the burden. The next Part reviews the advantages and disadvantages of contingent work for all stakeholders.

II. THE BENEFITS AND COSTS OF CONTINGENT WORK

A. THE EMPLOYER'S PERSPECTIVE

Employers benefit from using contingent workers in many ways, but the advantage they cite most frequently is flexibility—the ability to meet demand peaks without swelling the ranks of their permanent work forces.⁵⁰ Another flexibility-oriented benefit of using contingent workers is the ability to add expertise rapidly, particularly in the area of information technology.⁵¹ Using contingent workers to perform routine maintenance and administrative tasks also allows employers to pare down their permanent work forces to those employees engaged in the employers' main businesses, or core competencies.⁵² Like other forms of flexibility, focusing on core competencies allows management to invest more strategically in the development of the business, and to respond efficiently to customer needs and market fluctuations.⁵³

Using contingent workers also helps employers avoid unionization.⁵⁴ 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.⁵⁵ Unionization is difficult for contingent employees under the traditional site-based paradigm, because by their nature contingents are not legally attached to a particular site.⁵⁶

49. This is probably the most extreme case, since many cannot find temporary jobs that are even close to perfect. See Lester, *supra* note 5, at 88; Morin, *supra* note 6.

50. See Davidson, *Maximize Return*, *supra* note 1, at 59; Thaler-Carter, *supra* note 8.

51. See DeBare, *supra* note 7; Laabs, *supra* note 1, at 62.

52. See Lester, *supra* note 5, at 96; *No Ties but No Security: An Increase in Demand for Casual Staff Has Created an Underclass of Workers in the US*, FIN. TIMES (London), Aug. 21, 1998, Recruitment, at 9 [hereinafter *No Ties*].

53. See *No Ties*, *supra* note 52.

54. Summers, *supra* note 1, at 513.

55. See generally ROTHSTEIN & LIEBMAN, *supra* note 2, at 46–57 (describing the rise of collective bargaining and employer resistance to unionization).

56. See DeBare, *supra* note 7; *supra* notes 39–44 and accompanying text (discussing absence of legal attachment as a defining characteristic of contingent work).

Furthermore, using contingent workers discourages union activity by permanent workers. Many employers use contingents as strikebreakers.⁵⁷ The presence of contingents may also serve to remind nonunionized employees that they are replaceable, implicitly suggesting that employees refrain from organizing if they want to keep their jobs.⁵⁸

Moreover, using contingent workers is convenient, particularly from the standpoint of the busy manager who wants to add people to a project quickly and with a minimum of bureaucratic hassle. Upper management tends to focus mostly on profit goals, whereas line managers often have pressing production deadlines that demand most of their time and energy. Often, the profit goals of upper management are in tension with the production goals of line management, and in such cases, line managers often resort to contingents simply because it is the “path of least resistance.”⁵⁹ By hiring a contingent worker, the line manager avoids becoming enmeshed in the company’s human resources bureaucracy. Since the new worker does not become part of the company’s permanent head count, there is no red flag to draw the attention of upper management.⁶⁰

Finally, employers reap a number of cost benefits from using contingent workers. Although the benefits of work force flexibility, avoiding unionization, and managerial convenience are all driven in part by cost considerations, there are more direct cost savings associated with using a contingent work force. Contingents are typically paid less than their permanent counterparts are,⁶¹ resulting in significant wage cost savings for employers.⁶² Also, contingent workers do not receive company benefits like permanent employees, saving both the direct costs of providing benefits and the indirect costs associated with their administration.⁶³

57. Summers, *supra* note 1, at 513.

58. No court has addressed whether using contingent workers in such a context constitutes an unfair labor practice under the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) (1994). Failing to reinstate former strikers in favor of using temporary employees, however, may violate the Act. See *NLRB v. Oregon Steel Mills*, 47 F.3d 1536, 1537–39 (noting lack of evidence to support employer’s asserted cost-savings justification for using temporary labor).

59. Grossman, *supra* note 29, at 83 (quoting a human resources professional).

60. *See id.*

61. This is not the case in a limited number of highly skilled jobs in the information technology sector. Some of these employees are actually paid more than their core counterparts are. Melchionno, *supra* note 6, at 31.

62. Summers, *supra* note 1, at 510, 512; Grossman, *supra* note 29; Thaler-Carter, *supra* note 8.

63. See ROBERT A. HART, *THE ECONOMICS OF NON-WAGE LABOUR COSTS* 155 (1984) (describing the costs of benefits administration, including searching for appropriate plans, accumulating funds to pay premiums, and completing necessary paperwork).

Finally, termination is less costly due to the absence of direct severance costs and the reduced probability of litigation.⁶⁴

The costs employers incur by using contingents instead of permanent workers have not been documented in as much detail, probably because they are hard to quantify, and at least until recently, not particularly significant. The cost most often cited is productivity, on the theory that permanent employees are more invested in the company (either literally or figuratively) and thus tend to work harder to achieve management objectives.⁶⁵ Moreover, contingent workers, who are typically assumed to have low morale, can also impact the morale of others—their presence is often interpreted with suspicion and hostility by permanent workers who feel their own jobs are threatened.⁶⁶

Importantly for this Note, however, the potential costs of contingent employment have risen dramatically because there now exists increased legal uncertainty about contingent workers' status. Recent decisions in the Ninth Circuit, most notably *Vizcaino v. Microsoft Corp.*, suggest that employers cannot necessarily rely on their own interpretations of whether workers are regular or contingent. Thus, contingents might be legally reclassified and employers might suddenly become liable for back wages, taxes, and benefits.⁶⁷ This new cost has been perceived by management as very significant, and many companies are taking extreme steps to ensure that their classifications of contingent workers will withstand legal scrutiny.⁶⁸ The effects of this reaction on workers are discussed in the following Section, which considers the benefits and costs of contingent work from their point of view.

B. THE CONTINGENT WORKER'S PERSPECTIVE

Some contingent workers maintain that their jobs have distinct advantages over traditional employment. Like employers, contingent workers cite flexibility—for example, the ability to travel or to attend to family responsibilities—as the main advantage of impermanent work.⁶⁹

64. See Lo, *supra* note 8, at 519–20 (noting that although the employment-at-will doctrine has eroded in the United States, “the target of protection appears to be only regular employees”).

65. See Lester, *supra* note 5, at 133; Van Dyne & Ang, *supra* note 6, at 700. Given the lack of data, the productivity costs of contingent work may be seriously underestimated.

66. Lester, *supra* note 5, at 135, 137–38.

67. See *infra* Part IV.A.

68. See *infra* Part IV.B.

69. Caudron, *supra* note 6, at 43; Grossman, *supra* note 29, at 83. See also sources cited *supra* note 45.

Those who crave variety in their work are also attracted to contingent employment, because even routine administrative tasks become more challenging and varied when the setting in which they are performed changes from time to time.⁷⁰ Finally, some see contingent work as an attractive way to control one's own career path. Particularly among younger and more highly skilled workers, the traditional permanent employment paradigm may not be perceived as viable or even desirable; contingent work offers more choice, more opportunity to learn new skills, and the variety needed to establish a network of professional contacts.⁷¹

Of course, contingent employment also has its costs, many of which mirror the benefits to employers. Some of these costs are common to other segments of the work force, such as the wage and benefits gap that contingents face along with part-time workers.⁷² Another cost shared by contingent workers and part-timers is frustration that their contributions are sometimes viewed as qualitatively different from those of permanent or full-time employees.⁷³ Moreover, employers can use both contingent workers and part-timers to manipulate employment levels, thereby avoiding extending certain statutory protections to *any* employees.⁷⁴ This problem potentially affects all workers, but contingent workers and part-timers suffer doubly—they not only lose statutory protection, but management uses them to ensure this very loss.

Other costs are borne most heavily by contingent workers alone. These costs include a lack of opportunity to pursue other opportunities within the company, exclusion from many employer-sponsored training programs, and inherently limited recognition due to not being part of “the team.” Any investment to be made in the employee has to come from the individual, because the employer has little incentive to invest if it will not

70. Morin, *supra* note 6.

71. See Camden, *supra* note 1; Melchionno, *supra* note 6, at 27, 30–31.

72. Klare, *supra* note 8, at 257; Summers, *supra* note 1 at 510. Wages for contingent work in certain high-technology jobs are higher than those paid to permanent employees, in part to compensate for the lack of benefits. Renate M. de Haas, *Employee Benefits: Vizcaino v. Microsoft*, 13 BERKELEY TECH. L.J. 483, 483 (1998). Nevertheless, the norm in most sectors is lower wages for contingent workers, and in some cases, a lower wage growth rate as well. See Jefferson & Bohl, *supra* note 28, at 20, 22–23 (finding that while wages for contingent workers in the information technology sector were growing rapidly, particularly in light of strong demand generated by Year 2000 compliance projects, wage growth for contingent employees overall remained on par with or lower than that of permanent workers).

73. See Lester, *supra* note 5, at 133.

74. *Infra* notes 96–98 and accompanying text.

necessarily reap the reward.⁷⁵ Even contingent workers who invest in their own skills training, or who obtain training through temporary help agencies, do not have access to the usual paths of promotion that permanent employees have. Most employers will not consider contingent workers for promotion from within, and to the extent such opportunities are available, the price might be strained relations between contingent and core employees.⁷⁶ Regular employees who perceive that contingent workers are competing for the same promotions may feel threatened and engage in retaliatory behavior.⁷⁷ Moreover, contingent workers' prospects for advancement by changing jobs are hampered disproportionately by having had little opportunity to demonstrate leadership potential.⁷⁸ Even if a position elsewhere may lead to advancement, the employee would have much to prove to a new set of supervisors and coworkers before getting that promotion. Over a lifetime, that can add up to many wasted years and a sizable effective pay cut.

The recent legal uncertainty regarding contingent employment practices has increased the costs borne by contingent workers even as it has increased costs for employers. Employers have reacted strongly to *Vizcaino*, perhaps even irrationally, using draconian measures to ensure that no one will mistake a contingent worker for a permanent employee. For example, many companies require contingents to wear distinctive, brightly colored identification badges; many do not invite them to company social functions such as the annual picnic or the holiday party; and some companies have gone so far as to mandate that company parking lots are for the use of permanent employees only, suggesting that contingent workers take the bus instead.⁷⁹ Many of these measures serve no

75. See Silverstein & Goselin, *supra* note 1, at 18; Kent Blake, 'She's Just a Temporary', HR MAGAZINE, Aug. 1998, at 45, 48-50; *No Ties*, *supra* note 52. There may be legal ramifications for employers who do offer training to contingent workers. See Gillian Flynn, *Temp Staffing Carries Legal Risk*, WORKFORCE, Sept. 1999, at 56, 58.

76. This is true of employers who have a tradition of promoting from within. Not all companies operate this way, however, and some commentators suggest that fewer companies are continuing this traditional practice. See, e.g., Donna G. Albrecht, *Reaching New Heights: Today's Contract Workers Are Highly Promotable*, WORKFORCE, Apr. 1998, at 42, 48.

77. *Id.*; Lester, *supra* note 5, at 137-38.

78. See Melchionno, *supra* note 6, at 27 chart 2 (indicating that managerial assignments make up only 2.2% of temporary jobs); *id.* at 32 (noting that "[t]emporary workers continually must enter new jobs, adapt to different personalities and work situations, and perform their duties with limited knowledge of the company; then, just as they are adjusting, they may have to move to another assignment").

79. E.g., Grimsley, *supra* note 7 (referring to Microsoft's practice). This may not seem important in areas of the country where public transportation is in ample supply, but where work is not easily accessible, it can form a significant obstacle. Moreover, what offends most is not the failure to

discernible legal purpose, but merely serve to stratify the workplace, encouraging a caste system with permanent employees at the top and contingents at the bottom. As long as the legal uncertainty persists, however, employers are likely to continue treating contingent workers as second-class citizens. This embodies many contingent employees' worst fear—being treated as a disposable person, as “just a temp.”⁸⁰

On top of the added burdens all contingent workers bear after *Vizcaino*, involuntary contingent workers are also vulnerable to productivity losses due to low morale and pervasive uncertainty.⁸¹ People who take contingent jobs because they cannot find other employment experience a unique sense of despair that stems from knowing that any day at work might be their last, dreading the stigma of unemployment and the grinding job hunt to come.⁸² Voluntary contingent workers are not impacted to the same degree because they do not experience the same loss of control over their own lives; they have expressed a preference for contingent work despite its uncertainty.⁸³ In contrast, even involuntary contingent workers who know the endpoint of their current jobs have to cope with the stress and time pressure of impending—or in some cases, ongoing—job searches, which may impede their ability to be effective in their current positions.

Productivity may also diminish over time as involuntary contingent workers resign themselves to their situation; once they have no incentive to perform especially well for their employers, they may do only the minimum required to stay in the job.⁸⁴ This is a cost felt keenly by

provide parking for employees—it is the practice of providing parking, then revoking that privilege *only* from contingent employees. In any area or company where the norm is to drive to work, such a policy has a significant stigmatic effect on contingent workers as a class.

80. *E.g.*, Caudron, *supra* note 6, at 44 (quoting an older, voluntary contingent worker explaining that the hardest part is when he's treated like “just a temp”). *See generally* Blake, *supra* note 75; Jackie Krasas Rogers, *Just a Temp: Experience and Structure of Alienation in Temporary Clerical Employment*, 22 WORK AND OCCUPATIONS 137 (1995).

81. *See* Lester, *supra* note 5, at 105 (quoting one commentator's description of contingent workers as “motivated by insecurity and fear”).

82. *See generally* Livingston, *supra* note 7 (“It's work and a paycheck today, then return to the hiring hall tomorrow.”).

83. *See* Camden, *supra* note 1; Laabs, *supra* note 1, at 62 (“Out of a growing psychic need for people to find synchronicity between who they are and what they do, millions of workers are breaking free from organizational bondage.”); sources cited *supra* note 45.

84. Lester, *supra* note 5, at 133; Silverstein & Goselin, *supra* note 1, at 18. This effect is sometimes dismissed in the literature, because some argue it is a *cause* of contingent employment; that is, unmotivated employees tend to be marginalized into contingent work because their attitude prevents them from obtaining permanent employment. *E.g.*, Lester, *supra* note 5, at 91 (describing the view that the disparities between contingent and core employment merely reflect “underlying differences in human capital, endowments, preferences, and commercial exigencies”). The result is a sort of chicken-

workers, but it is also a very real cost to permanent coworkers and the employer. Some argue that the morale issue cuts the other way, however—that people who think their jobs are secure (permanent employees) are more likely to slack off than people who think they must arrive each day to prove their worth anew.⁸⁵ Nevertheless, any incentive effect generated by the prospect of permanent employment is bound to fade eventually, giving way to a despondent attitude and reduced productivity levels.⁸⁶

The next Part moves away from considering stakeholder perspectives, and considers how current law protects the interests of the contingent work force.

III. WORKER PROTECTION STATUTES AND CONTINGENT WORKERS

A. LAWS THAT EXTEND TO CONTINGENT WORKERS

Many protective statutes apply to contingent workers as well as permanent employees, at least as a general rule. For example, all contingent employees except independent contractors are covered by worker's compensation, health and safety laws, and minimum wage laws.⁸⁷ Although the "employer" directly paying for these benefits may differ for a contingent worker and a permanent employee working at the same job site, the coverage is the same. Typically, an employment agency, contracting firm, or leasing firm will pay these benefits for their employees, rather than having the end user company pay directly. Service contractors cover their own employees as well. Independent contractors, properly defined, are responsible for paying these themselves, so they too are covered so long as they make the payments. In all these instances, the problem arises that the enterprise in control of the workplace (i.e., ensuring conformance to health and safety laws, or preventing workplace accidents) is usually not the same as the enterprise paying for the coverage. This means that contingent employees are covered in the event of a problem, but may not enjoy the same degree of practical protection by way of precautions that permanent employees do. By contrast, in the case of minimum wage laws, most contingent workers are covered just as effectively as permanent employees

and-egg problem that puts contingent workers on the defensive in an interview setting, forming another barrier to finding permanent employment. *See id.* at 133.

85. *See* Van Dyne & Ang, *supra* note 6, at 701.

86. *See* Grimsley, *supra* note 7 (describing the now-lost hope of a Microsoft temporary employee that good performance would be rewarded with a permanent job).

87. Summers, *supra* note 1, at 516.

are, with the exception of “under-the-table” workers common in day-labor industries like agriculture.⁸⁸

B. LAWS THAT EXCLUDE CONTINGENT WORKERS

In many areas, however, contingent workers are not afforded as much statutory protection as core employees. Many statutory benefits are subject to eligibility requirements that exclude most contingent workers from coverage. For example, it is difficult for contingent workers to amass the necessary 1,250 hours of work for the same employer within a year to qualify for benefits under the Family and Medical Leave Act (FMLA).⁸⁹ In a similar fashion, contingent workers are excluded from unemployment insurance benefits,⁹⁰ pension vesting under the Employee Retirement Income Security Act (ERISA),⁹¹ and many forms of collective bargaining under the National Labor Relations Act (NLRA).⁹² This latter exclusion is particularly troublesome for reformers, because some form of collective bargaining is one approach frequently suggested to resolve the difficulties of contingent employment.⁹³ Contingent workers are usually excluded from collective bargaining alongside site employees, and in any event, the interests of permanent and contingent employees are often divergent.⁹⁴ Although contingent employees are permitted to bargain as a discrete group, this often proves practically impossible.⁹⁵

88. *Id.*; Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 570 (1996).

89. 29 U.S.C. § 2611(2) (1994). *See* Summers, *supra* note 1, at 511.

90. This is the subject of much academic commentary. There seems to be a virtual consensus that unemployment insurance schemes, nearly all of which exclude contingent workers from coverage, deny benefits to precisely those who need them most. *See, e.g.*, O’Connell, *supra* note 5, at 894–96; Schwab, *supra* note 11, at 926–28. *See generally* Sachin S. Pandya, *Retrofitting Unemployment Insurance to Cover Temporary Workers*, 17 YALE L. & POL’Y REV. 907 (1999). Some states have already started responding to this criticism by reforming their unemployment laws. *See infra* note 163.

91. Contingent workers are almost entirely excluded due to the statutory five-year vesting period and nontransportability of benefits. Dau-Schmidt, *supra* note 5, at 885–86; O’Connell, *supra* note 5, at 892–94; Schwab, *supra* note 11, at 923–25.

92. Hylton, *supra* note 6, at 859–60; Silverstein & Goselin, *supra* note 1, at 36–51 (suggesting amendments to the NLRA that would allow meaningful collective bargaining for contingent workers); Summers, *supra* note 1, at 513.

93. *See infra* Part V.C.

94. Summers, *supra* note 1, at 513. In addition to serving as a tacit reminder to core employees that their jobs could be eliminated at any time, “temporary employees are often used as strikebreakers to defeat the union.” *Id.*

95. DeBare, *supra* note 7.

[T]he National Labor Relations Board has said you can’t negotiate a contract for a group of temps unless all the staffing agencies that employ them have agreed to take part in the bargaining.

In a similar vein, antidiscrimination laws such as Title VII and its state law counterparts apply to contingent workers in theory, but they are not particularly effective in practice.⁹⁶ Discrimination against contingent workers on the basis of impermissible criteria is particularly insidious, because contingents have even less hope of successfully challenging an employer's refusal to hire or to promote, or to contest termination, than regular employees do. Moreover, such insidious discrimination disproportionately affects women and minorities, since they comprise the majority of the contingent work force.⁹⁷ Worst of all, employers can use contingent workers to avoid having the number of "employees" required to bring the enterprise within the statute's coverage, denying protection for *all* employees, contingent and permanent alike.⁹⁸

Of course, the law fails to protect all workers, not just contingents, in many important ways. Many benefits extended to permanent employees, such as health insurance coverage, vacation benefits, pension plans, sick pay, and the like, are the result of employer largesse or market pressure. Since no employee has a legal entitlement to these benefits, contingent workers are no worse off than some permanent employees are in this respect.⁹⁹ The voluntary nature of such benefits, however, means that employers who extend them to permanent employees have no legal obligation to include contingent workers. Furthermore, although these benefits are not required, many employers do in fact extend them to permanent employees, so as a group, contingent workers are more adversely impacted than traditional workers are.¹⁰⁰

The next Part considers how recent legal developments have made employers less certain than ever about which employee protections extend to whom, and how this uncertainty has exacerbated the second-class status of contingent workers.

IV. VIZCAINO V. MICROSOFT AND ITS CONSEQUENCES

Part III provided an overview of the major statutory protections for contingent workers and regular employees. *Who* is an "employee" for

"You might have to bargain with five different agencies, and if one refused to give its consent, none of the other agencies would be required to bargain[]"

Id. (quoting a former temporary employee at Microsoft).

96. Summers, *supra* note 1, at 510; *Employment Discrimination*, *supra* note 1, at 1658–62.

97. Ontiveros, *supra* note 9, at 33; *Employment Discrimination*, *supra* note 1, at 1651.

98. Summers, *supra* note 1, at 513. Manipulating employment levels also allows employers to avoid coverage under the FMLA. *Supra* note 89 and accompanying text.

99. Hylton, *supra* note 6, at 852.

100. O'Connell, *supra* note 5, at 890–95.

statutory purposes, however, is increasingly an open legal question. This uncertainty makes contingent work more costly for employers, whose attempts to avoid litigation of the issue have exacerbated workplace stratification that hurts contingent workers. The Ninth Circuit's decision in *Vizcaino v. Microsoft Corp.*¹⁰¹ is the primary source of this new uncertainty, less by virtue of the decision's uniqueness than by virtue of the defendant's extremely high profile in the business world.¹⁰² Legal guidance aimed at management is already full of advice on how to avoid Microsoft's mistake,¹⁰³ and the overwhelming majority of the recommendations are not good news for contingent workers. Occasionally, management is encouraged to hire permanent workers instead of using contingents;¹⁰⁴ however, the bulk of the advice is aimed at ensuring that no one will mistake a contingent for a permanent employee.¹⁰⁵ In short, *Vizcaino* has prompted employers to create two-tier, status-conscious working environments that clearly demarcate contingent workers.

A. VIZCAINO AND ITS TREATMENT BY SUBSEQUENT COURTS

In *Vizcaino*, the Ninth Circuit held that a group of workers classified by Microsoft as independent contractors may be eligible to participate in the company's pension plans.¹⁰⁶ The workers involved in the suit had been hired to work on specific projects, performing skilled functions such as

101. 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1098 (1998). The Ninth Circuit's en banc opinion is sometimes referred to as *Vizcaino II*, with the original hearing before a three-judge panel, *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), referred to as *Vizcaino I*. This Note refers to the en banc opinion simply as *Vizcaino*.

102. Many of the circuit courts have considered who is an "employee" for ERISA benefits plan purposes. *See, e.g.*, *Capital Cities/ABC, Inc. v. Ratcliff*, 141 F.3d 1405 (10th Cir. 1998), *cert. denied*, 525 U.S. 873 (1998); *Trombetta v. Cragin Fed. Bank*, 102 F.3d 1435 (7th Cir. 1996); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir. 1993); *Holt v. Winpsinger*, 811 F.2d 1532 (D.C. Cir. 1987). *Vizcaino*, however, was a closely watched case in which the court reached an unexpected result, and it has received by far the most attention in both legal and business circles. *See, e.g.*, Davidson, *Better Deal*, *supra* note 7, at 49 ("[A]ll eyes are on the Microsoft case."); de Haas, *supra* note 72, at 484 (discussing *Vizcaino*'s implications for employee benefits); Flynn, *supra* note 75, at 56–58 (suggesting management caution in dealing with contingent workers after *Vizcaino*: "Consider Microsoft your wake-up call"); Grimsley, *supra* note 7 (noting changes in management relations with contingent workers since *Vizcaino*).

103. *See* de Haas, *supra* note 72, at 493–99; Flynn, *supra* note 75, at 56.

104. *See* Flynn, *supra* note 75, at 57 (quoting a Microsoft spokesperson who indicates, "We're in the process of evaluating whether [people] that have been classified as contingents should be brought in as full-time employees or [whether] this is the best way to continue to operate") (alterations in original).

105. *See id.* at 58–62; Davidson, *Better Deal*, *supra* note 7, at 50; Davidson, *Maximize Return*, *supra* note 1, at 60; de Haas, *supra* note 72, at 498.

106. 120 F.3d at 1013.

production editing, formatting, indexing, proofreading, and testing.¹⁰⁷ They were fully integrated with the regular Microsoft work force, shared the same supervisors, used company facilities and equipment, and performed the same work during the same core hours as regular employees.¹⁰⁸ They were paid through accounts payable, however, rather than the payroll department; they were responsible for their own income and employment taxes; and they were not allowed to participate in Microsoft's pension plans.¹⁰⁹ In addition, the workers had signed agreements prior to commencing work at Microsoft that stated in relevant part that they were "Independent Contractors," and that the agreement should not be construed as creating an "employer-employee relationship."¹¹⁰ They also signed information forms stating that they were self-employed, responsible for their own taxes and benefits, and that they were not employees or temporary employees of Microsoft.¹¹¹

In 1989 and 1990, the workers were reclassified as "employees" as a result of an IRS audit, which had found the workers to be employees under the common law.¹¹² Microsoft acknowledged the change in status by issuing tax withholding forms to the workers and paying back employment taxes for them.¹¹³ Furthermore, the company hired some of the workers as permanent employees, and offered the others the option of returning to Microsoft as temporary employees under the auspices of a temporary employment agency.¹¹⁴ The workers then claimed they were Microsoft employees, and as such were eligible to participate in Microsoft's pension plans, including the Savings Plus Program (SPP) and Employee Stock Purchase Program (ESPP).¹¹⁵ Microsoft disagreed, and the plan administrator concurred, indicating that the workers were not eligible because they "had agreed that they were independent contractors and because they had waived the right to participate in benefit plans."¹¹⁶

The *Vizcaino* court did not decide for itself whether the workers were employees at common law, since Microsoft had conceded the issue on

107. *Id.* at 1008.

108. *Id.*

109. *Id.*

110. *Id.* at 1010 (quoting the Microsoft agreements).

111. *Id.*

112. *Id.* at 1008. The particulars of the IRS determination and the common-law test are discussed *infra* notes 119–20 and accompanying text.

113. *Id.*

114. *Id.* at 1009.

115. *Id.*

116. *Id.*

appeal.¹¹⁷ The court did note, however, that the IRS finding would have been dispositive.¹¹⁸ The IRS had reached its decision by applying the agency law test of whether a worker is an employee or an independent contractor.¹¹⁹

“[W]e consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”¹²⁰

The court reiterated the propriety of using the common-law test to determine who is an employee, absent Congressional indication of a different statutory meaning.¹²¹ On the assumption that the workers were in fact employees, the court went on to consider the effects of the agreements they signed before beginning work for Microsoft.

Since the court found that the workers were not in fact independent contractors, the “Independent Contractor” agreements they signed that waived their participation in the pension plans did not render them ineligible to participate.¹²² The court stated that the agreements were based at best on a mutual mistake, and reformation was unnecessary since Microsoft had already acknowledged that the workers were not independent contractors.¹²³ Furthermore, the court declined to parse the agreements into withholding and benefits sections for separate consideration, and suggested in dicta that even a waiver of benefits alone would likely not withstand scrutiny.¹²⁴ Thus, since the workers were

117. *Id.* at 1010.

118. *See id.* at 1009.

119. *Id.* at 1009–10.

120. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

121. *See Vizcaino*, 120 F.3d at 1009 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)).

122. *See id.* at 1011–12.

123. *See id.* at 1012.

124. *See id.* The court noted that any waiver of benefits would have to have been “knowing and voluntary under ERISA and Washington law,” and that the SPP would have to withstand “special scrutiny designed to prevent potential employer or fiduciary abuse.” *Id.*

employees, the agreements did not bar their participation in the pension plans, and the plan administrator abused his discretion in denying benefits on that basis.¹²⁵

With regard to the SPP plan, the plan administrator had asserted a new reason for denying benefits at trial, one that was not communicated to the workers at the time they were deemed ineligible to participate.¹²⁶ This reason related to the plan's restriction of benefits to employees "on the United States payroll of the employer."¹²⁷ The court, by a margin of six to five, declined to decide whether this phrase precluded the plaintiffs' claim to benefits, and so remanded the case to the district court with instructions that the plan administrator should interpret the plan language in the first instance.¹²⁸ The five judges dissenting from this portion of the opinion would have held that the workers were eligible to participate in the SPP.¹²⁹ As for the ESPP, the court held that the workers were eligible to participate, since the offer was extended to "employees."¹³⁰ Since the workers knew the plan existed, their continued work for Microsoft constituted acceptance of that offer even though they did not know its precise terms.¹³¹

In sum, *Vizcaino*'s holding is fairly limited: Where workers are *in fact* common law employees, the validity of any agreements they sign on the understanding that they are not employees may be called into question; plan administrators should construe plan language in the first instance, subject to judicial review for abuse of discretion; and any benefit offered to employees may be accepted by their continued service for the employer, even if they are not aware of the precise details of the plan. In a later case, *Burrey v. Pacific Gas & Electric Co.*,¹³² the Ninth Circuit used reasoning similar to *Vizcaino* in reversing the district court's order of summary judgment in favor of an employer that had excluded a leased employee from participation in its benefits plans.¹³³ The court stated that the district court had erred in not considering whether the plaintiff was an employee at

125. *Id.* at 1013.

126. *Id.*

127. *Id.* (quoting the language of Microsoft's plan).

128. *See id.* at 1013–14. Note, however, that three of the judges who concurred with the majority on this issue dissented from the rest of the opinion. *See id.* at 1018–23. Further complicating matters, the three-judge panel in *Vizcaino I* had found the phrase ambiguous, but chose to construe it in favor of the workers. *See id.*

129. *See id.* at 1017.

130. *Id.* at 1014.

131. *Id.*

132. 159 F.3d 388 (9th Cir. 1998).

133. *See id.* at 394.

common law, which by the plan's own terms would have precluded her from being a "leased employee" properly ineligible to participate.¹³⁴

Other courts, however, have questioned *Vizcaino* or found its applicability limited.¹³⁵ Recently, the Eleventh Circuit asserted that *Vizcaino* did not control in *Wolf v. Coca-Cola Co.*,¹³⁶ another ERISA benefits case involving a contingent employee. There, the court stated that meeting eligibility criteria for ERISA requires satisfying two prongs: first, the worker must be an employee, and second, the employee must be eligible to receive benefits under the plan. Thus,

[N]either *Vizcaino* nor *Burrey* holds that a person meeting the common law employee test must be given ERISA benefits. Rather, *Vizcaino* and *Burrey* simply clarify that if *the plan* makes all common law employees eligible, then meeting the first prong also will satisfy the second prong. When the plan affirmatively excludes certain workers from coverage, however, then meeting the first prong is not sufficient because . . . failing the second prong denies the plaintiff ERISA standing.¹³⁷

This means employers can avoid liability by a) ensuring their plan does not state that all common law employees are eligible to participate; or b) by including language in the plan that specifically excludes certain kinds of employees such as leased or temporary employees. The *Wolf* court acknowledged that the Coca-Cola plan used the term "employee," but since it did so in defining "regular employee," where it specifically excluded leased and temporary employees from that definition, the plaintiff's status as a common-law employee was not dispositive of her eligibility for benefits.¹³⁸

134. *Id.* The plan in *Burrey* incorporated the IRS definition of "leased employee" as stated in I.R.C. § 414(n), which states that a leased employee is a person who is "not an employee" and meets certain other criteria. See 26 U.S.C. § 414(n) (1994); *Burrey*, 159 F.3d at 392. Thus, it was not possible to be both a common-law employee and a leased employee for the purposes of the plan. See *Burrey*, 159 F.3d at 393.

135. See, e.g., *McCoy v. Federal Ins. Co.*, 7 F. Supp. 2d 1134, 1144 (E.D. Wash. 1998) (disapproving *Vizcaino* insofar as it suggests a plan administrator may assert at trial an entirely new basis for denying benefits); *Hensley v. Northwest Permanente P.C. Retirement Plan and Trust*, No. CV-96-1166-ST, 1999 WL 685886, at *1, *4 (D. Or. 1999) (declining to follow *Vizcaino*, despite holding that plan administrators should apply the common-law definition when deciding who is an employee).

136. 200 F.3d 1337 (11th Cir. 2000).

137. *Id.* at 1341-42.

138. *Id.* at 1342.

B. THE CONSEQUENCES OF *VIZCAINO* FOR CONTINGENT WORK

Neither the limited nature of *Vizcaino*'s holding, nor its narrowing by subsequent cases, have resulted in employers being any less concerned about the prospect of liability in the event of a lawsuit brought by contingent workers. Typical management advice suggests ways to stay beyond *Vizcaino*'s reach: "[S]tate in your 401(k) and stock plans that any workers who are paid by a third-party firm are not covered under the plan. Then—voilà!—it doesn't matter if they're common-law employees, because that's not the standard being used to determine if they're covered."¹³⁹ Other suggestions include rethinking whether workers should continue as contingents, since what some companies need is regular, full-time employees.¹⁴⁰ Some commentators advise management to address a broad spectrum of factors that courts might consider in determining who is an employee, including paying contingents on a different scale and from a different department, making sure independent contractors are really working independently, and using consistent terminology for contingent employees and regular employees in all company documents.¹⁴¹

Many companies, however, are responding by cracking down on legally insignificant but very visible aspects of the working environment to make sure no one is mistaken about contingent employees' status. One human resources official acknowledges that treating contingent workers differently can be difficult even for permanent employees: "Some of the stuff may be hard to swallow, like not inviting them for the department birthday cake or picnic, and you're working right next to these people . . ."¹⁴² Those who study labor issues have also remarked on the degree to which *Vizcaino* has made a bad situation worse: "At Microsoft, it's a very stratified system . . . If you're not the right color badge, you get excluded from certain kinds of things and not invited to the company picnics. You feel different. It's having a weird, demoralizing effect, and it is skewing the organization. It's a complex problem."¹⁴³ Disparate

139. Flynn, *supra* note 75, at 62.

140. *See id.* at 60.

141. *See, e.g.,* de Haas, *supra* note 72, at 498.

142. Flynn, *supra* note 75, at 60. *Cf.* Jefferson & Bohl, *supra* note 28, at 23 (finding that from July 1997 to July 1998, when *Vizcaino*'s consequences had yet to materialize fully, seventy-three percent of companies invited contingent workers to holiday parties and picnics).

143. Grimsley, *supra* note 7 (quoting a spokesperson for the Center for Labor Study). Not all commentators agree that the caste system is a problem, particularly those who represent the temporary help industry. Edward Lenz, senior vice president and general counsel for the National Association of Temporary and Staffing Services, warns employers to "avoid recruiting, making wage and benefit decisions and providing training (other than worksite-specific safety training)" in addition to not

treatment of contingent workers is evident in many other incidents related by the workers themselves, such as being prohibited from participating in their workplace's "Take Our Daughters to Work Day,"¹⁴⁴ and being barred from the company parking lot and told to take the bus.¹⁴⁵

Some of these incidents seem petty, and from a legal standpoint, they are. Nothing in *Vizcaino* suggests that such measures would change the legal analysis, and although *Burrey* cites a few such factors in dicta, it lists far more factors that relate directly to the common-law test. Some managers in the temporary help industry seem to recognize this, and they are encouraging clients to integrate contingent workers into their regular work force as much as is legally possible: "Companies can't let the 'Microsoft cloud' affect their relationship with temporary employees. There's a lot of fear out there right now, and if companies pull back and become so cautious with temp workers that they further exclude them from activities, this will only create more of a caste system."¹⁴⁶ For some client company managers, this approach makes good business sense as well, because without an inclusive atmosphere that values each worker's contributions regardless of status, teamwork and the success that comes with it is impossible.¹⁴⁷

The next Part considers various proposals for reform of contingent work, and how effectively they address the problems of the post-*Vizcaino* workplace.

V. PROPOSALS FOR REFORM

The programs advanced by commentators to address the problem of contingent work range from doing nothing at one extreme¹⁴⁸ to building up an extensive social welfare net at the other.¹⁴⁹ In between, the broad-brush possibilities are extending the reach of current laws through judicial

inviting contingents to company parties and events. Davidson, *Better Deal*, *supra* note 7, at 50. When asked if he believes these decisions will make contingent workers feel like second-class citizens, Lenz responded, "Probably not. Most temporary workers report high satisfaction with their job experience, and since most work for very short periods of time, the absence of strong attachments with the customer's workforce is unlikely to be of great concern." *Id.*

144. Grimsley, *supra* note 7. See Goozner, *supra* note 7 (noting that a contingent worker was allowed to bring her son to "Bring Your Child to Work" day, but the child was not allowed to participate in the special activities set up for the regular employees' children).

145. Grimsley, *supra* note 7; *supra* note 79 and accompanying text.

146. Davidson, *Better Deal*, *supra* note 7, at 49 (quoting a temp-staffing industry specialist).

147. *Id.* at 50.

148. See *infra* Part V.A.

149. See *infra* Part V.D.

construction or legislative act,¹⁵⁰ unionizing contingent workers,¹⁵¹ or passing new laws that specifically address the problems experienced by contingent workers.¹⁵² Each reform has a slightly different focus, and many do not specifically target contingent workers as I have defined them. All the suggestions for reform, however—except doing nothing—involve distributing the social burden of contingent work more evenly, since the current scheme allocates the burden primarily to the contingent worker and not to the employer. In other words, any reform will have a cost to employers. Many reforms also involve costs to others—taxpayers, all employees, permanent employees, all contingent workers, or voluntary contingent workers—although they may not be direct or even very large. Many reforms, however, will benefit all or some of these other groups.

A. THE ARGUMENT AGAINST REFORM

One approach is to let the market decide—in other words, to do nothing.¹⁵³ Some who suggest this approach use the fact that most employees are technically temporary to bolster their argument that there is no problem, or at least no *unique* problem.¹⁵⁴ Employers invest in their regular employees to an extent they do not in contingent employees,¹⁵⁵ however, and while at-will employees do not have any legal guarantee of indefinite employment, they are rarely the first to go when business is slow.¹⁵⁶ Thus, there is a clear incentive for employers to invest in the professional growth and happiness of permanent employees. There is also a corresponding disincentive to invest in contingent employees, particularly after *Vizcaino*, because doing so weighs in favor of the workers being considered employees at common law.¹⁵⁷ More importantly, *Vizcaino* has introduced legal uncertainty and its consequences into contingent

150. See *infra* Part V.B.

151. See *infra* Part V.C.

152. See *infra* Part V.D.

153. Hylton, *supra* note 6, at 862; Lenz, *supra* note 6, at 769. Some commentators have conceded that reform may be necessary, but found it premature, at least at the time they were writing. See Schwab, *supra* note 11, at 933 (“Massive regulation of contingent jobs is not the answer. . . . As our empirical understanding of contingent work increases, policy recommendations can become sharper.”).

154. See Hylton, *supra* note 6, at 850.

155. See Silverstein & Goselin, *supra* note 1, at 17–18.

156. Management is unapologetic about this effect; in fact, contingent labor is often used intentionally as a buffer to preserve regular employees’ jobs. See Lo, *supra* note 8, at 496; Grossman, *supra* note 29, at 82 (“We want people who want to work in flexible ways, so we can have the option of putting them back on the shelf when we don’t need them.”) (quoting a human resources executive).

157. See Davidson, *Better Deal*, *supra* note 7, at 50; Flynn, *supra* note 75, at 58.

employment arrangements.¹⁵⁸ Thus, failure to implement reform will most likely leave the costs of contingent work wholly intact and on the shoulders of contingent workers,¹⁵⁹ rather than resulting in market-based changes in employer behavior.

B. EXTENDING THE REACH OF CURRENT WORKER PROTECTION LAWS

Another proposal calls for reforming labor protection laws to encompass contingent workers, either by explicitly including contingent workers or by redefining the term “employee.” This has started to occur through judicial construction in decisions like *Vizcaino*, with the result that contingent workers and employers are worse off than they were before.¹⁶⁰ A more promising route may be legislative action to bring contingent employees under the statutory umbrella,¹⁶¹ although previous congressional attempts to do this have been unsuccessful.¹⁶² A renewed call for such legislation would likely encounter political resistance from voluntary contingent workers and management, since increased regulation would decrease the autonomy they value so highly.¹⁶³ On the plus side, involuntary contingent workers would, in some instances, receive important social welfare benefits.

C. REFORM THROUGH COLLECTIVE BARGAINING

Several commentators suggest that contingent employees should bargain collectively to improve their working conditions.¹⁶⁴ A collective unit may also function as an alternate institution from which workers could derive many of the benefits of a traditional employment relationship.¹⁶⁵ Proposals for collective bargaining by contingent employees have run the

158. *Supra* Part IV.

159. *Supra* Part II.B.

160. *Supra* Part IV.

161. For example, Mississippi has made changes to its unemployment insurance laws to bring many temporary employees within its scope. Diana Runner, *Changes in Unemployment Insurance Legislation in 1998*, MONTHLY LAB. REV., Jan. 1999, at 20, 24.

162. In 1993, Representative Pat Schroeder introduced a bill to provide pension plan and health coverage for some contingent workers, but it never reached the House floor for a vote. *See* Part-Time and Temporary Workers Protection Act of 1993, H.R. 2188, 103d Cong. The bill would have amended ERISA to lower the number of hours of service required to trigger statutory benefits protection. *See id.* § 4. The bill also sought unemployment insurance coverage, pension-plan participation, and pro rata employer contributions to health plans for part-time workers. *See id.* §§ 2, 4.

163. *See* Silverstein & Goselin, *supra* note 1, at 29–30.

164. *See, e.g., id.* at 34–51; Lester, *supra* note 5, at 143–44.

165. Silverstein & Goselin, *supra* note 1, at 36–43 (suggesting that a union would act as a focus of loyalty, commitment, and participation for contingent workers, as well as provide tangible benefits).

gamut from loose groups formed to press particular industries for better working conditions¹⁶⁶ to comprehensive unionization with trade-based hiring halls, structured training programs, and union-sponsored benefits.¹⁶⁷ Most commentators agree, however, that collective bargaining alongside traditional unions is not a good strategy for contingent workers.¹⁶⁸ Moreover, site-based bargaining is not a viable alternative for mobile contingent employees, who would benefit more from profession-based organizing.¹⁶⁹

Another potential problem for the collective bargaining approach is that many contingents want to be permanent employees.¹⁷⁰ Such workers might resist committing to contingent solidarity when they see themselves (rightly or wrongly) as possibly becoming permanent in the near future. Since many contingents long to join the core work force to which they are operationally attached,¹⁷¹ they may prefer not to upset the existing regime by organizing as an adversarial bloc.¹⁷² A collective unit with more modest goals, however, such as professional development opportunities and access to group benefits discounts, might have appeal for contingent workers. 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.

166. For example, the South Bay Labor Council of the AFL-CIO, which serves California's information technology-intensive Silicon Valley, has formed an advocacy group to encourage best-practice uses of contingent workers. The group has also started its own nonprofit staffing firm that offers favorable terms and conditions to its employees. DeBare, *supra* note 7.

167. See Lester, *supra* note 5, at 119–21 (describing the “occupational unionism” model, which organizes around skills instead of work sites); Middleton, *supra* note 88, at 617–20 (describing occupational and geographical association models for organizing contingent workers); Silverstein & Goselin, *supra* note 1, at 36–37 (advocating unions and professional associations to establish prehire agreements with user companies and to act as employment agents for contingent workers to provide training, benefits, and employment security).

168. See, e.g., Summers, *supra* note 1, at 513. The interests of contingent and permanent employees diverge enough to make common action difficult; moreover, experience suggests that core employees view contingents as part of the problem, not part of the solution. *Id.*

169. Silverstein & Goselin, *supra* note 1, at 37.

170. See Lester, *supra* note 5, at 115 (characterizing the “ever-present ‘dangling possibilities’ of becoming permanent” as a source of hope for many contingent workers); Kavan et al., *supra* note 7, at 79; Livingston, *supra* note 7.

171. Operational attachment is discussed *supra* notes 39–43 and accompanying text.

172. *But see infra* note 193 and accompanying text (describing nascent unionization by contingent workers at Microsoft).

D. PROPOSALS FOR NEW LAWS AIMED SPECIFICALLY AT
CONTINGENT WORKERS

A final approach is new legislation to address the specific problems of contingent workers through additional regulation of the workplace, expanding the social welfare net, or regulating agencies that provide contingent workers to client companies. The first type of change would prohibit discrimination against contingent workers in wages and benefits, along the lines of current efforts in Congress by Representative Lane Evans.¹⁷³ Evans' bill calls for wage parity for contingent workers,¹⁷⁴ and would establish an eligibility threshold beyond which contingent workers would receive the same benefits as permanent employees do.¹⁷⁵ While such legislation may alleviate some of the inequities of contingent work, it would entail significant compliance costs, especially in the area of benefits administration. The result might be fewer job opportunities for voluntary contingent workers or even reduced benefits levels for all employees.

The second, larger task of increasing America's social welfare net could be as simple as making privately obtained benefits more portable,¹⁷⁶ or it could mean a comprehensive overhaul providing for benefits like universal health care.¹⁷⁷ The former might be achievable politically, but it would drive up benefits administration costs while leaving unaddressed such pressing contingent work problems as differential treatment in the workplace, low wages, and lack of professional development opportunities. Many commentators feel that more comprehensive social welfare reform is needed; however, most have rejected the idea given the current political climate.¹⁷⁸ Moreover, such sweeping change would hardly be tailored to—much less justified by—the specific problems of contingent work.¹⁷⁹

173. Evans has introduced the Equity for Temporary Workers Act of 1999, H.R. 2298, 106th Cong.

174. *See id.* § 3 (An employer "shall not discriminate . . . on the basis of employment status by paying wages to temporary employees . . . at a rate less than the rate at which the employer pays wages to full-time employees . . . for equal work . . .").

175. An employee would be eligible for full benefits after working one thousand hours for the same employer within a twelve-month period. *Id.* § 2(b). Evans has also introduced a companion bill that would amend ERISA to make contingent workers meeting these criteria eligible to participate in employer pension plans. ERISA Clarification Act of 1999, H.R. 2299, 106th Cong.

176. *E.g.*, Dau-Schmidt, *supra* note 5, at 885–86.

177. *E.g.*, Belous, *supra* note 1, at 877–78; O'Connell, *supra* note 5, at 903–06.

178. *See, e.g.*, ROTHSTEIN & LIEBMAN, *supra* note 2, at 455 ("[T]here is inadequate political support for any system that is not dependent, at least financially, on employers.").

179. *See* Hylton, *supra* note 6, at 850–52; Schwab, *supra* note 11, at 928–32.

The final approach would be to regulate contingent work directly, by regulating temporary help, contract, and leasing agencies. Although most employers are not legally required to offer benefits, market wages, training, and advancement opportunities to their employees, there may be justification for requiring employment agencies to do so. Unlike traditional employers, agencies have no direct economic incentive to invest in their workers.¹⁸⁰ There may even be some disincentive, to the extent that increased wage and benefit costs make openings scarcer or reduce agency profits, or to the extent that workers with improved skills find permanent work and leave agency payrolls altogether. Therefore, legislation to substitute for the market forces driving traditional employers might be an effective remedy for some contingent workers; however, such a solution would not find favor with employers, agencies, or many voluntary contingent workers. Moreover, the enhanced security of permanent work and benefits specific to traditional employers, such as stock purchase plans, may still make permanent work more attractive.

The next Part proposes a combination of reform measures designed to have maximum impact on the problems of contingent work, with minimum impact on its advantages for various stakeholders.

VI. RECOMMENDATIONS FOR STRATEGIC REFORM

Reform should preserve what works, not merely eliminate what does not. Considering the phenomenon of contingent work from all sides, some common themes emerge. First, legal uncertainty regarding employee classifications benefits no one. Both management and contingent workers would be better off if contingents could be integrated as fully as possible into the regular work force without incurring legal risk. Second, some of the changes workers want (more money) can be reconciled with management's most pressing needs (flexibility and autonomy). Such a tradeoff suggests a promising way to balance the interests of all stakeholders. Third, contingent workers need a source of benefits and training that is not connected to specific employers. Access to training opportunities and group discounts on benefits would improve the skill levels, motivation, and morale of contingent workers, with a corresponding improvement in the value they offer management. This Part addresses each

180. There may, however, be some indirect incentive: Agencies with better paid, more talented workers may emerge as industry leaders and acquire more business as a result. See Davidson, *Maximize Return*, *supra* note 1, at 59 ("Best-practice companies have . . . started to focus on finding the best service in their location in each specialty area.")

of these themes in turn, proposing a three-part proposal for strategic reform of contingent work.

A. ELIMINATING LEGAL UNCERTAINTY

Legislative action should be taken to eliminate the legal uncertainty facing employers in the wake of *Vizcaino* and its progeny. Employers should be able to establish who is (and is not) eligible for their benefits plans without worrying that courts will second-guess them. Similarly, employees should know up front what they are (and are not) getting from the employment bargain. Congress should pass a law specifying that any employer-sponsored benefit plan governed by ERISA is presumptively unavailable to contingent workers, as they are defined in this Note,¹⁸¹ unless otherwise indicated in the language of the employer's plan. The law should also clarify that the employer's classification of a worker controls so long as the worker has signed an agreement acknowledging the classification. Accordingly, the law would expressly disapprove the mutual-mistake construction applied to Microsoft's independent contractor agreements in *Vizcaino*. Admittedly, this confers on employers a tremendous amount of discretion as to who is eligible for benefits, but it would eliminate the *Vizcaino* uncertainty without resulting in high administrative costs or any material change for the vast majority of workers.

Having a clear way of determining who is eligible for benefits should eliminate employer incentive to treat contingent workers badly for fear of legal reprisal. Factors such as degree of employer control over the work, badge color, training by the employer, eligibility for promotions, inclusion in company events, and integration with regular employees in the workplace would have no legal bearing on eligibility for benefits, so the incentive to create a two-tiered workplace would largely disappear.¹⁸² Management would benefit by regaining the discretion to maximize productivity and teamwork instead of focusing on potential legal trouble; workers would benefit because they would no longer be treated as second-class citizens in the workplace.

181. See *supra* Part I.B.

182. The one remaining factor that such reform would not address is permanent employee hostility. Such hostility is likely to decrease, however, as the blended work force becomes the norm rather than the exception. See Albrecht, *supra* note 76, at 48.

B. ADDRESSING THE WAGE GAP

Contingent workers need more than legal certainty, however. As things stand, employers reap most of the benefits of contingent work, while the workers bear most of its costs. To compensate for this burden—their relative lack of job security, lack of employer-sponsored benefits, and remote chances for advancement—contingent workers should receive a higher hourly wage than that of permanent employees who perform substantially similar work. Congress should pass a law using language similar to the Equal Pay Act¹⁸³ to establish a mandatory wage differential for contingent workers.¹⁸⁴ Instead of requiring equal pay for substantially similar work, however, the law would state that contingent workers must receive higher wages than permanent employees do for substantially similar work.¹⁸⁵ The law should also follow the Equal Pay Act's framework in including a provision that no one's wages be lowered in order to comply with the law, so that permanent employees will not suffer as a result.¹⁸⁶ As with the benefits eligibility law proposed above, "contingent workers" for the purposes of a wage differential statute should be defined in accordance with Part I.B of this Note.

At first blush this may sound like a windfall for contingent workers, but they would still retain the burdens of hedging against the possibility of being suddenly unemployed; planning for retirement and purchasing other benefits;¹⁸⁷ and carving out their own career paths in the absence of defined corporate schemes. In light of that tremendous personal responsibility, the

183. 29 U.S.C. § 206(d)(1) (1994).

184. The language would be similar to the wage parity portion of Representative Evans' proposed law discussed *supra* note 174 and accompanying text.

185. The wage differential would take the form of a percentage of the corresponding permanent employee's wage. For example, setting the differential at fifteen percent would mean that a contingent worker would be paid \$11.50 an hour for the same work performed by a permanent colleague who is paid \$10 per hour. I have not suggested a specific differential here because doing so would require detailed economic analysis beyond the scope of this Note.

186. Over the long term, employers may start to substitute permanent part-time workers for contingents as a way around this requirement. While I do think such a response would warrant legal attention, the focus would then be on generally "bad" (i.e., few hours, low wages, no benefits) jobs, *not* contingent work.

187. If legislators become concerned that contingent workers might not spend the extra wages wisely to pay for benefits, they could build in a tax incentive to do so. A tax incentive, rather than direct government control of the funds, would be consistent with the antipaternalistic rationale underlying contingent work. It would also be consistent with the manner in which benefits represent tax-advantaged compensation for most permanent employees. See HART, *supra* note 63, at 154–55. Note, however, that the proposed statute would not condition receipt of the wage differential on whether permanent employees receive benefits from their employers. Doing so would only encourage employers to stop providing benefits for permanent employees.

tradeoff does not seem overly weighted in favor of contingent workers. It might tip the balance enough, however, to make contingent work more attractive for some people. To the extent that voluntary contingent work is a happy match of preferences, this is good news for workers and employers alike.

Employers, of course, would rather not pay contingent workers more. They also say, however, that retaining flexibility—not saving on costs—is the primary reason they use contingent workers. If the ability to expand and contract the work force is as important as employers say it is, it should be well worth trading off some wage-cost savings to retain that ability. Indeed, other countries' experiences suggest that a wage differential for contingent workers is economically viable for employers.¹⁸⁸ Moreover, this particular approach involves a bright-line rule that is easy to administer, so compliance costs over and above the initial wage increase should be minimal.¹⁸⁹ There may be some initial contingent job loss as a result, but there is no reason to suppose it will fall disproportionately on the shoulders of voluntary contingent workers. In fact, many voluntary contingent workers are already paid more than permanent employees are,¹⁹⁰ so the change would not affect them or their employers.

C. TOWARD OBTAINING BENEFITS AND PROFESSIONAL DEVELOPMENT OPPORTUNITIES

Finally, contingent workers need access to benefits plans and professional development opportunities tailored to their peripatetic work patterns. Professional associations could function as a source of group discounts on benefits like health care and retirement savings plans.¹⁹¹ Although temporary-help industry officials are quick to note how many agencies now offer benefits to their employees,¹⁹² professional organizations might be able to secure better volume discounts as well as reach individuals who change agencies very frequently, or who do not work through an agency at all. Moreover, if necessary, some similarly loose form of organization could help contingent workers bargain with management for better working conditions, particularly where there are

188. *Employment Discrimination*, *supra* note 1, at 1664 n.120.

189. This approach would only become expensive if employers attempt to circumvent the law. I dismiss such costs as illegitimate.

190. This is particularly true in the information technology sector. Melchionno, *supra* note 6, at 31.

191. *See, e.g.*, Middleton, *supra* note 88, at 612; Grossman, *supra* note 29, at 83.

192. *See* Lenz, *supra* note 6, at 764.

high concentrations of contingent workers in certain sectors or companies. A group called WashTech has taken this approach with Microsoft, and while management has not recognized them as an official bargaining unit, their persistence appears to be paying off in the form of better salaries and benefits.¹⁹³ Such organizations might be able to encourage best-practice behavior in industries, since word would quickly spread as to which companies are best to work for on a contingent basis. If nothing else, such groups could attract management attention to important issues in a nonthreatening way precisely because they lack legal force.¹⁹⁴ Thus, while this is not a *legal* solution per se, it does suggest a conduit for dialogue that might be more effective than making isolated individual complaints or engaging in a rigid, formal collective bargaining process.

The first and third reforms described above would be easy to implement from a political standpoint. The second—the wage differential—is nonetheless worth pressing for, and it is a critical part of the overall approach. Management has insisted that its practice of using contingent workers is driven primarily by the need for flexibility and not by a bare desire to cut costs. A wage differential would not impact flexibility, so there should be no objection on that ground. Moreover, higher wages may attract better-qualified contingent workers,¹⁹⁵ offsetting some of the increase in wage costs through higher productivity and better-quality work product.

Taken together, these reforms would make contingent work more desirable and flexible than it is in the current legal climate. Although higher wages may lead to some initial job loss, the cost would be offset to some degree by reduced legal costs and improved productivity. This combination of measures minimizes administrative costs and represents a fair compromise between the needs of all stakeholders: employers, who want a stable labor core to which they can add flexible contingent labor; contingent workers, who want better wages, benefits, and equal treatment in the workplace; and core workers, who want to neutralize the threat of cheap, disposable labor being brought in to replace them on a whim. Contingent employment under this scheme would still be a good strategic choice for many employers, but it probably would not be used lightly as a

193. Jim Nesbitt, *Unions Confronting Challenge of Organizing Cyberworkers*, PLAIN DEALER (Cleveland), Mar. 12, 2000, at 6H.

194. See Laabs, *supra* note 1, at 62 (detailing a New York membership organization, Working Today, that says it is the opposite of a union—it helps “get contingent workers better (and less-expensive) access to health care, office supplies and other supplies at a discount. . . . It doesn’t help workers bargain for wages and perks, but helps them bargain for the stuff with which to work”).

195. See *supra* note 180 and accompanying text.

bargaining chip against permanent employees or merely to realize marginal increases in profit.

CONCLUSION

Strategic reform of contingent work would include legislative clarification of who is eligible to receive benefits under employer-sponsored plans; passing a wage differential law to increase compensation for contingent workers; and fostering the development of professional organizations to provide access to benefits and training. These reforms would encourage employers to use contingent workers to achieve flexibility and efficiency, while improving the promise of contingent work as a viable employment paradigm.