

# **The Legal Landscape for Contingent Workers in the United States**

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## **Introduction to the Legal Problems of Contingent Workers**

Contingent or non-standard work is now present in virtually every sector of the economy; in some industries (such as computer programming, financial services and telecommunications) these types of jobs are a relatively new development, while in others (garment, agriculture, taxi drivers) the jobs cannot be called “non-standard” because they have been the paradigm for a century or more. Contingent workers comprise upwards of 30% of the workforce and most would prefer to have a permanent, standard job. (Economic Policy Institute, 1999). The General Accounting Office reports that contingent workers’ income and benefits lag significantly behind those of the rest of the workforce. (General Accounting Office 2000). The National Alliance for Fair Employment (NAFFE), a nationwide network of over 50 labor, community, and resource groups, launched earlier this year to bring the plight of contingent workers to the national stage, sponsored a nationwide poll which found that over 68% of the public believe it is unfair that contingent workers receive unequal treatment on the job.

Contingent workers take several forms, and include the overlapping categories of (1) contract workers, a structure that dominates the garment, agriculture, janitorial, and poultry processing sectors; (2) misclassified independent contractors, which are prevalent in the businesses of trucking, home care, taxis and limousines, and news carriers; (3) temp workers, which can be found in most every sector, but have received much attention lately in the hi-tech and more recently, the day labor jobs, and (4) part-timers, who are frequently found in nursing and other health care provider jobs, fast food restaurants and academic faculty positions, to name a few examples. While each category of contingent work presents its own particular challenges for the worker, all share the problem that workers in these jobs are disproportionately paid less, receive fewer benefits, and enjoy less job security than their permanent, full-time counterparts.

## **The Nature of Legal Disputes**

Legal questions regarding contingent worker status often involve one of two disputes. First, a company may claim that it has no obligation under employment or labor laws toward a particular worker because that worker is properly classified as an “independent contractor” operating a business, rather than an “employee.” Second, a company may concede that a worker is an “employee” but disclaim any responsibility under labor laws based on the contention that another entity “employs” that worker. In the latter situation, the worker may be supervised by an independent contractor or a temp firm with little economic power or resources and may contend that the company and the contractor or temp firm together “jointly employ” the worker and, therefore, are jointly responsible for complying with labor and employment laws.

Whether or not a worker is an “employee” and who or what entity is that worker’s “employer” depends on the particular law relied on by the worker. A worker may be an “employee” for purposes of minimum wage and overtime coverage but not an “employee” for purposes of having the right to bargain collectively. Similarly, a temp agency and the worksite or user business may be “employers” for purposes of providing family and medical leave, but not “employers” in a dispute involving retaliation for engaging in concerted activity.

### **Labor Laws Covered by the Narrow Common-Law Standard**

The United States Supreme Court has decided that where a statute lacks a specific definition of employment relationships, courts should apply the common law of “agency” and “master-servant” to determine whether a worker is an “employee” and if so the identity of the employer. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) (“*Darden*”).

The common law’s standard generally is called the “right to control” test. A company will not be deemed to be an individual’s “employer” unless it has the power to control both the outcome of the individual’s work and “the manner and means by which it is performed.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) (“*CCNV*”). The Court has remarked that, “as a practical matter, it is often difficult to demonstrate the existence of a right to control without evidence of the actual exercise” of the right to authoritatively direct and control the way in which the workers perform their tasks. *CCNV*, 490 U.S. at 750 fn. 17; see *Standard Oil Co. v. Anderson*, 212 U.S. 214 (1908). In disputed situations under this narrow standard, workers often are unable to persuade the courts that they are “employees” entitled to labor law protections rather than “independent contractors” operating a business. In addition, the common law test traditionally led courts to conclude that a subcontractor or labor contractor is the *sole* employer of the worker and relieved the dominant enterprise of employer responsibilities.

Further, the common law test, despite a long history, is often unpredictable because courts and administrative agencies have adopted varying sets of “factors” to consider and differ in the way they interpret and apply those factors. Some of the many factors used to determine whether an entity controls the manner in which work is performed include: direct supervision over the performance of work; the right to hire, fire or modify employment terms; setting wage rates; responsibility for payroll; provision of tools; location of the work; whether the work is part of an integrated production process; and the duration of the relationship.

#### *The National Labor Relations Act And Contingent Workers*

The National Labor Relations Act (NLRA) requires businesses to bargain in good faith with their employees’ labor unions and prohibits the use of unfair labor practices directed against employees and unions seeking to organize them. 29 U.S.C. § 151 *et seq.* Large, dominant

enterprises often use contingent workers to insulate themselves from liability and the obligation to bargain collectively.

Congress gave the NLRA the restrictive common-law definition of employment relationships and rejected the Supreme Court's early effort to apply a broader definition. *See NLRB v. United Ins. Co.*, 390 U.S. 254 (1968). The National Labor Relations Board (NLRB), which is owed deference by the courts in interpreting and enforcing the NLRA, has developed its own method of implementing the common law standard..

*Is the Worker an "Employee" or "Independent Contractor"?* Where a worker is *not* an "employee," the relationship between the worker and the company is considered a commercial one between a company and an independent contractor. The NLRA has applied the common law standard to determine alleged independent contractor status, not always consistently, in such cases as *Roadway Package System*, 326 NLRB No. 72 (NLRB found delivery drivers to be employees); *Dial-A-Mattress*, 326 NLRB No. 75 (1998)(NLRB found delivery drivers to be independent contractors).

*The Single Employer Theory: Two Businesses Acting as One.* One way to overcome the obstacles created by a contracting relationship is to show that the dominant enterprise and its contractor are in reality a single employer. This is possible in exceptional circumstances where the two are extremely closely related and integrated. The Board looks at four factors, none of which alone is controlling: common ownership, common management, interrelationships in operations, and common control of labor relations. *Dow Chemical Co.*, 326 NLRB No. 23 (1998). The NLRB looks to actual, not potential, control, and the potential control of parent corporations over subsidiaries is not alone sufficient. Where a single employer is shown, employees of the contractor have full protection of the NLRA with respect to the dominant enterprise and the contracting company.

*The Joint Employer Theory: Two or More Employers of a Worker.* The NLRB and the courts have construed the NLRA to allow for finding of joint employer status where separate entities "share or codetermine matters governing essential terms and conditions of employment. . . . The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (Aug. 25, 2000) at 4; *NLRB v. Western Temporary Services, Inc.*, 821 F. 2d 1258 (7th Cir. 1987); *N.K. Parker Transport, Inc.* 332 NLRB No. 54 (Sept. 29, 2000) at 2-3. The NLRB de-emphasizes several factors that are in the traditional common law test and that often operate to the worker's advantage, such as who provides the tools and other equipment needed for the work, who owns the premises where the work is performed, whether the work is relatively unskilled (and therefore needs little close supervision by the dominant enterprise), and whether the work is an integral part of the regular business of the dominant enterprise. Nonetheless, the NLRB has found joint employer status in some instances, particularly where the dominant enterprise, or "user employer," utilizes workers from a temporary worker agency, employee leasing company

or other “supplier employer.”

Joint employer status under the NLRA does not automatically establish joint liability in certain cases. For example, one joint employer may escape liability upon proving that it had no reason to know that the other joint employer discharged a worker based on union activities and could not have prevented the illegal conduct. *Bultman Enterprises, Inc. d/b/a/ Le Rendezvous Restaurant*, 332 NLRB 445 (Sept. 25, 2000).

For some years, the NLRB had held that, absent employer consent, the temp workers jointly employed by the supplier and the user could not be in the same collective bargaining unit as the permanent employees employed solely by the user. Voicing concern for the collective bargaining rights of temporary workers and other contingent workers, the NLRB recently changed its position to allow the temp workers and the permanent employees to bargain collectively as one unit without the consent of the employer. *M.B. Sturgis*. The jointly employed workers and the permanent employees also have the option of seeking to bargain as a unit only with the dominant enterprise (the user). *M.B. Sturgis* at 11; *Professional Facilities Management, Inc.*, 332 NLRB No. 40 (Sept. 26, 2000) at 1-2. However, where two employers are not joint employers or otherwise related, employer consent is required to create a multi-employer bargaining unit. Such consent often will not be given.

*Collective Bargaining, Strikes, Picketing and Consumer Boycotts.* A union may lawfully negotiate a contract that restricts subcontracting to preserve the jobs of members in the bargaining unit. A union may also negotiate about terms and conditions of temp workers that affect the bargaining unit’s members, such as the wages and hours of temps working on site with union members.

Workers and unions cannot use economic power such as strikes, picketing or coercive demonstrations against one employer in order to influence the labor relations of another employer. (There are many exceptions or limitations to this general ban on secondary boycotts or secondary activity, including exemptions for the garment industry and the construction industry). However, unions may engage in *consumer* boycotts without violating secondary boycott restrictions. In addition, non-union organizations, such as student groups, are free to use coercive economic power against one company to affect labor relations of another.

#### *Title VII of the Civil Rights Act of 1964 and Other Civil Rights Laws*

Discrimination in hiring and employment on the basis of sex, race, and national origin is outlawed by Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* Courts generally have followed Title VII’s approach to contingent work issues when ruling on cases under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA).

In some circumstances, companies may discriminate on the basis of national origin, race or sex by selecting temp firms or subcontractors according to the demographic makeup of their workers. Such companies often will argue that they are not liable for the discrimination because it is the subcontractors who control their own workforces. In other cases, temp firms refer workers to jobsites where workers suffer harassment or discrimination but claim not to be able to investigate every worksite. A company that successfully characterizes workers as “independent contractors” can discriminate without violating laws unless the court recognizes the “interference” theory described below.

Recent court opinions regarding independent contractor status and joint employment under Title VII have applied the restrictive common law approach that has been developed under the National Labor Relations Act, which is described above. *See Cilecek v. Inova Health System Services*, 115 F.3d 256 (4<sup>th</sup> Cir. 1997); *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236 (11<sup>th</sup> Cir. 1998). *See also, Caldwell v. Servicemaster Corp.*, 966 F. Supp. 33 (D.D.C. 1997) (employment agency not liable as joint employer because did not know of discrimination).

The Supreme Court has not issued a decision on the issue of contingent work under Title VII or other anti-discrimination statutes, and consequently there are several unresolved questions. A minority of court decisions has concluded that particular language in Title VII requires a more generous view of employment relationships. Specifically, although Title VII does not contain any special definitions of “employee” or “employer,” it prohibits discrimination against any “individual,” and not merely against an employee, and it imposes liability on employers as well as their “agents.” The Equal Employment Opportunity Commission has issued regulations that interpret the law more generously than some courts and these interpretations can be helpful in litigation until the Supreme Court clarifies the law.

*The Agency Test: Companies Can Be Liable for Conduct of Their “Agents.”* There may be a theory separate from the joint employer concept to make a company responsible for discriminatory actions taken by its subcontractors. Title VII prohibits discrimination by an “employer” and any “Agent” of the employer. Under the common law definition of agency, a separate entity may be considered an agent and the agent’s conduct can create liability for the larger company (the agent’s “principal”). *Miller v. D.F. Zee’s*, 31 F. Supp. 2d 792 (D.Ore. 1998) (Denny’s chain, under contract and Oregon law, had the right to control a franchise restaurant and therefore is responsible for restaurant’s discrimination under Title VII agency theory). However, some courts believe that this statutory provision simply means that the actions of a supervisor or other employee of an employer can cause the employer to be liable. *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925 (D. S.C. 1997).

*The “Interference” Theory of Multiple Employer Liability.* Some courts have held that a worker may sue a person or company that is not his or her employer for interfering with the worker’s employment opportunities based on discrimination that is illegal under Title VII. In one case, a trucking company employed a worker to weigh trucks at a turkey processing plant whose

officials' sex discrimination allegedly caused the worker to lose her job with the trucking company. The court held that the worker may be entitled to sue the turkey plant even though it did not employ the worker. *Moland v. Bil-Mar Foods*, 994 F. Supp. 1061 (N.D. Iowa 1998). The future of this theory and the specific requirements of it are in some doubt after *Alexander v. Rush North Shore Med. Ctr.*, 101 F.3d 487 (7<sup>th</sup> Cir. 1996).

*Employment Agency Liability.* Title VII makes it unlawful for an employment agency to discriminate in the job referral process. The fifteen-employee requirement applicable to employers does not apply to referral agencies being sued for referral activities. If a worker wishes to sue a temp agency for conduct outside the referral process, such as for sexual harassment on the job or discrimination in salary, then the worker must prove that the agency is his or her "employer" and the fifteen-employee requirement applies.

### *The Occupational Safety And Health Act*

The purpose of the federal Occupational Safety and Health Act (OSH Act) is to ensure "so far as possible [to] every working man and woman in the Nation safe and healthful working conditions." To that end, the law authorizes the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) to issue occupational safety and health standards applicable to "employers." These health and safety standards generally are enforced by OSHA or, in about one-half the states, a cooperating state agency. Generally, workers cannot file a lawsuit against their employers for violations of the OSH Act.

In considering whether an employment relationship exists, the OSHRC states that it relies primarily on who has control over the work environment such that "abatement" of occupational hazards can be obtained. The OSHRC examines a series of factors related to control over the day-to-day details of a worker's employment.

The OSHRC's approach differs slightly from the common law right-to-control test. In one way, it is even harsher on workers than the common law: the OSHRC ignores several of the factors used in the right-to-control test that that would help subcontracted workers prove the existence of multiple employers. In another way, the OSHRC slightly liberalizes the common law standard: in determining who has control, the agency will analyze the "economic realities," or the substance of relationships, rather than merely their form or contractual labels. However, this standard is not nearly as broad as the test under the Fair Labor Standards Act (which also looks at "economic realities" but emphasizes the "economic dependence" of workers rather than on control over the work environment.) We will refer to the OSHRC standard as the "modified right-to-control test."

The Supreme Court has not directly ruled on the definition of employment relationships under the OSH Act. Because the OSH Act does not contain a special definition of employment relationships, recent Supreme Court holdings probably require application of the common law

definition. *See Darden*. Anticipating that the Supreme Court might reject any modification of the common law test, the OSHRC now says that there is no practical difference between its current test and the common law standard. *Loomis Cabinet Co.*, 1992 OSAHRC Lexis 65 (1992), *Loomis Cabinet Co. v. OSH Review Commission*, 20 F.3d 938 (9<sup>th</sup> Cir. 1994).

*Is The Worker An “Employee” Or An “Independent Contractor”?* The OSHRC’s modified right-to-control test tends to be helpful to a company wanting to claim that an individual is in business as an independent contractor and is therefore not the company’s employee. The standard is so vague, however, that the outcome of such cases is often unpredictable. Compare *S & S Diving Co.*, 8 OSHC 2041 (1980) (divers were employees of commercial fishing company/boat owner) with *Timothy Victory*, 1996 WL 109659 (1996)(divers were independent contractors involved in a “joint adventure” with, not employees of, commercial fishing company/boat owner).

*Who Is/Are The Worker’s Employer(s)?* Several OSHA cases concern complicated subcontracting arrangements under which each company claims that the other should be responsible for preventing occupational hazards. Several decisions have held that under OSHA more than one entity may be the employer of a single worker and may, therefore, be individually or jointly responsible for compliance with a safety standard. *Sam Hall & Sons, Inc.*, 8 OSH Cas. (BNA) 2176 (1980). In some cases, however, the government seems to prefer to assign “employer” status only to the one company that was most directly in charge of the job site and most capable of abating the hazard, and not to other companies, even when they recruit, hire, and pay the workers. *CNG Transmission Corp.*, 1994 OSAHRC Lexis 12 (1994), *Union Drilling*, 1994 WL 86002 (1994) (companion cases). This has a certain logic but it may create incentives for some employers to create the false impression that they have no ability to inspect or maintain the safety of the jobsite where workers are assigned. The better course would be to issue a citation to all the joint employers to send the message that all are responsible for ensuring the safety of their employees.

#### *Contingent Workers and Social Security and Unemployment Compensation Coverage*

The Federal Insurance Contributions Act (FICA) and the Federal Unemployment Compensation Act (FUTA) require employers to contribute to the federal Social Security and federal unemployment insurance systems on behalf of their “employees. Congress has defined “employee” and “employer” under both laws using the common-law definitions. 26 U.S.C. §§ 3121 (d); 2131(g). The Internal Revenue Service (IRS) has developed a list of twenty nonexclusive factors to determine employee status under the FICA, and this test has been adopted by the courts as well. The factors are overlapping and manipulable, but are meant to assist the fact finder in determining whether the employer has the right to control and direct the work. Because the FICA and FUTA use this more restrictive definition and test for employment status, many workers in subcontracting situations will not be covered. Congress has been considering simplifying this test, although recent proposals still utilized the common law

approach. Note however, that under most state unemployment insurance (UI) laws, a more expansive “ABC” test is used to determine employee and employer status, and these definitions control. (National Employment Law Project, 1997).

Most states define “independent contractor” in one of three ways: using a restrictive, common-law based control test; using a more expansive so-called “ABC” test, or, in at least one instance, using the most expansive “economic reality” test. *Capital Carpet Cleaning & Dye Co. v. Employment Security Comm’n.*, 372 N.W.2d 332 (Mich. App. 1985). Under the “ABC” test, an employer must show that a worker meets all three of the following things to show she is not an employee, and thus an independent contractor: (A) the worker is free from control and direction over the performance of her work; (B) the work is performed either outside the usual course of the business for which it is performed or is performed outside of all places of business of the enterprise for which it is performed; and (C) the worker is customarily engaged in an independent trade, occupation, profession, or business. The ABC test is often misapplied by the courts and UI boards.

Employee leasing and temping laws in the state UI systems also attempt to sort out the question of “who’s the employer.” At least thirteen states have unemployment compensation laws under which temporary employees who do not report to their temporary agency at the completion of a job and who fail to take any job offered by the agency will be deemed to have a voluntarily quit and therefore be disqualified from receiving benefits.

### *Workers’ Compensation Laws*

Many states have expansively worded workers’ compensation laws, in part to permit employers to claim workers compensation payments as the exclusive remedy and avoid common law negligence suits by injured workers. Other state laws have the common law definitions of employment but specifically include categories of contingent workers.

Alaska, Illinois, Pennsylvania and Oregon specify that employers utilizing workers employed by subcontractors are responsible for providing workers’ comp coverage if the employees are not otherwise covered. In California, construction workers performing labor on a project are considered employees of the person having the work executed. Pennsylvania imposes workers comp liability on any employer who permits workers (including employees of subcontractors) to enter its premises and perform work. Washington state’s workers comp law covers “workers,” which includes employees and independent contractors working under a contract “the essence of which is his or her personal labor for an employer.” Several states create statutory employees and employers in their workers’ comp statutes, creating automatic coverage. Examples include domestic workers working at least 16 hours a week (Massachusetts), migrant workers in Texas, and lease drivers in New York. More states categorically exclude certain occupations, which include many contingent workers. Examples include agricultural workers who do not meet certain threshold hours worked requirements; (in New York and Illinois, for



example) and security guards in California.

### **Labor Laws Covered by “Suffer or Permit” and Other Broad Definitions**

Some state and federal laws utilize definitions or other mechanisms to regulate employment relationships that are far broader than the common law standard. Most notably, the Fair Labor Standards Act of 1938 (“FLSA”) “defines the verb ‘employ’ expansively to mean, ‘suffer or permit to work.’” *Darden*, 503 U.S. at 324. In 1937, then-Senator, later-Justice, Hugo Black described this definition, which was taken from state labor laws, as “the broadest definition that has ever been included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360 (1945). The Supreme Court in 1992 remarked on the “striking breadth” of this statutory definition. Congress later incorporated the standard in the Family and Medical Leave Act (FMLA), the Equal Pay Act, and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).

Workers seeking to establish that they are “employees” of a particular “employer,” or are employed jointly by both a labor contractor or a temp firm and the larger contracting company, often fare much better in their legal arguments under this definition than under laws that utilize the common law standard.

#### *Contingent Workers and the FLSA, AWPA, FMLA, and the EPA*

The FLSA's basic requirements, subject to various exceptions, are: payment of the minimum wage of \$5.15 per hour, overtime pay of time-and-one-half pay for time worked over 40 hours in a workweek, restrictions on employment of children, and preparation and maintenance of employment records. In enacting FLSA, Congress concluded that substandard working conditions harmed workers and also constituted an “unfair method of competition” that harmed reasonable, law-abiding companies. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299 (1985). Legislators understood that their goal of eliminating these harms would be undermined if companies could engage in subcontracting to avoid responsibility as employers and blame all violations of the law on subcontractors. One of its tools was a broad definition of employment relationships.

Generally, a court will look at the “economic reality” of a worker's relationships with alleged employers and will de-emphasize contractual labels and technical concepts developed under the common law. It will try to determine whether the worker is “economically dependent” on the alleged employer(s). This “economic dependence/economic reality” standard is broader than common law and than other “economic reality” tests (such as under the OSH Act).

To determine whether economic dependence exists as a matter of economic reality, courts look at a series of “factors” and evaluate the “totality of the circumstances.” A labor contractor or temp agency may be considered to be more akin to an employed “foreman” or “lead person,” rather than an independent contractor, if he has little capital, is dependent on the larger business

to meet weekly payroll, has few customers, lacks specialized skill or knowledge and is an integral part of the larger business' production process. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

*Who Is/Are the Employer(s)?* Most, though not all, FLSA/AWPA cases are far more hospitable to the concept of "joint employers" than under laws with other standards. *Antenor v. D&S Farms*, 88 F.3d 925 (11<sup>th</sup> Cir. 1996), *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998). The courts often do not explain adequately how they arrived at their decision, but the "economic reality/economic dependence" standard does make a difference in practice.

These factors are very similar to the ones courts use under the narrow common law standard, and therefore fail to implement the strikingly broad definition of employment relationships in AWPA and FLSA. We contend that there should be a return to the law's literal definition, especially the words "suffer or permit to work."

Under this standard, the business could be held liable as an employer because it had suffered -- failed to prevent -- the work, even though another party had "employed" the worker in the sense that it had hired, paid, and supervised the worker. See *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918) (decision on state child labor law by Justice Cardozo). It could prevent the work when it has or should have knowledge of the work, and it should have such knowledge if the work was integrated into the defendant's business. If the contractor has his own business which exercises significant skill, exercises independent judgment, utilizes significant capital investment, and operates autonomously, then the workers may be employed solely by the contractor because the larger business has not "suffered" or "permitted" the work. The effort to move courts to this approach is explained in a law review article by Bruce Goldstein, Marc Linder, Laurence E. Norton, II, and Catherine K. Ruckelshaus, "Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment," 46 *UCLA Law Review* 983 (April 1999).

#### *Contingent Workers and the Family & Medical Leave Act*

The Family & Medical Leave Act ("FMLA"), enacted in 1993, provides job-protected unpaid leave of up to twelve weeks a year for workers with family and medical emergencies. The Act's definitions of employment are the same broad definitions found in the FLSA, making it a potentially important tool for ensuring that contingent workers are afforded labor and employment rights.

Contingent workers' main obstacle to taking a FMLA leave arises under the Act's restrictive definition of "eligible employee," which requires that workers have worked for an employer for one year and for 1,250 hours (approximately 25 hours a week) in the year immediately preceding the leave request. In addition, the FMLA only covers employers with 50 or more employees within a 75 mile radius, excluding many mid-sized businesses and even

larger businesses with operations spread around the country. These requirements can act to exclude temporary workers and employees who work in smaller worksites. Otherwise, the FLSA's broad employment definitions and economic reality test apply, bringing many contingent workers under its protection. *Bonnetts v. Arctic Express, Inc.*, 7 F. Supp. 2d 977 (S.D. Ohio 1998), *Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997)(temp worker could count her hours worked as a temp towards the 1,250 hours requirement).

## **State and Local Laws on Contingent Workers**

The discussion above focused on coverage of subcontracted workers under labor-related laws and focused on efforts to garner legal protection by establishing that the workers meet the particular statute's definition of employment relationships. Politically, it may be difficult to persuade Congress to extend the broader definitions to those statutes in which the restrictive common law standard applies. It may be possible, however, to persuade courts and administrative agencies to slightly broaden the unduly narrow approach taken in many cases, particularly under the National Labor Relations Act, the OSH Act and the civil rights laws. There is a need to increase enforcement efforts of those statutes containing the broad definition of employment relationships (FLSA, AWP, the Equal Pay Act, and the FMLA).

Many states, counties and cities have recognized the need to take more direct action to reduce the negative consequences of many contingent work arrangements. (Emsellem and Ruckelshaus, Nov. 2000). Some examples include:

- establish commissions to evaluate application of their laws to nonstandard workers and to recommend changes in those laws
- broaden the definitions of employment relationships under state laws to reduce misclassification of employees as independent contractors and increase the use of the joint employment doctrine to encourage all employers to comply with labor laws regarding contingent workers
- broaden coverage under unemployment compensation and other employment-related laws to eliminate exclusions based on temporary, seasonal or part-time work
- require government entities to ensure that contractors pay their employees what they would have earned if they had been government employees
- reform unemployment compensation laws under which temporary employees who do not report to their temporary agency at the completion of a job and who fail to take any job offered by that agency will be deemed to have voluntarily quit and therefore be disqualified from receiving benefits
- impose special sanctions against companies that wrongfully induce an employee to enter into an agreement stating that she is an independent contractor
- require labor contractors to register with the state and attest to compliance with all labor laws, and require users of labor contractors to ensure that all labor contractors are registered,

licensed, insured, bonded and capable of meeting their responsibilities

- specifically authorize state occupational safety and health inspectors to cite multiple employers at a worksite for dangerous employment conditions.
- protect “day laborers, ” including those participating in day labor pools, by requiring minimum standards for health and safety, and granting undocumented workers full rights to enforce labor laws

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### **References**

Economic Policy Institute, *The State of Working America*, Washington, D.C. (1999).

Emsellem and Ruckelshaus, *Organizing for Workplace Equity: Model State Legislation for “Nonstandard Workers”* National Employment Law Project (November 2000), available online at [www.nelp.org](http://www.nelp.org).

National Alliance for Fair Employment, *Contingent Workers Fight for Fairness* (2000), available online at [www.fairjobs.org](http://www.fairjobs.org).

National Employment Law Project, *Mending the Unemployment Compensation Safety Net for Contingent Workers*, (1997), available online at [www.nelp.org](http://www.nelp.org).

U.S. General Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce* (June 2000).