

April 2013

The Great Recession and the Pressure on Workplace Rights

Katherine S. Newman

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Labor and Employment Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Katherine S. Newman, *The Great Recession and the Pressure on Workplace Rights*, 88 Chi.-Kent L. Rev. 529 (2013).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol88/iss2/13>

This The Piper Lecture is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

THE PIPER LECTURE

THE KENNETH M. PIPER LECTURESHIP SERIES

The Kenneth M. Piper Lectureship Series is dedicated to the memory of Mr. Kenneth M. Piper, who made substantial contributions to the fields of personnel management and labor relations during more than two decades of service with Motorola, Inc. and Baush & Lomb, Inc. The Lecture Series is funded by the Kenneth M. Piper Endowment, established by a gift from Mrs. Kenneth M. Piper in memory of her husband. Major Programs in labor law are presented each year at the Chicago-Kent College of Law as part of the Piper Lecture Series

THE GREAT RECESSION AND THE PRESSURE ON WORKPLACE RIGHTS

KATHERINE S. NEWMAN*

INTRODUCTION

The Great Recession has hit the American economy with the force of a tidal wave, increasing long-term unemployment to record levels, creating an army of involuntary part-time workers anxious to find full time jobs, placing relentless downward pressure on real wages, and increasing to record levels the already high rates of youth unemployment.¹ At the same time, the gyrations of the stock market and the implosion of the housing market, coupled with historic low interest rates, have sent millions of elderly retirees back into the labor market as they find their retirement income declining and the value of their housing equity evaporating. Altogether, at this writing, 12.2 million Americans are officially unemployed.² The number of long-term unemployed—those jobless twenty-seven weeks and over—was 4.8 million, or approximately forty percent of the unemployed.³ They are enduring the deepest and most prolonged downturn since the end of the Second World War.

What have these abysmal conditions meant for the rights of workers in the United States and overseas? The picture is not pretty; it is also not entirely the work of the Great Recession. Secular trends in play long before this downturn began—particularly the declining proportion of the private labor force that is under union contract—already placed pressure on workers to give back hard-won benefits and accordingly have increased inequality within and between groups.

* Katherine S. Newman is the James B. Knapp Dean of the Krieger School of Arts and Sciences and Professor of Sociology at Johns Hopkins University.

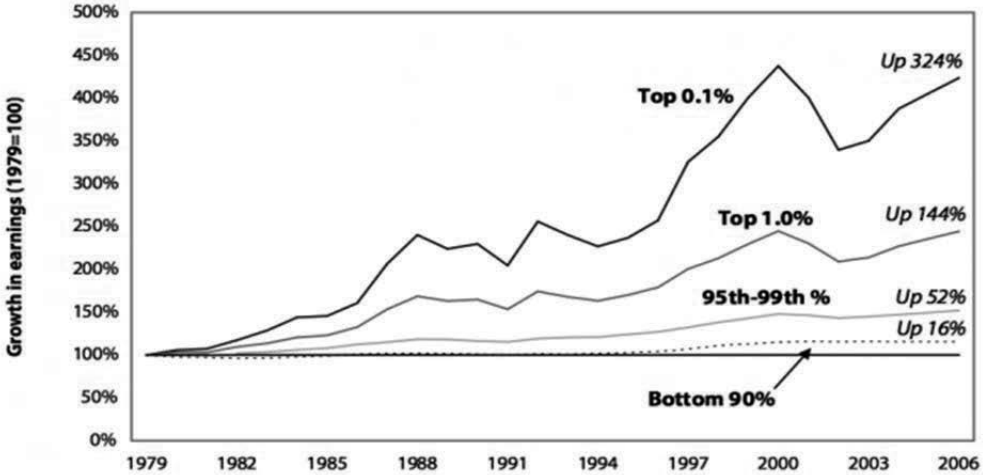
1. REP. CAROLYN B. MALONEY, U.S. CONGRESS JOINT ECONOMIC COMMITTEE, UNDERSTANDING THE ECONOMY: UNEMPLOYMENT AMONG YOUNG WORKERS, at 1 (May 2010).

2. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE USDL-13-0001, THE EMPLOYMENT SITUATION – DECEMBER 2012 at 2 (Jan.2013).

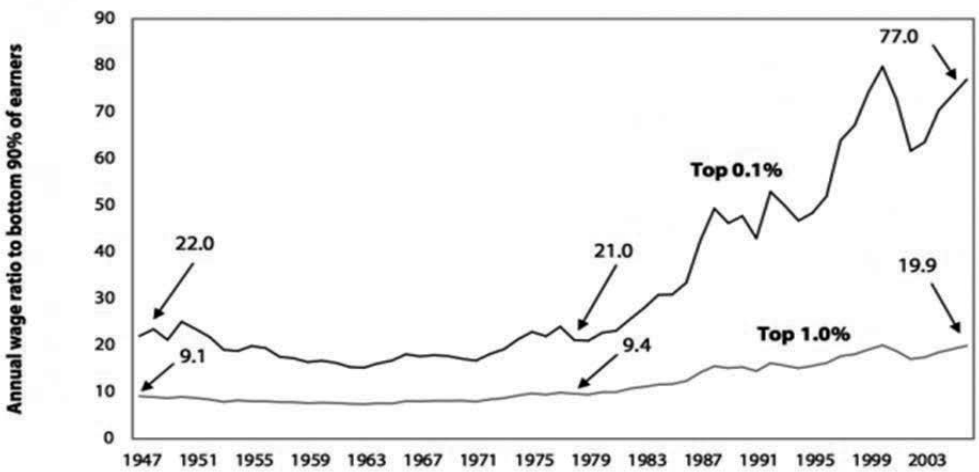
3. *Id.*

As Bruce Western and others have argued, the decline of union representation has left labor in a weak position to claim a robust share of the benefits deriving from high corporate profits.⁴ As research by the Economic Policy Institute has shown, the distribution of wage growth—with the top 1% up 324%, while the bottom 90% up only 16%—is further evidence of the linkage between inequality and the decline in collective bargaining:

Growth in annual earnings by wage group, 1979-2006



Ratio of wages of highest earners to those of bottom 90%, 1947-2006



NOTE: Figure F and G from Mishel, Lawrence, Jared Bernstein, and Heidi Shierholz, *The State of Working America 2008/2009*. An Economic Policy Institute Book. Ithaca, N.Y.: ILR Press, an imprint of Cornell University Press, 2009.

SOURCE: Author's analysis of Social Security wage data and Kopczuk, Saez, and Song (2007).

If these difficulties emerged long before the Great Recession, how has the downturn impacted the position of organized labor, immigrant workers, young entrants to the labor market, and other groups affected by marginal employment growth? In short, it has made a difficult situation much worse, not only in terms of dollars and cents, but in terms of rights. We have seen growth in reliance on contingent/temporary workers and unpaid interns, which typically provide few job protections and no benefits to such employees, as well as negatively impact the wages and bargaining power of the core labor force and overall job creation. The practices of misclassifying jobs and/or failing to pay minimum wage and overtime benefits has become more widespread, despite laws and contract provisions requiring employers to do so.

The downdraft impacting private sector workers is now extending with brute force to public sector employees. Calls upon the public purse, particularly the use of taxpayer monies to bail out ailing companies and municipalities, has made it politically acceptable to re-write existing employment agreements, with federal and local governments seeking to reduce payouts to municipal workers, particularly their pension and health benefits. Budget pressures created by declining tax receipts have emboldened those who have long found public sector collective bargaining unacceptable, leading opponents to seek legislative roll backs that diminish protection against layoffs (particularly compared to other rich countries), eliminate benefits, and restrict public employee collective bargaining.

These pressures are hardly the exclusive experience of the American labor force. Globalization has insured a relationship between the American experience and conditions in labor markets overseas, particularly in industries that can successfully offshore their production and service or back office functions. Accordingly, options for American workers to redress a weakening of their rights are limited, as work could flow to employees in other countries who are seeing losses in rights as their bargaining power is reduced.

I. THE RISE OF CONTINGENT LABOR IN THE UNITED STATES

The term “contingent worker” does not have a fixed meaning, but can be used to describe a variety of employment arrangements, including:

- Independent contractors who are self-employed and provide specialized skills on a contract basis with little or no supervision by the company that hires them;
- Temporary employees, who are typically provided by staffing agencies for a limited amount of time;
- Leased employees, who are provided by staffing agencies and whose employment is longer term but typically not permanent;
- Professional Employer Organization, in which all or most of an employer's workers are hired by the employer, but then co-employed by the PEO, which assumes responsibility for employment taxes, benefit plans, etc.; and
- Human Resources Outsourcing, where the human resources functions are assigned to an outside agency, but that agency does not assume the role of employer.⁵

According to the Bureau of Labor Statistics, the number of contract positions has been growing steadily for many years now, from 1.1 million in 1990 to 2.3 million in 2008.⁶ Hence, long before this most recent recession, a secular trend toward reductions in the core labor force in favor of contract work has been growing.⁷

“Changes within the contingent workforce have always been considered a leading indicator of the ebbs and flows within the overall economy” as, historically, at the beginning of a recession firms would lay off contract workers before laying off employees.⁸ However, this pattern weakened in the Great Recession and “beginning in 2010, the demand for temporary/contract workers increased dramatically,” while the “demand for traditional workers did not follow at the same pace.”⁹ In 2010, 307,000 temporary jobs were added to the economy, more than twenty-five percent of the total number of private sector jobs added that year.¹⁰ In the month of November of 2010 alone, “temp jobs accounted for 80% of the 500,000 jobs added by private sector employers.”¹¹ Indeed, Monster.com, a major on-line recruitment site, saw a forty-six percent increase in contract job postings in March of

5. Christiane Soto, *Rise of the Contingent Workforce*, SNELLING STAFFING SERVICES (2012), <http://www.snelling.com/WorkArea/DownloadAsset.aspx?id=20147>.

6. Tian Luo et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, 133 MONTHLY LAB. REV. 3, 3 (2010).

7. *Id.* at 4.

8. Soto, *supra* note 5.

9. *Id.*

10. *Id.*

11. *Id.*

2010, compared to the same period in 2009, while overall job listings went up at a far more modest pace.¹²

Temporary employment has increased dramatically because it is both less expensive and provides more flexibility to employers. Firms that rely on contingent workers are relieved of administrative responsibilities for them, including payroll accounting functions like tax withholding or other kinds of employment records. Temporary employees are generally not provided any of the benefits that attach to the core labor force, including health insurance, retirement benefits, or workers' compensation coverage.¹³ This helps to explain a rash of cases where employers deliberately misclassify workers as independent contractors when the Fair Labor Standards Act, the federal wage and hours law, would clearly define them as employees.¹⁴

These cost advantages became particularly valuable in the Great Recession when consumer demand was down and profit margins were squeezed. But even when profits rebounded, the relatively modest expense involved in contract work when compared to its core counterpart was advantageous enough to shift the ratios, even in very successful firms built on skilled workers. Hence by 2010, Microsoft had a 1:1 ratio of regular to contract employees, relying on temporary staff for short-term projects.¹⁵ Other IT, medical, creative and sales professions have seen a similar evolution.¹⁶

A. *Contingent Workers' Rights*

As noted above, contingent workers typically do not get paid-vacations, employer-paid health insurance or employer contributions to retirement plans. Companies that hire independent contractors are not required to even pay a minimum wage or overtime pay. This kind of work generally comes with less job security and those who freelance typically find themselves in a very weak negotiating position vis-à-vis

12. Eve Tahmincloglu, *Need a job? Contract work could be new normal*, NBCNEWS.COM <http://www.nbcnews.com/id/36826679/ns/business-careers/#.Tyb7cWBdq> (last visited Mar. 12, 2013).

13. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-05-1433, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, FEBRUARY 2005 (2005), <http://www.bls.gov/news.release/conemp.nr0.htm>

14. See, e.g., Tahmincloglu, *supra* note 12 (stating a 2000 Labor Department study in which "10 to 30 percent of firms audited in nine states misclassified at least some employees").

15. Joel Capparella, *Overview of the 2010 Contingent Workforce Strategies Summit*, THE SEAMLESS WORKFORCE (Nov. 1, 2010), <http://blog.yoh.com/2010/11/overview-of-2010-contingent-workforce.html>.

16. Soto, *supra* note 5.

their employers and can be let go without explanation, with few options for legal recourse.

All of this, of course, makes hiring contract workers particularly attractive to employers during a recession, but also means that, as the percentage of people engaged in contingent work has increased, more and more workers in the labor market are seeing their rights eroded. Of course, it is important to acknowledge, as noted above, that these arrangements can benefit high-skilled workers, whose services are in demand and highly remunerated.

B. "Interns Built the Pyramids"

The number of students attending four year colleges and universities in the US is approximately 9.5 million—a large majority, perhaps as many as 75 percent, undertake at least one internship before they graduate No firm figures for the internship boom currently exist, but it is probably a conservative estimate that between 1 and 2 million people participate in internships each year in the U.S. globally, the number is many times that.¹⁷

As the bottleneck has tightened through which middle class college graduates must squeeze in order to find the increasingly scarce professional opportunities, the increase in skilled, but unpaid labor has been staggering. "In 2008, the National Association of Colleges and Employers found that 50 percent of graduating students had held internships, up from the 17 percent shown in a 1992 study by Northwestern University."¹⁸ It is impossible to quantify how much of the work done by young interns used to be completed by paid employees, but it is safe to say that the displacement is not trivial. Consequently, jobs that actually pay a wage are becoming less plentiful: they are being displaced by unpaid interns.

Technically, this is an illegal practice. There are strict regulations governing the definition of interns intended to differentiate them from paid employees to whom federal standards apply. In order for an employer to legally forgo paying someone for work, its internships must adhere to the following six federal legal criteria, developed by the U.S. Department of Labor's Wage and Hour Division to evaluate whether a

17. ROSS PERLIN, *INTERN NATION* xiv (2011).

18. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, *THE NEW YORK TIMES* (Apr. 2, 2010) (corrected Apr. 10, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html>.

worker is a trainee or an employee for purposes of the Federal Labor Standards Act (“FLSA”)¹⁹:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his operations may actually be impeded;
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.²⁰

If all of the factors listed above are met, then the worker is a “trainee,” an employment relationship does not exist under the FLSA, and the FLSA’s minimum wage and overtime provisions do not apply to the worker. Because the FLSA’s definition of “employee” is broad, the excluded category of “trainee” is necessarily quite narrow. Just because an employer labels a worker a trainee and develops a training program does not qualify that person as a trainee; the six factors must be met.

Within the past several years, officials in several states, including Oregon, California and New York, have launched investigations and fined employers for violating minimum wage laws because they have transgressed this boundary.²¹ There are no federal data sources tracking the number and characteristics of unpaid internships, but there is anecdotal evidence that it is becoming a standard practice for many private firms. For example:

Former New York state labor commissioner M. Patricia Smith began launching investigations into several companies’ unpaid internship programs in 2009. Similar investigations by Oregon’s Bureau of Labor and Industries found that profitable firms such as Centron Solar (now known as Grape Solar) used interns to work in place of paid staff persons. The intern who filed the complaint against Centron Solar, Paul Hughes-Rod, was eager to gain experience in the solar energy industry—but said that his internship duties at Centron, which

19. 29 U.S.C. § 201, et. seq. (2010)

20. See U.S. DEP’T OF LABOR, EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT, WH Publication 1297 (Rev. May 1980).

21. Greenhouse, *supra* note 18.

included operating a forklift, entering data and installing computers, did not give him meaningful experience.

...

Recent lawsuits brought by former unpaid interns against companies such as magazine giant Hearst Corporation and Fox Searchlight, have exposed the sometimes exploitive nature of internships at large, profitable companies. In February, Diana Wang, a 28-year-old former Harper's Bazaar intern, filed a class-action lawsuit against the magazine for minimum wage violations. In court documents, Ms. Wang's attorneys allege that between August and December of last year, she worked up to 55 hours per week without pay at the magazine. Ms. Wang claims that the work she did for the magazine did not grant her a marketable skill set in lieu of wages—she alleges that she spent much of her time at Harper's Bazaar hauling boxes and performing menial clerical work.²²

The rise of college internships has complicated the landscape as many universities offer credit for unpaid placements that advance a student along the road to graduation. Federal regulators stress that giving college credit does not necessarily absolve an employer from paying interns (and rely instead on the six legal criteria above).²³ But, the widespread practice of fusing higher education with workforce preparation through the internship model muddies the water. While clearly beneficial for the student as a means of developing career related skills and references, the "internship nation" introduces a gray zone that sees millions of young people doing work that is not defined as employment and hence is not covered by the protections—from overtime pay to toxic exposure to sexual harassment—envisioned by federal statutes.²⁴

This gray zone is no longer limited to the private sector. Local and federal law enforcement agencies have been advertising unpaid or "volunteer" positions. For example, in the midst of a hiring freeze, the Department of Justice has sought unpaid labor in the form of Special Assistant US Attorneys.²⁵ Local District Attorney's ("DA") offices, like that in Marin County, California, have also sought to fill assistant or

22. Anonymous, *The Underground Intern Economy*, SPARE CHANGE NEWS (June 1, 2012 2:36PM), <http://sparechangenews.net/news/underground-intern-economy>.

23. Greenhouse, *supra* note 18.

24. See Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. TIMES. (Apr. 2, 2011), <http://www.nytimes.com/2011/04/03/opinion/03perlin.html>. Also discussed in ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* (2012).

25. See David Latt, *Would You Work as a Federal Prosecutor—For Free?*, *Above the Law* (May 18, 2011). <http://abovethelaw.com/2011/05/would-you-work-as-a-federal-prosecutor-for-free/>.

deputy DA positions with volunteers.²⁶ This is legal under FLSA because volunteering for a public agency is legal, as long as it is not for one's own job.²⁷

It stands to reason that the more work is shunted onto the shoulders of volunteers and interns, the fewer real jobs are created for regular employees. Their presence puts downward pressure on wages and leaves those who must work for an actual paycheck at a disadvantage. That this happens for highly skilled labor—attorneys, accountants, and the like—is a sobering development and may help to account for the rise in under- and un-employment among those with professional credentials. According to a March 2012 report from CBS News, out of the approximately 45,000 law school graduates each year, almost forty-five percent cannot get jobs that require a law degree.²⁸ It probably does not help their chances for a significant amount of free labor to be available.

II. THE RECESSION'S IMPACT ON UNIONS

To understand how the changing landscape of labor market conditions translates into impact on workers' rights, we must detour into a discussion of the long term, secular trends in union density, as well as the short term impact of the Great Recession on these vital forms of worker representation. For while increasing pressure on the labor force from unemployment or the rise of an unpaid work force are important, the power (or lack of it) for unions makes a difference in how these trends translate into weaker or stronger regimes of worker protection.

26. *Id.*

27. *Elaws—Fair Labor Standards Act Advisor, Volunteers*, U.S. DEP'T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp> (last visited Mar. 12 2013). Under the FLSA, employees may not volunteer services to for-profit private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception - public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed. There is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector. *Id.*

28. Chip Reid, *Lean Times for Law School Grads*, CBS NEWS (Mar. 8, 2012 7:00 PM), http://www.cbsnews.com/8301-18563_162-57393849/lean-times-for-law-school-grads.

A. Decline of Unions Over Time

As the growing literature on inequality makes clear, unions in the private sector have been losing ground nationwide for many years.²⁹ According to the US Bureau of Labor Statistics, “[i]n 2011, the union membership rate—the percent of wage and salary workers who were members of a union—was 11.8 percent.”³⁰ Approximately 15 million American workers were union members.³¹ “In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers.”³² Union density was significantly higher in the 1950s and 60s, in many ways the heyday of organized labor.

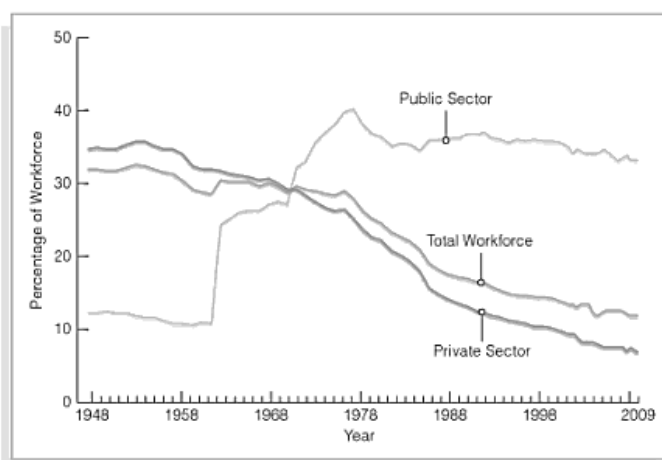


FIGURE 7-4
Changes in Union
Membership: 1948–2009

Source: Bureau of Labor Statistics, 2010.

Source: MICHAEL E. MILAKOVICH & GEORGE J. GORDON, PUBLIC ADMINISTRATION IN AMERICA 307 (2009)(citing data from the Bureau of Labor Statistics, 2010).

The erosion of union strength has had profound consequences for inequality in the United States. Bruce Western and Jake Rosenfeld examined data from the Current Population Survey from 1973 to 2007

29. See RUTH MILKMAN & LAURA BRASLOW, THE STATE OF THE UNIONS 2011: A PROFILE OF ORGANIZED LABOR IN NEW YORK CITY, NEW YORK STATE, AND THE UNITED STATES 3 (2011) (hereinafter “State of the Unions”).

30. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, USDL-12-0094, UNION MEMBERS 2011 (2012).

31. *Id.*

32. *Id.*

and concluded that unions have been an “equalizing force in the labor market,”³³ while de-unionization appears to be worsening the income inequality gap:

From 1973 to 2007, wage inequality in the private sector increased by more than 40 percent among men, and by about 50 percent among women. . . . [D]e-unionization—the decline in the percentage of the labor force that is unionized—and educational stratification each explain about 33 percent of the rise in within-group wage inequality among men. Among women, de-unionization explains about 20 percent of the increase in wage inequality, whereas education explains more than 40 percent.³⁴

The impact of union density went far beyond the wages and benefits accruing to organized labor. Employers anxious to keep the appeal of unions down were willing to compete against their contract provisions in firms that were not organized and hence, unions exerted an impact in highly unionized sectors, above and beyond their consequences for workers under union contracts. Hence, even non-union workers—if they work in highly unionized industries—tend to have fairly equal wages, partly because nonunion employers will raise wages to the union level to discourage unionization.³⁵

Of course this has not been a uniform process across the country, as Ruth Milkman and Laura Braslow have shown.³⁶ Some places, such as New York City, remain, by comparison, bastions of union strength:

Nearly one-fourth (22.9 percent) of all wage and salary workers residing in New York City were union members in 2010-11. . . . This proportion was slightly higher in New York State (24.1 percent), which ranks first in union density among the nation’s fifty states, and whose unionization rate is more than double the U.S. average of 11.9 percent. In absolute terms, New York State had more union members—over 1.9 million—than any state except California, which has a far larger population. In 2010-11, there were over 750,000 union members in the five boroughs of New York City, comprising about 40 percent of all union members in the State.³⁷

Why has union strength declined so precipitously in the United States while in other, very similar countries, it remains relatively robust? As Daniyal Zuberi has pointed out, Canada has much higher un-

33. American Sociological Ass’n, *Union Decline Accounts for Much of the Rise in Wage Inequality*, NEWSWISE (Jul. 11, 2011, 11:10 AM), <http://www.newswise.com/articles/study-union-decline-accounts-for-much-of-the-rise-in-wage-inequality>.

34. *Id.* “Part of the reason for this gender discrepancy is that men have experienced a much larger decline in private sector union membership—from 34 percent in 1973 to 8 percent in 2007—than women (who went from 16 percent to 6 percent during the same period).” *Id.*

35. *Id.*

36. State of the Unions, *supra* note 29.

37. *Id.*

ion density than the United States despite remarkably similar economies.³⁸ The differences have to do with the rules and procedures that govern union elections, which are more accommodating in Canada than they are in the United States.³⁹

The most recent version of this skirmish involved the 2009 effort to pass the Employee Free Choice Act (“EFCA”).⁴⁰ The bill would have allowed a union to be certified as an official bargaining agent if its officials were able to collect signatures of a majority of workers.⁴¹ Consequently, the EFCA would have eliminated the current right of the employer to demand an additional, separate ballot in cases where over half of employees have already given their signature supporting the union.⁴² The bill would have also required employers and unions to enter binding arbitration to produce a collective agreement 120 days after a union was recognized.⁴³ Perhaps most important, the EFCA would have increased penalties on employers who discriminate against workers for union involvement.⁴⁴

A 2009 Gallup Poll found that fifty-three percent of Americans favored the law, while thirty-nine percent opposed it.⁴⁵ Despite this popular support, the bill never came up for a vote. This was the latest in a long line of efforts to make it easier for workers to unionize that have failed. Accordingly, relative to our peers in Canada and Europe, the United States is a tougher environment to unionize and this translates into lower union density.

B. *Unions and the Recession*

The recession has not been kind to the nation’s unions. As millions have lost their jobs, resentment against those who have been relatively protected, or whose pension benefits are defined as a source of undue pressure on municipalities and states, has grown. Increasingly, attacking unions and the rights they protect has become a matter of party

38. DAN ZUBERI, DIFFERENCES THAT MATTER: SOCIAL POLICY AND THE WORKING POOR IN THE UNITED STATES AND CANADA 51-52 (2006).

39. *Id.* at 50-51.

40. H.R. 1409, 111th Cong (2009).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Lydia Saad, *Majority Receptive to Law Making Union Organizing Easier*, GALLUPECONOMY (March 17, 2009), <http://www.gallup.com/poll/116863/majority-receptive-law-making-union-organizing-easier.aspx>

politics, with presidential, gubernatorial and congressional candidates decrying what they see as untoward privileges and widespread victimization, particularly of school children and consumers, at the hands of pampered and protected union workers. The crescendo of this movement came in Wisconsin, as Governor Scott Walker moved to strike down the right to collective bargaining for public workers in a state long thought to be a pro-union bastion.⁴⁶

Unions representing the nation's teachers have come under particularly hostile scrutiny. Their wages, health care and retirement benefits have been under attack as too generous, and the perception that incompetence is protected at the cost of children's educational well-being is widespread. Both Wisconsin and, most recently, New Jersey have retrenched on the rights of teachers to collectively bargain, while insisting on higher productivity and less attractive healthcare options.⁴⁷ For many, retirement now seems preferable to working, especially in Wisconsin where the new laws require that they pay more for benefits, while taking away most of their rights to organize.⁴⁸ The rate of teacher retirement in the state doubled in the wake of these attacks.⁴⁹

Hotel workers have also seen their working conditions affected as employers have looked to cut their wages. Hilton Hotel workers called a strike in Chicago to protest what union officials claimed was an attempt by the hotel chain to "lock workers into cheap recession contracts."⁵⁰ Similarly, Hyatt Hotel workers went out on strike to protest the "abuse of its housekeepers."⁵¹

The auto industry appears to be one bright spot in the economy, particularly following government intervention to support the largest

46. See Ian Saleh, *Wisconsin Gov Scott Walker Signs Collective Bargaining Bill, Bypasses Senate Democrats*, WASH. POST (March 11, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/11/AR2011031103966.html>

47. *Teachers Distressed Over Wisconsin Collective Bargaining*, NAT'L PUB. RADIO (Sept. 6, 2011), <http://www.npr.org/2011/09/06/140214590/teachers-distressed-over-wis-collective-bargaining> (transcript of radio interview); see also Jeanette Runquist, *Teacher Contracts Feel the Recession*, STAR-LEDGER (Sept. 8, 2009), <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-14/125236830364140.xml&coll=1>.

48. Scott Bauer, *Wisconsin Teacher Retirements Double, Departures Come Just Before a Law Raising Benefit Payments Takes Effect*, ASSOCIATED PRESS (Sept. 1, 2011), available at 2011 WLNR 17362454.

49. *Id.*

50. *Hilton Chicago Strike: Workers Protest 'Cheap Recession Contracts'*, HUFFINGTON POST, http://www.huffingtonpost.com/2010/10/17/hilton-chicago-strike-wor_n_765974.html.

51. Annemarie Strassel, *Hyatt Workers in Four Cities Launch Strikes* (Sept. 8, 2011), http://www.hotelworkersrising.org/News/press_release.php?press_id=173.

manufacturing firms. “Domestic and international automakers plan to hire or rehire at least 25,000 workers between now and 2015,” according to Bloomberg Businessweek Magazine, which “includes 4,000 in the fourth quarter of 2011 alone, spread among Toyota’s \$1.3 billion Mississippi plant, a new assembly shift at Honda Motor’s Civic factory in Greensburg, Ind., a third shift at Kia Motors’ Georgia assembly plant, and an expansion at Hyundai Motor’s factory in Alabama.”⁵²

These expansion plans by international automakers come at the same time General Motors, Ford Motor, and Chrysler Group say they will also restore 20,000 jobs across thirty-four U.S. factories by 2015 as part of new contract agreements with the United Auto Workers Union (“UAW”).⁵³ The unionized jobs will pay about \$35,000 annually, not including benefits.⁵⁴ While the employment news—and the re-growth of union membership—is welcome news in the Midwest, the wage levels are roughly half of what they were before the wave of outsourcing and the benefits are less generous. In 2010, the UAW filed a suit against General Motors claiming the automaker owes it \$450 million for retiree health care.⁵⁵

III. EROSION OF WORKERS’ RIGHTS IN A RECESSIONARY ECONOMY

The economic conditions that have plagued the labor market during the Great Recession, compounded by the growth of the contingent labor force, unpaid interns, and weakened stance of the unions has created a perfect storm for workers’ rights. We are seeing a growing tendency on the part of employers to skirt or violate labor laws in order to gain advantage. That this is taking place in a period of relative prosperity in the private sector is particularly worrisome. In 2011, the profits of Fortune 500 companies were up a record 16.4% from 2010.⁵⁶ Total profits of these companies: \$824.5 billion.⁵⁷ This compares favorably to the previous record, set in 2006 of \$785 billion.⁵⁸

52. Alan Ohnsman, *Surprise! Carmakers Are a Recovery Bright Spot*, BLOOMBERG BUSINESS WEEK (Nov. 3, 2011), <http://www.businessweek.com/magazine/surprise-carmakers-are-a-recovery-bright-spot-11032011.html>.

53. *Id.*

54. *Id.*

55. *UAW Sues GM Over Retiree Health Care*, ASSOCIATED PRESS (Apr. 7, 2010).

56. Rick Ungar, *3rd Quarter Corporate Profits Reach Record High – Worker Pay Hits Record Low: So How Exactly is Obama the ‘Anti-Business’ President?*, FORBES.COM (Dec. 4, 2012), <http://www.forbes.com/sites/rickungar/2012/12/04/3rd-quarter-corporate-profits-reach-record-high-worker-pay-hits-record-lowso-how-exactly-is-obama-the-anti-business-president>.

57. *Id.*

58. *Id.*

Where is the profit coming from? CBS News argues that layoffs and shifting business to developing countries are two important sources.⁵⁹ High levels of productivity are also making a positive difference. Accordingly, it would seem unnecessary to rely so heavily on contingent labor or put downward pressure on wages. Even so, these practices are being reported with increasing frequency.

A. *Wage Errors*

National data on wage errors is difficult to obtain, but the experience in New York, a state with a high proportion of union workers, and hence more legislative clout than right to work states, makes it clear that the problem is severe. A large number of employees in New York State “are being paid less than their correct wage and are not receiving the appropriate amount of overtime compensation.”⁶⁰ Sanctions on employers who violate employees’ wage rights are either not strong enough or are not enforced properly, failing to deter employers from illegal underpayment.⁶¹

In 2010, the New York State Department of Labor returned \$26.6 million in illegally underpaid wages to workers, an amount the department claims is the second highest ever collected on behalf of workers in the department’s 110-year history.⁶² It disbursed \$18.7 million to 19,000 workers in industries like car washes and restaurants.⁶³

While the problem of wage errors (often, though not always, through the misclassification of workers) has apparently been an issue for some time, according to NY State Labor Commissioner Colleen Gardner, “the current recession has made a bad problem even worse.”⁶⁴

59. See *Top U.S. Corporations Post Record Profits*, CBSNEWS.COM (May 7, 2012), <http://www.cbsnews.com/video/watch/?id=7407748n>.

60. Lisa A. Fraser, *As Wage Theft Act is passed, DOL returns millions in lost wages*, GREENPOINT STAR (Jan. 4, 2011), http://www.greenpointstar.com/view/full_story/10865861/article-As-Wage-Theft-Act-is-passed—DOL-returns-millions-in-lost-wages.

61. *Id.*

62. *Id.*

63. *Id.* One \$1.9 million settlement arose out of a case involving Broadway Bridge Carwash in Manhattan, which failed to pay the minimum and overtime wages to employees.

64. *Id.*

The Wage Theft Prevention Act,⁶⁵ which went into effect in April of 2011, is aimed at significantly increasing the action taken against employers who violate labor laws.⁶⁶ They are required to keep more transparent records on all employees and those who fail to comply with minimum wage laws are subject to a year in prison and a \$5,000 fine.⁶⁷ The Act increases the amount that can be recovered as damages in a suit for non-payment over lost wages from 25% to 100%.⁶⁸

B. *Misclassification of Workers*

Contract workers are sometimes purposefully misclassified by employers as independent contractors because employers are looking to skirt rules that require them to pay benefits. "A study conducted on behalf of the U.S. Department of Labor in 2000 found that ten to thirty percent of workers were misclassified as independent contractors. In Colorado, total audit results from [June 2009 through December 2010] found that 14.2 percent of workers were misclassified."⁶⁹ This kind of misclassification can result not only in wage theft, but labor law and health violations, particularly when low-wage workers are involved.

Misclassification has spillover impacts beyond the consequences for workers. Departments of Revenue, the Unemployment Insurance Program and Division of Workers' Compensation, are also affected. Indeed, the estimated financial impact of misclassification in Colorado includes \$167 million in lost income tax revenues annually and, from June 2009 through December 2010, \$744,359 in underpaid unemployment premiums and interest.⁷⁰

The federal government and state officials have recently pledged to crack down on misclassification. The White House's latest budget includes funding to hire federal investigators to look into violations, the IRS announced a three-year contractor classification audit of thou-

65. N.Y. SESS. LAWS Ch. 564, S. 8380 (2010) (McKinney 2011) (hereinafter "WTPA") Legislation to repeal a portion of the act passed in the NYS Senate but died in the Assembly. However, there is speculation that the repeal will come to a vote again in April or May.

66. N.Y. DEP'T OF LABOR, *Wage Theft Prevention Act Frequently Asked Questions (FAQ)*, <http://www.labor.ny.gov/workerprotection/laborstandards/PDFs/wage-theft-prevention-act-faq.pdf> (last visited Mar. 12, 2013).

67. N.Y. LAB. LAW § 662 (McKinney 2011).

68. See WTPA, *supra* note 65, § 7 (amending N.Y. LAB. LAW § 198 (McKinney 2011)).

69. COLO. DEP'T OF LABOR AND EMP'T, *MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS ANNUAL COMPLIANCE REPORT*, H.B. 09-1310 at 3 (2011).

70. *Id.*

sands of companies, and the White House budget for fiscal year 2013 provides for enhanced enforcement.⁷¹

In addition to misclassification, which is illegal, we are seeing attempts to pressure workers by re-writing employment agreements in the private and public sector. Federal and local governments are seeking to pare payouts with municipal workers, auto-workers, and even employees of companies like American International Group (“AIG”), which were bailed out by the government.⁷² Rewriting agreements of “sitting workers” is becoming more common, but equally widespread is the alteration of hiring practices and pay structures for workers who have one foot in the door. Even in high skilled industries, we see firms reducing the traditional pay scale. Law firms have been especially aggressive about reducing the salaries and benefits of new associates.⁷³

C. *International Problems in Workers’ Rights*

The United States is hardly alone in this maelstrom. Europe is also experiencing an increase in “specific flexible employment contractual arrangements that deviate from standard employment contracts.”⁷⁴ Even so, the European Union (“EU”) regulatory structure has been more aggressive than its American counterpart in curbing the excesses by insisting that contingent workers be treated to the same benefits as their “core labor” counterparts.⁷⁵

71. See Ilyse Schuman, *White House 2013 Budget Proposal Would Boost Funding for Many Employment-Related Programs, Agencies*, WASHINGTON D.C. EMPLOYMENT LAW UPDATE (Feb. 14, 2012), <http://www.demploymentlawupdate.com/2012/02/articles/agency-rulemaking/white-house-2013-budget-proposal-would-boost-funding-for-many-employmentrelated-programs-agencies>.

Although the overall funding level suggested for the Department of Labor (DOL) is less than that provided to the agency in 2012, a number of DOL departments would receive greater amounts for 2013 in order to bolster enforcement of worker misclassification laws and whistle blowing programs, among other initiatives. According to the DOL proposed budget for fiscal year 2013, the agency would receive \$12 billion in discretionary funding, a slight decrease from last year’s funding level.

Id. (referencing U.S. DEP’T OF LABOR, BUDGET IN BRIEF, FISCAL YEAR 2013 at 1 (2012), <http://www.dol.gov/dol/budget/2013/PDF/FY2013BIB.pdf>).

72. Mary Williams Walsh & Jonathan Glater, *Contracts Now Seen as Being Rewriteable*, N.Y. TIMES (Mar. 31, 2009), <http://www.nytimes.com/2009/03/31/business/economy/31contracts.html>.

73. Dan Slater, *At Law Firms, Reconsidering the Model for Associates’ Pay*, N.Y. TIMES (Apr. 1, 2010), <http://dealbook.nytimes.com/2010/04/01/at-law-firms-reconsidering-the-model-for-associates-pay>.

74. Andrea Broughton et. al, *Flexible Forms of Work: ‘Very Atypical’ Contractual Arrangements*, EUROPEAN WORKING CONDITIONS OBSERVATORY (May 3, 2010),

75. *Id.*

According to a 2010 Eurofund study, “progressively . . . the employment rights of workers on non-standard forms of contract have come closer to those of standard workers” with EU regulations and their transposition into national norms in each EU Member State allowing “for the recognition and development of these rights.”⁷⁶

[W]orkers in non-standard employment who feel that their employment rights are being breached usually have access to the same mechanisms for redress as workers in standard forms of employment—that is, employment tribunals and labour courts. In many countries, a dedicated phone helpline has been set up to enable workers to lodge complaints about breaches of employment rights.⁷⁷

There are areas in which contingent workers have fewer rights than standard workers in the EU. For example, in Ireland and the United Kingdom, the right to contest firing is available only to workers who have worked for an employer a year or longer.⁷⁸ Apparently, this has led employers in those countries to contract with workers for less than a year in order to avoid having to honor such claims.

In the United Kingdom, the law makes a distinction between ‘employees’ and ‘workers,’ with the former possessing greater employment rights.⁷⁹ However, they are still covered by minimum wage laws, as well as working time and health and safety legislation.

Collective bargaining is another area where non-standard workers in Europe have fewer rights, as they are often not represented by “social partner organizations” (a term that denotes representatives of management and labor).⁸⁰ The transient nature of much non-standard work makes organizing a challenge. That said, some European trade unions do represent non-standard workers. In Denmark, for example, a trade union representing freelancers gives legal guidance to freelance members regarding terms and conditions of employment.⁸¹

The situation is less encouraging in other parts of the world. During the recession, the number of contract workers also rose in Singapore. Their salaries are generally lower, they lack medical coverage and sick leave, and tend to be the first to be let go in an economic

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

downturn.⁸² Singapore's contract jobs are no longer solely the province of low wage workers, but are widespread in industries like IT and manufacturing, though these workers typically work on renewable contracts, unlike their low-skill counterparts.

Africa also experienced a rise in the numbers of contract workers during the recession (they make up forty-five percent of the entire working population of Nigeria, for example).⁸³ Contract workers rarely receive the same pay or benefits as their permanent counterparts and are generally not entitled to union membership. Because they are less costly to African firms and multinationals, contract workers are rapidly replacing permanent staff.

The most vulnerable workers on any continent come from the ranks of migrant labor. The global economic downturn has affected the rights of migrant workers in Southeast Asia, for example, as we learn from a recent Amnesty International report, "Disposable Labor: Rights of Migrant Workers in South Korea."⁸⁴ It focuses on the visa system in Korea, which is particularly unfavorable to migrant workers who are subject to periodic crackdowns because they are, almost by definition, illegal workers. Some of the abuses are notorious: more than a hundred migrant shipbuilders were locked in a cage for three months by their employers to prevent them from complaining to the authorities about unpaid wages.⁸⁵

CONCLUSION: IS THERE HOPE?

Though the recession has been punishing on many fronts, some sectors have fared better than others where workers' rights are concerned, usually because they have proven to be more hospitable to union victories. Health care labor unions, for example, have been expanding quickly and winning hundreds of elections, although these victories have not been without their costs:

82. Mavis Toh, *Contract workers are the first to go*, ASIA ONE (Jan. 6, 2009), <http://www.asiaone.com/Business/Office/Learn/Job%2BHunting/Story/A1Story20090105-112425.html>.

83. Avodamola Owoseye and Chima Onwe, *Recession: Temporary Employment is the New Toast for Employers*, NBF TOPICS (Mar. 3, 2010), www.nigerianbestforum.com/generaltopics/?p=37710.

84. *Disposable Labour: Rights of Migrant Workers in South Korea*, AMNESTY INTERNATIONAL (Oct. 2009), <http://amnesty.org/en/library/asset/ASA25/001/2009/en/8bc729f6-39d7-4ce9-aeab-86eea173451c/asa250012009en.pdf>.

85. Mike Glendinning, *Migrant Workers and the Recession*, AMNESTY G48 (Aug. 19, 2010), <http://aikg48.wordpress.com/2010/08/19/migrant-workers-and-the-recession-1/>.

Department of Labor data show that the California Nurses Association (CNA) increased its spending from \$15 million in 2000 to \$61 million in 2009[.] . . . Altogether, health care unions in 2010 held 264 elections and won 71% of them[.] . . . That pace slowed in 2011, as health care unions only held 85 elections across the first half of the year, but they also won 75% of them, according to a report from IRI Consultants and the American Hospital Association.⁸⁶

Moreover, they have introduced a wave of strikes in hospitals across the country. In September 2011, nearly 23,000 nurses in California went on strike. In early 2012, thousands of Kaiser Permanente nurses from 80 Southland hospitals went on a one-day strike to protest cuts in their own healthcare coverage and retirement benefits.⁸⁷ This was the fourth such strike for Kaiser employees since they started bargaining in 2010.⁸⁸

In Nevada, one of the most heavily unionized and high wage states, the recession has seen the Culinary Union lose about ten percent of its members to layoffs and hour reductions.⁸⁹ Even so, this particular union has been able to exert a considerable amount of clout. In 2007, it made a deal with Las Vegas casino companies to contribute to a fund that would help its workers buy homes, something that falling home prices, made somewhat easier.⁹⁰ By 2010, nearly 200 families had made use of the program to help them buy homes.⁹¹

These are but a few of the encouraging signs that, downturn or no, it is possible to improve the lot of American workers. They have been amplified by organizations from the United Nations to faith-affiliated groups that have made it a priority to develop international movements focused on the rights of workers, the passage of child labor laws, the monitoring of supply chains for compliance with fair labor standards, and shareholder resolutions that draw attention to corporate responsibility for the behavior of their subsidiaries and suppliers.⁹²

86. Cassandra Blohowiak, *The ripple effects of a large-scale walkout*, THE DAILY BRIEFING (Sep. 22, 2011), <http://www.advisory.com/Daily-Briefing/2011/09/22/ripple-effects-of-a-nurse-walkout>.

87. *Kaiser Nurses Strike Over Cuts To Health Care, Retirement Benefits*, CBS LOS ANGELES, (Jan. 31, 2012), <http://losangeles.cbslocal.com/2012/01/31/kaiser-nurses-strike-over-cuts-to-health-care-retirement-benefits>.

88. *Id.*

89. Michael Mishak, *Union Helping Open Doors to Homeownership in Las Vegas*, LAS VEGAS SUN (Feb. 1, 2010), <http://www.lasvegassun.com/news/2010/feb/01/union-helping-open-doors-homeownership>.

90. *Id.*

91. *Id.*

92. *See, e.g.*, INTERFAITH CENTER FOR CORPORATE SOCIAL RESPONSIBILITY, <http://www.iccr.org> (last visited Mar. 12, 2013).

Raising these concerns to public awareness spurs consumer understanding of the origins of the goods they are purchasing.

Nonetheless, the long arm of the Great Recession has had very serious consequences for organized labor and hence, for workers' rights. It is very difficult to sustain those hard won protections when millions are out of work within national borders, and even more so when work can easily flow overseas to countries where labor is even weaker.

