Upjohn Institute Press

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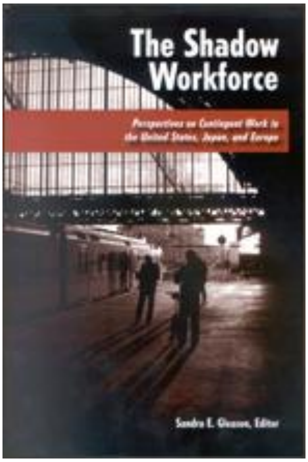

Chapter 5 (pp. 135-168) in:
The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe
Sandra E. Gleason, ed.
Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2006
DOI: 10.17848/9781429454889.ch5

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No Safe Harbor

A Review of Significant Laws Affecting Contingent Workers

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There has been an increase in contingent employment arrangements in the United States for more than two decades. This increase has generated much discussion in the legal and human resource practitioner communities, as well as legislative activity and litigation, about how to apply federal and state laws governing these forms of employment. However, many of the key precedents used to apply the laws to contingent employment arrangements have been established already through case law. Consequently, the challenge has been to apply these guidelines to new emerging employment arrangements, such as the growth of employee leasing.

The overriding common purpose of U.S. labor and employment laws for more than a century has been to protect the wage-earning worker hired by an employer. This means that virtually every employment-related statute includes an explicit definition of the terms "employee" and "employer" to determine the coverage of the statute and permit enforcement.[1] As a result, many of the issues related to a given statute can be resolved through reference to guidelines and precedents that have been in effect for decades.[2] Unfortunately, the fact that each law has its own unique definitions and evolving case law, and the lack of generic definitions that may be used interchangeably from one statute to another, can be quite confusing to employers.

This confusion has caused some employers to think that contingent employment arrangements offer an easy escape from the obligations and constraints imposed by these laws, and thus a way to reduce labor costs. With a few notable exceptions, however, this belief is fallacious. Classifying people as independent contractors, placing people in temporary or part-time jobs, or retaining employees through a leasing company does not provide a “safe harbor” for employers.[3] Employers should not assume that their legal liabilities are reduced because they hire contingent workers.[4]

This chapter discusses the basic criteria and provisions of the major workplace laws influencing controversial issues pertaining to the contingent worker. Most of the issues are not new, but rather reflect the challenge of applying them in some new contexts and to a larger number of workers. The discussion focuses on the most critical and broadly applied legal interpretation issues embodied in the employment arrangements of independent contractors, temporary employees, and leased employees.[5] The use of the common-law control test and the economic realities test in the interpretation of the laws is reviewed. The key issues then are discussed as they apply to the federal income tax, employment tax, and retirement benefit laws; wage and hour rules (minimum wage); workers’ compensation; and equal employment opportunity laws. In closing, recommendations to improve public policy focused on contingent employment issues and questions for future research are discussed.

VARIATIONS IN TERMINOLOGY AND LEGAL TESTS

The application of employment-related laws by employers to the contingent workforce is clouded by the lack of common or universal terminology used to identify the different types of workers or employers within federal statutes or across state statutes. Furthermore, there is confusion about applications of the legal tests used to interpret the meaning of “employee” and “employer” for each law.

Variations in Terminology

Two variations are important to this discussion: the definition of an employee and the definition of an employer. For example, a person may clearly qualify as an independent contractor based on the definition of an employee in the Internal Revenue Service (IRS) or the National

Labor Relations Board (NLRB) rules, but be classified as an employee under the Fair Labor Standards Act (FLSA) and workers' compensation laws. Thus, because of these differences, an attorney who is asked whether an individual qualifies as an independent contractor can only respond, "Under what law?"

One illustration of the confusing variety of terms for employers is the identification of a temporary agency or employee leasing company.[6] These firms may be referred to as the leasing company, general employer, primary employer, labor broker, lessor, loaning employer, staffing company, or contractor employer. Similarly, the employee placed by a temporary or leasing company may be referred to as a temporary employee, leased employee, borrowed employee (or servant), loaned employee (or servant), coemployee, or joint employee.

However, although these terms are similar, they are not necessarily interchangeable due to differing technical definitions. Also, some laws regulate these categories but do not precisely distinguish them. For example, many employment statutes, such as FLSA and Equal Employment Opportunity (EEO) laws, generally do not distinguish between leased employees and temporary employees per se. However, under other laws, such as worker compensation statutes, these categories are addressed with great specificity.

This chapter will use the terminology commonly associated with the particular law being discussed. In some cases distinguishing features will be noted, but every distinction cannot be articulated.

Common-Law and Economic Realities Tests

Statutes, regulations, revenue rulings, and legal tests are used to interpret issues of worker status (for a more detailed discussion of these tests, see Muhl [2002]). The beginning point in analyzing the relationship between a worker and a company is to determine whether the worker is an employee under a given statute. This question is critical because it determines the responsibilities of the employer for a variety of employment taxes in addition to pay and benefits. If a worker can be classified as an independent contractor instead of an employee, the employer can reduce costs.[7]

Two similar legal tests, or a hybrid of the two tests, have been used by the courts to make this determination: the "common-law control test" and the "economic realities" test.[8] These tests ask multiple questions to evaluate all aspects of the employment situation, and the courts examine each fact pattern independently. Particular attention is paid to who has the right to control the work process, but all factors must be considered to determine the outcome. If the employer has this right, then the person controlled generally will be considered an employee. Consequently, it is the conditions of employment that are key in determining employee status, not the classification of the workers assigned by the employer.

These two legal tests vary in the breadth of the circumstances investigated. The common-law test is the most widely used in federal cases. It is based on the legal concept of agency in which the employee is given authority to act for the employer by the employer. This test generally uses 10 factors to determine who has the right to control the work process.[9]

However, the IRS uses 20 factors to determine the presence or absence of control.[10] Also, when presenting a case before the IRS or courts, taxpayers can introduce other factors beyond the 20 as persuasive evidence negating or establishing control. Moreover, some IRS agents use three types of evidence in determining a worker's classification: behavioral control, financial control, and the relationship of the parties. The intent of the parties, industry custom, independent contractor agreements, and the provision of employee-type benefits are other factors which have been considered by courts.[11]

If a company misclassifies a worker as an independent contractor, the IRS will reclassify the independent contractor as an employee and impose taxes, interest, and penalties that can create large tax bills.[12] In a typical reclassification, the company may be assessed for income taxes that were not withheld and employment taxes; the employment tax liability would include both the employer's and employee's share.

The economic realities test usually is applied where the purpose of the law is to protect or benefit a worker who is financially dependent on an employer. It focuses on the nature of the economic relationship between the employer and the worker. It uses six factors to determine whether a worker depends on the employer for ongoing employment and economic livelihood. Since this test has a broader focus than the common-law test, individuals are more likely to be classified as employees by the court.[13]

The hybrid test also examines all of the circumstances affecting the employment relationship by combining elements from the common-law and economic realities tests. It considers the economic realities particularly critical, but it also considers who has the right to control the work process.

These different tests have resulted in varying interpretations of who is an employee and who is an independent contractor across the spectrum of tax, labor, employment, and retirement benefit laws. As a consequence, a worker in the same job category can be either an employee or independent contractor, depending on the facts and circumstances.[14] For example, in *Consolidated Flooring Services v. United States* (1997), a holding company owned two companies in which workers were installing floor coverings. The workers in both companies were doing the same work but were classified differently due to varying circumstances. One company, Monroe Schneider Associates (MSA), used union employees to install floor coverings while the other company, Consolidated Flooring Services (CFS), contracted with nonunion workers for installation services. The Court applied the common-law test to conclude that the CFS nonunion installers were independent contractors. The Court stated: ". . . where CFS did maintain some control . . . installers retained their independence with respect to the sequence, manner and skill with which jobs were completed. Installers bore the risk of profit or loss on their jobs and controlled their own work force."

FEDERAL INCOME TAX, EMPLOYMENT TAX, AND RETIREMENT BENEFITS LAWS

Identifying a worker as an employee or independent contractor is critical for federal income tax, employment tax, and retirement benefits laws. The determination of employee or independent contractor classification is made by examining statutes, regulations, revenue rulings, and case law. Once it is established that a worker is an employee, then full-time, part-time, temporary, or leased employee status must be ascertained. The full- or part-time status of an employee generally will be decided by the number of hours worked. The arrangement with an outside company will determine whether the worker is a temporary or leased employee instead of an employee of the company for which a worker performs services. The application of the test and the factors used to guide decisions are discussed below.

Federal Income and Employment Tax

Employee or Independent Contractor

The Federal Unemployment Tax Act (FUTA) and Federal Insurance Contribution Act (FICA) are employment taxes.[15] Employers generally prefer to hire independent contractors when appropriate because it reduces both their administrative costs of collecting and paying federal income and employment taxes. In contrast, the IRS prefers to have workers classified as employees so that it can collect the maximum amount of tax revenue.

If the worker is an employee, the company as employer has the responsibility to withhold income and employment taxes (e.g., to pay for the Social Security and Medicare programs supported by FICA) from the compensation of the employee.[16] The payment of one-half of the FICA tax with the accompanying filing and reporting obligations is a primary reason many companies attempt to classify a worker as an independent contractor. In addition, the employer must pay the FUTA tax, which covers the cost of administering the unemployment insurance system and the states' Job Service programs, and provides 50 percent of the cost of extended unemployment benefits when unemployment is high.[17]

In contrast, payments to independent contractors are not subject to withholding of any taxes because the company is not considered an employer of this type of worker. Independent contractors therefore must pay the proper amount themselves in estimated quarterly income tax payments or be subject to penalties and interest.[18] A negative consequence for independent contractors is that they are not covered by unemployment insurance and are not entitled to these benefits if they become unemployed.[19] Similarly, as discussed in Chapter 6, many part-time employees are not eligible for FUTA coverage due to working too few hours.

Coemployment

The determination of the "employer" who is liable for tax and employment law compliance can be particularly perplexing when a company is employing temporary workers provided by a temporary employment agency or leased workers provided by a leasing agency.[20] The issue created by these arrangements is whether the worker can be an employee of *both* the employment agency and the client (customer) organization. This dual status where two or more parties both stand legally as the employer of a single employee is "coemployment."[21]

In the typical one-to-one employment situation, the employer for whom the worker performs services is responsible for income tax withholding. However, in a coemployment situation in which another party has control over the payment of wages, then that party is considered to be the employer. For example, in a case involving the General Motors Corporation, the company was held not to be the employer for employment tax withholding purposes when it contracted with a foreign company to obtain design engineers (*General Motors Corp. v. United States* 1990). The court concluded that regardless of whether the auto company ultimately controlled each design engineer while on the job, the facts supported a finding that the foreign company was responsible for paying the wages of the design engineers. This court focused on which party had control over the payment of wages to determine which company was the employer and therefore responsible for the employment taxes.

Retirement Benefits

A qualified retirement plan offers attractive tax features to employers and employees. Generally, for federal tax purposes, an employer is allowed a deduction when an employee includes the amount in gross income; however, the employer receives an immediate deduction for contributions to qualified retirement plans, even though employees do not have to include the amount of the contribution in gross income.[22] The tax consequences for the employee are deferred until the employee receives a distribution from the qualified plan. Contributions maintained in a trust or other qualified fund accumulate tax free, resulting in an accelerated accumulation of pension funds for employees.

However, a qualified plan must meet a strict set of statutory requirements. Generally, a qualified retirement plan by its design and operation must satisfy standards requiring coverage of a minimum percentage of employees and not discriminate in favor of highly compensated employees in contributions or benefits.[23] The definition of employee is critical in the qualified plan arena.

Employee or Independent Contractor

A specific definition of "employee" for qualified retirement plans is not contained in the Internal Revenue Code (I.R.C.). The Supreme Court applied the common-law test in determining whether a worker was an employee for the purpose of a qualified plan, but did not conclude that the common-law definition must apply in all employee benefit cases.[24]

The continuation of the qualified status of a retirement plan can be dependent on the proper classification of workers. If workers who are actually employees but improperly classified as independent contractors are excluded from a qualified plan, then the minimum coverage or nondiscrimination standard could be violated, resulting in disqualification of the plan. Similarly, the requirement that the plan should be for the exclusive benefit of employees would be violated if an independent contractor was incorrectly classified as an employee and included, and could cause disqualification.[25] Also, the qualified status of the plan may be in jeopardy if a sufficient number of part-time employees who have one year of service have not been allowed to join the plan.[26] Even where the tax-qualified status of a plan is not in jeopardy, the erroneously excluded part-time employee would be entitled to participate in the plan. This would require the employer to make any missed past contributions to the plan on behalf of such improperly excluded employees.

Disqualification of a qualified retirement plan is viewed as the ultimate penalty because of the severe tax consequences on the employer, plan participants, and the plan trust. The IRS has recognized the severity of the plan disqualification penalties and the need to encourage plan sponsors to correct defects by introducing a set of administrative programs that allow many defective plans to correct problems without disqualification.[27]

Leased Employees

Leasing employees may be an attractive option for companies that are concerned with the higher costs associated with full-time permanent employees, such as the payment of retirement benefits. The U.S. Congress was apprehensive that some companies might attempt to reduce their retirement benefit costs by hiring a large number of leased employees who would perform the same services as employees without being eligible to participate in the retirement plan. Congress therefore enacted strict statutory guidelines to provide leased employees with additional qualified retirement plan protection. The statutory guidelines require the leased individual to be treated as the recipient's employee when verifying standards such as coverage and nondiscrimination if

1) the services are provided pursuant to an agreement between the recipient and any other person,
2) the individual has performed services for the recipient . . . on a substantially full-time basis for a period of at least one year, and
3) such services are performed under primary direction or control by the recipient.[28]

As a result, when using leased employees, the employer must track the number of employees in this category to ensure that the stated percentage of employees benefit under the plan's coverage and participation tests. If the company has too many leased employees who are not eligible solely due to their statuses, then the plan will be disqualified for failing the coverage and participation standards.

Coemployment

Two frequently cited cases illustrate the challenges of determining who is the employer in a coemployment situation: *Vizcaino v. Microsoft* (1997) and *Bronk v. Mountain States Telephone and Telegraph, Inc.* (1996). In both cases the workers brought their action under ERISA, but different outcomes resulted due to the differences in the interpretation of ERISA by the courts. In *Vizcaino v. Microsoft* the court ruled that workers were employees for the purposes of participation in a retirement plan, while in *Bronk* the opposite conclusion was drawn.

Microsoft had a practice of supplementing its regular employee pool with workers who were classified as independent contractors or temporary agency employees. In some job categories the regular employees, independent contractors, and temporary agency employees were performing the same work under the direction and control of Microsoft. The IRS, in an employment tax audit, made a determination that the independent contractors should have been classified as employees. Microsoft responded to the IRS audit reclassification by offering jobs to a small number of the independent contractors as regular employees. However, the majority of Microsoft's independent contractors were given the choice of being fired or converting to temporary agency employees. The temporary employment agency merely provided payroll services; the working relationship between new temporary employees and Microsoft remained substantially the same as before the IRS audit.

Former independent contractors then filed an action on behalf of workers who met the definition of employees under the common-law test but who were not allowed to participate in the retirement benefit plan because Microsoft considered them independent contractors or employees of a temporary employment agency. The 9th Circuit Court of Appeals stated: "Even if for some purposes a worker is considered an employee of the agency, that would not preclude his status of common law employee of Microsoft. The two are not mutually exclusive."[29]

The 10th Circuit Court of Appeals in *Bronk* reversed the earlier District Court's holding that employers must include in pension plans leased employees who were considered by the IRS as "employees" based on the common-law test. The Court of Appeals held that the I.R.C. and Treasury regulations governing the tax qualification of retirement plans did not implicitly modify ERISA to require employers to include in their retirement plans those leased employees who had been excluded from the plans because they were not "regular employees." Moreover, the Court of Appeals reasoned that Congressional action would be required to modify the tax qualification provisions of the Code to permit retirement plans under ERISA to require the inclusion of properly excluded leased employees. Thus, some uncertainty remains about how "employee" will be interpreted by the courts as evidenced by the inconsistent decisions in *Vizcaino* (*In re Vizcaino* 9th Cir 1999), the lower court in *Bronk v. Mountain State Telephone and Telegraph Inc*. (1996), and other cases *Abraham v. Exxon Corp*. (1996); *Clark v. E.I. DuPont De Nemours and Co*. (1997).

FEDERAL WAGE-HOUR LAW: THE MINIMUM WAGE LAW

The FLSA is the primary federal wage-hour law.[30] It imposes on covered employers a minimum wage, a requirement to pay overtime pay at time and one-half after 40 hours of work in a week to employees earning less than $24,000 a year, and child labor restrictions applicable to persons under 18 years of age. This law provides nearly universal coverage for full-time and part-time employees with few exceptions other than independent contractors, white-collar exemptions, and trainees.

Employee or Independent Contractor

Historically, the DOL enforcement policy has carefully monitored and limited the use of independent contractor status because it creates a potential escape for employers from wage and overtime obligations.[31] Based on the influence of an early Supreme Court decision in *Rutherford Food Corp. v. McComb* (1947a) the DOL has applied the economic realities test in deciding who qualifies as an independent contractor because, as the Supreme Court cautioned, "there is . . . no definition that solves all problems to the limitations of the employer-employee relationship" (*Rutherford Food Corp. v. McComb* 1947b). The economic realities test is strictly applied to achieve the purposes of the FLSA to ensure that workers are not deprived of protection due to an artifice of making a would-be employee into a contractor.

The official guiding principles applied by the Wage-Hour Division emphasize four factors in the *Field Operations Handbook* (U.S. Department of Labor 2003, p. 10b06).[32] These and additional control factors, considered in combination with economic reality factors, resemble the approach used by the IRS discussed above (U.S. Department of Labor 2003, p. 10b07). Interestingly, the wage-hour guidelines further advise that the method of compensation, the issuance of governmental licenses, the place where the work is performed, and the absence of a formal agreement are immaterial to the determination of contractor status. The exclusion of these four factors may reflect the fact that each can be easily manipulated by employers to create the artifice of an independent contractor status.[33]

In cases with many factors suggesting an employment relationship, the outcomes can vary, as illustrated by two well-known cases from the U.S. Court of Appeals: *Brock v. Superior Care* (1988) and *Herman v. Express Sixty-Minutes Delivery Services* (1998). In *Brock v. Superior Care* the U.S. Labor Department sought to classify nurses working for a nursing agency as "employees" under the FLSA to support the claims of the nurses for unpaid overtime compensation. Superior Care, a provider of temporary health care nurses to individual patients, nursing homes, and hospitals, contended that the nurses were independent contractors. The arguments employing six key factors from the economic realities test are summarized in Table 5.1.

In a two-to-one split decision in *Brock*, the 2nd Circuit U.S. Court of Appeals found that the nurses were employees under the FLSA, overruling the trial court's decision. Noting the closeness of the case, the court found that the integral relationship between the work and the agency's business, the lack of significant investment, and no risk of loss required a finding of an employee. The court further gave weight to the fact that the agency retained "employees" doing work similar to the alleged contractor nurses. However, the dissenting judge opined that the weight of evidence favored an independent contractor determination.

In contrast, in *Herman v. Express Sixty-Minutes Delivery Services* (1998), where the facts of the case were not substantially different from *Brock*, the 5th Circuit U.S. Court of Appeals majority opinion ruled against the DOL in a split decision.[34] The court found that drivers for Express Sixty-Minutes Delivery Service, a courier delivery service, were independent contractors even though they performed work that was integral to the nature of the company. In determining that the individuals were contractors, the court relied on the same tests used in *Brock*.[35]

These two cases demonstrate that the legal tests do not lend themselves necessarily to consistent interpretation and application; even learned judges with the benefit of extensive testimony and thousands of pages of documents cannot agree on the application of the independent contractor factors in the same case. Such uncertainty may encourage prudent employers to classify borderline cases as employees.

Table 5.1 Key Factors in Arguments in *Brock v. Superior Care*

Key factors in economic realities test	Company arguments for independent contractor status for nurses	DOL arguments for employee status for nurses
Degree of control exercised by alleged employer	No control: nurses worked with little supervision; primarily interacted with patients	Nurses' hours and notes were reviewed; worked subject to procedures in extensive manual and received some direction from physicians
Degree to which employee's opportunity for profit or loss is determined by alleged employer	Similar to independent contractor, some nurses paid flat fee per visit	No opportunity for profit and loss; nurses had no independent investment in business
Permanency of relationship	Assignment spanned from a few days to a few months, depending on patient needs; not ongoing	
Skill and initiative required	Highly skilled work requiring exercise of independent judgment and discretion and interactions with physicians and patients, similar to independent contractor	No indication that nurses used skills independently with business like initiative
Dependence on alleged employer for economic livelihood	Permitted to work for other agencies and many did, not dependent on employer for livelihood	Some paid by the hour based on local labor market conditions; had on payroll some nurses doing similar work paid as "employees"
Performing core work of alleged employer		Work performed was integral to business

Coemployment

Joint liability under the FLSA allows either party to be held accountable for the full amount of liability. By making both the staffing contractor and the client company responsible there is a greater likelihood that employees will be paid properly. Also, if one "employer" should go out of business, the other party is responsible for unpaid minimum and overtime wages. Furthermore, this avoids the legal complexities associated with determining which employer is responsible. Consequently, the DOL holds both temporary employment agencies and leasing companies jointly liable with their customer companies for back wages and penalties. In theory, by making both employers liable, the client company may be more careful in choosing responsible staffing providers. Thus, although there are a variety of risks with coemployment, those under the FLSA are potentially the most expensive (Moldover 2005).

The DOL provides this protection to employees by broadly defining coemployment status in its compliance guidelines. The regulation states that two or more employers may be deemed to be coemployers under any one of three circumstances:

1) There is an arrangement between employers to share an employee's services even with separate payrolls.
2) One employer is acting directly or indirectly in the interest of the other employer or employers in relation to the employee.
3) The employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, whether directly or indirectly.

Client companies using temporary or leased employees may think that the above definitions do not cover them because they do not hire or assign the employee, or discipline or discharge. However, the second criterion extends employer status to them since they act indirectly in relationship to an employee. Typically, the client company pays the staffing company amounts that are based on the hours worked and the hourly wage and benefit costs. The staffing company then acts directly in the interest of its client company with regard to the employment of individuals assigned to work at the client's establishment. Also, the client company typically "directly acts" through supervision of the temporary or leased employee in the performance of the day-to-day work. In many leasing and temporary arrangements, this may hold true even when the staffing company has a personnel administrator on the client's premises to deal with attendance, payroll, disciplinary, and discharge issues. Accordingly, in conventional temporary staffing and leasing arrangements, both the staffing company and client company are jointly responsible for FLSA compliance (see DOL 1969, 1975).

The courts generally have been supportive of the DOL coemployment guidelines. For example, in a 1998 decision, *Baystate Alternative Staffing v. Herman* (1998), the 1st Circuit U.S. Court of Appeals found that a corporate staffing company and its officers were liable for unpaid overtime even though the client employer directed the workers in their day-to-day work. Similarly, in *Hodgson v. Griffin & Brand, Inc.* (1973), the 5th Circuit U.S. Court of Appeals found that a fruit and vegetable company qualified as a joint employer of farm workers who were supplied by independent contractor crew leaders.

WORKERS' COMPENSATION LAWS

The goal of the workers' compensation programs since their creation[36] has been to maximize the social safety net provided for employees when they are injured or disabled in the course of their employment. The program covers the loss of wages and medical expenses resulting from these injuries and disabilities. Except in a few industries such as railroads, air carriers, shipping, and the federal government, workers' compensation is provided through state laws.[37]

Workers' compensation was developed as "no-fault" insurance designed to address quickly the financial effects of inevitable industrial accidents. The "exclusive remedy" doctrine grants employers immunity against personal injury lawsuits brought by employees for work-related injuries except in extremely narrow exceptions. In granting this immunity, state legislatures require employers to participate in workers' compensation plans that cover virtually all work-related injuries regardless of whether the employee is full- or part-time. The basis of payment is the experience rating of each employer: the greater the number of claims, the more the employer pays. Overall, the workers' compensation program is beneficial to the employer because the dollar amount awarded for workers' compensation claims is only a fraction of what would be awarded by a jury if the employee could sue the employer in a personal injury lawsuit. Moreover, the claims adjudication process in workers' compensation largely alleviates much of the costs of litigation.

Employee or Independent Contractor

Because only employees are eligible for workers' compensation coverage, there can be savings from employing "contractors" instead of employees, especially when an employer has an unfavorable injury rating. This situation may tempt employers to classify workers as independent contractors. However, legislatures and workers' compensation agencies have imposed stringent limitations on classifying employees as independent contractors to provide the broadest basis for coverage, so the outcome is nearly identical to that of the FLSA.

The difficulty for multistate employers and insurance carriers is that the economic realities tests used in these cases vary somewhat from state to state. For example, case law refers to a test that has been derived from various Michigan Supreme Court decisions over the years. This list identifies eight issues:

1) What liability, if any, does the employer incur in the event of the termination of the relationship at will?
2) Is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
3) Is the position or job of such a nature that the employee depends upon the emolument for payment of his living expenses?
4) Does the employee furnish his own equipment and materials?
5) Does the individual seeking employment hold himself out to the public as one ready to and able to perform tasks of a given nature?
6) Is the work or the undertaking in question customarily performed by an individual as an independent contractor?
7) Control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be con-

sidered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.

8) Weight should be given to those factors which will most favorably effectuate the objectives of the statute (*McKissic v. Bodine* 1972).

The court cautioned that these issues “must be applied as a whole and on a basis of common sense” (*McKissic v. Bodine* 1972).

Other states apply factors similar to the above list with many expansive questions on control, not unlike the IRS 20-factor test. However, the lack of legislative activity on this issue seems to indicate that the courts are applying strict standards for independent contractors since a liberally construed test would open the floodgates for employee lawsuits.

Typically, employers err on the side of caution and carry workers’ compensation insurance to cover any independent contractor who ultimately may be determined to be an employee. Absent willful deception on the part of the employer, the employer will be fully covered as though the contractor was an employee. However, the carrier or state agency often will have the right to seek retroactive premiums for any misclassified individuals.

Coemployment Issues

For many decades workers’ compensation tribunals and state legislatures have recognized the “borrowed servant” doctrine (see, for example, West Publishing Co. [2002]). This doctrine recognizes that both the general employer (in this context, the temporary agency, leasing company, or staffing company) and special employer (the client company) may be obligated to provide workers’ compensation benefits. This doctrine generally has been applied when one employer borrows another’s employees or to specialty staffing companies, such as custodial firms, or employees that come with special equipment from the staffing company. However, it has not been consistently applied to temporary and leased employee arrangements. Because of the exclusive remedy provisions there have been inconsistencies in the interpretation of this doctrine for these two categories of workers.

When an employer retains a temporary agency’s employee or enters into an employee leasing contract, the working agreement provides that the temporary agency or lessor company will handle all payroll and insurance matters and expressly includes the provision of workers' compensation benefits. When the coemployment doctrine is applied to these arrangements, often the state statute requires or implies that both companies are legally obligated to ensure that workers' compensation coverage is provided. Therefore, if the temporary agency should go out of business without providing this coverage, the employee can seek workers' compensation benefits from the client company that directly supervised the employee in day-to-day work. This generally holds true even when the temporary agency has breached its contract by failing to provide workers' compensation benefits. If the client company brings a lawsuit for breach of contract against the temporary agency, this will not alleviate any of its joint obligations in the workers' compensation system.

However, the courts generally afford the client company immunity from lawsuits when workers' compensation is provided by a temporary agency. For example, in *Sorenson v. Colibri* (1994), a Rhode Island case, an employee who was injured on the job collected workers' compensation benefits from the temporary agency's policy and then filed a lawsuit against the client employer for the same injuries under tort law. Even though the Rhode Island workers' compensation law requires that the "general" employer (the temporary agency) must provide the workers' compensation coverage, it upheld the dismissal of the lawsuit, holding that the client company was immune from employee lawsuits. The court reasoned that extending immunity to the client company was an equitable result because it is presumed that the temporary agency had charged an hourly rate to the client company that was high enough to recover the cost of workers' compensation premiums.[38] In a minority of states, however, different decisions have been made, particularly in the context of leasing arrangements, which do not give exclusive remedy immunity to the client employer.[39]

Concern has been growing among associations concerned with workers' compensation, such as the International Association of Industrial Accident Boards and Commissions and the National Association of Insurance Commissioners, about a relatively new challenge: the use of leasing arrangements by client employers to circumvent their experience ratings.[40] For example, an industrial employer may experience a high injury rate, resulting in a large increase in the price of its workers' compensation premiums. In response it could "terminate" all employees but continue to employ them through a leasing agency, thereby avoiding higher payments for its poor injury experience rating. In contrast, the leasing agency as a separate entity pays a neutral and lower rate for workers' compensation premiums. Also, there may be deliberate misrepresentations or concealments by the employer or its agents of the reported job duties of workers used for workers' compensation underwriting and quarterly earning and payroll reports.[41] Amendments to workers' compensation statutes have attempted to create a basis for using the experience ratings of the client company when employees are leased.

FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAWS

The challenge for EEO laws is to hold accountable those who are responsible for ensuring equal opportunity and to prevent discrimination in the workplace. Application of the EEO laws to the contingent worker raises issues similar to those raised under wage and benefit laws.

This discussion focuses on the three major federal statutes: Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), and the 1990 Americans with Disabilities Act (ADA). The Equal Pay Act (EPA) is part of the FLSA, so liability for equal pay violations generally follows other FLSA applications as discussed above.[42] State fair employment practice or EEO laws usually follow to varying degrees the precedents set in the federal laws.

In 1997 the EEOC assembled what had been a scattering of court decisions, segments of language from various statutes and regulations, and formal guidance letters into one document addressing the applications of Title VII, ADA, and ADEA to the contingent workforce. These enforcement guidelines were provided in an easy-to-follow format illustrated with examples.[43] Although not binding on the courts, the document generally follows the weight of the case law, and may be given "due deference" by the courts. The EEOC focus on contingent work is not surprising in light of the patterns related to race and gender discussed in Chapter 2. The enforcement guidelines expressly note that the employees of temporary employment agencies are disproportionately female and African American, while workers provided by contract staffing firms are disproportionately male (U.S. EEOC 1997a, pp. 1–2).

Employee or Independent Contractor

Employers commonly use the independent contractor status as a defense against EEO claims made by individuals who work with little supervision and are paid on a commission or incentive basis. However, the EEOC has maintained a conservative posture in allowing employers to assert the independent contractor defense. The EEOC has its own unique list of 16 factors that are used to determine independent contractor status, but none of them are controlling.[44] The courts have liberally applied the hybrid test with varied outcomes, based on the facts of each situation.[45]

Coemployment

Like other employment law agencies, the EEOC has applied broadly the definition of employer to achieve the purposes of the laws for which it is responsible. In relationships between client companies and temporary agencies or employee leasing arrangements, the EEOC guidelines place great weight on whether one or both parties are in a position to control the outcome that is the subject of an alleged EEO infraction. For some infractions liability may extend to nonemployers.

Customarily the temporary staffing agency hires the individual and pays her wages throughout her tenure with the client company. The client company supervises the employee, indirectly pays for her wages and benefits, and has the right to terminate the employee and ask the temporary provider to send another worker. Under these circumstances, the EEOC guidelines indicate that both the temporary staffing agency and the client company are "employers" under the civil rights laws (U.S. EEOC 1997, p. 10). In other variations, the gradations in control and lack of control by the respective parties may change the outcome. For example, although a staffing company provides landscaping employees that it trains and supervises, the client company also may legally become an "employer" if it reserves the right to direct the workers to perform particular tasks or otherwise controls the specific manner of performance (p. 11).[46] In contrast, the guidelines indicate that in a leasing arrangement in which the leasing firm merely provides services for wages and benefits administration, the leasing firm would not be considered to be the “employer” for the purposes of Title VII (p. 8).

The EEOC broadly applies the coemployment doctrine even when one party more clearly seems at fault. For example, if a staffing firm providing nurses is asked to provide a “white nurse,” and the client firm says that it will only accept white nurses, the staffing firm nonetheless is liable. The firm making a discriminatory request also is liable if it meets the threshold size test for liability (U.S. EEOC 1997, pp. 18–19).[47]

In sexual harassment cases, liability is more closely related to fault. The guidelines provide an example of a temporary agency assigning a receptionist who then is sexually harassed at the work site by her supervisor. The supervisor is an employee of the client company. She complains to the temporary agency and the temporary agency advises the client company. The client company refuses to investigate and asks for another receptionist who is not “a troublemaker.” The temporary agency tells the employee that it cannot force the client to investigate and assigns another worker to the receptionist job. The guidelines conclude that, in this situation, both the temporary agency and the client are liable. The temporary agency failed to take adequate corrective action; it should have insisted that the client investigate and asserted that its workers have the right to work free from harassment.

IMPLICATIONS FOR FUTURE RESEARCH

The use of various types of contingent workers and the expansion in outsourcing to fill workforce gaps is predicted to continue in the future (Society for Human Resource Management 2005). However, the complexity of laws, lack of clarity, and potential for adverse economic effects on employers using contingent workers will continue until changes are made. Public policy initiatives designed to reduce those compliance errors that occur despite the good faith efforts of employers and make compliance easier must be balanced against the objectives of the statutes to protect workers or provide benefits to as many workers as possible. Changes pursued jointly by the federal and state governments should include agreements that create greater uniformity and consistency in the terminology, simplify and clarify the legal tests, and improve guidance for compliance.

Greater Uniformity and Consistency in Terminology

One of the major compliance challenges is the lack of a single definition of “employee” that can be used in all work-related laws. This challenge was recognized by the Dunlop Commission when it recommended the adoption of one definition of “employee” and one definition of “employer” for all workplace laws (DOL 2004). This change would greatly simplify employer compliance, particularly for small and medium-sized companies which, unlike large companies, cannot afford to retain legions of lawyers and consultants and employ staffs of dedicated experts in human resource departments. Furthermore, the cost of compliance for large firms is substantial. An economic analysis detailing the time and costs associated with the absence of universal definitions, as well as inconsistent rules and practices, will provide useful insights into these employer costs.

A comprehensive analysis of the compatibility of uniform terminology and definitions for tax, employment, and retirement benefits laws is an important first step. This analysis could help encourage federal and state agencies to reach agreement on the usage of common terms and begin to apply the laws with greater consistency. In some instances, however, this change in approach will require diligent support from legislative bodies.

Such initiatives have already begun in some areas of the law. The development of uniform model laws and practices has been urged or adopted by industry associations. For example, model legislation drafted by the National Association of Insurance Commissioners has been designed to promote a common approach by state legislatures to the licensing of leased employees and to ensure the proper experience-rating of workers’ compensation premiums (Employee Leasing Registration Model Act 1997). To achieve optimal results in the interest of public policy, these cooperative efforts should be undertaken not only through the efforts of government, but with participation of the academicians, industry representatives, and technical professionals, such as lawyers.

Simplify and Clarify the Legal Tests

At present each law has a unique definition of "employee" and is interpreted by referring to lists of factors used to evaluate the facts of each situation. These legal tests have been developed over time by government bodies or created by the courts. As a consequence the interpretations of many tax, employment, and benefit laws are needlessly arcane, verbose, and perplexing.

Despite each law having its own particular guidelines, the factors used to evaluate the facts of each situation are remarkably similar. Therefore it is feasible that careful analysis of cases can lead to the development of a uniform test, or perhaps two or three types of uniform tests, to classify workers consistently in all work-related laws. It is likely that greater uniformity can be achieved without significantly sacrificing the enforcement objective of minimizing the number of independent contractors so the maximum number of employees is covered.

Provide Useful Compliance Guidelines

While it is evident that many employers struggle to understand their legal obligations when classifying workers and engaging in coemployment arrangements, governmental agencies have done little to help. Guidelines can be written in a user-friendly, "plain English" style with clear examples and illustrations that employers can easily understand for the various employment laws. An example of this approach is the EEOC's enforcement guidance document (U.S. EEOC 1997). Although the agency enforces many different laws with unique legislative histories and lengthy tests, it has created a single document that presents the full range of contingent work issues with many helpful illustrations. Case-law authority, distinctions in the application of particular EEO laws, and clear explanations of principles in an easy-to-follow, question-and-answer format are provided. More primers of this sort would be helpful to employers to demystify the legal enigmas of contingent employment arrangements.

Notes

Alvin Storrs is indebted to Matthew Rocky-Hawley, a student at Michigan State University Detroit College of Law, for his assistance with the research in this chapter. Although the topic of this chapter is legal in nature, its content is intended solely to facilitate the purpose of general information and learning. Nothing herein is intended to serve as legal advice relative to any specific or general legal question or problem. Legal advice should only be obtained through retained legal counsel who is fully informed of all of the particular facts and circumstances.

1. These include the Federal Insurance Contribution Act (FICA), Federal Unemployment Tax Act (FUTA), Fair Labor Standards Act (FLSA), National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA), Employee Retirement Income Security Act (ERISA), Occupational Safety and Health Act (OSHA), and state laws governing unemployment and workers' compensation. Citations for the federal statutes in the order listed are: 42 U.S.C. § 410(e); 26 U.S.C. § 3306(a); 29 U.S.C. § 203(e)(1); 29 U.S.C. § 152(3); 42 U.S.C. § 2000(c); 29 U.S.C. § 623(a)(1); 42 U.S.C. § 12111(4); 29 U.S.C. § 2611; 29 U.S.C. § 1002(6); and 29 U.S.C. § 652(6). For an example of state unemployment and workers' compensation laws, see Michigan compiled Code Laws §§ 421.42, 418.161(b).
2. The major exception is the legislation in employee benefits. The tax code amendments in the 1980s and 1990s significantly altered the arena of deferred benefits.
3. In § 530 of the Revenue Act of 1978, Congress provided so-called safe harbor tests, which prevent the IRS from retroactively reclassifying an independent contractor as an employee. This provision is extremely beneficial because it provides retroactive relief for employment taxes, penalties, and interest. A company seeking relief under § 530 must meet these requirements: have a reasonable basis for classifying a worker as an independent contractor; demonstrate consistent treatment of the worker as independent contractor for periods beginning after December 31, 1997; and file all required federal tax returns consistent with classifying the worker as independent contractor. Although the requirements appear to be straightforward, the interpretation has proven to be complex; only a relatively small number of businesses have qualified for relief.

   There are, however, other methods available to mitigate or reduce potentially onerous employment tax penalties and interest. For example, see I.R.C. § 3509 which provides reduced employment tax liability for certain retroactive reclassifications of workers. Form 1099 is a document used to report nonemployee compensation for independent contractors. If Form 1099 is filed for workers, then the employer's tax liability is 1.5 percent of wages for income tax withholding and 20 percent of employee's share of Social Security taxes. If Form 1099 is not filed, the above 1.5 percent is increased to 3.0 percent and the above 20 percent to 40 percent. I.R.C. § 6205 allows a special interest-free adjustment for certain underpayments of FICA and income tax withholding. I.R.C. § 3402(d) provides for retroactive relief from the assessment of income tax liability if the employer can prove that the worker reported the income assessed on the Form 1040 return. Also, in I.R.S. Notice 98-21, 1998-15 I.R.B. 14, the IRS classification settlement program has been extended indefinitely. This program is designed to resolve worker classification issues as soon as possible in the administrative process. If a taxpayer satisfies certain requirements then the taxpayer may pay a reduced employment tax liability.

4. For example, see the summary of the risks of leasing workers in Dunn and Berkery (2005).
5. Part-time and seasonal employees are not discussed in depth. Contrary to popular belief, there is no universal or even prevailing definition of a part-time employee among the various labor, employment, and retirement benefit laws. Many of these laws employ exact definitions determined by the number of hours in a year or in a week that can affect coverage, exemptions, and obligations. Consequently, human resources, employee benefits, and attorney practitioners are cautioned to review carefully how employees are defined relative to the number of hours worked and full-time status in every labor, employment, and retirement benefit law. For example, the Fair Labor Standards Act (FLSA) exempts from overtime certain seasonal employees connected with amusement industries (29. U.S.C. § 213(a)(3)). Eligibility for coverage under statutes such as the Employee Retirement Income Security Act (ERISA) and the Family and Medical Leave Act (FMLA) often is defined in terms of a minimum threshold of a specific number of hours worked in a year or given time period. For example, ERISA requires a minimum threshold of 1,000 hours before existing law mandates that an employee cannot be excluded from participation in a retirement plan on the basis of hours worked. The FMLA does not apply to a worker who has worked less than 1,250 hours during the 12-month period immediately preceding the commencement of the leave.
6. Similarly, the firm contracting its services may be referred to as the lessee, lessee employer, special employer, secondary employer, client employer (or company), customer employer (or company), borrowing employer, or contracting employer. More recently, leasing companies have begun calling themselves professional employer organizations (PEOs) (BPI Communications 1999).
7. For example, in 1999 the U.S. Department of Labor alleged that Time Warner misclassified as many as 1,000 of its 40,000 workers to reduce its employee benefits costs (*Herman v. Time Warner, Inc.* 1999). A similar case occurred with FedEx in California when it classified drivers as independent contractors (Nicholas 2005).
8. The common-law test is used by the IRS and has been applied by the courts to the FICA, FUTA, ERISA, NLRA, and income tax withholding. The economic realities test has been applied by the courts to the FLSA and Equal Pay Act, Title VII, ADEA, ADA, and FMLA. The hybrid test has been applied by the courts to Title VII, ADEA, and ADA (Muhl 2002, p. 6).

9. These 10 factors are 1) right to control, 2) type of business, 3) supervision, 4) skill level, 5) tools and materials, 6) continuing relationship, 7) method of payment, 8) integration, 9) intent, and 10) employment by more than one firm (Muhl 2002, pp. 5–7).
10. The 20 factors are: 1) instructions; 2) integration; 3) right of discharge; 4) right to terminate; 5) services rendered personally; 6) hiring, supervising, and paying assistants; 7) training; 8) payment by hour, week, month; 9) payment of business and/or traveling expenses; 10) continuing relationship; 11) set hours of work; 12) full time required; 13) working for more than one firm at a time; 14) making service available to general public; 15) furnishing of tools and materials; 16) doing work on employer's premises; 17) order of sequence set; 18) oral or written report; 19) significant investment; and 20) realization of profit or loss. See Rev. Rul. 87-41, 1987-1 C.B. 296 for a description of each factor.
11. For example, see *Illinois Tri-Seal Products, Inc. v. U.S.* (1965); *Bonney Motor Express Inc. v. U.S.* (1962); *In re Rasbury* (1991); and *Butts v. Comm'r* (1993).
12. For example, see the following sections of the Internal Revenue Code: 1) § 6651: The penalty for the failure to pay employment taxes has a maximum of 25 percent, which is calculated at 0.5 percent of the unpaid tax each month. This code section also has a penalty for failure to file employment tax returns with a maximum of 25 percent, which is assessed at 5 percent per month; 2) § 6662: It imposes a penalty of 20 percent of the underpayment attributable to negligence; 3) § 6663: If serious abuse is found there is a 75 percent penalty of underpayment due to fraud; 4) § 6656: A failure to deposit penalty can range from 2 percent to 15 percent of the underpaid deposit. This penalty is imposed in addition to failure to pay the penalty; 5) § 6721: A penalty of $15 to $50 per return is charged for the failure to file the correct information return such as a W-2. The maximum penalty is $250,000 with a reduced maximum of $100,000 for small employers; 6) § 6722: If an employer fails to provide timely W-2s to employees, a penalty of $50 per return may be assessed. The maximum penalty is $100,000.
13. The six factors are 1) integration, 2) investment in facilities, 3) right to control, 4) risk, 5) skill, and 6) continuing relationship (Muhl 2002, pp. 6–9).
14. Artists – Compare Rev. Rul. 57-155, 1957-I C.B. 333 with Rev. Rul. 65-262, 1965-2 C.B. 391; Loggers – Compare Rev. Rul. 71-273, 1971-1 C.B. 286 with Rev. Rul. 71-274, 1971-1 C.B. 287; Repairers – Compare Rev. Rul. 55-248, 1955-1 C.B. 117 with Rev. Rul. 55-370, 1955-1 C.B. 122.
15. I.R.C. §§ 3301–3311 (FUTA); 3101–3128 (FICA).
16. The Social Security tax is imposed at a rate of 12.4 percent on a changing wage base, while the Medicare tax is 2.9 percent on all wages. These taxes are imposed half on the employer as an excise tax and half on the employee in the form of a withholding tax collected from the employee's wages by the employer.
17. The FUTA tax is imposed solely on employers at a rate of 6.2 percent on the first $7,000 of the employee's wages. Generally, a credit is allowed against the FUTA tax for amounts paid into state unemployment funds. This credit cannot exceed 5.4 percent of first $7,000 of wages. If the maximum credit of 5.4 percent is allowed, the FUTA tax rate after the credit is 0.8 percent.

18. Compensation paid to independent contractors is subject to the Self Employment Contributions Act (SECA) tax. The self-employed tax rate is 15.3 percent (I.R.C. §§ 1401–1403). The independent contractor pays an amount equal to the employee plus the employer portion of the FICA tax. In an attempt to mitigate a double tax burden, the independent contractor is allowed to deduct one-half of self-employment taxes as an adjustment to gross income and for SECA purposes (I.R.C. §§ 164(f)(1); 1402(a)(12)). The same definition of employee used in FICA also applies for SECA to exclude individuals who are not subject to SECA tax (I.R.C. § 1402(d)).
19. Two recent cases in Idaho illustrate that this classification problem continues to create enforcement challenges. See the discussion of the problem of classifying workers at Excell Construction, Inc. (Idaho Supreme Court Reviews Test for Independent Contractor Status [2005]).
20. A temporary employee is sometimes defined as one who is retained with an expectation of being employed for one year or less and who has worked for the current employer for less than one year. There are two categories of temporary employees: 1) employees of an organization in a "temporary" status with no expectation of continued employment and 2) employees who are hired, referred, and sometimes supervised in part by a temporary employment agency. See Hipple (1998).

    The terminology "leased workers" is somewhat new. However, the concept of "borrowed servant"—when one employer borrows the employees of another—can be traced at least to the 1930s and the early years of workers' compensation laws. An entire industry known as "employee leasing" emerged in the United States during the 1980s and early 1990s. Setting aside the various statutory definitions, in this discussion the term "leased employees" refers to employees who are hired, referred, assigned, and in some respects supervised by an outside firm (leasing agency) with an expectation of employment longer than one year, but the assignment can be indefinite. Thus, a leased employee is different from a temporary employee since the latter is assigned with the expectation of employment for one year or less.
21. It also may be referred to as "joint employment" or "dual employment."
22. I.R.C. § 404.
23. I.R.C. §§ 410(b) and 401(a)(4).
24. See *Nationwide Mutual Insurance Co. v. Darden* (1992), where the court used only 12 factors in making the decision. See also *Hensley v. Northwest Permanete P.C.* (2001), in which it was determined that the plan administrator did not err when interpreting the undefined term "employee" in a pension plan by using the W-2 definition and not the common-law definition.
25. I.R.C. § 401(a)(2).
26. The definition of one year of service is a 12-month period during which an employee works at least 1,000 hours. I.R.C. § 410(a)(l)(a)(ii) & (3). Careful monitoring of hours worked is required to ensure that part-time employees expected to work less than 1,000 hours are included if they in fact work more than 1,000 hours.

27. See Rev. Proc. 2003-44, 2003-C.B. where the administrative program is called the Employee Plans Compliance Resolution System (EPCRS) and includes the following corrective programs: Self-Correction Program (SCP), Voluntary Correction Program (VCP), and the Audit Closing Agreement Program (Audit Cap).
28. I.R.C. §§ 414(n)(3)(a) and 414(n)(2). However, there is a statutory exception that provides that the recipient organization will not be required to include the leased employees for testing purposes if the leasing organization maintains a money purchase plan which meets certain requirements and no more than 20 percent of the non-highly-compensated employees of the recipient are leased. The money purchase plan must provide: 1) a minimum contribution of 10 percent of compensation; 2) immediate participation in the plan; and 3) 100 percent vesting in benefits at all times (I.R.C. § 414(n)(5)). However, it is unusual for a leasing organization to maintain such a generous qualified retirement plan.
29. The protracted *Vizcaino v. Microsoft* litigation spawned appellate victories for independent contractors and Microsoft. See *Vizcaino v. Microsoft Corp*. (1996, 1997). Microsoft, as part of the settlement for the case, changed its worker classification practices. This resulted in 3,000 of the litigants being hired as regular employees entitled to participate in the retirement plans. A similar case occurred in Massachusetts (*Langone v. USCO Distribution Services, Inc*. 2005). See Barran (2005).
30. The FLSA is enforced by the Wage-Hour Division of the U.S. Department of Labor. While state laws also regulate wages and hours and impose similar and additional obligations, this discussion is limited to the FLSA. The FLSA regulations were revised to add income tests effective August 23, 2004. 1938 law, as amended (*Fair Labor Standards Act* 2003).
31. A recent example of a company misclassifying street sweepers in California as independent contractors is seen in *Garces v. Cannon Pacific Services* (October 4, 2005) (Cole 2005).
32. The four factors are 1) the extent to which the services in question are an integral part of the employer's business, 2) the amount of the alleged contractor's investment in facilities and equipment, 3) the alleged contractor's opportunities for profit *and* loss, and 4) the amount of initiative, judgment, or foresight in open market competition required for the success of the enterprise.
33. The courts do not consider the wage-hour guidelines as controlling, although the weight of the case law is largely consistent with the guidelines. Some courts have amplified the tests with factors such as the skill level of the alleged contractor and the contractor having other clients. For example, see *Brock v. Superior Care, Inc*. (1988).
34. In a five-page dissenting opinion, Judge King concluded that the workers were employees. The majority opinion, he said, erred in departing from a long line of cases followed in that circuit.
35. The five tests used were 1) Control: Even though the individuals were required to wear uniforms and attend a special training session, the court found that they could control their own hours, days of work, and reject any delivery without re-

taliation. 2) Opportunity for profit and loss: Drivers were paid on a commission basis, but the majority opinion found that profit and loss was nonetheless driven by worker's ability to cut costs and understand the courier business. 3) Permanency of relationship: The court observed that most of the drivers only worked for the company for a short period of time and were able to work for other companies. No noncompete agreement was required. 4) Skill and initiative required: The court found that the drivers must determine the route, read MAPSCO, and choose alternate routes. The majority opinion further noted that these skills require the workers to use industry and efficiency indicative of independence and nonemployee status. 5) Relative investment of the worker and alleged employer: The court found that the necessity of owning a vehicle, paying insurance, and buying a dolly, tarp, a two-way radio, pager, and a medical delivery bag constituted a substantial investment.

36. Wisconsin was the first state to pass a comprehensive workers' compensation law (1911), and Mississippi was the last state (1948) Guyton (1999).
37. See Federal Employers' Liability Act (FELA); 45 U.S.C. Section 5(1), *et seq*. (airline and railroad employees); Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. Section 901 *et seq*., and the Federal Employees' Compensation Act, 5 U.S.C. Section 8101 *et seq*. Unemployment compensation benefits also are offered under state laws to complement workers' compensation. However, the basic features of these state programs must comply with federal laws to be eligible for revenues and funding from the federal unemployment tax (FUTA).
38. Other state jurisdictions have reached a similar conclusion in analogous cases. For example, a Florida court reached a similar conclusion. In *Maxson Construction Co. v. Welch* (1998), an injured leased employee brought a tort action against the client company of his leasing company employer. The Florida Court of Appeals held that immunity would apply to the client employer even though Florida's leasing statute made the leasing company responsible for paying workers' compensation premiums. As in the Rhode Island decision, the court justified its decision pointing out that the client company indirectly paid workers' compensation premiums. Also see cases in California, Iowa, Michigan, Minnesota, New Hampshire, Texas, South Dakota, and Wisconsin (*Wedeck v. Unocal Corp*. (1997); *Jones v. Sheller-Globe Corp*. (1992); *Danek v. Meldrum Mfg. and Eng'g Co., Inc*. (1977); *Farrell v. Dearborn Mfg. Co*. (1982); *LaVallie v. Wire and Cable Co*. (1992); *Regalado v. H.E. Butt Grocery Co*. (1993); *Gansch v. Nekoosa Papers, Inc.* (1990)).
39. For example, an injured employee in North Dakota who was covered by the workers' compensation policy of the leasing company that hired him brought a tort action against the client company. The North Dakota Supreme Court declined to extend employer status and its accompanying immunity to both the leasing company and the client company. The court explained that the North Dakota workers' compensation law relieves only "contributing employers," even though the client company paid an hourly fee that "probably" covered the cost of workers' compensation premiums. The court noted that allowing such indirect

payment to trigger immunity could extend immunity to most independent contractors who indirectly recoup the costs of benefits from their clients (*Cervantes v. Drayton Foods, L.L.C.* 1998). A similar decision was rendered by the Ohio appellate court, which also held that such indirect payments were insufficient to extend immunity to the client company (*Carr v. Central Printing Co.* 1997).

40. Telephone and personal interviews conducted by Thomas Coens with representatives and members of these associations in several states and Washington, D.C. (March 1999–September 1999).
41. For examples of cases of judgments against client companies in workers' compensation cases, see West Publishing Company (2001, 2003) and *Del Industrial, Inc. v. Texas* (1998).
42. Equal Pay Act: 29 U.S.C. § 206 (1963).
43. The Equal Employment Opportunity Commission (EEOC) is responsible for the enforcement of Title VII, the ADA, ADEA, and EPA (EEOC 1997).
44. The 16 factors are 1) the firm or the client has the right to control when, where, and how the worker performs the job; 2) the work does not require a high level of skill or expertise; 3) the firm or the client rather than the worker furnishes the tools, materials, and equipment; 4) the work is performed on the premises of the firm or the client; 5) there is a continuing relationship between the worker and the firm or the client; 6) the firm or the client has the right to assign additional projects to the worker; 7) the firm or the client sets the hours of work and the duration of the job; 8) the worker is paid by the hour, week, or month rather than for the agreed costs of performing a particular job; 9) the worker has no role in hiring and paying assistants; 10) the work performed by the worker is part of the regular business of the firm or the client; 11) the firm or the client is itself in business; 12) the worker is not engaged in his or her own distinct occupation or business; 13) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation; 14) the worker is considered an employee of the firm or the client for tax purposes, i.e., the entity withholds federal, state, and Social Security taxes; 15) the firm or the client can discharge the worker; and 16) the worker and the firm or client believe that they are creating an employer-employee relationship (U.S. EEOC 1997).
45. For example, see the following cases: *Deal v. State Farm County Mut. Ins. Co. of Tex.* (1993); *Jones v. Seko Messenger, Inc.* (1997); and *Lane v. David P. Jacobson & Co., LTD.* (1995).
46. The EEOC's position stems, in part, from an earlier case, *Amarnare v. Merrill Lynch* (1984). In this case an employee of a temporary agency sued for race and gender discrimination under Title VII when she was discharged from her temporary assignment and the client company refused to offer her a regular position. The client company contended that there was no employer-employee relationship. The court found, however, that the client company was the employer because it controlled the plaintiff's hours, workplace, and assignments; it supervised and trained her; and ultimately it "discharged" her.
47. The threshold for liability for the client firm is 15 employees for Title VII and ADA and 20 employees for the ADEA.

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The Shadow Workforce

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Editor

2006

W.E. Upjohn Institute for Employment Research
Kalamazoo, Michigan

Library of Congress Cataloging-in-Publication Data

The shadow workforce : perspectives on contingent work in the United States, Japan, and Europe / Sandra E. Gleason, editor.
p. cm.
Includes bibligraphical references and index.
ISBN-13: 978-0-88099-288-6 (pbk. : alk. paper)
ISBN-10: 0-88099-288-3 (pbk. : alk. paper)
ISBN-13: 978-0-88099-289-3 (hardcover : alk. paper)
ISBN-10: 0-88099-289-1 (hardcover : alk. paper)
1. Temporary employment—United States. 2. Temporary employment—Japan. 3. Temporary employment—Europe. 4. Part-time employment—United States. 5. Part-time employment—Japan. 6. Part-time employment—Europe. 7. Contracting out—United States. 8. Contracting out—Japan. 9. Contracting out—Europe.
I. Gleason, Sandra E.
HD5854.2.U6S53 2006
331.25'729—dc22

W.E. Upjohn Institute for Employment Research
300 S. Westnedge Avenue
Kalamazoo, Michigan 49007-4686

Cover design by Alcorn Publication Design.
Index prepared by Diane Worden.
Printed in the United States of America.
Printed on recycled paper.