



1988

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### Recommended Citation

William J. Kilberg, *Labor Laws and the Small Business: Betting the Farm*, 33 Vill. L. Rev. 1091 (1988).  
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1988]

## LABOR LAWS AND THE SMALL BUSINESS: BETTING THE FARM

WILLIAM J. KILBERG†

### I. INTRODUCTION

**A**MERICA'S small employers are facing serious economic pressures as a result of recent developments in labor and employment law. Legislatures and the courts, both state and federal, are playing a game of "bet-the-farm" with the small employer, and the small employer can only lose. The cause of this threat to small employers is twofold. First, during the past two decades the judiciary has greatly expanded employees' rights and the scope of recovery against their current or former employers. Consequently, employees have been able to litigate nearly every employment action taken by employers. The tortious nature of these lawsuits has enabled these employees to obtain much larger awards and settlements than were available in the past. Second, at the state and national levels, legislatures and the Congress are considering and enacting statutory measures which mandate specific types and amounts of compensation and fringe benefits. Although these laws are couched in terms of general applicability, they are in fact aimed specifically at small employers who, statistics show, are less likely than large employers to provide the minimum benefits to be required by proposed legislation. The result of these judicial and legislative developments may be the imposition of employment costs beyond the ability of many small employers to pay. As a matter of social policy, the value of small businesses to our society should be a consideration in any further evolution of employment law.

### II. THE IMPORTANCE OF SMALL BUSINESS TO THE ECONOMY

There is much good to be said of small businesses. In the aggregate, small businesses contribute to the growth of the American economy and employ an increasingly greater share of the

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country's work force. Small businesses hire a disproportionate share of America's labor force and are the greatest source of new jobs. There are now fifteen million small businesses, one for every seven workers, and they "employ more Americans . . . than any other sector of the economy."<sup>1</sup> Nearly fifty percent of the nation's civilian work force is employed by small business.<sup>2</sup> Even more impressive is small business's contribution to creating new jobs. A 1987 survey estimated that half of the 2.6 million jobs created that year developed in businesses with fewer than fifty employees,<sup>3</sup> and many of these jobs were created by businesses with twenty or fewer employees.<sup>4</sup>

Small businesses also provide significant employment opportunities to minorities and other disadvantaged groups. Small businesses are more likely to hire the aged and the young,<sup>5</sup> and

1. Novak, *Profit Motive Not at the Top*, Washington Times, Jan. 22, 1988, at F3, col. 1.

2. H.R. REP. NO. 300, 99th Cong., 2d Sess. 680, 681 reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1164, 1165 (Report to Accompany Recommendations From the Committee on Small Business) [hereinafter Small Business House Report] ("Small businesses employ 48 percent of the private work force.").

3. Burnham, *Small Businesses Will Create Half of All New Jobs in U.S. This Year*, Survey Says, Investor's Daily, Mar. 31, 1987, at 9 (Dun & Bradstreet survey indicated that "[t]he nation's smaller businesses—those that employ 50 workers or less—are expected to account for half of the estimated 2.6 million new jobs that will be created in the U.S." in 1987). The value of small businesses in job creation has been borne out in numerous studies and articles. See, e.g., President's Annual Report to Congress on the State of Small Business, 1 PUB. PAPERS, 412 (Mar. 18, 1983) (noting small business job creation); MINOLTA/GALLUP, SMALL BUSINESS SURVEY 9 (Mar. 1987) (small business sector is source of most new jobs, and expects to increase sales and employment in future); *Small Firms Lead Growth Figures*, Washington Times, Oct. 27, 1987, at C5 (small businesses create majority of nation's new jobs); Lerner, *Doom and Gloom? Entrepreneurs Scoff*, Washington Times, May 25, 1987, at A8, col. 1 (since late 1982 "more than 14 million new jobs have been created, with small business providing the lion's share").

4. *The State of Small Business*, Wall St. J., May 15, 1987, at 13D (small business supplement, statistical tables) (projecting that in 1987 small businesses with fewer than twenty employees will create thirty-seven percent of nation's new jobs); Minolta Corp., Press Release, Money is the Root of Most Failure But Other Factors Motivate Small Business, Survey Finds, at 2 (1987) ("[F]irms with fewer than 20 employees provide 90.6% of all new jobs."); 97th Cong., 1st Sess., pt. 8, 127 CONG. REC. 10,996, 10,997 (1981) (presentation by Sen. Slade Gorton) (during years 1969 to 1976 "[f]irms with fewer than 250 workers provided 90 percent of the 6.8 million jobs created" and "[c]ompanies with less than 20 employees accounted for two-thirds of new jobs and the majority of these jobs were in firms less than three years old.").

5. Small Business House Report, *supra* note 2, at 1165 ("Jobs generate[d] by small firms are more likely to be filled by younger workers, older workers and women."); OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY, U.S. SMALL BUSINESS ADMIN., HEALTH CARE AND PENSIONS, ECONOMIC POLICY IN THE EIGHTIES: THE

two-thirds of the twenty-three million jobs created by small businesses between 1976 and 1986 were held by women.<sup>6</sup> Fully twenty-five percent of small businesses are owned and operated by women,<sup>7</sup> and this figure could become fifty percent by the year 2000.<sup>8</sup>

Small businesses are the most innovative segment of the business sector, generating twenty-three times as many innovations per research dollar as large firms.<sup>9</sup> Small businesses also experience remarkable productivity, accommodate part-time work schedules, are willing to train and develop new entrants into the labor market<sup>10</sup> and have exerted a moderating effect on the economy during recessionary periods.<sup>11</sup>

A disadvantage of small businesses is that they generally are unable to provide their employees with a compensation package equivalent to that offered by larger businesses. Companies larger in size usually pay their employees higher hourly wages and offer more comprehensive fringe benefits.<sup>12</sup> Additionally, larger businesses tend to provide a safer workplace, utilize less capital per employee and are less likely to experience business failure.<sup>13</sup>

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SMALL BUSINESS FACTOR 6 (1984) [hereinafter SMALL BUSINESS FACTOR] ("Small businesses tend to hire older workers . . . more . . . than large businesses.") (footnote omitted).

6. Lambro, *Women's Businesses Booming*, Washington Times, Aug. 18, 1986, at 2D, col. 2 ("In the last 10 years, 23 million new jobs have been created, two-thirds of them going to women . . . . Of the 7.3 million new jobs created between December 1982 and August 1985, nearly 50 percent were filled by women.").

7. Dunn, *USA Women Mind Their Businesses*, USA Today, Aug. 7, 1986, at 1A (women own about a quarter of small businesses, totaling 2.9 million businesses in 1982, and generated approximately ten percent of nation's revenues); *Women Own 24% of U.S. Firms, Study Says*, Investor's Daily, Aug. 7, 1986, at 5 (women own 23.9% of all individual proprietorships, partnerships and small business corporations); Schmid, *Women Own One-Fourth of Nation's Firms*, Washington Post, Aug. 7, 1986, at E-1.

8. Schmitt, *Women Entrepreneurs Thrive*, N.Y. Times, Aug. 18, 1986, at D-1, col. 2 (prediction by Small Business Administration that by year 2000 women will own half of all small businesses). A White House Conference on Small Business reflected a growing trend toward women owning small businesses. Galante, *Composition of Delegates Reveals Rise of Women in Small Business*, Wall St. J., Aug. 18, 1986, at 23, col. 1. "Today, woman-owned small businesses represent the single biggest source of new business formation in the United States." Lambro, *supra* note 6, at 2D, col. 2.

9. 97th Cong., 1st Sess., pt. 8, 127 CONG. REC. 10,996, 10,997 (1981) (presentation by Sen. Slade Gorton).

10. Small Business House Report, *supra* note 2, at 1164-66.

11. President's Annual Report to Congress On the State of Small Business, *supra* note 3, at 413.

12. SMALL BUSINESS FACTOR, *supra* note 5, at 2.

13. Small businesses encounter many difficulties in their attempt to survive

Despite the relatively less favorable wages and working conditions offered by small businesses, these same small businesses make an invaluable contribution to the nation through their innovation, job creation and employment of the aged, young, women and minorities.

### III. SMALL BUSINESS IS SUBJECT TO LABOR AND EMPLOYMENT LAWS IN THE SAME WAY AS LARGE BUSINESS

Traditionally, labor and employment laws have applied to small businesses in much the same way that they have applied to large businesses. A number of employment related laws provide no coverage exemptions whatsoever based on employer size. Examples include the Railway Labor Act,<sup>14</sup> the Labor-Management Relations Act (LMRA),<sup>15</sup> the Immigration Reform and Control Act of 1986,<sup>16</sup> the Employee Retirement Income Security Act (ERISA),<sup>17</sup> the Occupational Safety and Health Act (OSHA)<sup>18</sup> and the Federal Mine Safety and Health Act.<sup>19</sup>

The legislative history of a number of other employment statutes set forth no more than occasional expressions of concern for the impact of these laws on the small employer.<sup>20</sup> The legislative

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and compete effectively. One study indicates that high interest rates and government regulations are the predominant threats, along with soaring liability insurance costs and burdensome paperwork. MINOLTA/GALLUP, *supra* note 3, at 9-10; accord Melloan, *Small Firms Brace for a Legislative Attack*, Wall St. J., May 5, 1987, at 37, col. 3; *Small Business Wants Less Regulation*, Washington Times, Aug. 22, 1986, at 9C; K. CHILTON & M. WEIDENBAUM, SMALL-BUSINESS PERFORMANCE IN THE REGULATED ECONOMY (National Federation of Indep. Business, Research and Educ. Found., Public Policy Discussion Series) (1980); *Comments of Small Business Administration: Official Report on Small Employer Pension Plans*, PENSION ACTUARY, Feb. 1987, at 3 (noting disincentives to smaller employers to sponsor pension plans due to "complex," "costly" and "top-heavy" rules).

14. 45 U.S.C. §§ 151-188 (1982).

15. 29 U.S.C. §§ 141-187 (1982 & Supp. IV 1986).

16. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of U.S.C.).

17. 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1986).

18. 29 U.S.C. §§ 651-678 (1982 & Supp. IV 1986).

19. 30 U.S.C. §§ 801-962 (1982 & Supp. IV 1986).

20. For example, it was believed by some that the equal employment opportunities provisions of the Civil Rights Act of 1964 (Title VII) "contain[ed] onerous provisions for recordkeeping, inspection, and reporting; and constitute[d] an . . . ill-devised limitation upon the area of discretion and decisionmaking of . . . American businesses." H.R. REP. NO. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2426 (additional views of Hon. George Meader). A Senate amendment would have permitted small employers to recoup their litigation costs and attorney fees if they prevailed in lawsuits brought by the United States or the Equal Employment Opportunity Commission. H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S.

history of the often-amended Fair Labor Standards Act (FLSA),<sup>21</sup> for example, contains typical expressions of congressional concern for the FLSA's consequences to small employers. Over thirty years ago, several witnesses testifying before a House committee against a minimum wage increase to over ninety cents per hour "asserted that many employers could not absorb an increase, and predicted that shutdowns and resultant unemployment of marginal workers would follow any upward change in the present rate."<sup>22</sup> In 1961, Congress explicitly acknowledged that it was balancing "the injurious effect on small business" of a higher minimum wage rate against the need for a "living" wage.<sup>23</sup> When Congress was considering a minimum wage of \$1.60 per hour, one member of Congress expressed apprehension that the sixty percent wage rate increase and efforts by small businesses to comply with 300 pages of Labor Department rules, regulations and interpretations that accompany the FLSA would result in "[h]igher prices, fewer jobs, and the curtailment of small business in this country."<sup>24</sup> In 1977, it was recognized that many small businesses operate at relatively low profit margins, necessitating some exemption from FLSA coverage.<sup>25</sup> It was estimated that the 1977 amendments to the FLSA would cost \$3.5 billion and would ultimately force small employers "to stop hiring new employees, lay off some existing employees, inflate prices, or go out of business."<sup>26</sup> Yet, in spite of these expressions of concern for the small business, the FLSA has been applied fairly uniformly to all employers regardless of size. The numerous amendments to the

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CODE CONG. & ADMIN. NEWS 2183 (Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers discussing the Equal Employment Opportunity Act of 1972).

21. 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986).

22. H.R. REP. NO. 1095, 84th Cong., 1st Sess. 2, *reprinted in* 1955 U.S. CODE CONG. & ADMIN. NEWS 3083 (Report on testimony before House Committee on Education and Labor regarding FLSA amendments of 1955).

23. S. REP. NO. 145, 87th Cong., 1st Sess. 80, *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 1676 (Minority Views of Sens. Goldwater and Dirksen). Critics claimed that even if small businesses were exempt from the minimum wage laws, in order to recruit employees who might otherwise work for larger companies, small businesses would still be forced to pay the minimum wage. *Id.* at 1672-73, 1693-94.

24. S. REP. NO. 1487, 89th Cong., 2nd Sess. 77, *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 3043-44 (individual views of Hon. Paul Fannin regarding the FLSA amendments of 1966).

25. H.R. REP. NO. 521, 95th Cong., 1st Sess. 34, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. 3235 (Report of the Committee on Education and Labor regarding FLSA amendments of 1977).

26. *Id.* at 3254 (additional views of Hon. John M. Ashbrook).

FLSA have instead indicated a responsiveness to the needs of various industries. Only within the industry-specific exemptions to the FLSA created by Congress have work force size and dollar volume thresholds been incorporated.<sup>27</sup>

More frequently, employment and labor legislation has contained exemptions for the employer with few employees or a low sales volume. Nevertheless, these coverage exemptions have affected only the smallest and most embryonic of businesses. For instance, Title VII of the Civil Rights Act of 1964,<sup>28</sup> which prohibits employment discrimination, applies to companies employing at least fifteen persons for twenty or more calendar weeks in the current or preceding calendar year.<sup>29</sup> Labor unions are covered by Title VII once they have fifteen members or employees.<sup>30</sup> The Longshoremen's and Harbor Workers' Compensation Act,<sup>31</sup> an occupational safety and disability compensation law for the nation's port workers, excludes from its protection "any person engaged by a master to load or unload or repair any small vessel

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27. The FLSA incorporates a multiplicity of industry-specific exemptions to coverage. See 8 Fair Empl. Prac. Manual (BNA) ¶ 411, at 329-32 (1986) (exemption chart for nonagricultural industries and occupations). For example, overtime is not required to be paid to: (a) switchboard operators of an independently owned telephone company with fewer than 750 stations, 29 U.S.C. § 213(a)(10) (1982); (b) seamen, *id.* § 213(b)(6); (c) radio and television announcers, news editors and chief engineers in a city of 100,000 or less, *id.* § 213(b)(9); (d) newsboys, *id.* § 213(d); (e) homeworkers who make evergreen wreaths, *id.*; (f) workers at forestry or logging operations employing eight or fewer employees, *id.* § 213(b)(28); and (g) airline employees whose activities are necessary to or related to air transportation. *Id.* § 213(b)(3). Overtime payments are also not required of petroleum distributors who do less than one million dollars worth of business and make more than seventy-five percent of their sales intrastate. 29 U.S.C. § 207(b)(3) (1982 & Supp. IV 1986). Among the employees exempt from the minimum wage are: (a) seamen on foreign vessels, 29 U.S.C. § 213(a)(12); (b) home evergreen wreath makers, *id.* § 213(d); and (c) employees of part year amusement and recreational establishments, *id.* § 213(a)(3)(A). Subminimum wages are authorized under certain circumstances for apprentices, the mentally and physically handicapped and messengers. 29 U.S.C. §§ 213(a)(7), 214(a), (c) (1982 & Supp. IV 1986); 29 C.F.R. §§ 500-730 (1987). Additionally, the minimum wage need not be paid where an owner hires only members of the owner's family, or where an enterprise as a whole, inclusive of all separate physical establishments, has annual gross sales of less than \$250,000. 29 U.S.C. § 203(s) (1982). Specifically exempt are retail or service establishments with annual or gross sales below \$362,500 and gas service stations with \$250,000 or less in annual gross sales. *Id.*

28. 42 U.S.C. §§ 2000e-2000e-17 (1982).

29. *Id.* § 2000e(b). Originally the act applied only where twenty-five or more workers were employed. See Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (1972), amended by 42 U.S.C. § 2000e(6) (1982) (extending coverage from employers with twenty-five or more workers to those with fifteen or more workers).

30. 42 U.S.C. § 2000e(e).

31. 33 U.S.C. §§ 901-950 (1982 & Supp. IV 1986).

under eighteen tons net.”<sup>32</sup> An explicit “small business” exemption<sup>33</sup> was incorporated into the Migrant and Seasonal Agricultural Worker Protection Act.<sup>34</sup> This law was intended to protect migrant and agricultural workers, yet it excepts from its protection employees working for employers using 500 or fewer man-days of agricultural labor per year.<sup>35</sup> The Age Discrimination in Employment Act (ADEA)<sup>36</sup> applies to employers which employ twenty or more employees in each working day for at least twenty weeks in the current or preceding calendar year<sup>37</sup> and to labor unions with twenty-five or more members.<sup>38</sup>

Similarly, coverage limitations under laws regulating the conduct of government contractors tend to be stated in such low dollar amounts as to exempt only the smallest band of small contractors. The Contract Work Hours and Safety Standards Act<sup>39</sup> requires payment of the minimum wage to laborers and mechanics where the government contract is above \$2,000.<sup>40</sup> The contract must be \$10,000 for the minimum wage provisions of the Walsh-Healey Act<sup>41</sup> to take effect,<sup>42</sup> while a \$2,000 contract implicates an obligation to pay the prevailing wage and overtime on federally funded construction projects under the Davis-Bacon Act.<sup>43</sup>

#### Prohibitions on employment discrimination on the basis of

32. *Id.* § 902(3)(H).

33. See H.R. REP. NO. 885, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4547, 4556.

34. 29 U.S.C. §§ 1801-1872 (1982 & Supp. IV 1986).

35. 29 U.S.C. § 1803(a)(2) incorporates the man-day threshold for coverage contained in 29 U.S.C. § 213(a)(6)(A) of the FLSA.

36. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

37. *Id.* § 630(b).

38. *Id.* § 630(e).

39. 40 U.S.C. §§ 327-33 (1982 & Supp. IV 1986).

40. All contracts involving laborers or mechanics, where the project is for, on behalf of or financed by the United States, are subject to the overtime provisions of 40 U.S.C. § 328 and the health and safety standards contained in 40 U.S.C. § 333. See *id.* § 329. However, the federal acquisition regulations, which govern acquisitions by executive agencies, limit coverage under the Act to contracts over \$2,000 which are awarded for publicly funded construction projects, as well as to nonconstruction contracts above \$2,000. See 48 C.F.R. §§ 1.101-6101-40 (1987).

41. 41 U.S.C. §§ 35-45 (1982 & Supp. IV 1986).

42. *Id.* § 35; 41 C.F.R. §§ 50-201.1, 50-204.1 (1987); 48 C.F.R. § 22.602 (1987). The regulations also exempt certain industries from coverage. 48 C.F.R. § 22.604-2 (1987).

43. 40 U.S.C. §§ 276a-276c (1982); 29 C.F.R. § 3.3 (1987); see 48 C.F.R. §§ 22.400, 37.301 (1987).



race, sex, religion and national origin,<sup>44</sup> or Vietnam era veteran status,<sup>45</sup> by government contractors generally apply where there is a federal contract over \$10,000. However, where the handicapped are involved, an even smaller contract amount is required.<sup>46</sup> Similar low threshold amounts are applied to impose affirmative action plan requirements on government contractors.<sup>47</sup>

As contracts with the federal government go, the contract amounts triggering coverage are, of course, so miniscule as to be tantamount to no exemption at all. Furthermore, multiple contracts awarded to one party can be aggregated for purposes of calculating employment obligations.<sup>48</sup> Many of these coverage levels have remained unchanged for many years. For example, the exclusion from coverage under the Davis-Bacon Act<sup>49</sup> for federal contracts below \$2,000 has not been altered in fifty years.<sup>50</sup> The Solicitor of Labor, George Salem, stated that “[i]n today’s

44. 41 C.F.R. § 60-1.4 (1987) (nonconstruction); 41 C.F.R. § 60-4.3 (1987) (construction); 48 C.F.R. § 52.222-26 (1987) (federal acquisition regulations).

45. Vietnam Era Veterans Readjustment Assistance Act of 1972, § 503, *as amended*, 38 U.S.C. § 2012 (1982); 41 C.F.R. § 60-250.3 (1987); 48 C.F.R. § 22.1302 (1987) (contracts for supplies and services); *see also* Exec. Order No. 11,701, 38 Fed. Reg. 2675 (1973) (encouraging employment of veterans by federal agencies and their contractors and subcontractors).

46. The Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap where there is a contract of at least \$2,500. 29 U.S.C. § 793(a); *see also* 29 C.F.R. § 60-741.3 (1987); 48 C.F.R. § 22.1402 (1987).

47. Government contractors must prepare affirmative action plans if they are awarded a contract of \$10,000 and have at least fifty employees. 41 C.F.R. § 60-1.40(a)(1) (1987) (nonconstruction). A \$50,000 and fifty-employee threshold amount test applies to affirmative action plans for Vietnam veterans, 41 C.F.R. § 60-250.5 (1987), and the handicapped, 41 C.F.R. § 60-741.5 (1987). The federal acquisition regulations also use the fifty-employee, \$50,000 contract minimum threshold to determine the need for affirmative action plans covering race, sex, religion and national origin by nonconstruction contractors and businesses submitting bills of lading. 48 C.F.R. § 22.804-1 (1987).

48. Agencies using blanket purchase agreements may aggregate the amount of the actual orders awarded to determine coverage for fair employment obligations. 41 C.F.R. § 60-1.5(a)(1); *see also Brock Orders Debarment of California Grower Based on Failure to Submit Affirmative Action Plan to OFCCP*, Daily Lab. Rep. (BNA) No. 128, at A-9 (July 7, 1987) (LEXIS, Labor library, Dlabrt file) (OFCCP regulations do not contemplate aggregation of contracts to meet \$50,000 threshold, but contract value may be determined by total amount of orders the parties reasonably anticipate to be placed during life of contract).

49. 40 U.S.C. § 276a (1982).

50. *See, e.g., Heritage Foundation Report on the Labor Department and NLRB*, Daily Lab. Rep. (BNA) No. 13, at D-1, D-4 (Jan. 19, 1983) (LEXIS, Labor library, Dlabrt file) (original \$2,000 federal spending threshold no longer realistic figure; intention of Davis-Bacon Act was to prevent disruption of local economies, and small, low-cost projects cannot have such effect).

markets, a \$2,000 threshold is really meaningless."<sup>51</sup> Currently, the House is considering a bill which would raise the coverage threshold to \$50,000, yet it "would do little more than adjust the 1935 threshold of \$2,000 for inflation,"<sup>52</sup> and would exempt only 2.5% of the dollar volume of federally sponsored construction.<sup>53</sup>

Likewise, the dollar volume thresholds for the Walsh-Healey Act<sup>54</sup> and the Service Contract Act of 1965<sup>55</sup> have remained unchanged since 1936 and 1965 respectively.<sup>56</sup> The minimum wage and overtime coverages contained in section 203 of the FLSA have not been modified since 1981; the exemptions contained in the Rehabilitation Act of 1973<sup>57</sup> have never been altered; and the Longshoremen's and Harbor Workers' Compensation Act exemptions<sup>58</sup> have remained constant since 1972. In sharp contrast are the steep increases the nation has experienced in consumer prices and wages. Urban consumer prices have gone up 345% since 1967,<sup>59</sup> while in the same time period wages have risen 340%.<sup>60</sup>

Even where federal employment law coverage exemptions exist, state laws typically fill the regulatory void. Nearly every state in the Union has enacted equal employment and minimum wage laws,<sup>61</sup> and many localities also regulate employment mat-

51. *Statements on Bill (H.R. 2216) Revising Davis-Bacon Act Before House Labor Subcommittee on Labor Standards*, Daily Lab. Rep. (BNA) No. 92, at E-1, E-10 (May 14, 1987) (LEXIS, Labor library, Dlabrt file).

52. *Id.* at E-5 (statement of Rep. Austin Murphy).

53. *Id.* Contractors, however, would like a repeal of the Davis-Bacon Act. *Id.* at E-21 (statement of Jack Mincher presenting views of Associated General Contractors of America). In the past, Senate bills have sought Davis-Bacon thresholds on military construction projects of \$250,000 to \$1 million. See *Senate Avoids House-Passed Amendment to Revise Davis-Bacon, Issue to Be Resolved in Conference*, Daily Lab. Rep. (BNA) No. 96, at A-8 (May 18, 1988) (LEXIS, Labor library, Dlabrt file); *Senate Defense Authorization Bill Lifts Davis-Bacon Threshold to \$250,000*, Daily Lab. Rep. (BNA) No. 128, at A-1 (July 3, 1986) (LEXIS, Labor library, Dlabrt file).

54. 41 U.S.C. § 35 (1982 & Supp. IV 1986).

55. 41 U.S.C. § 351 (1982).

56. Efforts to amend these coverage amounts have been opposed. However, the overtime provisions of the Walsh-Healey Act were amended in 1985. See *Senate Defense Authorization Bill Lifts Davis-Bacon Threshold to \$250,000*, *supra* note 53, at A-1.

57. 29 U.S.C. § 793(a) (1982 & Supp. IV 1986).

58. 33 U.S.C. § 902(3) (1982 & Supp. IV 1986).

59. See *Shelley, Car Prices Help to Boost Consumer Prices by 0.4 Percent in October*, Daily Lab. Rep. (BNA) No. 224, at B-7 (Nov. 23, 1987) (LEXIS, Labor library, Dlabrt file).

60. See *id.* at B-7.

61. See generally [8A Fair Empl. Prac. Man.] Lab. Rel. Rep. (BNA) 453:1 to 457:3517 (state-by-state review of fair employment practices); [4 & 4A State

ters.<sup>62</sup> Significantly, state and local legislation has in some instances exceeded the requirements of analogous federal statutes. Examples include California's minimum wage law of \$4.25 per hour,<sup>63</sup> which is ninety cents per hour above the federal minimum.<sup>64</sup> A Maine statute goes beyond federal employee benefit legislation by mandating severance benefits in the event of a plant closing.<sup>65</sup> In Massachusetts, there is a law requiring all insured health plans to offer specific health benefits.<sup>66</sup> State laws which allow judgment creditors to garnish participants' entitlements to welfare plan assets have also been permitted.<sup>67</sup> Thus, whether by

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Laws] Lab. Rel. Rep. (BNA) 10:1-61:342 (fifty state review of state wage and labor relations laws). Like the federal government, the states are actively amending their employment laws. See *Employment Rights Issues Lead 1987 Agendas of State Lawmakers*, Daily Lab. Rep. (BNA) No. 67, at C-1 (Apr. 7, 1988) (LEXIS, Labor library, Dlabrt file); *States Take Action on Minimum Wage Bills*, Daily Lab. Rep. (BNA) No. 157, at A-2 (Aug. 17, 1987) (LEXIS, Labor library, Dlabrt file).

62. See, e.g., *City of Atlanta v. Associated Builders and Contractors*, 240 Ga. 655, 657, 242 S.E.2d 139, 140 (1978) (Atlanta minimum wage ordinance); *Boulden v. Mayor of Elkton*, 311 Md. 411, 416, 535 A.2d 477, 480 (1988) (Baltimore minimum wage ordinance); *City of Houston v. Houston Gulf Coast Bldg. and Constr. Trades Council*, 710 S.W.2d 181, 183 (Tex. Ct. App. 1986) (Houston minimum wage ordinance).

63. For a discussion of this law, see *Subminimum Wage for Tipped Workers Left in Place by California Supreme Court*, Daily Lab. Rep. (BNA) No. 135, at A-4 (July 14, 1988) (LEXIS, Labor library, Dlabrt file).

64. 29 U.S.C. § 206(a) (1982).

65. The primary piece of federal legislation which regulates employee benefit plans is the Employee Retirement Income Security Act of 1974 (ERISA), as amended 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1986). ERISA imposes recordkeeping, reporting and fiduciary obligations where employee welfare and pension plans are offered, and also requires certain funding and vesting levels and termination insurance for pension plans. However, states may, under certain circumstances, regulate employer sponsored benefits. One such example of permissive state employee benefits legislation is the Maine severance pay law which mandates the payment of severance benefits in the event of a plant closing. ME. REV. STAT. ANN. tit. 26, § 625-B (Supp. 1986-87). The Supreme Court rejected an ERISA preemption challenge to the Maine statute holding that ERISA preempts state laws which relate to employee benefits *plans* and not simply employee benefits. *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217 (1987). Further, Congress intended to preempt periodic benefits requiring administrative uniformity, and not to preempt a one-time benefit scheme that might never be utilized. *Id.* at 2216-18.

66. MASS. GEN. LAWS ANN. ch. 175, § 47B (West Supp. 1985) (requiring minimum mental health care benefits in plans which provide hospital and surgical benefits). In *Metropolitan Life Ins. Co. v. Massachusetts*, this statute was upheld by the Supreme Court. 471 U.S. 724, 758 (1985). The Court held that this was a lawful regulation of insurance practices and as such was not subject to ERISA preemption. *Id.*

67. In a recent opinion, the Supreme Court rejected ERISA preemption arguments and upheld the state law right of judgment creditors to garnish participants' entitlements to welfare plan assets. *Mackey v. Lanier Collections Agency & Serv., Inc.*, 108 S. Ct. 2182 (1988).

state or federal law, almost every employer is subject to the full range of labor and employment laws.

#### IV. THE DAY-TO-DAY ADMINISTRATION OF EMPLOYMENT LAWS HAS TRADITIONALLY ACCOMMODATED THE NEEDS OF THE SMALL EMPLOYER

Despite the breadth of legislation affecting the small employer, the full weight of the law is only rarely imposed. The specialized agencies established to administer and enforce the laws have exhibited considerable flexibility when dealing with small employers. Often, enforcement agencies target their enforcement policies in order to benefit the maximum number of employees,<sup>68</sup> directing their investigations against larger employers. The Equal Employment Opportunity Commission (EEOC) has stated that budgetary restrictions and policy preferences limit the enforcement goals of the agency; thus, it is the larger employer who is more often targeted for the agency-directed investigation.<sup>69</sup> Similarly, agencies have been encouraged to review their regulations in order to eliminate unnecessary costs and paperwork imposed on small businesses.<sup>70</sup> For instance, Congress explicitly allowed for regulatory flexibility by the Labor Department when it enacted the reporting and disclosure requirements of ERISA.<sup>71</sup>

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68. See, e.g., *Wage and Hour Compliance Actions Decline, But Amount of Unpaid Wages Recovered Rises*, Daily Lab. Rep. (BNA) No. 75, at A-9 (Apr. 19, 1988) (LEXIS, Labor library, Dlabrt file) (Labor Department gauges FLSA compliance by number of employees affected and dollar volume of sanctions generated); *New OFCCP Director Charts Course for Improving Agency's Operations*, Daily Lab. Rep. (BNA) No. 72, at A-11 (Apr. 14, 1988) (LEXIS, Labor library, Dlabrt file) (OFCCP targets for compliance those companies with significant job opportunities); *Federal and State Agencies Conducted More Than 175,000 Safety and Health Inspections in FY 1983*, Daily Lab. Rep. (BNA) No. 245, at A-8 (Dec. 20, 1983) (LEXIS, Labor library, Dlabrt file) (OSHA inspections either targeted at likely violators or come about as result of industrial accidents).

69. See *Statements on EEOC Remedial Policies Before House Labor Subcommittee on Employment Opportunities*, Daily Lab. Rep. (BNA) No. 139, at E-1, E-3 (July 19, 1985) (LEXIS, Labor library, Dlabrt file); *Conclusions of Report by U.S. Commission on Civil Rights on Enforcement Resources and Performance by Federal Agencies*, Daily Lab. Rep. (BNA) No. 226, at D-1, D-4 (Nov. 22, 1983) (LEXIS, Labor library, Dlabrt file).

70. Small employers perceive that administrative and paperwork burdens are their next greatest threat after soaring insurance costs. MINOLTA/GALLUP, *supra* note 3, at 10; President's Annual Report to Congress on the State of Small Business, 1 PUB. PAPERS 367, 368 (Mar. 19, 1984).

71. 29 U.S.C. § 1024(a)(3) (1982). The Secretary of Labor may exempt certain employee benefit plans from statutory reporting and disclosure requirements if such obligations are found to be inappropriate. Regulations promulgated by the Labor Department exempt small employee welfare plans—those

Agencies also possess the flexibility to treat small employers differently than large employers when seeking remedial relief or settlement terms. The courts have consistently upheld this discretion of the administrative agencies allowing them the enforcement flexibility to selectively litigate cases, to withdraw complaints and to settle with violators without third party intervention.<sup>72</sup> The Supreme Court has recently underscored the “ab-

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plans covering fewer than 100 participants—from reporting and disclosure requirements. 29 C.F.R. § 2520.104-20 (1987).

Furthermore, ERISA only applies if an employer provides employee benefit plans to its employees. It was not the intent of the law to compel employers to establish pension or welfare plans. See S. REP. NO. 383, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4899 (report of Committee on Finance).

72. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (General Counsel for NLRB has unreviewable discretion to decline to institute unfair labor practice complaint); *Bresgal v. Brock*, 833 F.2d 763, 770-71 (9th Cir. 1987) (upholding injunction against Secretary of Labor for failing to enforce laws protecting migrant forestry workers, but holding that district court had no power to force agency to amend its regulations, rewrite its enforcement plan or take specific measures in exercising its authority), modified on other grounds, 843 F.2d 1163 (9th Cir. 1988); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (Secretary of Labor possesses discretion to review and dismiss penalties imposed by Federal Mine Safety and Health Review Commission); *Jackman v. NLRB*, 784 F.2d 759, 764 (6th Cir. 1986) (General Counsel's discretion to withdraw unfair labor practice complaint is unreviewable); *International Union of United Auto. Workers v. Brock*, 783 F.2d 237, 244 (D.C. Cir. 1986) (Secretary of Labor may refuse to file suit for failure to report persuader activities under Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 431-441 (1982)); *Donovan v. Allied Indus. Workers*, 760 F.2d 783, 785 (7th Cir. 1985) (settlement of OSHA violation is part of prosecutorial function of Secretary of Labor to which employees of alleged violator may not object); *Donovan v. Occupational Safety & Health Review Comm'n*, 713 F.2d 918, 928 (2d Cir. 1983) (“The only substantive right that employees are granted in [OSHA] enforcement proceedings is the limited right to challenge the reasonableness of the ‘period of time fixed in the citation for the abatement of the violation.’”) (quoting 29 U.S.C. § 659(c) (1982)); *Adams v. Bell*, 711 F.2d 161, 168 (D.C. Cir. 1983) (court ordered enforcement of Title VI of Civil Rights Act of 1964, due to abdication of statutory obligations, does not justify injunction of settlement), cert. denied, 465 U.S. 1021 (1984); *Baker v. International Alliance of Theatrical Stage Employees*, 691 F.2d 1291, 1296-97 (9th Cir. 1982) (NLRA does not require General Counsel to issue complaint once violation is found, and court order directing issuance of unfair labor practice complaint would be inappropriate remedy even if decision is subject to judicial review); *International Ass'n of Machinists v. Lubbers*, 681 F.2d 598, 603-04 (9th Cir. 1982) (rejecting exceptions to general rule that “the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court”), cert. denied, 459 U.S. 1201 (1983); *City of Milwaukee v. Saxbe*, 546 F.2d 693, 706 (7th Cir. 1976) (without proof of purposeful discrimination, selective enforcement of reconstruction civil rights laws by Attorney General is encompassed within office's broad prosecutorial discretion); *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 708 (8th Cir. 1971) (once NLRB has found reasonable cause to believe that violation has occurred, it need not issue complaint or injunction and has discretion to attempt voluntary settlement), cert. denied, 405 U.S. 996 (1972).

solute discretion” of an agency’s enforcement decisions.<sup>73</sup> This flexibility and discretion has allowed largely unsophisticated small employers to reach agreeable and nonthreatening solutions to their employment difficulties, obviating the need for costly and protracted litigation or even agency proceedings. The agency representative sent to investigate an employer is able to view first hand the needs and circumstances of each party and to fashion resolutions in a manner which does not threaten the economic viability of the enterprise. In this accommodation process there is the opportunity to recognize smallness where smallness is a factor.<sup>74</sup>

A number of employment laws provide for conciliation often leading to an individually crafted result. The Civil Rights Act of 1964 explicitly directs the enforcing agency to seek an informal settlement of discrimination claims,<sup>75</sup> as do the regulations affecting government contractors,<sup>76</sup> agricultural workers,<sup>77</sup> age discrimination<sup>78</sup> and safety violations in the nation’s harbors.<sup>79</sup> The

73. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). In *Heckler*, death row inmates brought an action to compel the Food and Drug Administration to enforce its enabling legislation, contending that the lethal injection which prison officials planned to use violated the Federal Food, Drug, and Cosmetic Act. *Id.* at 823. The Court held that “an agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion.” *Id.* at 831. It likened an agency’s refusal to institute proceedings to the decision of a prosecutor not to indict:—“a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’ ” *Id.* at 832 (quoting U.S. CONST. art. II, § 3.).

74. However, there are always exceptions, and a notable restriction on agency flexibility involves the pollution controls required by the Environmental Protection Agency. Yet, even in this area, there has been some assistance to small employers in the form of low interest loans. “The high cost and *unproductive* nature of *required* pollution control facilities are often more than small businesses can be expected to handle.” Small Business House Report, *supra* note 2, at 1178 (emphasis in original). The 1972 amendments to the Service Contract Act similarly restrict agency flexibility. See 41 U.S.C. §§ 351-358 (1982). Prior to the amendments, the Secretary of Labor could recommend that debarment not take place. The Act now limits such recommendations to “unusual circumstances,” thus circumscribing the discretion of the Secretary. *Id.* § 354(a).

75. 42 U.S.C. § 2000e-5(b) (1982) (where reasonable cause exists to believe discrimination has occurred, Equal Employment Opportunity Commission “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion”).

76. 41 C.F.R. § 60-1.20(b) (1987) (“Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion.”).

77. 29 C.F.R. § 501.4 (1987) (violation of private obligations owed to aliens and temporary agricultural workers may be settled).

78. 29 C.F.R. § 1626.15(b) (1987) (once there is reasonable basis to believe age discrimination has occurred, conciliation may take place).

NLRB proudly proclaims that its settlement of unfair labor practice cases is over ninety percent.<sup>80</sup> Other laws encourage or mandate arbitration of certain disputes. The Railway Labor Act and the Labor-Management Relations Act are the most notable.<sup>81</sup> While conciliation and arbitration apply regardless of employer size, such informal cost-saving approaches are of heightened value to small employers.

Government agencies have not been the only institutions to acknowledge a distinction between small and large employers. Unions typically negotiate a pattern or master agreement with the larger firms within a given industry.<sup>82</sup> Concessions from that industry agreement may then be made when negotiating a collective bargaining agreement with a small employer. So, for example, small employers whose employees are represented by the Teamsters are rarely bound by the Master Freight Contract. A small steel fabricating plant may have a contract with the United Steel-

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79. 29 C.F.R. § 1921.8 (1987) (even after complaint has been issued, proceedings may be deferred to "permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding").

80. See *NLRB General Counsel's Overview, Fiscal Year 1987*, Daily Lab. Rep. (BNA) No. 54, at D-1, D-2 (Mar. 21, 1988) (LEXIS, Labor library, Dlabrt file); *ULP Charges Received by NLRB Decline Sharply in Fiscal 1984*, Daily Lab. Rep. (BNA) No. 29, at A-3 (Feb. 12, 1985) (LEXIS, Labor library, Dlabrt file); *Report of NLRB General Counsel Summarizing Fiscal 1982 Operations*, Daily Lab. Rep. (BNA) No. 12, at F-1, F-2 (Jan. 18, 1983) (LEXIS, Labor library, Dlabrt file) (noting success and high rate despite hiring freeze and budgetary constraints). The NLRB states that a formal settlement is preferred for more egregious violations such as those involving a history of violations or where physical violence was a factor. *Testimony on NLRB Before House Government Operations Subcommittee on Employment and Housing*, Daily Lab. Rep. (BNA) No. 138, at F-1, F-2 (July 18, 1986) (LEXIS, Labor library, Dlabrt file) (statement of Rosemary M. Collyer, General Counsel for NLRB).

81. In 1926, the Railway Labor Act created an arbitral mechanism for the resolution of interest and rights disputes. 45 U.S.C. §§ 153, 155 (1982) (arbitration for airline employees). The "Steelworkers' Trilogy" cases, which were decided under what is now the Labor-Management Relations Act, confirmed that privately negotiated employment agreements and dispute resolution are preferable to government intervention. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454-55 (1957) (collective bargaining agreements enforceable in courts, and agreement to arbitrate is quid pro quo for agreement not to strike); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568-69 (1960) (judicial role is to determine whether parties intended to arbitrate particular dispute, rather than to decide merits of dispute); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960) (presumption of arbitrability exists where collective bargaining contract is ambiguous).

82. A national union may select a target company in an attempt to achieve the best negotiated employment terms for its members which will then set a pattern for other companies in the industry. See, e.g., *Rubber Workers Choose Goodyear as Target for Pattern Settlement*, Daily Lab. Rep. (BNA) No. 70, at A-8 (Apr. 12, 1988) (LEXIS, Labor library, Dlabrt file).

workers of America, but it will not be the same labor contract as USX has, nor will a small automobile parts supplier who bargains with the United Auto Workers be compelled to observe the same terms and conditions of employment as General Motors. In addition, collectively bargained grievance procedures, while occasionally frustrating, are generally affordable and rarely, if ever, threaten the viability of the employer.

Thus, while small employers have had to comply with the same laws and the same regulatory obligations as large employers, informal adjustments have been made to accommodate their lesser financial base, more limited range of employment classifications and inability to address the full range of possible remedies.

#### V. THE EXPANSION OF PRIVATE CAUSES OF ACTION AND INCREASED AVAILABILITY OF JURY TRIALS AND PUNITIVE DAMAGES IN EMPLOYMENT LAWSUITS

It is clear that in exercising its power under the commerce clause,<sup>83</sup> Congress has the authority to preempt a regulatory field.<sup>84</sup> However, even when Congress has acted in a broad pre-

83. U.S. CONST. art. I, § 8, cl. 3.

84. It has long been held that Congress's power to regulate commerce between the states is plenary. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). As a result of this power, as well as the power conferred by the supremacy clause, Congress may not only regulate activities within and between states, it may preempt state measures dealing with the same subject matter. The analysis used to determine the preemptive effect involves a determination of whether: 1) the subject matter was traditionally an area of state regulation; 2) the state and federal laws are inconsistent and in direct conflict with one another; 3) the federal act explicitly occupies the field; or 4) the federal act implicitly occupies the field through its overall scheme, structure and purpose. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 532 (1977) (reasonable weight tolerances in section 1(n) of the Federal Meat Inspection Act preempted stricter state fair labeling law) (construing 21 U.S.C. § 601(n) (1976)); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-52 (1963) (Agriculture Department guideline on avocado maturity did not preempt state law which used oil content as additional criterion). This has created a recurring problem for the courts because certain laws, such as the LMRA, do preempt state regulation to a certain extent, yet the exact limits are often left unstated. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485 (1953).

In the last fifty years, the interstate commerce power has been applied to uphold the application of various federal labor laws to even the smallest of businesses. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (wheat grown by one farmer for personal consumption in excess of federal quota could, in aggregate, depress price of wheat, thus justifying federal regulation); *United States v. Darby*, 312 U.S. 100, 123 (1941) (minimum wage law applied to lumbermen where lumber was destined for out-of-state markets; "competition by a small part may affect the whole and . . . the total effect of the competition of many



emptive manner, such as in the enactment of ERISA, exceptions are eventually created by the courts. ERISA provides that the federal law shall "supersede any and all State laws insofar as they . . . relate to any employee benefit plan."<sup>85</sup> Yet, the Supreme Court has upheld state severance, insured health benefits and garnishment laws although they clearly "relate to" employee benefit plans.<sup>86</sup>

Lacking the protection of federal preemption, the government administration of employment laws has begun to give way to private rights of action. Flexible administrative enforcement is being replaced by unpredictable jury verdicts and punitive damage awards. As a consequence, predictability of result and affordability of relief are being lost as litigious employees seeking exorbitant damage awards stampede to the courts.

One illustration of the rapid evolution of employment law involves an employee's ability to seek redress for discrimination. In 1964, Congress enacted Title VII of the Civil Rights Act of 1964.<sup>87</sup> This enactment was intended to grant minorities and other disadvantaged groups equality of employment opportunity. It was carefully drafted to allow agency enforcement flexibility and to encourage conciliation,<sup>88</sup> and specifically denies the right

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small producers may be great"); *NLRB v. Fainblatt*, 306 U.S. 601, 608 (1939) (New Jersey garment maker employing 60-200 workers, which received cloth from, and shipped garments to, New York, subject to federal labor laws).

The Supreme Court has continued to assert its belief that the commerce power is plenary. *See generally* Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (tracing gradual expansion of congressional regulatory authority under commerce clause). The reach of the Civil Rights Act of 1964, pursuant to the commerce clause, was held to be broad enough to encompass "Ollie's Barbeque," a family-owned restaurant in Birmingham, Alabama, which employed thirty-six persons and annually purchased forty-six percent of its meat, at a total of \$70,000, from out of state. *Katzenbach v. McClung*, 379 U.S. 294, 296, 304 (1964).

More recently, the Mine Safety and Health Act was applied to an owner-operated mine. *See* *Marshall v. Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978), *aff'd*, 605 F.2d 1194 (3d Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1102 (1980). The Act was also applied to a mine operated by two partners where none of the ore was sold outside of the state. *See* *Secretary of Interior v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976).

85. 29 U.S.C. § 1144(a) (1982).

86. *See* *Mackey v. Lanier Collections Agency & Serv., Inc.*, 108 S. Ct. 2182, 2185-91 (1988) (ERISA does not preempt state laws allowing creditors to garnish participants' welfare plan entitlements); *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2215-16 (1987) (ERISA preempts state laws which relate to employee benefit plans, not simply benefits); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751-58 (1985) (ERISA does not preempt mandatory minimum health care benefits).

87. 42 U.S.C. §§ 2000e-2000e-17 (1982).

88. The enforcing agencies "shall endeavor to eliminate any . . . unlawful

to a jury trial and punitive damages.<sup>89</sup> The 1964 Civil Rights Act was enacted after much deliberation by Congress and in spite of the vociferous opposition of many persons.

Four years later, in 1968, the Supreme Court decided the case of *Jones v. Alfred H. Mayer Co.*<sup>90</sup> The significance of the *Jones* case lies in the willingness of the Supreme Court to allow a black person to sue and recover for racial discrimination on the grounds that such discrimination violated a statute passed during the reconstruction era after the Civil War.<sup>91</sup> Thus, the nation was informed that the necessary and magnificent victory which was achieved when the Civil Rights Act was passed in 1964 was redundant; a statute tailored to the needs of minorities had existed for 100 years. Unlike Title VII, the reconstruction statutes eliminate resort to an administrative agency,<sup>92</sup> contain a more generous limitations period,<sup>93</sup> entitle the employee to trial by jury,<sup>94</sup> enable

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employment practice by informal methods of conference, conciliation, and persuasion." *Id.* § 2000e-5(b).

89. Since Title VII actions are equitable in nature, a jury trial is not available. *Id.* § 2000e-5(g). See, e.g., *Morelock v. NCR Corp.*, 546 F.2d 682, 687 (6th Cir. 1976). Aside from equitable remedies, only back pay is explicitly available to a prevailing party. 42 U.S.C. § 2000e-5(g).

90. 392 U.S. 409 (1968). In *Jones*, the Supreme Court allowed a black man to maintain a lawsuit predicated on racially discriminatory housing practices under 42 U.S.C. § 1982. *Id.* at 413-17. This provision specifically guarantees that all citizens have an equal right to inherit, purchase, lease, sell, possess and convey real and personal property. 42 U.S.C. § 1982 (1982). Violations are actionable under 42 U.S.C. § 1983, which authorizes an action at law or equity for deprivation of any rights, privileges or immunities granted under federal law. 42 U.S.C. § 1983 (1982). The prohibition on racially motivated employment discrimination was ascertained in later Supreme Court decisions to be violative of another reconstruction era statute, 42 U.S.C. § 1981. Section 1981 generally guarantees that all persons shall have equal rights under the law, and specifically mentions the right to contract and to become a party to a lawsuit or a witness therein. See 42 U.S.C. § 1981 (1982). Claims of unlawful discrimination under § 1981, like those pleading racially motivated housing practices pursuant to § 1982, may be redressed through the express right of action granted in § 1983. See generally *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (racial and sexual discrimination action in employment under § 1983); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (sex discrimination action by prison guard under § 1983 and Title VII); *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (racial discrimination action under § 1983 by Puerto Rican citizens barred from private practice of engineering); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (plaintiffs subjected to racial discrimination in employment have separate remedies under Title VII and § 1981).

91. 42 U.S.C. §§ 1981-1985 (1982).

92. Title VII requires a discrimination claimant to file charges at a federal, state or local equal opportunity employment agency. 42 U.S.C. § 2000e-5 (1982). The claimant may file a lawsuit 180 days after filing an agency charge. *Id.* § 2000e-5(f). There is no such duty under 42 U.S.C. § 1983. See *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

93. Actions under 42 U.S.C. § 1983 utilize the applicable state limitations

the jury to award compensatory and punitive damages<sup>95</sup> and enable the court to award attorney's fees.<sup>96</sup> They have been interpreted to prohibit discrimination on grounds other than race.<sup>97</sup> The reconstruction statutes invoke the equal protection clause, requiring proof of discriminatory intent,<sup>98</sup> and thus are not a perfect substitute for Title VII. The Supreme Court has also found a right to a jury trial in the Age Discrimination in Employment Act (ADEA), a statute that did not explicitly incorporate such a right when initially drafted by Congress.<sup>99</sup> Thus, an employee may now challenge before a jury his employer's employment decisions; decisions which were made in an often complicated context of business pressures.

Further, disaffected or former employees have relied on the plethora of state employment law causes of action which seem to be limited only by the imagination of creative counsel. Commentators have likened these state claims for "wrongful termination"

periods which *vary considerably*. See *Gates v. Spinks*, 771 F.2d 916, 920 (5th Cir. 1985) (one year), *cert. denied*, 475 U.S. 1065 (1986); *Carpenter v. Williams County*, 618 F. Supp. 1293, 1294 (D.N.D. 1985) (six years). A claimant under Title VII, in contrast, must act within 180 days. 42 U.S.C. § 2000e-5(e).

94. Many courts permit a jury trial under 42 U.S.C. § 1983. See, e.g., *Dolence v. Flynn*, 628 F.2d 1280 (10th Cir. 1980); *Hildebrand v. Board of Trustees*, 607 F.2d 705 (6th Cir. 1979).

95. See, e.g., *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982); *Blessing v. County of Lancaster*, 609 F. Supp. 485 (E.D. Pa. 1985). Title VII makes no such provision. 42 U.S.C. § 2000e-5(g) (authorizing award of equitable relief and back pay).

96. 42 U.S.C. § 1988 allows the prevailing civil rights litigant to seek attorney's fees. 42 U.S.C. § 1988 (1982).

97. See *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019, 2021 (1987) (Jews); *Saint Francis College v. Al-Kahzraji*, 107 S. Ct. 2022, 2026-27 (1987) (Arabs); *Dothard v. Rawlinson*, 433 U.S. 321, 328 (1977) (Title VII protects women); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 120-22 (5th Cir. 1980) (white employee at predominantly black university); *Roberto v. Hartford Fire Ins. Co.*, 177 F.2d 811, 813-14 (7th Cir. 1949) (aliens), *cert. denied*, 339 U.S. 920 (1950); *Puntolillo v. New Hampshire Racing Comm'n*, 390 F. Supp. 231 (D.N.H. 1975) (national origin).

The prohibition on employment discrimination contained within § 1981 has also been expanded to allow claims for hostile work environment. *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987); *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987); see also *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985) (retaliatory discharge); *Martin v. Citibank, N.A.*, 762 F.2d 212, 221 (2d Cir. 1985) (constructive discharge).

98. The Supreme Court ruled out § 1981 disparate impact claims in *General Building Contractors Association, Inc. v. Pennsylvania*. 458 U.S. 375, 386-91 (1982) (requiring evidence of purposeful discrimination).

99. The Age Discrimination in Employment Act (ADEA) was held to provide a jury trial right in *Lorillard v. Pons*, 434 U.S. 575, 585 (1978). 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).

or "unjust dismissal" to the civil rights actions which have long been available to employees. The civil rights claims and more recent employment causes of action share notions that the employer's actions must not be unprincipled, unreasonable or unfair. In order to overcome the presumptive correctness of the plaintiff's allegations of unfairness, the employer must prove that the employment actions in question were not arbitrary and, indeed, were rooted in a just and reasonable cause.<sup>100</sup> In the civil rights context, this has been accomplished by shifting burdens of proof and presumptions.<sup>101</sup> Nevertheless, it has only been in the last fifteen years that state courts have extended the notion of fairness to the entire spectrum of employment actions.<sup>102</sup>

These recent state law claims are being brought under a number of legal theories, each of which creates an exception to the traditional notion that an employment of indefinite duration is terminable at will.<sup>103</sup> These theories include breach of the employment agreement, tortious conduct and violation of public policy.<sup>104</sup>

The cases permitting suits based on allegations of breach of the employment agreement have either implied a term into a written employment contract, implied the existence of an employment contract from employer handbooks and manuals or have found the employer to have made a promise upon which the em-

100. *E.g.*, J. BARBASH, J. FEERICK & J. KAUFF, UNJUST DISMISSAL AND AT WILL EMPLOYMENT 15 (Practising Law Institute, Litigation & Administrative Practice Series, Litigation Course Handbook Series No. 208, 1982) [hereinafter UNJUST DISMISSAL].

101. In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that a Title VII plaintiff must establish a prima facie case that discrimination occurred by showing that he is a member of the protected class, was qualified for the position and suffered an adverse employment action. 411 U.S. 792, 802 (1973). Once this is established, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection" in order to rebut the presumption that discrimination occurred. *Id.*

102. UNJUST DISMISSAL, *supra* note 100, at 29.

103. It is reported that an 1877 legal treatise established the at-will rule for American employment. See W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 27-28 (1985) [hereinafter EMPLOYMENT TERMINATION].

In all jurisdictions, it is still presumed that employment is at will; however, the numerous exceptions in states such as California and Massachusetts tend to emasculate this general rule. See NATIONAL EMPLOYMENT LAW INSTITUTE, EMPLOYMENT-AT-WILL: A 1986 STATE-BY-STATE SURVEY (D. Cathcart & M. Dichter eds. 1986) (Report of Litigation Section of Employment & Labor Relations Law Comm. and Labor & Employment Section of Comm. on Employee Rights & Responsibilities in the Workplace of the American Bar Assoc.) (recounting general at-will rule of each state and recognized exceptions).

104. UNJUST DISMISSAL, *supra* note 100, at 29.

ployee detrimentally relied. Two California cases have been frequently cited for the proposition that implied employment contract terms prohibit arbitrary employer action. In *Cleary v. American Airlines, Inc.*,<sup>105</sup> the employer was held to have breached an implied duty of good faith and fair dealing, which is implied in most commercial contracts, in its discharge of an eighteen-year employee in a manner contrary to the employer's own internal procedures. One year later, in *Pugh v. See's Candies, Inc.*,<sup>106</sup> a former employee successfully maintained that he could be discharged only for just cause. No such just cause was present where the plaintiff was a longtime employee with satisfactory performance, there was no indication of employer dissatisfaction and the past practice of the employer had been to discharge only for cause.<sup>107</sup>

An example of the courts' willingness to convert statements contained in employer handbooks and manuals into employment agreements is the Michigan case of *Toussaint v. Blue Cross & Blue Shield*.<sup>108</sup> The Supreme Court of Michigan held that because, through its manual or handbook, an employer may create expectations in the minds of its employees, its written procedures would be fairly and consistently applied, even though the employee has no knowledge of the terms of these procedures.<sup>109</sup> Similarly, oral representations that an employee was guaranteed lifetime employment supported a jury verdict for breach of contract in *Terrio v. Millinocket Community Hospital*.<sup>110</sup>

The California courts were also in the forefront of the development of the public policy exception to at-will employment. In *Petermann v. International Brotherhood of Teamsters*,<sup>111</sup> a California appellate court accepted the public policy claim of a former employee who alleged that he had been discharged for refusing to perjure himself on his employer's behalf before a state legislative committee. Other states have allowed retaliatory discharge claims on public policy grounds for filing a worker's compensa-

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105. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

106. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

107. *Id.* at 329, 171 Cal. Rptr. at 927. The just cause standard addresses the misconduct of the employee and only indirectly addresses the valid business concerns of the employer. Just cause for an employment action may range from substance abuse and disloyalty to poor performance and criminal activity. See EMPLOYMENT TERMINATION, *supra* note 103, at 120-33.

108. 408 Mich. 579, 292 N.W.2d 880 (1980).

109. *Id.* at 613, 292 N.W.2d at 892.

110. 379 A.2d 135 (Me. 1977).

111. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

tion claim,<sup>112</sup> sexual harassment,<sup>113</sup> wage garnishment,<sup>114</sup> jury duty<sup>115</sup> and refusal to submit to a polygraph test.<sup>116</sup>

The tort claims which ostensibly arise out of employment terminations and other diverse employment actions may take the form of an abusive discharge, or the existence of tortious conduct associated with the breach of the employment agreement may be appended to a wrongful termination action. Maryland courts have allowed a cause of action for abusive discharge since 1981.<sup>117</sup> The cause of action was held to be available where the manner of the discharge is outrageous, although initially it had to be predicated on a public policy violation.<sup>118</sup> In *Beye v. Bureau of National Affairs*,<sup>119</sup> a Maryland court extended the reach of a claim for abusive discharge to encompass a situation wherein the employee was constructively discharged; where working conditions are "so intolerable that the employee is forced to initiate his own unlawful termination."<sup>120</sup>

Where the discharge itself is not tortious, other aspects of the employer's conduct may cause a disaffected employee to append independent tort claims to a cause of action for wrongful discharge. Typical tort claims include defamation and intentional infliction of emotional distress.<sup>121</sup> In one instance where waitresses were fired in order to pressure them to provide information on a work theft, there was held to be sufficient evidence of extreme and outrageous conduct to support a cause of action in tort.<sup>122</sup>

Defamation actions have been difficult to maintain, as communications between persons possessing a common interest, such as co-workers, are qualifiedly privileged. Thus, the false publications must be made with malice in order to state a legally cognizable claim. For example, a New York court held that an accusation of check kiting, which resulted in the plaintiff's discharge, was in-

112. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

113. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

114. *McCabe v. City of Eureka*, 664 F.2d 680 (8th Cir. 1981).

115. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

116. *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984).

117. *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981).

118. *Id.* at 47, 432 A.2d at 473.

119. 59 Md. App. 642, 477 A.2d 1197, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984).

120. *Id.* at 653, 477 A.2d at 1203.

121. For a discussion of these claims, see EMPLOYMENT TERMINATION, *supra* note 103, at 210-18, 307-29.

122. *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976).

sufficient to avoid a summary disposition.<sup>123</sup>

Many of these state law exceptions to the employment-at-will doctrine have become established law in jurisdictions throughout the nation.<sup>124</sup> As a consequence, the employee of yesteryear, who could be terminated at will without redress, has been replaced by an employee who can receive consideration of his claims by a jury of his peers and who is eligible for a potential windfall in the form of compensatory and punitive damages. A few examples will illustrate the threat faced by all employers.

In Michigan, a female sales representative, who had consistently been a top performer, was discharged for poor performance and insubordination.<sup>125</sup> Under Michigan law, an obligation not to discharge an employee save for good or just cause is implied in all employment contracts.<sup>126</sup> The jury found that the plaintiff's discharge was a result of sexual bias rather than poor performance and awarded her a total of \$1,270,000.<sup>127</sup> On appeal, although one count was dismissed, the plaintiff was held to be still entitled to \$740,000.<sup>128</sup>

The Montana Supreme Court upheld an award of \$94,170 in economic damages, \$100,000 for emotional distress and exemplary damages of \$1,300,000 in *Flanigan v. Prudential Federal Savings & Loan Association*.<sup>129</sup> In *Flanigan*, a twenty-eight-year bank employee who had performed well throughout her career was terminated without notice shortly after accepting a position as a teller.<sup>130</sup> The court noted that in Montana, "[a] long-term employee has an expectation of continued employment provided that the employee's work performance is satisfactory."<sup>131</sup> Just cause is needed to terminate such an employee. Punitive damages were held to be appropriate where malice could be inferred from the defendant's "calloused attitude toward older employees."<sup>132</sup> Just one such occurrence can result in the forfeiture of a lifetime of work for the small employer.

123. *Gordon v. Allstate Ins. Co.*, 71 A.D.2d 850, 419 N.Y.S.2d 173 (1979).

124. See NATIONAL EMPLOYMENT LAW INSTITUTE, *supra* note 103.

125. *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 647, 378 N.W.2d 558, 559-60 (1985).

126. *Id.* at 657, 378 N.W.2d at 564 (quoting *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 610-11, 292 N.W.2d 880, 890-91 (1980)).

127. *Id.* at 651, 378 N.W.2d at 561.

128. *Id.* at 670, 378 N.W.2d at 570.

129. 720 P.2d 257 (Mont. 1986).

130. *Id.* at 258-59.

131. *Id.* at 261.

132. *Id.* at 265.

Even established laws can prove to be troublesome for small employers. In addition to the increased availability of jury trials and tortious causes of action for which punitive damages may be recovered, there has been an explosive growth of both rights and remedies for civil rights violations under the 1964 Civil Rights Act.<sup>133</sup> Presently, a discrimination claim need not be based on overt and bigoted conduct. Today, a claim can be made that fringe benefits are discriminatory,<sup>134</sup> or that the work environment is so tainted by discrimination that it becomes too offensive to remain in,<sup>135</sup> and the employee (whether or not the direct target of the discriminatory behavior) quit or accepted a transfer in order to escape the hostile environment. The employee then may claim a discriminatory "constructive" discharge.<sup>136</sup>

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133. See generally L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 1-192 (2d ed. 1988) (tracing doctrinal developments under Title VII).

134. Disparate retirement benefits have been held to be adequate to support a discrimination claim. *Arizona Governing Comm'n v. Norris*, 463 U.S. 1073 (1983). Nevertheless, disparate retirement contributions have been held to be discriminatory. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). However, distinctions based on pregnancy were lawful until the Pregnancy Discrimination Act amended Title VII. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); 42 U.S.C. § 2000e(k). Early retirement plans have been challenged, but may now be bona fide, see *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977); 29 U.S.C. §§ 621-34 (1982 & Supp. IV 1986) (ADEA). It has been held that cost is a valid reason to vary benefits even if it is disadvantageous to older workers. See *Karlen v. City Colleges*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988).

135. Under Title VII, a hostile work environment exists when discriminatory workplace conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 106 S. Ct. 2399, 2405 (1986) (quoting 29 C.F.R. § 1604.11(a)(3) (1985)). The plaintiff must demonstrate that "the defendant's conduct would have interfered with a reasonable person's work and would have affected seriously the psychological well being of a reasonable employee" and did indeed harm the plaintiff. *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 270 (N.D. Tex. 1987). This theory of recovery has been used in cases involving discrimination based on race, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); religion, *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984); national origin, *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977); and sex, *Vinson*, 106 S. Ct. at 2406.

136. In a constructive discharge case, the employee alleges that the working conditions were so intolerable that the employee was compelled to submit a voluntary resignation. Some courts use an objective test to measure whether a reasonable person in the employee's shoes would have resigned. See *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). Other courts utilize a subjective standard. See *Henson v. City of Dundee*, 682 F.2d 897, 907 (11th Cir. 1982); *Bailey v. Binyon*, 583 F. Supp. 923, 928 (N.D. Ill. 1984). In order to state such a claim, a plaintiff must allege more than just the presence of discrimination. *Bishopp v. District of Columbia*, 602 F. Supp. 1401 (D.D.C. 1985), *rev'd in part*, 788 F.2d



Another example involves the fluid definition of a handicapped employee under the Rehabilitation Act of 1973.<sup>137</sup> The handicapped now include not only the physically or mentally impaired, but those persons with contagious diseases,<sup>138</sup> or recovering or rehabilitated alcoholics and substance abusers.<sup>139</sup> Once an employee is recognized as legally handicapped, an employer is forbidden from discriminating on the basis of the handicap and must attempt to accommodate the needs of the handicapped person.<sup>140</sup> Further, Title VII of the Civil Rights Act<sup>141</sup> may even preclude a blanket employment exclusion for conditions not covered by the statute, for example drug use, if the employer's policy has a disparate impact on protected groups.<sup>142</sup>

It is also significant that Congress and numerous state legislatures are considering legislation which, for the first time, would specifically regulate small employers. These legislative measures, which include mandated employee health benefits and parental leave and an increase in the minimum wage, would attempt to eliminate the disparity in wages and working conditions that currently exists between small and large employers.<sup>143</sup>

Congress is currently considering bills which would require

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781 (D.C. Cir. 1986). Pervasive and repeated racial, ethnic or sexually tainted communications are necessary. *See, e.g.*, *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1256 (6th Cir. 1985) (racial slurs for five years), *cert. denied*, 475 U.S. 1015 (1986); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (repeated racial abuse); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982) (racial hazing applied to new oil rig workers); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir.) (segregated dining clubs while on duty), *cert. denied*, 434 U.S. 819 (1977).

137. 29 U.S.C. §§ 701-796i (1982 & Supp. IV 1986).

138. *See, e.g.*, *School Bd. v. Arline*, 107 S. Ct. 1123, 1129 (1987) (susceptibility to tuberculosis not valid justification for employment termination); *Kohl v. Woodhaven Learning Ctr.*, 672 F. Supp. 1226, 1248 (W.D. Mo. 1987) (hepatitis B carrier exhibiting behavioral problems must be accommodated by vocational facility). Additionally, the state of Arizona has expanded its statutory definition of handicap to include AIDS victims, though not HIV carriers. *See* 187-159 Op. *Ariz. Att'y Gen'l* 1, 1, 9 (Dec. 14, 1987).

139. *See, e.g.*, *Whitlock v. Donovan*, 598 F. Supp. 126, 129 & n.3 (D.D.C. 1984), *aff'd*, 790 F.2d 964 (D.C. Cir. 1986); *Whitaker v. Board of Higher Educ.*, 461 F. Supp. 99, 106 (E.D.N.Y. 1978); *Davis v. Bucher*, 451 F. Supp. 791, 795 (E.D. Pa. 1978). Some state handicap discrimination laws explicitly treat drug addiction and alcoholism as protected handicaps. *See, e.g.*, *Connecticut Gen. Life Ins. Co. v. Department of Indus., Labor & Human Relations*, 86 Wis. 2d 393, 273 N.W.2d 206 (1979) (construing Wisconsin Fair Employment Act).

140. 29 U.S.C. § 794 (1982 & Supp. IV 1986).

141. 42 U.S.C. §§ 2000e-2000e-17 (1982).

142. *See* *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 585-86 (1979) (black and Hispanic methadone users involved in rehabilitation program, who were excluded from employment, unable to prove disparate impact).

143. Larger companies tend to pay their employees higher hourly wages

all employers to provide at least catastrophic health coverage to their employees.<sup>144</sup> Any employee working seventeen and one-half hours per week would be entitled to a minimum health package for himself and his dependents which would include the bill's specified physician, hospital, diagnostic, prenatal and well-baby care benefits. Each employer would be compelled to pay at least eighty percent of the health premium, and for employees paid below 125% of the minimum wage, the employer would have to pay the entire premium.<sup>145</sup>

The Congressional Budget Office estimates that the minimum health benefits bill will cost twenty-four billion dollars and may cause employers to lay off employees or reduce their hours which would particularly harm black teenagers.<sup>146</sup> The benefits bill may also reduce employment growth, wages and existing fringe benefits offered by small businesses.<sup>147</sup>

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and offer more comprehensive fringe benefits. See SMALL BUSINESS FACTOR, *supra* note 5, at 2.

144. S. 1265, 100th Cong., 1st Sess., 133 CONG. REC. S7075 (May 21, 1987); H.R. 2508, 100th Cong., 1st Sess., 133 CONG. REC. H3916 (May 21, 1987). Both bills are entitled the Minimum Health Benefits for All Workers Act of 1987. More recently, a new House bill was introduced which would compel employers to offer minimum health, maternity and child care benefits, or else face a tax of \$100 per day per employee. For a discussion of this bill, see *Stark Introduces Legislation Requiring Minimum Health Benefits*, 15 Pens. Rep. (BNA) No. 27, at 1040 (July 4, 1988) (LEXIS, Labor library, Pensn file).

145. See Rovner, *Senate Labor OKs Mandated-Benefits Measure*, 46 CONG. Q. 363, 365 (Feb. 20, 1988) (synopsis of major provisions of S. 1265). The only concessions made to small businesses are that regional health pools would be created for businesses with fewer than twenty-five employees, and firms with ten workers or less, which have been in business for less than two years, would only need to offer catastrophic coverage. Amendments provide for a phase-in coverage for new businesses, farms and small employers. *Id.*

146. See *Minimum Health Benefits Bill Said Jeopardy to Low-Wage Jobs*, Daily Lab. Rep. (BNA) No. 213, at A-10 (Nov. 5, 1987) (LEXIS, Labor library, Dlabrt file).

147. *Many Major Companies Beginning to Accept Concept of Minimum Benefits*, 15 Pens. Rep. (BNA) No. 16, at 664, 666 (Apr. 18, 1988) (LEXIS, Labor library, Pensn file) ("[E]mployers with high proportions of low-wage workers would find their business costs increased substantially."); *Minimum Essential Health Benefits for All Workers Act of 1987: Hearings on S. 1265 Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 13 (1987) (statement of Edward M. Gramlich, Acting Director, Congressional Budget Office) (six million workers who now earn under four dollars per hour may face layoffs or reduction in hours).

Senator Hatch was presented with over 13,000 petitions from small employers protesting the minimum health benefits bills. Senator Hatch stated that to insure the uninsured would cost the government eight billion dollars, but to finance the bills' coverage would cost from \$28 billion to \$100 billion and the loss of 100,000 to one million jobs. *Small Business Owners Give Sen. Hatch Over 13,000 Petitions Protesting Bills*, Daily Lab. Rep. (BNA) No. 118, at A-2 (June 20, 1988) (LEXIS, Labor library, Dlabrt file); Cong. Index (CCH) 1, 2 (Feb. 19, 1988).

Small companies would be especially affected by this legislation. Although they employ an increasingly larger percentage of the work force, they are the least likely to offer employee health insurance.<sup>148</sup> Small businesses must also pay higher health insurance premiums to cover their workers because they more frequently employ the very old and the very young who disproportionately utilize health care services.<sup>149</sup> Many large businesses favor this new legislation, however, because it is believed that their health plans are subsidizing their smaller competitors.<sup>150</sup>

In addition to the proposal to mandate health coverage, which could raise the per worker cost to the employer by forty cents per hour,<sup>151</sup> companion measures are in both houses of Congress which would raise the minimum wage from its 1981 level.<sup>152</sup> The Senate bill would raise the minimum wage to \$4.65 per hour by January 1, 1990, and it would thereafter become indexed to the national average hourly wage of nonagricultural employees.<sup>153</sup> The House proposal would ultimately increase the

148. SMALL BUSINESS FACTOR, *supra* note 5, at 1-3; Brookes, *Beating Up on Small Business*, Washington Times, June 1, 1987, at D1, col. 1.

149. See Rovner, *supra* note 145, at 367.

150. "[S]ome large employers favor the bill as a way to force competitors to shoulder more of the corporate health insurance burden." *Senate Labor Panel Clears Bill Requiring Many Employers to Boost Health Benefits*, Wall St. J., Feb. 18, 1988, at 3, col. 2. It is believed that "[c]urrently, large manufacturing companies that provide health care protection for their employees are subsidizing employers in the service sector who do not." *Many Major Companies Beginning to Accept Concept of Minimum Benefits*, *supra* note 147, at 666. American Airlines, for example, asserted that "Continental Airlines was trying to gain a competitive advantage in the industry by cutting back on its health coverage." Rovner, *supra* note 145, at 367. Chrysler corporation felt that it was assuming the health care costs of its own employees as well as employees of other companies. *Id.*

J.C. Penney Company recently withstood a sex discrimination challenge to its cost containment health policy which denied employee dependent coverage to spouses who earned more than the J.C. Penney employee and should thus have their own employee health coverage. *EEOC v. J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1988).

"[S]ince most large and unionized companies already provide such [health] benefits, the only target of this legislation is the small business that can least afford the cost." Brookes, *supra* note 148, at D1, col. 1; see also Melloan, *supra* note 13, at 37, col. 3 (mandated benefits unlikely to affect big business, but may force smaller businesses not to employ marginal workers).

151. See Cong. Daily (CCH) 1 (Feb. 17, 1988).

152. See Knudsen, *House Panel Agrees to Minimum-Wage Hike*, 46 CONG. Q. 578 (Mar. 5, 1988). Some states are already boosting their minimum wage rates above the current hourly rate stipulated by the FLSA. See *States Take Action on Minimum Wage Bills*, Daily Lab. Rep. (BNA) No. 157, at A-2 (Aug. 17, 1987) (LEXIS, Labor library, Dlbrt file).

153. S. 837, 100th Cong., 1st Sess., § 2 (1987); see also *Minimum Wage Restoration Act of 1987: Hearings Before Comm. on Labor and Human Resources on S. 837*,

hourly minimum wage to \$5.05 by January 1, 1992, liberalize the tip credit and raise the minimum coverage thresholds for small businesses.<sup>154</sup>

A Congressional Budget Office study estimated that the House bill could "lead to higher prices on consumer goods and the loss of nearly 500,000 jobs,"<sup>155</sup> with southern states sustaining the greatest loss of employment.<sup>156</sup> Congressional testimony indicated that the hotel and motel industry alone could be forced to eliminate 83,000 jobs, and industries faced with cheaper foreign imports could encounter a decrease in competitiveness.<sup>157</sup> Additionally, adult workers could be substituted for part-time teenagers.<sup>158</sup>

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100th Cong., 1st Sess. 139, 139-41 (1987) (statement of National Small Business United) (opposing increase of minimum wage rate to \$4.65 per hour and indexing to manufacturing sector). A substitute measure for S. 837, approved by the Senate Labor and Human Resources Committee on June 29, 1988, would raise the minimum wage to \$4.55 per hour by 1991. See *Senate Labor Committee Clears Bill to Raise Minimum Wage to \$4.55 an Hour*, Daily Lab. Rep. (BNA) No. 126, at A-1 (June 30, 1988) (LEXIS, Labor library, Dlabrt file).

154. H.R. 1834, 100th Cong., 2d Sess. §§ 2, 3, 5 (1988). Enterprise coverage would begin at \$500,000, and an establishment's sales volume would need to be \$362,500 for the act to apply. *Id.* §§ 3, 5; see also *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings Before Subcomm. on Labor Standards of the Comm. on Education and Labor*, 100th Cong., 1st Sess. (1987 & 1988).

155. Morehouse, *CBO's Unwelcome Cost Estimate Vanishes*, 46 CONG. Q. 1013 (April 16, 1988). These figures are being hotly contested. Sixty-five percent of all minimum wage jobs are held by part-time workers. The General Accounting Office predicts that the new legislation could result in the loss of 124,000 to 619,000 youth jobs. See Brookes, *supra* note 148, at D1, col. 3. Even Democratic supporters of the minimum wage legislation admit that, as a consequence of the bill, several hundred thousand jobs may be lost which would particularly affect young blacks and Hispanics who are most likely to be seeking jobs at or near the minimum wage. See *Senate Labor Committee Clears Bill to Raise Minimum Wage to \$4.55 an Hour*, *supra* note 153, at A-1. However, a recent survey indicates that many employers are already paying wage rates above the proposed minimum, and thus would not be affected by minimum wage legislation. See *Minimum Wage Hike Won't Cause Layoffs, Many Employers Say*, Daily Lab. Rep. (BNA) No. 132, at A-1 (July 11, 1988) (LEXIS, Labor library, Dlabrt file).

156. See *Business Group Backs Increase in Minimum Wage: House Vote Due in May*, Daily Lab. Rep. (BNA) No. 77, at A-7 (Apr. 21, 1988) (LEXIS, Labor library, Dlabrt file).

157. See *Senate Panel Concludes Hearings on Bill to Raise Minimum Wage*, Daily Lab. Rep. (BNA) No. 141, at A-12 (July 24, 1987) (LEXIS, Labor library, Dlabrt file). The Congressional Budget Office study results, predicting that a minimum wage increase may lead to inflation and the loss of up to 500,000 jobs, has raised the ire of several Congressmen who are now questioning possible partisan practices by the Congressional Budget Office. See Morehouse, *supra* note 155, at 1013; see also *CBO Draws More Fire on Minimum-Wage Report*, 46 CONG. Q. 1188 (Apr. 30, 1988).

158. Small businesses may substitute adult workers for part-time teenagers. The "[w]orkers displaced by the minimum wage legislation tend to seek employment in the uncovered sector," resulting in further depressed wages or unem-

Another controversial piece of legislation pending before Congress would entitle each employee to a certain number of weeks of unpaid leave in order to care for a new infant or a child or parent with a serious illness. The House measure, which would allow an employee up to ten weeks without pay every two years, would apply to businesses employing at least thirty-five employees.<sup>159</sup> A Senate compromise bill would allow ten weeks of leave, but is limited to the care of a child.<sup>160</sup> Within the stipulated time period, both measures mandate that an employee retain reinstatement rights and health coverage under the employer's plan.<sup>161</sup>

Small businesses have vociferously opposed the parental leave act because of the burdensome costs it would impose. These costs include new employee training,<sup>162</sup> losses in produc-

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ployment. EMPLOYEE BENEFIT RESEARCH INSTITUTE No. 75, *THE IMPACT OF GOVERNMENT REGULATION ON THE LABOR MARKET: A SURVEY OF RESEARCH FINDINGS* 1, 3 (1987). One commentator suggests that most of the workers who are paid the minimum wage are young people aged twenty-four and under from nonpoor families. Thus, the stereotypical image of a poverty stricken head of household whose income would be increased by a higher wage is not accurate. Samuelson, *The Myth of the Minimum Wage*, Washington Post, July 6, 1988, at F1, col. 4.

One economist has posited that an increase in the minimum wage is no different than a mandated nonwage benefit. He asserts that a ten percent increase in the minimum wage will result in a twelve percent decrease in non-monetary benefits, such as flexible hours, on-the-job training, Christmas parties and a slower productivity rate. The greatest loss, he predicts, will be the jobs which will be eliminated. *CATO Economist Argues Case Against Mandated Benefits*, Daily Lab. Rep. (BNA) No. 151, at A-3 (Aug. 5, 1988) (LEXIS, Labor library, Dlabrt file).

159. Family and Medical Leave Act of 1988, H.R. 925, 100th Cong., 2d Sess., §§ 102-103 (1988); see also H.R. REP. No. 511, 100th Cong., 2d Sess., pt. 1, at 2-4 (1988) (as reported by the Comm. on Post Office and Civil Service on Mar. 8, 1988, and by the Comm. on Education and Labor on Mar. 9, 1988).

160. Parental and Medical Leave Act of 1988, S. 2488, 100th Cong., 2d Sess., §§ 102-103 (1988) (as introduced June 8, 1988); see also S. REP. No. 447, 100th Cong., 2d Sess. 2-6 (1988). At least seventeen states have already enacted mandatory parental and maternity leaves. See EMPLOYEE BENEFIT RESEARCH INSTITUTE Vol. 8, No. 12, *PARENTAL LEAVE AND DEPENDENT CARE ISSUES IN CONGRESS* 1 (1987).

161. S. 2488, 100th Cong., 2d Sess. § 106; H.R. 925, 100th Cong., 2d Sess. § 106; S. 249, 100th Cong., 1st Sess. § 106 (1987).

162. *The Family and Medical Leave Act of 1987: Joint Hearings on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 100th Cong., 1st Sess. 86 (1987) [hereinafter *House Joint Hearings*] (testimony of Gene Boyer) ("The cost of training and orienting new employees is by far the greatest cost that the small business owner bears."); see also *id.* at 88 (testimony of Mary Del Brady, President, National Association of Women Business Owners). Training received by employees of small businesses helps to provide skilled workers to larger firms. *Id.* at 93 (statement of Mary Del Brady). It has been estimated that employers will

tivity,<sup>163</sup> overburdening of other employees<sup>164</sup> because small businesses are already minimally staffed,<sup>165</sup> skewed<sup>166</sup> or reduced compensation and layoffs.<sup>167</sup>

The House has finally acknowledged that small businesses would encounter unique difficulties in complying with the family leave law and agreed to a compromise that would eventually cover only the largest eight percent of all employers.<sup>168</sup>

Many states have also been active in the regulation of employment. Several states have gone beyond the requirements of federal law by mandating that employees be offered certain benefits such as health coverage and severance pay.<sup>169</sup> At least seventeen states require parental or maternity leave employment protections.<sup>170</sup> Other employment concerns that are increasingly being considered by state legislatures include minimum wages, lie detector testing, discrimination on the basis of disease and access to personnel files.<sup>171</sup>

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incur about an additional \$212 million in labor costs if the parental leave provisions are enacted. See *Report of General Accounting Office on Costs of Parental Leave Bill (H.R. 925)*, Daily Lab. Rep. (BNA) No. 217, at E-1 (Nov. 12, 1987) (LEXIS, Labor library, Dlabrt file).

163. *House Joint Hearings*, *supra* note 162, at 88 (statement of Mary Del Brady).

164. *Id.* at 123 (statement of Cynthia Grantz, representing, *inter alia*, National Federation of Independent Business).

165. *Id.* at 159 (statement of Marsha Burrridge, representing Independent Insurance Agents of America, Inc.).

166. *Id.* at 185 (statement of Phyllis Schlafly, President, Eagle Forum).

167. *Id.* at 175 (statement of Denise Fugo, representing National Small Business United) ("Small employers who often find it difficult to absorb or pass on significant increases in operating costs to their customers will be left with no option other than [to] offset any federally mandated increase in labor costs with a similar decrease achieved through wage reduction or freezes, reductions in fringe benefits, or layoffs."); *Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 85 (1987) (statement of David Blankenhorn, Director, Institute for American Values) (predicting reduction in work force as employees on leave not replaced); EMPLOYEE BENEFIT RESEARCH INSTITUTE, *supra* note 160, at 2 ("[M]andating leave will reduce an employer's flexibility in designing employee benefit packages to fit individual needs and will actually reduce the value of benefit packages for some employees by necessitating the exclusion or reduction of other benefits. Many firms, especially smaller ones, also expect their costs of doing business would be greater if parental leave were mandated.").

168. H.R. REP. No. 511, 100th Cong., 2d Sess., pt. 2, at 32 (1988) (over forty million employees would be covered).

169. For a discussion of Supreme Court cases upholding such state legislation, see *supra* notes 65-67.

170. See EMPLOYEE BENEFIT RESEARCH INSTITUTE, *supra* note 160, at 1.

171. See *Employment Rights Issues Lead 1987 Agendas of State Lawmakers*, Daily

## VI. CONCLUSION

The social obligations which each employer must shoulder, the method of enforcement of potential violations and the liability therefor are changing. Employment objectives having largely been achieved in the workplace of large employers through private means, these same objectives are now the focus of employment laws which target the small business. Laws such as the minimum wage increase and minimum health benefits and parental leave measures are explicitly directed at the small employer. Furthermore, since many large employers already offer such benefits, enforcement agencies will naturally focus on the small employer.

These very same pieces of legislation also reflect a trend towards placing the burden of social welfare on the private sector. Unable to raise additional revenue, the government is bettering the public welfare by improving the lifestyle of at least those persons who are employed.

At the same time, the courts have been instrumental in providing relief to employees. The scope of existing legislation, such as Title VII and the Rehabilitation Act, has encompassed new and different injuries to employees than originally envisioned by the Acts' drafters. Even more troublesome is the ability of a disgruntled employee to elect a jury trial and to seek damage awards far in excess of actual injuries. Federal race and age discrimination claims support jury trials as do the various state law tort claims which have evolved in recent years. The cost and delay of litigation, the uncertainty of outcome where there is a jury verdict and the uncontrollable nature of punitive damage awards make labor costs unestimable if not unaffordable. For the small employer, even if it can remain profitable while complying with the many pieces of proposed employment legislation, one lawsuit could very well put it out of business. As society places greater constraints on the small employer, the contributions of small employers through job creation and innovation and employment of the young, women, minorities and the aged will necessarily be diminished. As a matter of social and legal policy, it might well be remembered that all businesses, unlike their owners and employees, are not created equal. Nor are they equally able to bear the new and unexpected burdens created by the changed legal sys-

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Lab. Rep. (BNA) No. 67, at C-1 (Apr. 7, 1988) (LEXIS, Labor library, Dlabrt file).

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tem. A return to regulation by agencies with areas of expertise and to litigation which is designed to vindicate rights while still being sensitive to the needs of the small employer is acutely needed to assure the continued health of the most productive, job-generating sector of the economy.



