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Antidiscrimination Rights of Contingent Workers in the United States

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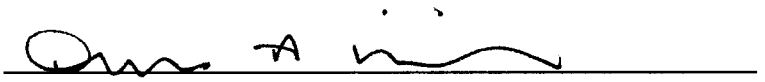

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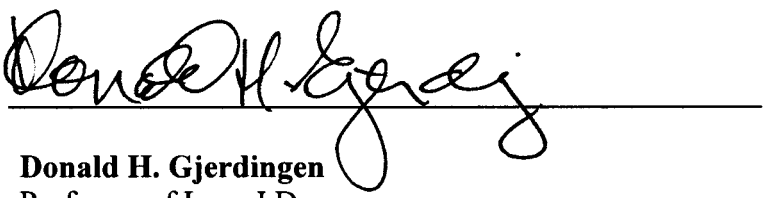

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To My Family

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ABSTRACT

HYUN JOO KANG

ANTIDISCRIMINATION RIGHTS OF CONTINGENT WORKERS

IN THE UNITED STATES

Title VII of the Civil Rights Act of 1964 prohibits an employer's discriminatory employment practices against an employee on the basis of race, color, religion, gender, or national origin. Most contingent workers in the United States are faced with discriminatory employment practices, such as low wages and low or no benefits, and they are disproportionately women and minorities. Title VII is the focal point, but Title VII has not functioned as a remedy for contingent workers. This dissertation examines why contingent workers suffer discrimination, despite Title VII, and suggests possible solutions.

In the United States, the distinctive interpretation of laws has not functioned as a remedy for contingent workers:

1. The Definition of "Employee" in Determining Who is Covered by Antidiscrimination Laws is too Narrow. The United States Excludes Independent Contractors as Defined Under the Right to Direct and Control Test. Some Independent Contractors can be Dependent, Suffer Discrimination just like Employees, and Have few Opportunities to offer work subject to discrimination by Contractors.

2. The Definition of "Employer" in Determining Whom is Covered by Antidiscrimination Laws is too Narrow. Temporary Employees Are Employees of the Temporary Agency, but Not the Primary Contractor for Whom They Work. The Primary Contractor is the One Who Has Economic Control of the Situation, Effectively Sets Wages and Benefits, and can Discriminate Against Contingent Workers.
3. The Definition of What constitutes "Discrimination" is too Narrow. The United States Does Not Accept Application of Disparate Impact Analysis, But Accepts Business Necessity Defense. The Employer's Pay Practices Have a Disparate Impact on Vulnerable Classes to Their Detriment, Even though there Is No Intent to Discriminate.

This study suggests that the U.S. needs to give antidiscrimination remedies to contingent workers through a change in the interpretation of the law and/or legislation:

1. Congress and/or courts must broaden the definition of covered "employee" to include contingent workers in the term "worker," and adopt the "economic realities test" to include some independent contractors as covered "worker."
2. Congress and/or the courts must apply the "single employer doctrine" more broadly to include both the primary contractor and the temporary agency as one employer under the antidiscrimination laws.
3. Congress and/or courts must apply the disparate impact theory more broadly (business necessity defense such as saving cost and market standard should not succeed), or pass legislation requiring proportional wages and benefits for "workers" in the same workplace.

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I. Introduction

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII")[1] prohibits an employer's discriminatory employment practices against an employee on the basis of race, color, religion, gender, or national origin. Most contingent workers in the United States are faced with discriminatory employment practices, such as low wages and low or no benefits, and they are disproportionately women and minorities.[2] Title VII is the focal point among antidiscrimination laws,[3] but Title VII has not functioned as a remedy for contingent workers.

There are three reasons. First the statutory definition of "employee," the claimant of Title VII, which determines who is covered by antidiscrimination laws, is too narrow. Second, the statutory definition of "employer," the respondent of Title VII, which determines who is covered by antidiscrimination laws, is too narrow. Third, the statutory definition of what constitutes "discrimination" is too narrow.

The United States needs to give antidiscrimination remedies for contingent workers through a change in the interpretation of the law and/or legislation. First, this study begins by examining who the contingent workers are and what their problems are. Next, this study covers how the United States antidiscrimination laws treat the contingent workers, and compares the law in other countries such as the United Kingdom (hereinafter "U.K."), Canada, South Korea (hereinafter

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[1] 42 U.S.C. §§ 2000e-2000e-17.

[2] *Infra* part II.

[3] The Age Discrimination in Employment Act of 1978 (hereinafter "ADEA"), Americans with Disabilities Act of 1990 (hereinafter "ADA"), and the Equal Pay Act of 1963 (hereinafter "EPA") are also included in antidiscrimination laws. 29 U.S.C. §§ 621-34; 42 U.S.C. §§ 12101-12213; 29 U.S.C.S. § 206(d). The ADEA and ADA prohibit age discrimination and disability discrimination, respectively. The EPA cannot protect contingent workers sufficiently, because contingent workers are unlikely to identify any higher paid full-time permanent male workers doing the same work.

"Korea"), Germany, France as well as the European Union (hereinafter "EU").[4] I then suggest possible solutions for the United States contingent workers. First, Congress and/or courts must broaden the definition of covered "employee" to include contingent workers in the term "worker," and adopt the "economic realities test" to include some independent contractors as covered "worker." Second, Congress and/or courts must apply the "single employer doctrine" more broadly to include both the primary contractor and the temporary agency as one employer under the antidiscrimination laws. Third, Congress and/or courts should apply the "disparate impact theory" more broadly. Here, I review whether or not the legislation requiring proportional wages and benefits for "workers" in the same workplace is the possible solution as well.

In the final part, I conclude and emphasize my argument that the United States is not recognizing the rights of contingent workers, even though companies are increasingly using contingent workers in place of traditional full-time permanent workers.[5] This writing is about employment stability as well as the rights of contingent workers in the labor market.[6]

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[4] These countries represent other countries which should be dealt with. On the whole, these countries have similar economic power to the United States, and these countries' antidiscrimination laws are comparable with those of the United States. Korea's economic power is somewhat different from the United States, but Korea's antidiscrimination laws and the interpretation of those are noteworthy, as discussed below.

[5] U.S. Department of Labor, U.S. Bureau of Labor Statistics, Contingent and Alternative Arrangements (annual statistical reports), *available at* http://www.bls.gov/cps/lfcharacteristics.htm#contingent.

[6] Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 887 (1995).

II. Contingent Workers in the United States

A. The Definition of Contingent Workers

Today, most private sector workers in the United States can be characterized as full-time permanent workers.[7] However, companies that want to choose flexible policies and cut back in costs have hired nontraditional model workers.[8] These workers are part-time employees, temporary employees, leased employees, contracted employees, and independent contractors, who can be categorized as "contingent workers."

The U.S. Department of Labor's U.S. Bureau of Labor Statistics (hereinafter "BLS") estimated that the contingent workforce comprised 4.9% of the general United States workforce in 2009.[9] This estimate is faced with criticism, because, from the definition of contingent workers, the BLS excludes part-time employees and direct-hire temporaries by the company. For example, the General Accounting Office (hereinafter "GAO") estimated that the portion of contingent workers was 29.9% of the United States workforce, based on the 1995, 1997, and 1999 Current Population Survey Supplements of the BLS.[10]

The comprehensive contingent workers concept was defined by Dr. Belous. According to Dr. Belous' definition, contingent workers include all the above categories of workers in a company with insignificant positions and weak affiliations with specific clients. "Weak affiliation" is

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[7] Clyde Summers, *Contingent Employment in the United States*, 18 Comp. Lab. L.J. 503, 503-504 (1997); Arne L. Kalleberg, *Part-Time Work and Workers in the United States, Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771 (1995).

[8] Mark Diana & Robin H. Rome, *Beyond Traditional Employment: The Contingent Workforce*, 196-APR N.J. LAW 8 (1999); Kenneth G. Dau-Schmidt, *supra* note 6, at 879.

[9] The BLS, *supra* note 5.

[10] GAO, Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce, at 14-15 (2000).

determined by various factors including, but not limited to, job security, the level of employee commitment to, and identification with, the firm, and the strength of the employer's incentive to invest in the human capital of particular workers.[11] Dr. Belous estimated that the percentage of contingent workers in the United States was between 25% and 30% in 1993.[12]

Part-time employees in the United States usually work for less than 35 hours a week.[13] They are employees hired directly by the company.

Temporary employees are defined as a short-term supplement to the firm's regular workforce.[14] They can be hired directly by the company. However, in the United States, a considerable portion of temporary employees work for the primary contractor, but they are usually hired, trained, and paid by a staffing firm.[15] The primary contractor pays the staffing firm that supplies temporary employees, and the staffing firm pays the temporary employees. The temporary employees are treated as the employees of the staffing firm, and not of the primary contractor.

Leased employees are initially selected by the primary contractor who intends to use the laborer, and they are leased to it.[16] They are employees of an employee leasing firm, but provide work for the primary contractor.[17] Leasing service firms are responsible for their wages and benefits.[18]

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[11] Richard S. Belous, *Symposium, The Rise of the Contingent Workforce: the Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 865 (1995).

[12] *Id.* at 867-68.

[13] The BLS, *supra* note 5.

[14] Summers, *supra* note 7, at 509.

[15] GAO, *supra* note 10, at 46.

[16] Summers, *supra* note 7, at 694.

[17] Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge for the Future*, 10 LAB. LAW. 143, 146 (1994); Belous, *supra* note 11, at 146.

[18] H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683 (1994).

Contracted or outsourced work occurs when the primary contractor uses another firm to perform a particular service.[19] Businesses may contract out essential functions of the enterprise or outsource nonessential functions such as cleaning and security services. The contracting employer that provides outsourcing services can assume full responsibility for managing a particular function for a company, including personnel and operations.[20]

Independent contractors are self-employed workers who are engaged by a company to work on a contractual basis.[21] Once contracted to a specific service, these individuals receive the money for completing the task by themselves and using their own methods. Jobs are paid for through a contract price and not through the general payroll of the company.[22] Independent contractors are different from employees because they do not commit to any employment relationship.

B. The Characteristics of Contingent Workers

The following description of contingent workers is mainly based on the GAO analysis (2000), because the GAO comprehensively analyzed contingent workers' characteristics, income, and benefits, by using the BLS survey. Even though the GAO analysis was in 2000, the BLS reports part-time employees' characteristics, income, and benefits annually, and the part-time

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[19] Hiatt & Rhinehart, *supra* note 17, at 146.

[20] Katherine G. Abraham, *Restructuring the Employment Relationship: The Growth of Market-Mediated Work Arrangements*, *in* NEW DEVELOPMENTS IN THE LABOR MARKET: TOWARD A NEW INSTITUTIONAL PARADIGM 86, 100; *see also* Francoise J. Carre, *Temporary Employment in the Eighties*, *in* NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE, at 6, 9.

[21] Diana & Rome, *supra* note 8, at 8, 9.

[22] Kathleen Baker & Kathleen Christensen, *Controversy and Challenges Raised by Contingent Work Arrangements*, *in* CONTINGENT WORK 4, 5 (1998).

employees' current situation is consistent with the GAO analysis in 2000.[23] 2007-2010 data come from the BLS. In the United States, leased workers usually receive the same wages as the regular employees of the company and qualify for fringe benefits.[24] Therefore, the focus of this paper is on the other categories of contingent workers.

The characteristics of contingent workers differ by category. First, most contracted employees and independent contractors are male, but most part-time employees and temporary employees are female[25] (*see* <Table 1>). In comparing the percentages of contingent workers by race, the largest difference between contingent workers and full-time workers is that the percentage of temporary employees who are black (21%) is higher than the percentage of full-time workers who are black (12%) (*see* <Table 2>). Part-time employees were more likely to be female. Temporary employees were more likely to be female, and black, or Hispanic or Latino.

<Table 1> Contingent workers by gender, 1999 (percentages)

Characteristics	Part-time	Temporary	Contracted	Independent Contractor	Full-time
Gender					
Men	29.9	42.2	70.5	66.2	56.1
Women	70.1	57.8	29.5	33.8	43.9

[23] A 2010 BLS survey about part-time employees is *available at* http://www.bls.gov/cps/cpswom2009.pdf, http://www.bls.gov/news.release/pdf/ebs2.pdf, http://www.bls.gov/news.release/pdf/empsit.pdf.

[24] Summers, *supra* note 7, at 515.

[25] GAO, *supra* note 10, at 46.

<Table 2> Contingent workers by race/origin, 1999 (percentages)

Characteristics	Part-time	Temporary	Contracted	Independent Contractor	Full-time
Race/origin					
White	78.5	61.0	73.6	84.8	72.9
Black	8.9	21.0	12.6	5.5	11.9
Hispanic	8.9	13.6	6.0	6.1	10.9
Other	3.7	4.5	7.9	3.6	4.3

Most part-time employees prefer the current work arrangement, due to personal reasons, such as childcare, study, or retirement from a full-time job,[26] but involuntary part-time employment for economic reasons, such as slack work, business conditions, or the inability to find full-time work, is increasing[27](*see* <Chart 1> and <Chart 2>). Most temporary employees involuntarily have to settle for temporary jobs[28] (*see* <Table 3>) Therefore, the focus of discrimination is on part-time employees and temporary employees. Most independent contractors prefer their current work arrangement (*see* <Table 3>). In case of contracted employees, there is no data on preference for a traditional work arrangement.

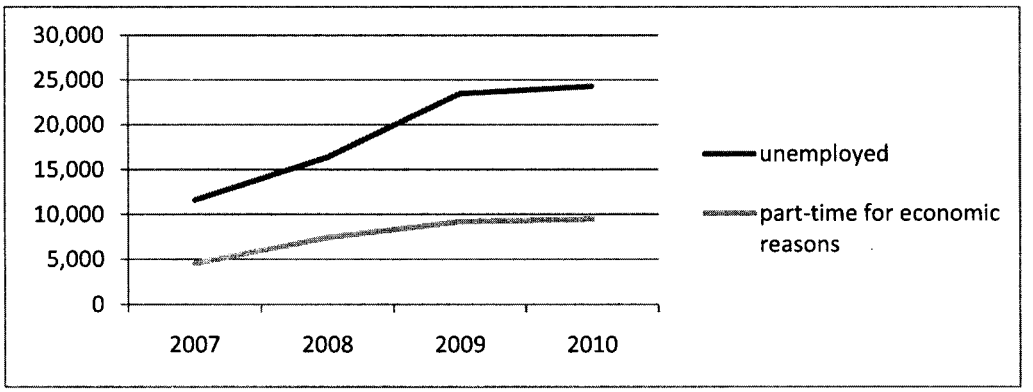
[26] The BLS, Current Population Survey, *available at* http://www.bls.gov/cps.

[27] *Id.*

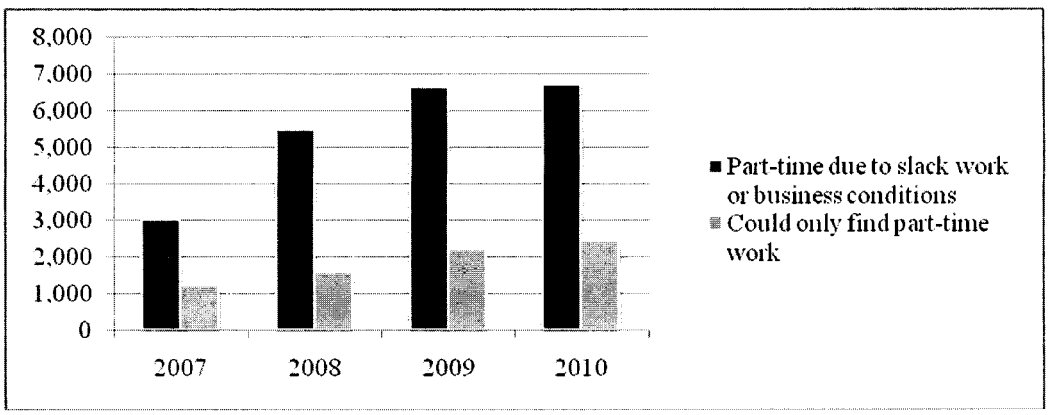
[28] *Id.*; GAO, *supra* note 10, at 12.

<Chart 1> Part-time employment for economic reasons and total unemployment, 2007-2010

(Numbers in thousands)



<Chart 2> Involuntary part-time employment, by reason, 2007-2010 (Numbers in thousands)



<Table 3> Work arrangement preference of employed workers with alternative work arrangement, 2005

(percentages)

Preference	Independent contractors	Temporary employee
Prefer traditional arrangement	9.1	56.2
Prefer indirect or alternative arrangement	82.3	32.1
It depends	5.2	6.5
Not available	3.4	5.2

C. What Are Contingent Workers' Problems?

1. Low Wages

Normally, part-time employees and temporary employees have wages lower than those of workers in the other categories of contingent workers. Particularly, temporary employees have the lowest annual family incomes compared to full-time employees (*see* <Table 4>).

<Table 4> Workers with annual family incomes below $15,000, 2000 (Numbers in thousands)

Category of worker	Number of workers with family incomes below $15,000	Percentage of workers in each category with family incomes below $15,000
Part-time	2,799,753	17.5
Temporary	338,503	29.8
Contracted	61,097	8.5
Independent	663,212	8.8
Full-time	6,477,268	7.7

2. Low or No Benefits

The problem of weak affiliation of contingent workers, particularly, the lack of attachment to a particular employer, mainly causes problems concerning the contingent workers' benefits. This is because contingent workers have difficulty in proving their eligibility for the receipt of

protection or benefits. For example, the Family and Medical Leave Act (hereinafter "FMLA"),[29] which permits eligible employee to take unpaid leave for their own serious health condition, as well as for a family member with a serious health condition, and upon the birth of adoption of a child, covers only those employees who have worked at least 1,250 hours for the same employer in the past year (more than twelve months).[30] The Employee Retirement Income Security Act (hereinafter "ERISA"[31]) does not compel an employer to allow participation in a pension plan until an employee works at least 1,000 hours in a twelve-month period[32] and does not cover employees who work an average of less than 20 hours per week.[33] To qualify for unemployment insurance, an employee must work a minimum number of days and earn a minimum amount of wages.[34] Most part-time and temporary employees are ineligible for certain employee benefits, because they lack sufficient work attachment to a particular employer. Overall, contingent workers are less likely than full-time workers to have employer-provided health insurance and pension benefits (*see* <Chart 3> and <Chart 4>).

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[29] 29 U.S.C. § 2601 (1996).

[30] 29 U.S.C. § 2611(2) (1996).

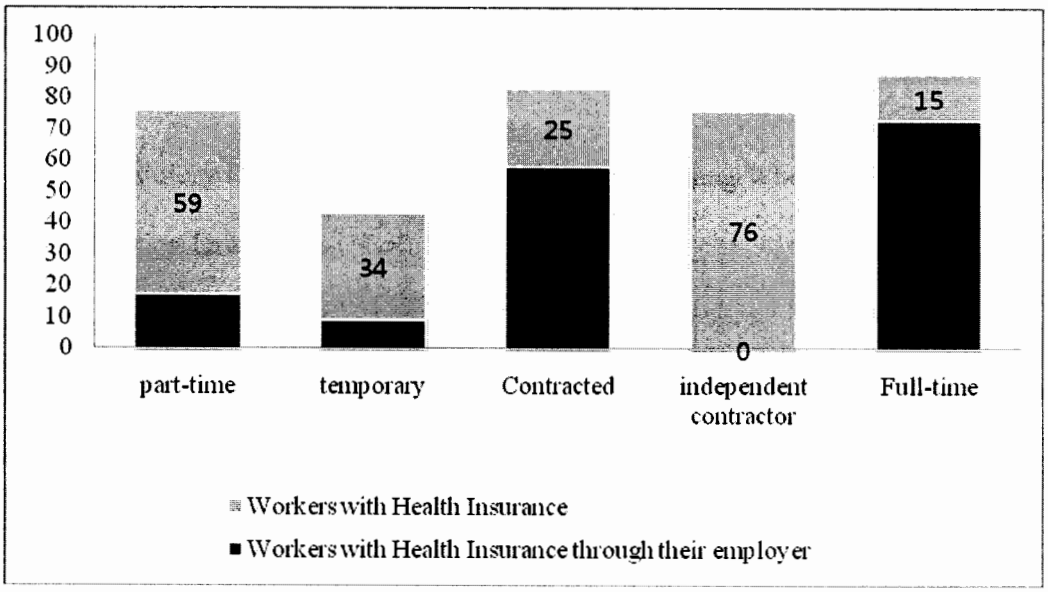
[31] 29 U.S.C. § 1001 (1996).

[32] 29 U.S.C. §§ 1052(a)(1), 1052(a)(3)(4) (2002). In addition, in order for an employer who has a private pension plan to obtain tax exemption for contributions and benefits extended to employees, it must be proportionate to earnings. Gwen Thayer Handelman, *On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment*, 52 WASH. & LEE L. REV. 815, 830-32 (1995).

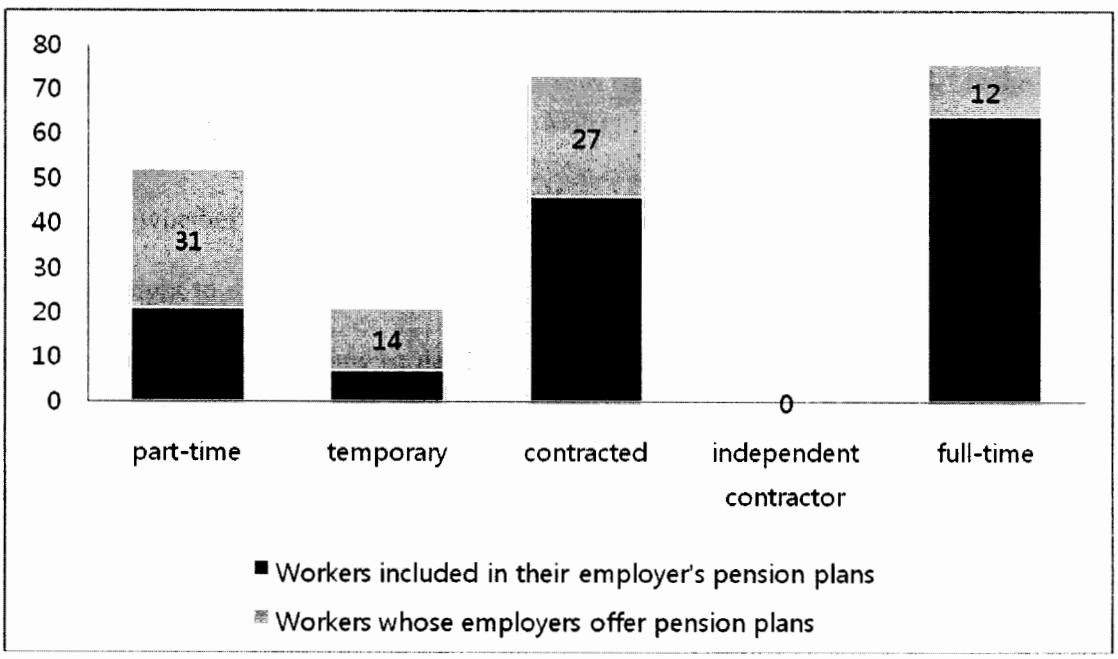
[33] 29 U.S.C. § 1052 (2002); Gregory L. Hammond, *Flexible Staffing Trends and Legal Issues in the Emerging Workplace*, 10 LAB. LAW. 161, 181-82 (1994).

[34] Chris Tilly, *Short Shift: The Causes and Consequences of Part-Time Employment, in* NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE (1992), at 89, 106.

<Chart 3> Workers with health insurance, 1999 (percentages)



<Chart 4> Workers with employer-provided benefits, 1999 (percentages)



III. The Treatment of Contingent Workers Under Antidiscrimination Laws in the United States, and Other Countries and the EU

A. The Statutory Definition of "Employee" in Determining Who Is Covered by the U.S. Antidiscrimination Laws Is Too Narrow

1. The U.S. Excludes Independent Contractors as Defined Under the "Right to Direct and Control" Test

Though Title VII uses the phrase "any individual" instead of a specific term like the "employee," the Supreme Court takes the stance that only an "employee" can file a lawsuit and only an "employee" can be the object of relief.[35] Therefore, independent contractors are not claimants under Title VII. Considering Title VII uses the phrase "any individual," is the Supreme Court's stance fair?

To decide whether or not an individual is an "employee" under Title VII, the Supreme Court has used the "right to direct and control" test. The right to direct and control test was developed originally under the common law to determine whether the employer exercised enough control over the employee to be held liable for torts under the doctrine of respondeat superior. The Supreme Court has summarized the right to direct and control test as follows: "the relation of

[35] "The concept of employee as a title should not be an issue that conforms to a label; rather the court judges the concept of employee." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992). Courts have ignored the written agreements signed by independent contractors. In the United States, there are cases alleging the unfair treatment of contingent workers who have to deal with the misclassification of employees. As an example, the Ninth Circuit held that Microsoft mistakenly classified thousands of contract workers, and, as a result, "employees" were unfairly denied benefits. In the end, the Supreme Court dismissed Microsoft's appeal. *Vizcaino v. Microsoft Corp.*, 92 F.3d 1187 (9th Cir. 1996). *Aff'd on reh'g*, 120 F.3d 1006 (9th Cir. 1997). *Cert. denied*, 118 S. Ct. 899 (1998).

master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done."[36]

The Equal Employment Opportunity Commission (hereinafter "EEOC") presented 16 factors in enforcement guidance, namely, the Application of the Equal Employment Opportunity Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing firms.[37] Whether the firm or the client has the right to control when, where, and how the worker performs the job is the most important factor. The remainder is just auxiliary to the basis that should be considered by the court in defining who is an employee. They are as follows:

(a) the firm or the client has the right to control when, where, and how the worker performs the job;

(b) the work does not require a high level of skill or expertise;

(c) the firm or the client, rather than the workers, furnishes the tools, materials, and equipment;

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[36] *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889). The concept of servants in common law was discussed in the United States courts to decide the liability of master in the tort law. Before 1826, the courts judged that any damage caused by a business to a third party should be solely settled at the liability of the master, whether or not the act was done by an independent contractor or employee. *Bush v. Steinman*, 1 Bos & P. 404, 126 Eng. Rep. R. 978 (C.P.1799); Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 497 (1935); Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 195 (1939); Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COL. L. REV. 1021 (1941). In 1826, the courts established the so-called principle of "respondent superior," in which the master is exempted from liability, provided that he or she is supplied regular labor by the suing independent contractor instead of the employee. *Laubher v. Pointer*, 5 B.&C. 547, 108 Eng.Rep. 207 (K.B.1826), Benjamin S. Asia, *Employment Relation: Common Law Concept and Legislative Definition*, 55 YALE L.J. 77 (1945). Thus, the so-called master-servant relationship should exist between doer and master to affirm the liability of the master. The concept of servants, in common law, is not applicable to the conceptual theory of employee, in other laws, because the United States courts take the position that the standard of judgment varies depending on the purpose of each law. However, the concept of servants in common law is still utilized in connection with Title VII, but only because there is no definition of employee in Title VII. The principle of common law as to whether the existence of the master-servant relationship can be recognized in connection with Title VII is arranged in the four sectors (Restatement (Second) of Agency §220 (1958), IRS Code 20 Factors Test, Darden Test, EEOC Guidance).

[37] Other "right to direct and control test" refer to <APPENDIX 1> <APPENDIX 2>, <APPENDIX 3>.

(d) the work is performed on the premises of the firm or the client;

(e) there is a continuing relationship between the worker and the firm or the client;

(f) the firm or the client has the right to assign additional projects to the worker;

(g) the firm or the client sets the hours of work and the duration of the job;

(h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;

(i) the worker has no role in hiring and paying assistants;

(j) the work performed by the worker is part of the regular business of the firm or the client;

(k) the firm or the client is itself in business;

(l) the worker is not engaged in his or her own distinct occupation or business;

(m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;

(n) the worker is considered an employee of the firm or the client for tax purposes;

(o) the firm or the client can discharge the worker; and

(p) the worker and the firm or client believe that they are creating an employer-employee relationship.[38]

The right to direct and control test is a rigorous stringent test, and thus leads to a judgment that the scope of independent contractors is broad. Is it fair that the Supreme Court uses the right to direct and control test for the definition of employee under Title VII, given that some

[38] The EEOC, Application of the Equal Employment Opportunity Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing firms, *available at* http://www.eeoc.gov/policy/docs/conting.html.

independent contractors can be dependent, suffer discrimination just like employees, and be denial offers of work due to the discriminatory practice of contractors?

The United States lower courts have used three tests to determine who is an employee: the right to direct and control test, the economic realities test, and the hybrid test. Three Circuit courts (the First, Second, and District of the Columbia Circuits) have not clarified the determining test yet, and the Third Circuit let their position be known that it does not matter what the test is in *Graves v. Lowery*.[39] However, the Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have used the right to direct and control test,[40] the Sixth and Ninth Circuits have used the economic realities test,[41] and the Fifth Circuit has used the hybrid test.[42] Because the United States uses several tests to determine the status of employee under various employment laws, it is difficult to determine the scope of non-employees, that is, independent contractors, to say nothing of the scope of employees. Is it fair that the United States uses several tests to determine the scope of employees? Or is it necessary to adopt a consistent standard to determine the scope of employees and nonemployees?

Because the hybrid test is the combination of the right to direct and control test and the economic realities test, and, since the right to control an employee's conduct is considered to be the most important element in this test, it is tantamount to a right to direct and control test. The economic realities test responds to the right to direct and control test, and can be regarded as a

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[39] *Graves v. Lowery,* 117 F.3d 723, 729 (3d Cir. 1997), remanded to *Graces v. Conty of Dauphon*, 98 F. Supp.2d 613 (M.D. Pa. 2000) (Quoting *Miller v. Advanced Studies, Inc.*, 635 F. Supp. 1196 (N.D. III. 1986).

[40] E.g., *Cilecek v. Inova Health System Services*, 115 F.3d 256, 259-260 (4th Cir. 1997), *cert. denied*, 522 U.S. 1049, 118 S. Ct. 694 (1998); *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 805 (7th Cir. 1999), *cert. denied*, 530 U.S. 1204, 120 S. Ct. 2197 (2000); *Schwieger v. Farm Bureau Ins. Co. of NE*, 207 F.3d 480, 484 (8th Cir. 2000); *Zinn v. McKune*, 143 F.3d 1353, 1357 (10th Cir. 1998); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir. 1982), *cert. denied*, 459 U.S. 874, 103 S. Ct. 163 (1982).

[41] E.g., *Lovas v. Huntington Nat'l Bank*, 2000 U.S. App. LEXIS 11840 (May 22, 2000); *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999), *cert. denied*, 528 U.S. 816, 120 S. Ct. 55 (1999).

[42] *Deal v. State Farm County Mut. Ins. Co. of Texas*, 5 F.3d 117, 118-119 (5th Cir. 1993).

standard of economic dependence rather than a standard of control.

In the economic realities test, the formal factors, such as the name on the agreement,[43] or expressed intent of the party,[44] are not important. For instance, in *Varnish v. Best Medium Publishing Co.*,[45] the court stated that if the paid labor cost complies with the ordinary route of the worker, then the fact that "independent contractors" is the name on the agreement, cannot exclude the labor supplier from legal protection. Further, in *Brennan v. Partida*,[46] the court stated that it did not care whether the contract parties intended to form an employment relationship or not. The court commented that it was wrong to note one factor, the intent of the party, before considering the overall situation of the labor provision relationship in deciding whether a certain labor supplier is an employee or independent contractor. Such a position is clearly expanded in *Real v. Driscoll Strawberry Associates, Inc.*,[47] which stated that it is the economic realities, instead of the name on the agreement, which decides the position of the employee to attain the specific purpose of the law.

The economic realities test used in Equal Employment Opportunity (hereinafter "EEO") cases[48] applies the standard of economic realities approaching the factor of direction and supervision instead of the factor of economic dependence, which is in the original meaning of the

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[43] *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Wirtz v. Silbertson*, 217 F. Supp 148 (D.C.E.D. 1963); *Tobon v. Cherry River Boom & Lumber Co.*, 102 F. Supp 763 (D.C.S.D. 1952); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968); *Usery v. Pilgram Equipment Co.*, 527 F.2d 1308 (5th Cir. 1976); *McComb v, McKay*, 164 F.2d 40 (8th Cir. 1947); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979).

[44] *Brennan v. Partida*, 492 F.2d 707 (5th Cir. 1974); *Usery v. Pilgram Equipment Co.*, 527 F.2d 1308 (5th Cir. 1976); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979).

[45] 405 F.2d 608 (2nd Cir. 1968), *cert den.* 394 U.S. 987 (1969).

[46] 492 F.2d 707 (5th Cir. 1974)

[47] 603 F.2d 748 (9th Cir. 1979).

[48] *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213 (6th Cir. 1992); *Knight v. United Farm Bureau Mutual Ins. Co.*, 950 F.2d 377 (7th Cir. 1991).

test. In *Goldberg v. Warren Bros. Roads Co.*,[49] the court held that what should be considered first in deciding the properties of employee is not the respective factors, which are individually independent, but the overall situation of the relationship, and, thus, the test in common law, namely, the right of direction and supervision over the method of supplying labor, is just one factor to be considered in the overall judgment.

However, in *Blankenship v. Western Union Telegraph Co.*,[50] the court held that the first thing to consider in deciding whether to supply labor as an employee or independent contractor is the right of direction and supervision over the method of supplying labor according to the purpose of the agreement. Since such a position is repeated in Title VII, control over the individual is emphasized.[51]

The factors of the economic realities test are as follows:

(a) the degree of control exerted by the alleged employer over the worker;

(b) the worker's opportunity for profit or loss;

(c) the worker's investment in the business;

(d) the permanence of the working relationship;

(e) the degree of skill required to perform the work; and

(f) the extent to which the work is an integral part of the alleged employer's business.[52]

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[49] 207 F. Supp. 99 (D.C.Me. 1962).

[50] 161 F.2d 168 (4th Cir. 1947).

[51] E.g., *Lilley*, 958 F.2d 746 at 750 (6th Cir. 1992); *Broussard*, 789 F.2d 1158 at 1160-61 (5th Cir. 1986).

[52] *Secretary of Labor, U.S. Dept. of Labor v. Lauritzen*, 835 F.2d 1529, 28 Wage & Hour Cas. (BNA) 654, 107 Lab. Cas.

Under the current United States economic realities test, are independent contractors claimants of Title VII?

Independent contractors are not covered under Title VII, although they may enjoy certain common law rights[53] (*see* <APPENDIX 4>). However, in Pennsylvania, female independent contractors enjoy the antidiscrimination right under the state workplace anti-discrimination law.[54] Is this exclusion from Title VII fair?

2. Other Countries

1) U.K.: Inclusion of "Workers" Gives Some Independent Contractors Protection

In the U.K., the courts have defined the concept of employee by applying the control test, integration test, economic reality test, and mutuality of obligation test. As the most traditional test, developed in the 19th century, the control test is still used. The economic reality test was adopted by the United States Supreme Court in *NLRB v. Hearst Publ'ns, Inc.* (1944),[55] and has been regularly cited by the U.K. courts since the end of the 1960s.

In 1995, a U.K. appellate court defined "employee" by applying a control test of who decides what to do (object), how to do it, the means of doing, and the time to do.[56] As skilled and professional employees broadly and autonomously decide when and how to provide their

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(CCH) 35003 (7th Cir. 1987).

[53] Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contract Workforce*, 116 YALE L.J. 170 (2006); Jason E. Pirruccello, *Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191 (2005).

[54] Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN §§951-963.

[55] *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

[56] *Lane v. Shire Roofing Co. (Oxford) Ltd.*, [1995] IRLR 493, 495 (Henry LJ).

labor, the U.K. courts have determined that the properties of employee cannot be clearly understood with this standard.

As alternative standards, the integration test and the mutuality of obligation test were presented. According to the integration test, a person is employed as part of a business and the work is done as an integral part of the business in the employment agreement. Although the labor contract agreement is done for the business, it is merely incidental to the business without being integrated into it.[57] Thus, according to the integration test, the human dependence of the employee on the employer is less emphasized, and the method by which the worker's labor is incorporated into the business of the employer is emphasized more. Although this standard is assessed to be the proper standard when managerial rights are exercised in a depersonalized way in a large company through a set of bureaucratic rules and order, it is pointed out that the properties of employee are not properly assessed if the boundary of organization is obscure, e.g., the subcontract or dispatched worker.

The mutuality of obligation test has been intensively used since the end of the 1970s. It focuses on the condition of individual employment. This standard judges the properties of employee on the basis of the existence of mutual obligation to provide work (in the case of the employee) and to approve the provided labor (in case of the employer).[58] The problem with this test lies in that the temporary employee is excluded from protection.

The economic reality test considers who has financial risk, and who has the opportunity to get profit by operating labor in a sound manner and the degree of such opportunity, if any.[59] Namely, if the relationship between the employer and the employee is an economically

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[57] Stevenson, *Jordan & Harrison v. MacDonald & Evans* [1052] 1 TLR 101 (Demming LJ).

[58] *O'Kelly v. Trusthouse Forte plc.* [1083] IRLR 369.

[59] *Lane v. Shire Roofing Co. (Oxford) Ltd.*, [1995] IRLR 493, 496 (Henry LJ).

dependent one, the employee is dependent on the employer who pays the salary for the use of his or her talent. In the U.K., the economic reality test tends to broadly interpret the concept of employee. It is used, depending on the character of the case, namely, in the relevant law.[60]

Although, in the U.K., there are various kinds of tests to judge the status of employee, institutionally, legislation to extend the eligibility for protection under the labor law for "workers", and not just for "employees," has increased steadily. With respect to antidiscrimination laws, "workers" can be eligible for protection under the laws banning sexual harassment, gender discrimination, racial discrimination, and disability discrimination.

The term "Worker" is not necessarily confined to those in "economic dependence," but is obviously a term that is interpreted more expansively than the concept "employees."[61] Workers can involve not only employees, but also normal independent contractors who promise to provide labor, individually, along with dependent self-employed workers.[62] The fundamental purpose of establishing exclusive categories of workers consists of expanding the eligibility of the labor protection law, that is to say, to protect those excluded from the interpretation of the concept of "employees."

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[60] Decision related to Safety and Health. *Ferguson v. John Dawson & Partmers (Contractors) Ltd.*, [1976] IRLR 376; *Lane v. Shire Roofing Co. (Oxford) Ltd.*, [1995] IRLR 493.

[61] *Bryne Brothers (Formwork) Ltd. v. Baird*, [2002] ICR 667, [2002] IRLR 96 (EAT); *Barlow and Another v. P.E. Jones Contractors Ltd.*, [2002] U.K.EAT 1086_00_0403; *Flynn v. Torith Ltd.*, [2002] EATS/0017/02; J.N.J. *Bricklaying Ltd. v. Wright* [2003] U.K.EAT 337_02_2005; *Riberts and another v. Redrow Hones (North West) Ltd.*, [2003] All ER (D) 258 (May); *Cavil v. Barratt Homes Ltd.*, [2003] All ER (D) 06 (Jul); *Firthglow Ltd. v. Descombers and Another*, [2004] All ER (D) 415 (Mar.).

[62] B. Burchell, S. Deakin & S. Honey, *The Employment Status of Individuals in Non-Standard Employment*, DTI, EMPLOYMENT RELATIONS RESEARCH SERIES NO. 6, 1999. 12.

2) Canada: Inclusion of Dependent Contractors and Emphasis of Factors for Independent Contractors in the Employee Test

During the 1970s, most of the Canadian jurisdictions adopted "dependent contractor" provisions and applied them to the concept of employees related to collective bargaining.[63] Currently, the Equal Pay Act and the antidiscrimination laws take the protective measure to include dependent contractors under their protection.

The concept of dependent contractor was introduced by Harry W. Arthurs,[64] and is the combination of the Swedish law introduced in Canada through Arthurs' paper and the United States Supreme Court decision in *Hearst Publications*.[65] Accordingly, the concept of employee is aimed at exploring economic reality, rather than the factor of control; this concept was embodied in the form of legislation.

Ontario's Labor Relations Act provides a useful definition of a covered "dependent contractor":

> ... a person whether or not employed under a contract of employment ... who performs work or service for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling

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[63] For example, Ontario Labour Relations Act, S. O. ch. 1, Sched. A., 80 (2002).

[64] Harry W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965).

[65] *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

the relationship of an employee than that of an independent contractor.[66]

In Canada, as one of the countries where common law is in force, the standard to determine the status of employee varies, basically depending on the purpose of the law. The Supreme Court of Canada considers diverse factors to decide whether an individual is an employee or independent contractor, without a decisive uniform standard for judgment. The properties of independent contractors, such as ownership of equipment, opportunity for profit or loss, are emphasized besides the control standard. It is similar to the economic realities test in the United States, but the courts of Canada further stress that the relative importance of each factor depends on the particular facts of each case.[67] Thus, the control factor can be excluded.

3) Korea: A Unique System for Contingent Workers, Such As Fixed-Term, Part-Time, and Temporary Agency Workers; and A De-emphasis of Control in the Employee Test.

Korea has antidiscrimination laws that prohibit employer discrimination on the basis of race, gender, nationality, or color. Further, Korea has introduced an employment discrimination remedies system for contingent workers and is installing a system whereby fixed-term, part-time, and temporary agency workers are covered. Therefore, an employer shall not treat fixed-term or part-time employees discriminately compared to the workers on a contract of indefinite term or full-time workers who perform a similar or the same kind of work in the same business or workplace (Article 8, Paragraph 1 and Paragraph 2 of the Fixed-term Act). Also, the sending

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[66] Ontario Labor Relations Act, S.O., ch. 1, sched. A., 80 (2002).

[67] 671122 *Ontario Limited v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983.

employer and the using employer shall not treat temporary agency employees discriminately compared to the workers on a contract of indefinite term or full-time workers who perform a similar or the same kind of work in the business or workplace of the using employer (Article 21, Paragraph 1 of the Temporary Agency Act).

The concept of fixed-term workers means those workers who sign a contract whereby the term of employment is fixed (Subparagraph 1 of Article 2 of the Fixed-term Act). The concept of part-time workers means workers whose work-hours are shorter than the specified work hours for ordinary workers who perform a similar or the same kind of work in the same business or workplace (Subparagraph 2 of Article 2 of the Fixed-term Act, and Subparagraph 8 of Article 2, Paragraph 1 of the Labor Standards Act). Dispatched workers mean those who are hired by a sending employer and those who are the subjects for dispatch work (Subparagraph 5 of Article 2 of the Temporary Agency Act).

On December 7, 2006, a new judicial precedent was set for the standard to be employed in determining employee status:

> whether the worker falls under the Labor Standard Act (hereinafter "LSA") should be determined on the basis of whether the worker actually provides labor to the employer in the business or workplace under a subordinate relationship for the purpose of being paid, irrespective of the form of agreement, whether the employment contract is in civil law or a subcontract agreement, and should also be determined by a general consideration of the following indices concerning the subordinate relationship.
>
> (a) whether the details of a job are decided by the employer;

(b) whether the employee is subject to the employment handbook or service (personnel) regulation;

(c) whether the employer directs and supervises the performance of the business;

(d) whether the employer designates the work hours and place, which are binding upon the worker;

(e) whether the labor supplier can independently manage the business account by possessing fixed or raw materials, or work tools, or by employing a third party to whom to entrust the job, and whether he bears the risk of creating profit or causing loss through the provision of labor;

(f) whether the wage is the consideration of labor itself and whether the basic or fixed salary is designated, and whether the withholding tax is imposed as work income tax;

(g) whether the individual continues to provide labor exclusively to the employer;

(h) whether the person is recognized as an employee by the other laws such as the social security system; and

(i) whether the economic and social conditions of both parties shall be generally considered.

However, whether the person is recognized as an employee with respect to the social security system may be arbitrarily decided by the employer for his own economic advantage. Thus, the properties of employee should not be negated, recklessly, only because such matters are not recognized. There is no continuity of providing labor and exclusiveness to the employer; for example, the employment relationship of lecturers is

limited to the term of the lecture. Thus, they are itinerary lecturers that are not exclusive to a specific employer. This is a general phenomenon for part-time college workers. Thus, it is not judged as index that negates the properties of employee. Further, there are situations covered by no rules, as is seen in the part-time workers' cases, and situations that can be arbitrarily fixed by the employer in a superior position.[68]

This decision is about an intellectual job (lecturer in an institute of matriculation). First, the determination of subordination to the power of the employer, namely, direction and supervision, is mitigated in its impact as the phrase "considerable direction and supervision" compared to the former expression, "specific and direct direction and supervision."[69] The lecturers are not specifically directed or supervised by colleges in the content or method of the lecture, merely because the property of the lecture is composed of intellectual activity. This does not mean that they are not employees. Thus, the judgment as to whether the employer specifically and directly supervises the performance of a job should be excluded. Second, the determinations as to whether the labor supplier can independently manage the business account by possessing fixed or raw materials or work tools or employing a third party to whom to entrust the job, and whether he bears the risk by creating profit and causing loss through the provision of labor were added.

[68] 2004Da29736 (2006.12.7).

[69] This position was repeated other cases in Korea. e.g., 2005Du8436 (2007.1.25) and 2005Du13018 (2007.3.29).

B. The Statutory Definition of "Employer" in Determining Who Is Covered by the U.S. Antidiscrimination Laws Is Too Narrow.

1. In the United States, Temporary Employees Are Employees of the Temporary Agency, But Not the Primary Contractor for Whom They Work.

Title VII stipulates that an "employer" is "a person engaged in an industry affecting commerce who [has] fifteen or more [employees] for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[70] The meaning of "have" is simple.[71] However, Title VII has developed the "joint employer doctrine."

The joint employer doctrine was first developed by the National Labor Relations Board (hereinafter "NLRB"),[72] and was later developed in cases under the Fair Labor Standard Act (hereinafter "FLSA")[73] and employment discrimination laws.[74] For example, in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*,[75] the joint employer doctrine by the NLRB recognizes that the business entities involved are separate but "share or codetermine the essential terms and conditions of employment." Further, the NLRB refined the "shared control test" by stating that there must be a showing that both employers "meaningfully affect matters relating to

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[70] 42 U.S.C. § 2000e(b) (1964).

[71] Webster's Dictionary.

[72] THE DEVELOPING LABOR LAW: THE NLRB, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1599 (Patrick Harding et al. eds., 3d ed. 1992); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Falk v. Brennan*, 414 U.S. 190 (1973).

[73] 29 U.S.C. §§201-06 (1994).

[74] 21 U.S. NLRB ANN. REP. 16 (1956).

[75] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

the employment relationships such as hiring, firing, discipline, supervision and direction."[76] However, the NLRB currently requires the consent of both employers. Because the joint employer doctrine of the NLRB is for the determination of a bargaining unit, and is such a complicated development, it is difficult to quote in employment discrimination cases (*see* <APPENDIX 5>).

The EEOC adopted a joint employer doctrine similar to that under the FLSA[77], in the Enforcement Guidance: Application of EEO laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms[78] (*see* <APPENDIX 7>). EEOC stipulates that employers must have "exercised substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment."[79] With respect to the substantial control factor, contingent workers generally have an employment relationship with staffing firms,[80] and staffing firms fall into the category of employers, because they hire, place, and pay the worker as well as withhold taxes, provide workers' compensation coverage, and have the right to discharge workers. The primary contractor is the employer only if working conditions are controlled either in whole or in part by it. The primary contractor is not the employer, because the primary contractor does not "schedule, direct, or supervise" the employee of staffing firm,

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[76] *TLI, Inc.*, 271 NLRB 798 at 798.

[77] The joint employer doctrine developed by the FLSA <APPENDIX 6>, is restricted to the purpose of minimum wage and overtime pay. Under the FLSA, the employers will be considered to be joint employers where: (1) "there is an arrangement between the employers to share the employee's service"; or (2) "one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee"; or (3) "the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." 29 C.F.R. § 791.2.

[78] *Available at* http://www.eeoc.gov/policy/docs/conting.html.

[79] *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 507 (E.D. Va. 1992).

[80] *Id.* at 500; *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984); *judgment aff'd*, 770 F.2d 157 (2d Cir. 1985).

even though the primary contractor is often a large powerful company.[81] Is the joint employer doctrine fair, because the primary contractor is the one who has economic control of the situation, effectively sets wages and benefits, and can discriminate against contingent workers?

Furthermore, the current joint employer doctrine of the EEOC is faced with the criticism that it collides with current antidiscrimination statutes.[82] Is there a need to establish new rules in applying the antidiscrimination laws?

2. Other Countries

1) U.K.: Establishing the Liability of Both Employers

In the U.K., the temporary agency worker has been protected under the antidiscrimination regimes since the 1970's, whereby a special obligation is imposed on the user employer. The Sex Discrimination Act describes this obligation:

> (1) This section applies to any work ... for a person ('the principal') which is available for doing by individuals ('contract workers') who are employed not by the principal himself but by another person, who supplies them under a contract made with the principal.

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[81] *Black v. Employee Solutions, Inc.*, 725 N.E.2d 138 (Ind. App. 2000) (case where the primary contractor only processed the payroll data supplied by the trucking company).

[82] Daniel P. O'Gorman, *Paying for the Sins of Their Clients: The EEOC's Position That Staffing Firms Can Be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 PENN ST. L. REV. 425 (2007).

(2) It is unlawful for the principal, in relation to work to which this section applies, to discriminate against a woman who is a contract worker

(a) In the terms on which he allows her to do that work, or

(b) By not allowing her to do it or continue to do it, or

(c) In the way he affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or

(d) By subjecting her to any other detriment.[83]

Contingent workers are explicitly protected from the client's discrimination, and, therefore, the conceptual controversy over the distribution of liability between the staffing firm and client is avoided. Under the U.K. legislation, the liability of both employers (dispatcher business proprietor and user business proprietor) is specified.

2) Korea: The Primary Contractor's Liability Under Antidiscrimination Laws

According to the Worker Dispatch Law, the user business proprietor shall be liable with the relevant dispatcher business proprietor, unless the dispatcher business proprietor pays the wages of the workers for reason attributable to the employer business proprietor, as specified by the presidential order. The reason attributable to the user business proprietor, as specified by the presidential order, refers to the case where the user business proprietor cancels the worker

[83] Sex Discrimination Act 1975, s. 9. Similar provisions are contained in the Race Relations Act 1976, s. 7; Disability Discrimination Act 1995, s. 12; Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg 8; Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), reg 8; and Employment Equality (Age) Regulations 2006 (SI 2006/1031), reg 9.

dispatch agreement without legal reason and does not pay the charge of the dispatched workers, as per the worker dispatch agreement, without legal reason.[84]

In addition, the system for the rectification of discrimination against contingent workers, discussed above in part III.A, prohibits discrimination of sending employers and using employers, and, therefore, both employers may receive an order for remedy. Regarding the concept of employer, sending employers and using employers are persons with an obligation to refrain from any discriminatory actions and they become the respondents for a remedy of discrimination according to the "individual scope of responsibility of the employers." In connection with the system for remedy of discrimination in Korea, the responsibility for the substantiation of evidence rests on the feasible reason for disadvantageous treatment. It stipulates on the transfer of responsibility for the substantiation of evidence to the employer (Article 9, Paragraph 4 of Fixed-Term Act), and rationality is applied proportionately to the period of employment. This is a very narrow concept which is applicable only to cases involving the principle of protection of part-time workers on the basis of proportion of time. It is sufficient if there exists objective discrimination between the type of employment of irregular workers and discriminatory treatment regardless of the existence of employer's subjective intent to discriminate, and if there is objective causation of such discrimination regarding the irregular worker.

3) Germany: The Primary Contractor's Obligation of Prohibiting Discrimination in the Worker Dispatch Law

The Worker Dispatch Law of Germany introduced the principle of equal treatment for

[84] Article 5 of enforcement ordinance in the Worker Dispatch Law.

dispatched workers to stimulate the worker dispatch business and to prevent the lowering of the position of dispatched workers. One reason for refusing the issuance of a permit or a renewal of a dispatched contract, stipulated in Article 3 Section 1 Item 3 of the Worker Dispatch Law, is where essential work conditions, including wages, applied differently to dispatched workers, and to workers of the user business proprietor engaged in similar work during the term of dispatch.[85] Article 9 Item 2 established the reason for which the labor contract between dispatcher business proprietors and dispatched workers is invalidated. It also prohibits (invalidates) the agreement that incorporates work conditions for the dispatched worker inferior to the essential work conditions, which include wages, applied to similar workers of the user business proprietor during the term of dispatch. When the labor contract between dispatcher business proprietors and dispatched workers is invalidated, the dispatched workers may request a dispatcher business proprietor to guarantee that they receive the same essential work conditions, including wages that are applied to similar workers in the business establishment of the user business proprietor (Article 10 Section 4).

Further, dispatched workers may request their employer business proprietor to provide information on the essential work conditions, including wages, applied to similar workers in its own business establishment (Article 13). The user business proprietor shall comply by providing the requested information in the written worker dispatch agreement (Article 12 Section 1 Phrase 3).

[85] However, this is not applied when the dispatcher business proprietor guarantees the net wage in the amount that the dispatched worker received as recent unemployment benefit for up to 6 weeks. When the relation of dispatched work already existed with the same dispatcher business proprietor, the latter phrase is not applied. It can be otherwise stipulated by collective bargaining. The employer and worker who are not subject to collective bargaining may agree to the application of rules in collective bargaining to the extent of such collective bargaining.

4) France: The Primary Contractor's Liability in the Real Sense

In the real sense, employers' liability occurs when a subcontractor is insolvent due to bankruptcy. In its clause, *Obligation and Joint Financial Liability of the Contractor*, the Labor Act of France stipulates:

"If the subcontractor specified in Article L 8232-1 is bankrupt, the contractor shall be responsible for the following matters in spite of all contrary provisions: 1. When work is performed or labor is provided in the business establishment of a dispatched business proprietor or its subsidiary building, the employer business proprietor shall substitute for the dispatched business proprietor in connection with the legal debt arising from the payment of wages and paid leave allowance, social insurance, industrial disaster, job disease, and family allowance for the workers of the dispatcher business proprietor. 2. For work performed in other business establishments instead of the contractor's or work performed by domestic workers, the employer business proprietor shall substitute for the dispatched business proprietor in connection with the payment of wages and paid leave allowance, allotment of family allowance, and allotment of double social insurance."[86]

[86] L. 8232-2.

C. The Statutory Definition of What Constitutes "Discrimination" Is Too Narrow

1. The United States Does Not Accept Application of Disparate Impact Analysis, but Accepts the Business Necessity Defense

Contingent workers are in a different wages and benefits structure from traditional employees. These policies seem facially neutral practices, but affect women and minorities who account for the majority of contingent workers. Courts have permitted part-time employees to use the disparate impact theory in cases before them.[87]

A disparate impact lawsuit is established in three stages. First, the plaintiff must establish the prima facie case by verifying that a certain practice of the employer has a disparate impact on employees on the basis of race, gender, or some other criterion prohibited by the law. Second, even though the plaintiff can establish the prima facie case, the defendant may avoid liability for disparate impact by presenting evidence that proves that the practice is job related and a business necessity.[88] However, even if the defendant makes this showing, the plaintiff can still win by proving that a less discriminatory alternative exists.

The plaintiff must prove that the challenged practice "select[s] applicants for hire or promotion in a . . . pattern significantly different from that of the pool of applicants" or that other

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[87] *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997); *Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440 (7th Cir. 1991); *O'Hara v. N. Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 887 (S.D. Ohio 1998); *Lovell v. BBNT Solutions, L.L.C.*, 295 F. Supp. 2d 611, 619 (E.D. Va. 2003). For a temporary employee case, *Payne v. Huntington Union Free Sch. Dist.*, 219 F. Supp. 2d 273, 281 (E.D.N.Y. 2002). However, in this case, the court held that the temporary employee must compare herself with other temporary employees.

[88] 42 U.S.C. § 2000e-2(k) (1964).

kinds of facially neutral policies likewise cause a significant disparate impact.[89] "Workplace-specific statistics" that show the specific effect of any challenged policy in the given workplace and demonstrate that there is a significant disparate impact are the strongest evidence.[90] The EEOC adopted the 80% rule to make a prima facie showing,[91] that is, the rate of persons who do not get benefits would need to be less than 80% of the rate of persons who do get benefits.

With respect to the "business necessity" defense, the federal courts are currently divided regarding how stringent this standard is. *Brandley v. Pizzaco of Nebraska, Inc.*[92] is a case where the employer must show true business necessity. The court clearly states that the mere profit for the employers' business is not sufficient enough to justify a policy that has a disparate impact. In this case, the court recognized that Domino Pizza's policy of prohibiting a beard has discriminatory impact on black men who are subject to pseudo folliculitus barbae, i.e., skin that cannot be shaven easily without irritation. The company claimed two business justifications for the action. First, more pizzas are sold if the employees are neat. Second, as a practical aspect, it is difficult and burdensome to measure the length of the beard and mustache of employees in 500 branches of Domino Pizza. In examining the justification in the light of the defendant's business, the court stated that the evidentiary burden of Domino Pizza Co. was heavy and the customers' preference was not sufficient to verify the compelling need to maintain the practice. Further, the 8th Circuit judged that the claim of reducing costs to meet the strict budget reduction, namely,

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[89] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

[90] *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1157 (7th Cir. 1997); *O'Hara v. N. Vernon Bd. of Educ.*, 16 F. Supp. 2d 868, 887 (S.D. Ohio 1998).

[91] 29 C.F.R. 1607D.

[92] *Brandley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993), *reh'g and suggestion for reh'g en banc denied* (Nov. 26, 1993).

the necessity of saving the cost, was not sufficient to meet the business necessity standard.[93]

However, in case of the contingent workers, courts in the United States usually accept the employers' business necessity defenses, such as market standard, and disparate impact is negated.[94] For example, courts allow an employer to rely on a market-based rate in setting wages[95] or do not permit disparate impact challenges to employer' overall pay structures.[96] Court hold that market prices of wages and fringe benefits policies are inherently job related or business necessity.[97] Is it fair?

The previous approaches including congressional action concentrate on the introduction of new law directly correcting discriminatory employment practices against contingent workers (*see* <APPENDIX 8>). Should the United States pass the legislation requiring proportional wages and benefits for contingent workers in the same workplace? Is this solution possible?

2. Other Countries and the EU

1) U.K.: Applying the Indirect Discrimination Provision for Part-time Workers.

Currently, the U.K. protects part-time workers according to the Part-Time Workers Prevention of Less Favourable Treatment Regulations of 2000, which was enacted for the implementation of the Council Directive 97/81EC Concerning the Framework Agreement on

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[93] *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

[94] *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1984).

[95] *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977); *Briggs v. City of Madison*, 563 F. Supp. 453, 447 (W.D. Wis. 1982).

[96] *Spaulding v. University of Wash.*, 740 F.2d 686, 705-08 (9th Cir. 1984); *American Fed'mn of States, County of Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985); *American Fed'mn of States, County & Mun. Employees v. County of Nassau*, 609 F. Supp. 695, 712 (E.D.N.Y. 1985).

[97] *Spaulding v. University of Wash.*, 740 F.2d 686, 705-08 (9th Cir. 1984).

Part-time Work Concluded by the European Social Partners.[98] However, before 2000, the U.K. protected part-time workers through the indirect discrimination provisions of the Equal Pay Act and Sex Discrimination Act of 1975, and, until now, these provisions, rather than the Part-Time Workers Prevention of Less Favourable Treatment Regulations of 2000, have worked well for part-time female workers in the U.K. Because this study advocates that the disparate impact theory should be applied to part-time workers, I will examine the U.K.'s indirect discrimination provision and its application.

The concept of disparate impact as developed in the United States was accepted in the U.K. after it was employed in the United States. Immediately after the *Griggs v. Duke Power Energy* decision[99] was issued, the U.K. enacted the Sex Discrimination Act which prevents discrimination based on gender and marital status. In the course of debate on the legislative bill, it was decided to include disparate impact or indirect discrimination.[100] In the Sex Discrimination Act, the concept espoused in *Griggs* was stipulated. Its contents were revised by accepting the EU Directive in 2001, thus, it corresponds to the position of the European Court of Justice (hereinafter "ECJ").[101]

Herein, proving the impact of inequality is the core issue. It is necessary to decide the proper tool for comparing the impact of a pertinent phrase, standard, or practice, then a decision must be made on whether or not there is a need for statistical evidence. Verification of the pool or impact of inequality is not a purely statistical process, because the court makes its decision

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[98] Directive of 15 December 1997, OJ L 14 of 20.01.1998.

[99] *Griggs*, 401 U.S. 424 (1971).

[100] W.B. Creighton, WORKING WOMEN AND THE LAW 157 (1979); Christopher McCrudden, *Institutional Discrimination*, 2 J. LEGAL STUD. 303, 357-58 (1982); David Pannick, *Indirect Discrimination Under the Sex Discrimination Act 1975*, 132 NEW L.J. 885 (1982).

[101] Paragraph 2(b), Article 1, Sex Discrimination Act.

normatively.

When the impact of inequality is proved an employer may win the case by justifying the pertinent phrase, standard, or practice. The standard for passing judgment on objective justification is comprehensively shown in *Hampson v. Department of Education & Science.*[102] First, such a standard shall be objective. Secondly, such a standard shall show a reasonable need of the enterprise. Thirdly, the reasonable need may be economic or administrative efficiency, but it is not limited to such cases; thus, the court frequently weighs the relative importance of the reasonable need and the discriminatory effect of the practice, which became the subject of the lawsuit.

However, unlike the case in the United States, the Sex Discrimination Act in the U.K. focused its attention on part-time workers. In short, in the U.K., part-time work was considered equivalent to female work. As a result, the indirect discrimination law was for settling disputes on the meaning of part-time work, and it played a role of origin, which emphasized the importance of female work and the woman's role with emphasis on the law's essence, value, and responsibility. Such debates were in the courts of the U.K. and the ECJ in the beginning of the 1980s, and the concept of indirect discrimination in connection with part-time work was developed. In the U.K., part-time workers can rectify discrimination in the area of the employment relationships such as pay, access to career advancement, access to vocational training, working conditions including conditions of dismissal, occupational pension schemes and statutory social security allowances.[103]

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[102] IRLR 69 (1989).

[103] Enrico Traversa, *Protection of Part-time Workers in the Case Law of the Court of Justice of the European Communities,* 19 INT'L J. OF COMP. LAB. L. & INDUS. REL 219 (2003).

2) EU: Part-Time Workers Protection from Pay and Pay-Related Benefits Discrimination

(1) General Standard Regarding the Employer's Defense in the Case of Contingent Workers

According to the Equal Treatment Directive of the EU which was revised in 2002, indirect discrimination occurs if the regulation, standard, practice, etc., which seem neutral outwardly, are particularly disadvantageous to one gender in comparison to the other gender and such discrimination cannot be justified on a ground other than gender (Paragraph 2, Article 2). Indirect discrimination in antidiscrimination laws related to race, sexual propensity, or religion is similarly defined as in the Equal Treatment Directive.[104]

In *Bilka-Kaufhaus GmbH,* which is a leading case in this area, ECJ ruled that the employer's defense based on economic reasons shall be "objective justification" unrelated to gender, that is, the measures taken must be "appropriate and necessary." In connection with the employer's defense of justification, the main points are as follows:

a. So-called general argument

Frequently, employers present general arguments that are not tested, but the court does not recognize the justification of such arguments. For example, such arguments are as follows: "Part-time workers are not devoted to their work," "We are not established for part-time workers," "We had the experience of employing part-time workers before but their work was poor," and "It costs more when part-time workers are employed." Such arguments can be justified only when

[104] Paragraph 2b, Article 2 of Racial Discrimination Directive; Paragraph b(i), Article 2 of Equal Treatment Directive

there is substantive evidence.[105]

For example, in the case where a continuous period of service by workers was treated as half of such a period of service, the ECJ ruled that the general argument that "those who are sharing jobs have less experience than full-time workers" cannot be justified.[106] The ECJ ruled that in the case of a doctor, receiving full-time training is demanded; in other words, the argument that working part-time is insufficient can be justified because it is possible to prove the insufficiency of experience or decline of efficiency.[107]

b. Previous discriminatory practice

Employer's actions that are applied without any consideration of personal circumstances can be discriminatory. For example, in *Stimpson v. Dewjoc Partnership*,[108] the employer asserted that the rejection of part-time workers, in view of having full-time workers doing the same work, can always be justified. However, the justification of the employer's argument was rejected by the court because it could not be accepted as just reason. The purpose of law is to protect against such discrimination and to avert previous practice that can be proved discriminatory.

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[105] *Lowe v. Peter Bainbridge Optometrist*, 5202334/99.
[106] *Hill and Stapleton v. the Revenue Commissioners*, [1998] IRLR 466.
[107] *Rinke v. Arztekammer Hamburg*, ECJ (9 September 2003).
[108] ET 61562/93.

c. When the employer does not observe his own policy

In *Taylor v. Secretary of State for Scotland*,[109] the House of Lords ruled that the employment equality policy, which is the result of bargaining with the labor union, constitutes part of the employment contract despite its promotional nature and the employer's admitted violation of the contract. In addition, in *Amos v. IPC Magazines*,[110] it was ruled that the refusal to recognize job sharing with the petitioner cannot be justified, because it constitutes a violation of the maternity policy of the petitioned himself.

d. When no alternative was considered

In *Smith v. Penlan Club*,[111] it was ruled that the requirement stipulating that the bartender shall work until six in the morning was unlawful, and, therefore, cannot be justified. It was pointed out that the petitioned did not consider the alternative for rationally accommodating the difficulty of the petitioner. In *Kaur v. David Lloyd Leisure Limited Nottingham*,[112] concerning the dismissal of a widowed mother because she could not work as a manager in the work shift, the court ruled such a dismissal falls under indirect discrimination, because the requirement of work was imposed as a measure for avoiding restructuring and dismissal, but the employer either did not consider job sharing or division of the work shift team or consulting with the petitioner's colleague.

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[109] [2000] IRLR 502.
[110] 2301499/00.
[111] 1602995/01.
[112] ET, 2600421/02.

e. Success of work during the term of employment

In *White v. Aqua-Gas (Valves & Fitting) Ltd.*,[113] the employer permitted the employee to work for eight months under the condition of working part-time after returning from maternity leave, and then work full-time again. It was ruled that need for full-time work could not be justified because the evidence as contended by the petitioned was scanty. According to relief of discrimination, the charge of unjust dismissal was approved.

The employer refusal can be justified when he can prove that the flexible work system, which was demanded by the worker, had never been practiced before and the employer can offer substantial evidence for its justification. In *Bryce v. R Glasgow & Associates Public Relations Ltd.*,[114] the petitioner demanded the employer to allow him to work part-time at similar work, but it was ruled that part-time work at a pertinent place of work causes difficulty uncontested by the petitioner, which arose from the employer's need for full-time work.

f. When opportunity for a trial is not provided

In *Dillon v. Rentokil Initial U.K. Ltd.*,[115] it was ruled that the employer's rejection of a workers' demand to work from 09:15 a.m. to 3 p.m. instead of 9 a.m. to 5 p.m. cannot be justified. If the employer were rational, he would operate such employment.

When this kind of work was requested by the employer and the worker rejected it from the

[113] No. 1201690/99.
[114] 2403613/0, 19.8.2002.
[115] Case no:2700899/01.

beginning, then, it may become a reason of justification by the employer. This is because justification of the refusal of the continuous maintenance of a new flexible work-time system in the course of a trial period of such a system will be difficult.[116]

g. Reason based on setting precedent

The argument that granting a certain request will set a problematic precedent is nothing but a hypothesis, and unless the employer can prove it, such reasoning may not be justified. For example, to prove justification of the contention that most workers are working part-time, and, thus, it would be difficult to fix a meeting time, and, in addition, that it may cause undue burden to full-time workers, there should be substantive evidence. In one case, it was ruled that permission for the petitioner to leave work ten minutes early every day to enable her to pick up her child from school would not function as precedent; therefore, that she was refused was not justified.[117] In another case, it was ruled that refusal to accept a worker's demand for lengthening his lunch hour by thirty minutes and allowing him to leave his place of work thirty minutes earlier was indirect discrimination.[118]

h. Reason of objection by other workers

The argument of other workers' objection cannot be justified in and of itself. When other workers' objections cause unreasonable burden their interrelationship may be recognized. For

[116] *Southall v. London Chamber of Commerce and Industry*, 2204702/00.
[117] *Scanlon v. G Plan Upholdstery Ltd.*, Case No.1401871/99.
[118] *Wright v. Rugby,* BC ET 23528/84.

example, in a case where the petitioner asked to leave work at 2:45 p.m., which was 15 minutes early to pick up her child from school, the employer refused and ordered her to work until 3. It was ruled that the reason offered by the employer that other workers will be dissatisfied with such a request is not a justifiable reason.[119]

i. When an argument was contrary to general practice in the industrial sector

If the worker can prove that a flexible working system was permitted in a similar type of job in the industrial sector, it may contribute to proving the possibility of compelling work hours according to a flexible work schedule. In *Kane v. Kerr-McGee Oil (U.K.),*[120] it was concluded that a requirement stipulating that technicians for oil refineries must work full-time was not just. The basis of such a finding was that three other oil refinery companies were using part-time female technicians and the petitioner's request for working three days a week could be accepted without any insurmountable problems.

j. Additional expenditure of cost

The ECJ can become the background for choosing social policies according to budgetary constraints by the EU member states. The ECJ concluded that the employer could not justify discrimination arising from the job-sharing system on the ground that avoidance of such

[119] *Rothwell v. Noble t/a DC's Chuckwagon and Pizza Pi*, ET 2902130/1999.
[120] PLC 2201015/98.

discrimination leads to an increase in cost.[121]

(2) The ECJ's Part-Time Worker Protection from Pay and Pay-Related Benefits Discrimination

The Court of Justice has corrected discrimination against part-time worker in the area of pay and pay-related benefits such as hourly rates, wages in the event of illness, severance grants, occupational (private) pensions and statutory social security allowances. Case laws in these areas show the Court's stance regarding the employer's business necessity defense.

In *Jenkins v. Kingsgate*,[122] Jenkins received an hourly rate of pay 10% lower than that of full-time male colleagues for the same work. The ECJ says that an indirect way of reducing the level of pay of part-time workers on the grounds that those groups of workers were composed predominantly of women is not justified. In *Rinner-Kühn v. FWW Spezial – Gebündereinigung*,[123] the case of the continued payment of wages in the event of illness, the ECJ held that a provision of German law, which excludes part-time workers from the continued payment of wages in the event of illness, is discriminatory against female (part-time) workers unless evidence is justified by objective factors unrelated to any discrimination on gender ground. The German government tried to justify the provision by observing that workers who work less than 10 hours a week were not as integrated into the company. However, the ECJ took a strong position that these considerations did not enable criteria to be identified which were both objective and unrelated to any discrimination on gender ground. In *Kowalska v. Freie und*

[121] *Hill and Stapleton v. The Revenue Commissioners,* [1998] IRLR 466.
[122] Case 96/80, [1981] ECR 911.
[123] Case 171/88, [1989] ECR 2743.

Hansestadt Hamburg,[124] the ECJ ruled the right of part-time workers to equal pay in Article 62 of the German Federal Civil Service Employee's Collective Agreement, which provided that only full-time employees were entitled to severance pay upon their retirement.

In *Hill and Stapleton v. Revenue Commissioner and the Department of Finance,*[125] Mrs. Hill and Mrs. Stapleton were placed on the full-time pay scale at a level lower than that of a full-time worker employed for the same period of time after job-sharing. Consequently, their hourly rate of pay was reduced, and they claimed a particular job-sharing scheme. The ECJ held that an employer could not justify discrimination arising from a job-sharing scheme solely on the grounds that avoidance of such discrimination would involve increased costs.

The well-known case of *Bilka-Kaufhaus v. Karin Weber von Hartz*[126] dealt with supplementary pension schemes of a group of department stores in Germany. That is, the retirement pension was available only to full-time employees who have works for at least 15 years. The ECJ admitted that the employer might justify the adoption of a pay policy excluding part-time workers on the economic grounds that it sought to employ as few part-time workers as possible. However, the ECJ submitted this possibility of claiming justification based on such economic grounds to the actual *probation diabolica* consisting of proving that the means chosen for achieving that objective and necessary to that end.

In *Vroege v. Instituut voor Volksuisvesting* and *Dietz v. Stichtingthuiszorg*,[127] they claimed the right to membership in their respective employer's pension fund. The ECJ held that the prohibition of discrimination on the ground of sex laid down in Article 119 covered not only

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[124] Case 33/89, [1990] ECR I 2591.

[125] Case C-243/95, [1998] ECR I-3759.

[126] Case 170/84, *Bilka-Kaufhaus v. Karin Weber von Hartz*, [1986] ECR 1607.

[127] Case C-57/96, *Vroege v. Instituut voor Volksuisvesting*, [1994] ECR I-4541, Case C-435/93, *Dietz v. Stichtingthuiszorg*, [1996] ECR I-5223.

entitlement to benefits but also the right to become a member of such a scheme.

In *Magorrian and Cunningham v. Department of Health and Social Services*,[128] regarding access to a special professional status that was reserved for full-time workers and grants of entitlement to additional benefits, the ECJ held that periods of service completed by part-time workers who had suffered indirect discrimination based on sex had to be taken into account for the purpose of calculating the additional benefits to which they were entitled.

By Directive 79/7/EEC on equal treatment for men and women in matters not governed by collective agreements or by individual employment contracts, part-time workers must receive statutory social security benefits such as compulsory old-age, sickness, unemployment insurance.[129]

3) Canada: Denial of Business Necessity

Despite the judicial decision in *Griggs* by the Supreme Court of the United States, the Supreme Court of Canada did not sanction acceptance of indirect discrimination for several years. The Human Rights Act of the Canadian federal government and the provinces of Canada have a legal form of listing reasons for such discrimination instead of defining discrimination similarly to Title VII of the United States.[130]

The first time the Supreme Court of Canada recognized the concept of indirect discrimination was in the case of *Bhinder & Canadian Human Rights Commission v. Canadian*

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[128] Case C-246/96, *Magorrian and Cunnigham v. Department of Health and Social Services*, [1997] ECR I-7173.

[129] Case C-317/93, *Nolte v. Landesversicherungsanstalt Hannover*, [1995] I-4625; Case C-444/93, *Megner and Scheffel v. Innungskrankenkasse Rheinland-Pfalz*, [1995] ECR I-4741.

[130] Human Rights, Citizenship and Multiculturalism Act, 1980, s.7(1) (Alta.); Human Rights Act, 1984, s.8(1) (B.C.); Human Rights Code, 1979, s.16(1) (Sask.).

National Railway Co. It was judged that the clause of prohibition of discrimination in the employment of the Human Rights Act of 1976 shall be applicable to disparate discrimination, by enlarging the scope of such application. In addition, in *Ontario Human Rights Commission & O'Mallay v. Simpson-Sears Ltd.*,[131] the Ontario Human Rights Code dealt with a judicial decision of similar tenor. The Canadian law also embraced the concept of indirect discrimination.

What was different from the United States was that those judicial decisions did not contain a defense on the relatedness of job assignment and business necessity. Therefore, the concept of indirect discrimination was broader in comparison to the United States Supreme Court' decision. Even when specific rules or a standard were adopted on the basis of "true reason for business," disparate impact discrimination was constituted.

[131] 2 S.C.R. 536 (1985).

4) Korea: Employer's Defense Is a Very Narrow Concept.

In Korea, according to the New System for Contingent Workers mentioned above, the employer cannot discriminate against contingent workers. Petitioners requesting a remedy for discrimination are fixed-term, part-time or temporary agency workers. They can gain relief from discrimination from both the sending employer and using employer. Depending on the scope of the employer's responsibility, prohibition of discrimination becomes the subject of the petition. The employer's defense is a very narrow concept, which is recognized only for cases of proportional application, depending on the period of employment and the principle of time-proportional protection of part-time workers. Specific reasons for justification have not been gathered because their implementation is in its fledgling stage.

IV. Possible Solutions

In part III, I discussed three points in which the United States is not recognizing antidiscrimination rights of contingent workers under Title VII. In this part, I suggest possible solutions and discuss relevant issues.

A. The U.S. Congress and/or Courts Must Broaden the Definition of Covered "Employee" to Include Contingent Workers in the Term of "Worker," and Adopt the "Economic Realities (Dependence) Test" to Include Some Independent Contractors as Covered "Worker."

In the United States, only an "employee" can file a Title VII lawsuit. The United States has excluded independent contractors, as defined under the right to direct and control test, from Title VII protection, even though they are not expressly excluded and the statutory language is broad enough to cover these workers. Many scholars have suggested that independent contractors or dependent contractors should be eligible for protection under the antidiscrimination laws.[132] Based on other countries' positions, I do not contend that all independent contractors should be claimants of Title VII, even though it is possible that Title VII can include independent contractors as covered "individual." We can imagine a statute where dependent contractors are protected by the antidiscrimination laws. In the United States, this proposal is complicated,

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[132] Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 266 (1997); Stephen F. Befort, *Revising the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMPLOY. & LAB. L. 153 (2003); Dau-Schmidt, *supra* note 4. Dau-Schmidt, *supra* note 6, at 884; Jonathan P. Hiatt, *Policy Issues Concerning the "Contingent Work Force,"* 52 WASH. & LEE L. REV. 739, 749-50 (1995); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 W. & MARY L. REV. 75, 112-14 (1984); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 652, 652 (2001).

because the Congress and/or courts have to add the dependent contractor concept in addition to the "individual" or "employee" concept. I assert that Congress and/or courts must broaden the definition of covered "employee" to include contingent workers in the term of "worker," and adopt the "economic realities test" to include some independent contractors as covered "worker."

Here, the factor of economic dependence originally stems from the United States. The U.K., influenced by the United States, has kept its prototype of the economic realities (dependence) test. In addition, Canada and Korea, which were also affected by the United States, make it possible to exclude the factor of control. For example, the Korean Supreme Court decided that the factor of whether or not a person is recognized as an employee with respect to the social security system may be arbitrarily decided by the employer by using his or her economic advantages. In the history of the control test in the United States, the factor of control was not regarded as single and ultimate standard, but was grasped as a secondary and an auxiliary factor. Sometimes, whether or not the employee was involved in another job or business while providing labor to the employer is regarded as a factor with independent and dominating importance.[133] Besides, courts have judged that the right of direction and supervision possessed by the employer over actual labor is not an indispensable factor when it is unnecessary or inefficient, at the least, or the technology of the employee makes it unnecessary.[134] Many courts have placed more significance on the point that employers can exert authority to terminate the employee arbitrarily, rather than

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[133] *Mullich v. Brocker*, 119 Mo. App. 338-339, 97 S.W. 551 (1905); *Maltz v. Jackoway-Katz Cap Co.*, 336 Mo. 1013, 82 S.W.2d 917 (1935); *Southern Cotton Oil Co. v. Wallace*, 23 Tex. Civ. App. 16, 54 S.W. 641 (1899).

[134] With respect to the situation where direction and supervision are unnecessary due to the difficulty of direction and supervision by employer, *Mullich v. Brocker*, 119 Mo. App. 322, 97 S.W. 549 (1905). The case where the technology of the labor supplier makes it unnecessary for the employer to possess the right of direction and supervision: *United States v. Butler*, 49 F.2d 52 (1931).

reinstatement.[135]

Through the criteria of supervision, other countries suggest that it has been the general practice to take the criteria of judging independent contractors into serious consideration (Canada, Korea) since it is hard to know if they are workers or not (U.K.). The obvious answer about the criteria of supervision and economic realities can be found by looking at Korea's interpretation of "changing." That is, the factor of control is considered the "general control," which is the perspective of some of the United States courts, and the factors to judge independent contractors are summarized as important rather than other factors. Regarding employee benefits and tax treatment shown in the Darden test and the EEOC's guidance, Korea's position is that they are determined by the employers arbitrarily, by utilizing their economically superior positions (obviously so in the discriminatory practices against contingent workers in the United States). Thus, whether or not employee benefits and tax treatment are recognized should not be used to deny the status of employee.

The anti-discrimination statutes should be considered to prescribe an extensive range of prevention against discrimination. *Griggs,* which employed the disparate impact theory, reveals the court reasoned thusly in interpreting Title VII. Congress intended to remove "artificial,

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[135] 14 RULING CASE LAW 72 said as follows: the fact that employers can have the rights to terminate the relations to provide labor, whenever they want to, is incompatible with the complete control independent contractors enjoy ordinarily in his work. Therefore, such employers' rights should be considered an important clue to the subordination of employees. Furthermore, perhaps, regardless of the final outcomes of the work itself, there is no more decisive single factor than the unlimited authority to terminate employment relations. Also, some courts have recognized this authority as more important than other elements. For examples, *L. B. Price Mercantile Co. v. Industrial Comm.*, 43 Ariz. 257, 30 P.2d 491 (1934); *Industrial Comm. v. Bonfils*, 78 Colo. 306, 241 Pac. 735 (1925) etc. Particularly, in *Bonfils*, courts concluded that courts could supervise specific tasks and mehods with regard to the authority (*Industrial Comm. v. Bonfils*, 78 Colo. 308, 241 P. 736 (1925)). Courts seemed to keep economic subordination of workers in mind, through this authority. In addition, *Seavey* points out that the rights of oversight were implemented through the subordination of employees, in most cases where there was no specific oversight on the part of employers in relations between employers and employees. Speculation as to 'Respondeat superiors,' HARVARD LEGAL ESSAYS (1934) 458, index 9)

arbitrary, and unnecessary" employment barriers.[136]

In Title VII, the category of "employee" is considered to be judged based on the factors of economic reality. In addition, the factor of economic dependence should be weighed rather than the factor of control. In the context of its inheritance, it should be verified, again, that the factors of economic reality are equivalent to those of economic dependence. To repeat a significant point, the U.K., being influenced by the United States, has kept its prototype, and Canada and Korea, which were also affected by the United States, utilize their own criteria to judge independent contractors and therefore exclude the factor of control.

[136] *Griggs v. Duke Power Co.*401 U.S. 424, at 431, 432 (1971).

B. The U.S. Congress and/or Courts Must Apply the Single Employer Doctrine (from the United States) More Broadly to Include Both the Primary Contractor and the Temporary Agency as One Employer.

The EEOC adopted the "joint employer doctrine" to determine who the employer is under Title VII, and the "control" factor, that is, "control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment,"[137] is the most important. The primary contractor is not the employer under Title VII, because the primary contractor does not control working conditions. Temporary employees are hired, trained, and paid by a staffing firm. Contracted employees are controlled by the contracting employer who assumes full responsibility for personnel and operations. Independent contractors are not employees because they work using their own methods on a contractual basis.

Title VII simply stipulates that an "employer" is "a person . . . who has fifteen or more" employees.[138] If Congress and/or courts broaden the definition of covered "employee" in the term "worker," "employer" becomes a person "who has . . . workers." Even though the primary contractor does not control the working conditions, he or she is the one who has economic control of the situation, who effectively sets wages and benefits, and who might discriminate against contingent workers, while the meaning of "have" is clear.

I assert that Congress and/or courts should apply the "single employer doctrine" more broadly to include both the primary contractor and the temporary agency as one employer, under the antidiscrimination laws. The U.K., Korea, and Germany set liability rules for the primary

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[137] *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 507 (E.D. Va. 1992).
[138] 42 U.S.C. § 2000e(b) (1964).

employer under the antidiscrimination laws. Furthermore, France places liability on the primary contractor when a subcontractor is insolvent due to bankruptcy.

The single employer doctrine was adopted by the EEOC with respect to the small firm exemption. The EEOC states, "even if an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an integrated enterprise that, overall, meets the requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. If a charge is filed against one of the entities, relief can be obtained from any of the entities that form part of the integrated enterprise."[139]

The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:

(1) The degree of interrelation between the operations

i. Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses

ii. Sharing of payroll and insurance programs

iii. Sharing of services of managers and personnel

iv. Sharing use of office space, equipment, and storage

v. Operating the entities as a single unit

[139] http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii-(a).

(2) The degree to which the entities share common management

i. Whether the same individuals manage or supervise the different entities

ii. Whether the entities have common officers and boards of directors

(3) Centralized control of labor relations

i. Whether there is a centralized source of authority for development of personnel policy

ii. Whether one entity maintains personnel records and screens and tests applicants for employment

iii. Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common

iv. Whether the same persons make the employment decisions for both entities

(4) The degree of common ownership or financial control over the entities

i. Whether the same person or persons own or control the different entities

ii. Whether the same persons serve as officers and/or directors of the different entities

iii. Whether one company owns the majority or all of the shares of the other company[140]

"The purpose of these factors is to establish the degree of control exercised by one entity over the operation of another entity. All of the factors should be considered in assessing whether separate entities constitute an integrated enterprise, but it is not necessary that all factors be

[140] http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-i.

present, nor is the presence of any single factor dispositive. The primary focus should be on centralized control of labor relations. It should be noted that while this issue often arises where there is a parent-subsidiary relationship, a parent-subsidiary relationship is not required for two companies to be considered an integrated enterprise."[141]

Under the joint employer doctrine, the meaning of "have" is "control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment,"[142] and under the single employer doctrine, the meaning of "have" is "control exercised by one entity over the operation of another entity, particularly centralized control of labor relations."[143] The difference between the joint employer doctrine and the single employer doctrine is the "degree" of control. Although the EEOC applies the single employer doctrine only with respect to the small firm exemption, there is no reason that this should be so. The single employer doctrine should be applied more broadly. Based on the same reasoning as discussed in the definition of employee, the control factor should become less important or disregarded, and the factor of economic dependence should become more important. Here, the EEOC narrows the meaning of "have" to control over "employment or labor relations," but, I cannot find any dictionary in which "have" is defined in relation to "employment or labor relations."

Further, I contend that the scope of applying Title VII should be expanded. The current Title VII is applied to the employer who has "more than fifteen" employees. Such a scope of application is frequently based on administrative or management reasons. Korea expanded the application of the Labor Standard Act (hereinafter "LSA") to a workplace where there are "one or more" employees, and the scope of application of antidiscrimination statutes is based on that

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[141] http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-i.
[142] *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 507 (E.D. Va. 1992).
[143] http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-i.

of the LSA.

In part IV. C, I will discuss the ability of workers to sue the employer, based on the disparate impact theory. If the employer is defined as a person who has "one or more" workers, one can imagine the case in which there is no comparable worker to whom to compare the contingent worker. In the United States, if a workplace has only a single contingent worker, it would probably be impossible to make a disparate impact claim, because contingent workers would need to show that an employer was treating some of its workers less well than others, but there would not be a sufficient population to show a statistical disparity.

The "Guideline on the Dispatched Worker" of the EU may be a reference. Article 5 of this guideline stipulates the principle of equal treatment concerning basic working conditions: The basic working conditions of temporary agency workers shall be, for the duration of their assignment, at least those that "would apply if they had been recruited directly" by that undertaking to occupy the same job.

French legislation may also be a reference. In France, the salary received by dispatched workers must not be less than the "percevrait" salary for workers employed directly b the user proprietors who work at the same job with the same occupational qualifications after work hours (Article L. 1251-18 and L.1251-43). The "percevrait" is a legal expression that does not mean the actual payment for regular work from a particular user business proprietor, but means the salary that can be paid to regular workers.

Article 3 Section 2 of "Law on the Part-time and Temporary Worker" (TzBfG) of Germany stipulates: Unless there is a worker for whom a comparable term is fixed in the business, the decision shall be made on the basis of applicable collective bargaining. The object for comparison shall be the workers for whom comparable term is not usually fixed in the industry.

If former full-time workers work as part-time workers in the U.K., their former treatment is compared to full-time workers and current treatment to part-time workers.

According to Agreement No. 175 of the International Labor Organization (hereinafter "ILO"), "comparable full-time workers" means those who have an employment relationship in the same or similar job and are employed in the same business establishment. Unless there are comparable full-time workers in the same business establishment, comparable full-time workers are found in the same business. Unless there are comparable full-time workers in the relevant business, comparable full-time workers are those who are employed in the same industry.

According to Article 3 of the Agreement (91/81/CE) of European Labor and Management, "part-time workers" means those who have an employment relationship in the same or similar business establishment, but they are defined by the overall situation, such as term of service and job qualification/capability. Unless there are comparable full-time workers in the business establishment, part-time workers are defined by comparing their work hours stipulated in the collective bargaining. Unless there is collective bargaining, part-time workers are defined by comparing their work hours stipulated in the law. Workers doing different duties or activities in different scopes are not compared to each other (EU, EuGH v. 11.5. 1999-Rs. C-309/97). If part-time workers and full-time workers perform the main job together and full-time workers additionally perform subsidiary work, this will constitute the same or similar job (Decision of Supreme Court, U.K. 2006. 3.1).

C. The U.S. Congress and/or Courts Must Apply the Disparate Impact Theory More Broadly, or Pass Legislation Requiring Proportional Wages and Benefits for "Workers" in the Same Workplace

The disparate impact theory of the United States is the prototype for other countries. However, the current United States disparate impact theory does not give much protection to contingent workers.

First, the plaintiff must show disparate impact to establish a prima facie case, mainly through statistics.[144] This is not an easy task. In *Ilhardt*, because Ilhardt could not sufficiently establish that an employment practice had a disparate impact on women, the court dismissed the lawsuit. If we consider the EU standard, or the manner in which the United States Congress and/or courts apply the single employer doctrine, the requirements that contingent workers must meet to show disparate impact should be reconsidered. The EU stipulates that indirect discrimination is established if the challenged practices have the effect that the contingent workers "would be put at a particular disadvantage."[145]

Second, this study is concerned with the employer's business necessity defense. In the case of contingent workers, the United States courts accept the market price of wages and an employer's discretionary fringe benefit policy for saving costs as job-relatedness or business necessity. With respect to this point, the EU particularly takes the position that an indirect way of reducing the level of pay of part-time workers is not justified. In addition, in the EU, the reason that avoidance of discrimination would involve increased costs and the reason employers sought

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[144] However, *see Waisome v. Port Authrity of New York and New Jersey*, 948 F.2d 1370, 1376 (1991).

[145] For example, Race Directive a2(2)(b), Framework Directive a2(2)(b).

to employ as few part-time workers as possible are not justified. Korea accepts business necessity only in the case of time-proportional protection of part-time workers, and Canada does not have standards, such as business necessity - even when a specific regulation or standard is adopted for true business necessity, indirect discrimination is recognized.

The U.S. courts accept employees' "workplace-specific" statistics as the strongest evidence for their claims, but the U.S. courts accept the employer's "non-workplace-specific" defenses, such as market standard. The U.S. courts have to choose a consistent standard for both sides, which would be the "workplace" or "business-specific" standard. In other words, the employer's pay policy should correspond to his or her "true business necessity needs."

Third, I advocate that the United States must recognize that the objectives of discrimination are "wages and benefits." The ECJ adopts this attitude, as I mentioned in part III.C. Article 5 of EU Directive 2008/104/CE enacted on Nov. 9, 2008 defined the equal treatment principle concerning basic working conditions of contingent workers, and Article 3 defined basic working conditions as legal, administrative directive, collective agreement or other general and binding regulations which are applied within a workplace of the primary contractor, e.g., stipulated hours of work, overtime work, leave, rest, nighttime work, holidays and wages. Furthermore, Article 2 of the Directive guaranteed contingent workers the right of access, which is equal to that of the regular workers of the primary contractor, to common facilities (mess-hall and nursery facility and allowance for commutation) within a workplace.

Korea prohibits discrimination in wages and other working conditions. "Wages" means all the money and valuables in the form of salary or whatever the employer calls the pay for workers as a compensation for work (Subparagraph 5 of Article 2 of the LSA). Other working conditions are work hours, holidays, leave, safety and public health, and worker's compensation, which

arise from the employment relationship and collective agreement, regulation for employment, or labor contract regulated under the LSA. In Korea, due to the peculiarity of the separation of the employment relationship, it is stipulated that the sending employer and the using employer shall not discriminate against contingent workers as to working conditions in comparison with those workers directly hired by them. Conditions other than wages (e.g., family allowance paid on the basis of the status of hired workers) shall not be considered as working conditions.

Finally, in the United States, some commentators have called for more direct governmental intervention to reduce the pay and benefits gap, and congressional action has been taken (*see* <APPENDIX 8>). In 1987, Representative Patricia Schroeder introduced bills that would require employers to provide proportional health and pension benefits to certain part-time and temporary workers.[146] In 1999, Representative Lane Evans introduced legislation calling for employers to provide contingent workers with equal pay for equal work and the same benefits as regular employees after a qualifying period of work attachment.[147] However, these actions have failed until now. More recently, in 2008, a minority of republicans denied women equal pay rights to overcome pay discrimination.[148] Considering the U.K. and EU position, these laws can play an important role in protecting antidiscrimination rights of contingent workers.

The United States has increased the number of laws that protect the working conditions of workers. The most familiar example is Title VII. However, to introduce another law is complicated, as it is for most employment laws. For example, in the law requiring proportional

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[146] E.g., H.R. 2188, 103rd Cong. (1993); *see* also Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy,* 52 WASH. & LEE L. REV. 731, 736-37 (1995) (summarizing the proposed Part-time and Temporary Workers Protection Act).

[147] H.R. 2298, 106th Cong. (1999); *See* also Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CA. L. REV. 570 (2001) (summarizing the proposed Equity for Temporary Worker Act of 1999).

[148] http://blog.aflcio.org/2008/04/23/republican-minority-denies-women-equal-pay-rights/.

wages and benefits, it is not simple to determine who is responsible for the benefits. Is the primary contractor responsible? The primary contractor becomes the employer under the single employer doctrine. In Germany, there was a case holding that the primary contractor is responsible for wages, based on his or her supplementary duty.[149]

[149] BAG vom 9. 4. 1957, AP Nr. 2 zu § 611 BGB Mittelbares Arbeitsverhältnis.

V. Conclusion

In the United States, Title VII has played an important role in removing employers' discriminatory practices. Contingent workers in the United States suffer discrimination, such as pay inequity and limited access to benefits, and these practices inordinately affect women and minorities. The current Title VII and its interpretation are not sufficient to correct these practices. The United States needs both legislative and interpretative logic. Contingent workers are claimants, and their primary contractors are respondents under Title VII; pay inequity and limited access to benefits constitute discrimination. Title VII should be expanded to the employer who has one or more workers, and the legal structure should be changed to more readily find a comparable worker.

Korea has added a unique system for contingent workers in addition to having antidiscrimination laws similar to those of the United States. This system protects male contingent workers as well as female. The U.K. House of Lords recently confirmed male part-time firefighters' occupational pension entitlement rights.[150] This decision was possible because of the U.K.'s Part-Time Workers Prevention of Less Favourable Treatment Regulations 2000. Currently, contracted employees and independent contractors in the United States are not covered by Title VII and they are disproportionately male, but they prefer the current nontraditional arrangements, as examined in part II. If they feel discrimination and their jobs are involuntary, both the Korean and the U.K. systems could also be considered in the United States. However, although the United States would introduce those systems, the value of the disparate impact theory would be maintained, in the light of the U.K.'s experience.

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[150] *Mattews and Others v. Kent and Medway Towns Fire Authority and Others*, [2006] U.K.HL 8, HL.

Antidiscrimination laws originated in the United States. Currently, other countries have recognized contingent workers' antidiscrimination rights. My suggestions frequently came from the United States. I expect the United States to reform Title VII.

APPENDIX

1. Right to Direct and Control Test: Restatement (Second) of Agency, §220 (1958)

This restatement is the classic formulation in the right to direct and control test. Although the so-called factor of control is not decisive, it is still the most important factor. The opinion of the courts varies in the issue whether actual work performance should be understood as the right to direct and supervise or merely, that the master exercises the general direction and supervision over the worker is sufficient.

(a) A servant is a person employed to perform services in the affairs of another and, who with respect to the physical conduct in the performance of the services, is subject to the other's control or right to control.

(b) In determining whether one acting for another is a servant or an independent contractor, the following facts are considered:

ⓐ the extent of control, which, by the agreement, the master may exercise over the details of the work;

ⓑ whether or not the one employed is engaged in a distinct occupation or business;

ⓒ the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

ⓓ the skill required in the particular occupation;

ⓔ whether the employer or the workman supplies the instrumentalities, tolls, and the place of work for the person doing the work;

ⓕ the length of time for which the person is employed;

ⓖ the method of payment, whether by time or job;

ⓗ whether or not the work is a part of the regular business of the employer;

ⓘ whether or not the parties believe they are creating the relationship of master and servant; and

ⓙ whether the principal is or is not in business

2. Right to Direct and Control Test: IRS Code 20 Factors Test[151]

This test can also be called the control test. To decide whether there is sufficient control in establishing an employer-employee relationship, this test abstracts 20 factors from the common law.

(a) Instructions. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.

(b) Training. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.

(c) Integration. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends, to an appreciable degree, upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

(d) Services rendered personally. If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in

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[151] ALI-ABA 1063, 1066-1069 (2001); 1987-1 C.B. 296 (June 8, 1987).

the methods used to accomplish the work as well as in the results.

(e) Hiring, Supervising, and Paying Assistants. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.

(f) Continuing Relationship. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.

(g) Set Hours of Work. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.

(h) Full Time required. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and therefore restrict the worker from doing other gainful work. But the independent contractor is free to work when and for whom he or she chooses.

(i) Doing Work on Employer's Premises. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this factor alone does not mean

that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

(j) Order or Sequence Set. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work, but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

(k) Oral or Written Reports. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

(l) Payment by Hour, Week, Month. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.

(m) Payment of Business and/or Traveling Expenses. If the person or persons for

whom the services are performed ordinarily pays the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.

(n) Furnishing of Tools and Materials. The factor that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

(o) Significant Investment. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. But the lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. Special scrutiny is required with respect to certain types of facilities such as home offices.

(p) Realization of Profit or Loss. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees, and, thus, does not constitute a

sufficient economic risk to support treatment as an independent contractor.

(q) Working for More Than One Firm at a Time. If a worker performs more than *de minimis* services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

(r) Making Service Available to General Public. The factor that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.

(s) Right to Discharge. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, however, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

(t) Right to Terminate. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes, without incurring liability, that factor indicates an employer-employee relationship.

3. Right to Direct and Control Test: Darden Test[152]

This refers to the 13 factors presented in *Nationwide Mutual Insurance Co. v. Darden.* Although this case is the application of the Employee Retirement Income Security Act of 1974, it is the most frequently quoted test as the standard in common law. According to the Darden Test, the Supreme Court judges that "if the right of control their work rests with the staffing firm or its client, and that all aspects of a worker's relationship with an employer determine where the right to exercise control over the work lies," the worker is the employee.

The 13 factors are as follows and the court judges on the basis of all the circumstances surrounding the relationship between the parties:

(a) right to control the manner and means by which the product is accomplished,

(b) the skill required,

(c) the source of the instrumentalities and tools,

(d) the location of the work,

(e) the duration of the relationship,

(f) right to assign addition projects to the hired party,

(g) the method of payment,

(h) hired party's role in hiring and paying assistants,

(i) part of regular business,

(j) the hiring party is in business,

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[152] *Nationwide Mutual Insurance Co. v. Darden,* 503 U.S. 318, 323 (1992).

(k) provision of employee benefits, and,

(l) tax treatment.

4. Independent Contractors' Common Law Rights in the United States

When regulating the relationship between independent contractors and employers as a 'contractual relationship,' any discriminatory damages resulting from the contractual relationship (at-will contract) should be subject to remedial measures prescribed under statutory and common law. This distinction shows similar results with the statutory distinction in the relationship between employees and employers.

1) No Racial Discrimination in Contracting: Section 1981

When dealing with racial discrimination issues, the independent contractor must adopt Section 1981 of the Civil Rights Acts of 1866 (as amended in 1991) under the Contractual relationship as an alternative to the Title VII paradigm.[153] Congress has accepted this position by stating "the Civil Rights Act of 1991 allows a cause of action for racial discrimination in the formation, performance, modification, and termination of contracts."[154] Section 1981 claims do not require a filing with the EEOC, unlike Title VII claims.[155]

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[153] *See* 42 U.S.C. §1981 (2000). Tarantolo, *supra* note 53, at 170 (2006); Pirruccello, *supra* note 53, at 191 (2005).

[154] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §1981). *See* Evan William Glover, *Commentary, Legitimacy of Independent Contractor Suits for Hostile Work Environment Under Section 1981*, 52 ALA. L. REV. 1301, 1303 (2001).

[155] Glover, *supra* note 154, at 1308.

2) Discriminatory Decision-making as Tortious Interference with the Employment Contract

Independent contractors could assert tortious interference based on improper motives if the discrimination is not per se based on race, but only if the damages are the result of discrimination based on sex, religion, national origin, or color. In *Comey v. Hill*, where the Massachusetts Supreme Court held that a salesman was an independent contractor and thus not an employee for the purpose of the Massachusetts antidiscrimination statute,[156] the Court affirmed the lower court's finding that the practice of age discrimination by the defendant company was a tortious interference with the salesman's contract.

In reality, although many states have acknowledged that employment relationships are, in essence, a form of a legal contract subject to the employment-at-will doctrine, they have nonetheless recognized the tortious interference with the existing contractual relationship.[157] In *Haddle v. Garrison*, the Court characterized interference with at-will employment relationships as "merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relation[ship]." The plaintiff employee must view these interferences as (1) the difficulties faced by a laborer with his or her new employer B after receiving an unfavorable recommendation from the former employer A and (2) the laborer sues a supervisor or coworker in his or her individual capacity for interference with the employment contract.[158] Here, the plaintiff must demonstrate that the supervisor acted as a

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[156] *Comey v. Hill*, 438 N.E.2d 811, 814 (Mass. 1982).

[157] *See generally* ABA SECTION OF LABOR AND EMPLOYMENT LAW, TORTIOUS INTERFERENCE IN THE EMPLOYMENT CONTEXT: A STATE BY STATE SURVEY (Brent M. Malsberger et al. eds., 2004) (covering state case law on tortious interference with the employment relationship).

[158] John Alan Doran, *It Takes Three to Tango: Arizona's Intentional Interference with Contract Tort and Individual Supervisor*

third-person in the employment relationship (acting outside the scope of his employment as an interferer between the employee and the principal employer[159]) and that the said actions were improperly motivated.[160]

Regarding the improper motive, a few jurisdictions have held that it will, on the part of supervisors, make them liable even if they otherwise act within the authority granted to them by the principal employer.[161] Other jurisdictions undertake a supervisor-ranking analysis that exempts some of the highest level supervisors from individual liability, but holds others as separate from the corporate entity.[162] Finally, some jurisdictions have taken the approach to the plaintiff-friendly extreme, holding the employer vicariously liable for the tortious interference of the improperly motivated supervisor, despite that the employer is a party to the contract that has been interfered with.[163]

Regarding the supervisor's conduct, the court interpreted that it must be "malicious and without justifiable cause"[164] or "independently tortious or unlawful."[165] Discrimination on the

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Liability in the Employment Setting, 35 ARIZ. ST. L.J. 477, 477-78 (2003)..

[159] *McGanty v. Staudenraus*, 901 P.2d 841, at 847 (1995) (holding that "when an employee is acting within the scope of the employee's employment, and the employer, as a result, breaches a contract with another party, that employee is not a third party for the tort of intentional interference with economic relations").

[160] *See George A. Fuller Co. v. Chi. Coll. of Osteopathic Med.*, 719 F.2d 1326, 1332-33 (7th Cir. 1983) (analyzing the necessary elements of malice and third-party status in a tortious interference case); *McGanty,* 901 P.2d 841, 846-47 (1995) (holding that since the plaintiff employee admitted that the supervisor had been acting within his scope of employment at all times, the plaintiff had no claim for intentional interference with economic relations); Doran, *supra* note 112, at 491-95 (discussing the third party interference element of the tort in several jurisdictions).

[161] E.g., *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 76 (1st Cir. 2001) ("Massachusetts treats proof of actual malice as a proxy for proof that a supervisor was not acting on the employer's behalf.").

[162] Doran, *supra* note 158, at 497-98 (discussing cases that base liability on supervisor rank and privilege).

[163] Frank J. Cavico, *Tortious Interference with Contract in the At-Will Employment Context*, 79 U. DET. MERCY L. REV. 503, 524-26 (2002) (discussing the lack of logic behind holding employers vicariously liable for acts of tortious interference by employees).

[164] *Haddle v. Garrison*, 525 U.S. 121, 126 (1998) (quoting 2 Cooley, *supra* note 108, at 589).

basis of race, color, religion, sex, or national origin, if proven, would necessarily be considered an improper motivation since such discrimination is independently unlawful.[166] In addition, given the muddled nature of the interference doctrine, any claim for interference against a supervisor has a legitimate chance to succeed where a claim for illegal discrimination against the principal survives summary judgment.[167]

3) Remedies in tort for non-statutorily protected workplace harassment

Although independent contractors are strictly limited to the penumbras of §1981 for "racial" harassment,[168] regarding discriminatory harassment of contractors based on sex, religion, national origin, or color, they can gain redress under the common law for non-statutorily protected harassment when the aforementioned control does not exist.

The Supreme Court concluded that sexual harassment by supervisors are not per se limited within the legal boundaries of the employment relationship, but these series of behaviors have personal motivations and cannot be applied for the benefit of the employer.[169] Harassment of

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[165] *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 713 (Tex. 1998).

[166] *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70 at 77 (1st Cir. 2001) ("[T]he elements underlying a claim for unlawful discrimination may be used to demonstrate malice in the context of a tortious interference claim." (citing *Comey v. Hill*, 438 N.E.2d 811, 817 (Mass. 1982)).

[167] Long, Alex B., Tortious Interference with Business Relations: "The Other White Meat" of Employment Law, 84 MINN. L. REV. 863, 867 (2000) ("Indeed, the vagaries of interference law work in conjunction with some of the more opaque areas of employment law to make the claim a particularly effective weapon in the plaintiff's arsenal.").

[168] *Manatt v. Bank of Am.*, 339 F.3d 792, 797 (9th Cir. 2003) ("[T]hose legal principles guiding a court in a Title VII dispute apply with equal force in a §1981 action."); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1008 (11th Cir. 1997) (citing cases).

[169] *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 756-57 (1998) (noting that "a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer," and that "[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer").

independent contractors, if proven, should also easily satisfy the essential element of the tort of interference--improper motivation. Sexual harassment is generally considered improper motivation in the employment context.[170] The company could not rely on business necessity as a justification for such actions, and, depending on the nature of the actor's conduct, such activity might also be considered independently tortious.[171]

If the harassment suffered is egregious enough, the contractor must prove that the supervisor acted within the scope of his or her employment.[172] If the contractor fails to convince the court as such, the contractor will have to prove ratification or authorization on the part of the principal.

4) Good faith and fair dealing: Interpreting independent contractor agreements to contain implied nondiscrimination terms

Independent contractors could seek contractual remedy by asserting discriminatory breaches of contract, which constitute bad faith, on the basis of the contractor's sex, religion, national

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[170] *Zimmerman*, 262 F.3d 70, 77 (1st Cir. 2001) (holding that discrimination can satisfy the element of malice (improper motive) in a tortious interference claim); *Nelson v. Fleet Nat'l Bank*, 949 F. Supp. 254, 260-61 (D. Del. 1996) (dismissing Title VII claims against an individual supervisor for sexual harassment but holding that the complaint stated a claim for tortious interference based on the Restatement factors); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1043 (Ariz. 1985) (adopting the Restatement's formulation of the tort of interference and remanding the case in order to determine whether a supervisor's discharge of an employee some time after she refused to participate in a "Moon River" skit, which required participants to expose themselves at an outside function, was intentional and improperly motivated).

[171] *Nelson*, 949 F. Supp. At 261 (implying that, if proven, sexual harassment by a supervisor would have been motivated by reasons other than business concerns; instead, the motivation in such a case would have stemmed from "gender hatred").

[172] E.g., *Agarwal v. Johnson*, 603 P.2d 58, 68 (Cal. 1979) (reiterating that "an employer is liable for willful and malicious torts of his employee committed in the scope of employment"). Note that the standard requiring conduct to be within the scope of employment in these cases is the exact opposite of the standard in interference causes of action.

origin, or color.[173] Several commentators have argued for the prohibition of racial and other discriminations in contractual relationships through the doctrine of good faith and fair dealing.[174] They argue that this protection is necessary in part due to the procedural difficulties in Title VII actions. It follows that common law recognition of an antidiscrimination norm in all contracts "has the potential to bolster the fight against discrimination in this society by supplementing shortcomings that have developed in statutory protections."[175] More broadly, it has been argued that by interpreting contracts to contain implied no-breach-for-discrimination clauses, state courts can enhance the United States' moral development by driving home the message that discrimination "is just plain wrong," which eventually leads parties to voluntarily conform their behavior to the antidiscrimination norm.[176] Finally, since Congress has declined to bring unprotected individuals under the federal civil rights umbrella, these commentators argue, state courts can promote real equality in business relationships by not extending the perpetrator-victim ideology to commercial contracts.[177]

When an independent contractor enters into a contractual relationship, he should be able to rest assured that he will not be released prematurely from that contract on the basis of

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[173] RESTATEMENT (SECOND) OF CONTRACTS §205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). The commentary goes on to list examples of bad faith, such as "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Id.*

[174] E.g., Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 222 (1994) ("Contract law's embrace of an antidiscrimination requirement would be perfectly compatible with its natural, orderly evolution in this century.").

[175] Williams, *supra* note 174, at 226.

[176] *Id.*

[177] Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785, 810 (2003) (suggesting the implementation of the concepts of good faith and fair dealing and of fiduciary duty to promote equality and end the perpetrator ideology).

discriminatory factors. He should also be protected, through the duty of good faith, from sexual, religious, or other discriminatory harassment that interferes with his ability to perform the contract on the customer's site. If courts choose to allow a contractor to sue for bad-faith breach of a contract based on discriminatory animus, the contractor's remedies must be limited to contractual damages rather than tortious ones.[178] That is, the contractor should only collect compensation for his expectation damages--the level of compensation expected had the contract not been arbitrarily breached.[179]

In *Monge v. Beebe Rubber Co.*,[180] a female plaintiff brought suit for the company's breach of the covenant of good faith in her at-will employment contract.[181] The court held that the plaintiff presented sufficient evidence to prove that she was fired, at least in part, for her refusal to "go out" with her supervisor.[182] As a result, the subsequent breach of the employment contract was made in bad faith and the plaintiff was essentially awarded back pay.[183]

Monge is particularly illustrative in the independent contracting context for two reasons. First, no remedy for sexual harassment existed under Title VII at the time of its decision. Therefore, as would be the case in the independent contracting setting, the state court was left to analyze the case under common contract law. Second, not only did the court uphold the plaintiff's

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[178] Sandra Chutorian, *Note, Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 406 (1986) (arguing for a broad definition of the duty of good faith as set out in the Restatement (Second) of Contracts, but that a breach should sound in contract, not in tort).

[179] *See* BLACK'S LAW DICTIONARY 417 (8th ed. 2004).

[180] 316 A.2d 549 (N.H.1974).

[181] *Id.* at 550.

[182] *Id.*

[183] *See id.* at 552 (holding that awards for mental suffering were not recoverable in contract actions, so the jury's award to the plaintiff for lost pay could be recovered but the award for mental suffering could not).

claim for a bad-faith breach based on discriminatory behavior, it also awarded strictly contractual damages for the breach.[184]

There is little doubt that allowing independent contractors' contractual bad-faith causes of action for discrimination will increase the courts' workload.[185] But, limiting independent contractors to contractual remedies (rather than tortious ones) for discriminatory bad faith breaches and disallowing such claims against defendants, other than employers, would give contractors an appropriately limited remedy for otherwise unprotected, discriminatory breaches of contract.

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[184] *Id.*

[185] Williams, *supra* note 174, at 225.

5.The Joint Employer Doctrine Under the NLRA

In *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*,[186] the "joint employer" concept recognizes that the business entities involved are . . . separate but that they "share or codetermine" the essential terms and conditions of employment. Further, the NLRB refined the shared control test by stating that there must be a showing that both employers "meaningfully affect matters relating to the employment relationship[s] such as hiring, firing, discipline, supervision and direction."[187]

(1) Original Doctrine

When considering the recognition of temporary help agencies in the 1940s, the notion of corporate users and corporate suppliers is not an unfamiliar concept. Traditionally, indirect corporate employers were referred to as corporate suppliers and corporations receiving workers from different agencies as corporate users. Both corporate users and corporate suppliers were generally viewed as joint employers responsible for the management and supervision of temporarily employed workers.

In reality, the NLRB, in guaranteeing absolute autonomy for the workers in exercising their legally protected rights, determines whether the corporate scope satisfies the goal of the bargaining unit, the occupational unit, the factory unit, or a departmental unit of a factory in an individual case approach. However, since the creation of NLRA, the NLBR has applied the

[186] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc*, 691 F.2d 1117, 1123 (3d Cir. 1982).

[187] *TLI, Inc.*, 271 NLRB at 798.

common interest test (standard) in determining whether indirect employment falls under the penumbra of the bargaining unit of the corporate users.

From the 1940s to the 1960s, there was virtually no discussion on how the NLRB should interpret the NLRA's regulation of the issue of common users. At the same time, the only cases attracting the attention of the NLRB, on the issue of common users, were cases where the NLRB had to decide whether corporate users (bargaining unit) could include workers who were jointly employed with other users. The NLRB, when deciding on these issues, focused solely on whether the workers employed jointly by the corporate users and those employed solely by them shared a community of interest. Under the Community of Interest Test, the NLRB found that the optimum unit of users where single corporate user types, regardless if certain portions of the workers were employed by other users. This test always focused on whether the two types of employees shared a community of interest.

(2) Establishment and Application of the *Greenhoot* Doctrine

a. *Greenhoot* decision

In 1973, the NLRB decided *Greenhoot, Inc.* ("*Greenhoot*"),[188] which introduced a new rule for a new situation. Greenhoot was a property management company in the District of Columbia that operated fourteen buildings, each one owned by separate individuals.[189] Both Greenhoot and the individual property owners shared responsibility over the employees employed at each of the

[188] *Greenhoot, Inc.*, 205 N.L.R.B. 250 (1973)..

[189] *Id.*

fourteen sites.[190] Nonetheless, there was no employee interchange among the buildings.[191] The engineers and maintenance employees at all of the fourteen properties Greenhoot managed petitioned the NLRB to certify a single unit for the purpose of bargaining with Greenhoot.[192] The NLRB, however, held that the group of employees would constitute a multi-employer unit and thus require Greenhoot's consent as well as all fourteen individual property owners' consent for certification.[193] Certification of the unit would not only force Greenhoot to the bargaining table, but it would inherently force the fourteen unrelated property owners to bargain together as well; hence, the term "multi-employer unit."

Consequently, *Greenhoot* introduced a question that the NLRB had never decided up to that point. It was not a case where workers jointly and solely employed by one employer wanted to bargain with one employer. Due to the nature of Greenhoot's business as a management company, none of its employees sought union representation,[194] therefore, rendering it a supplier-type employer for purposes of NLRB case law. Instead of a petition for certification of a user-type unit, *Greenhoot* presented a situation where employees, who only had a supplier-type employer in common, were trying to organize across multiple user employers.

The NLRB introduced a consent requirement where multiple-user employers are involved. *Greenhoot*'s treatment of multi-employer units can be explained through the same logic that prevents employees in a similar craft from forming industry-wide units. But for a few exceptions, it has long been a rule of the NLRB that industry-wide craft units are impermissible if there is no

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[190] *See id.* at 250-51.

[191] *Id.* at 251.

[192] *Id.* at 250.

[193] *Id.* at 251.

[194] *Id.* at 250.

consent from all employers involved, because they could force not just unrelated but often competing employers to adopt the same contractual terms and conditions with their labor supply.[195] A supplier employer unit is analogous to an industry-wide unit in that unrelated multiple user employers would have to bargain together with employees without explicitly agreeing to do so.[196]

Thus, the decisions in the *Greenhoot* case stemmed from a different premise than prior decisions of the NLRB. It addressed the requirements for a unit where the common employer of the workers trying to organize was the supplier employer, and not the user employer. Moreover, for nearly thirty years after the decision, the NLRB distinguished its reasoning in *Greenhoot* from the logic that combines the temporary and permanent employees of a common-user employer, in the same bargaining unit. *Greenhoot* recognized that the individual property sites could have separate user-type units, which would include each site's jointly employed workers with Greenhoot, without requiring consent from either employer.[197] Furthermore, the case law after *Greenhoot* indicates that the NLRB continued to certify user-employer units without requiring consent, as long as the permanent and temporary employees passed the community of interest test.[198]

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[195] *See* Virginia L. DuRivage et al., *Making Labor Law Work for Part-Time and Contingent Employees, in* CONTINGENT WORK 263, 272 (Kathleen Baker & Kathleen Christensen eds., 1998); *accord Bonanno Linen Services, Inc. v. NLRB*, 454 U.S. 404, 412 (1982).

[196] *But see id.* at 272-74 (advocating the adoption of industry-wide units).

[197] *Greenhoot, Inc.*, 205 N.L.R.B. at 251.

[198] *See U.S. Pipe & Foundry Co.*, 247 N.L.R.B. 139 (1980); *Sun-Maid Growers of Cal.*, 239 N.L.R.B. 346 (1978); *Walgreen La. Co., Inc.*, 209 N.L.R.B. 213 (1974).

b. *Lee Hospital* decision

In 1990, the NLRB abruptly turned the logic of *Greenhoot* on its head when it decided for *Lee Hospital*.[199] This case neglected to follow the established treatment of joint employers. Lee Hospital contracted with Anesthesiology Associates, Inc. (hereinafter 'AAI') to run its Anesthesiology Department.[200] The hospital also employed certified registered nurse anesthetists (hereinafter 'CRNAs'), who worked under the supervision of the hospital personnel as well as the personnel supplied by AAI.[201] These CRNAs sought certification of their unit to bargain with Lee Hospital.[202] The NLRB denied certification because the CRNAs did not warrant a separate unit from the rest of the employees in the hospital.[203] In its reasoning, the NLRB commented that a threshold question to the analysis is whether or not Lee Hospital and AAI were joint employers.[204] The NLRB decided that the hospital was the sole employer, and denied them certification because the CRNAs failed an unrelated "disparity of interests" test, which rendered a separate unit in the hospital, for them, as inappropriate.[205]

Thus, the *Lee Hospital* case did not require a ruling on the question of when the NLRB should require joint employer consent. This issue did not arise because the NLRB decided that

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199 *Lee Hospital*, 300 N.L.R.B. 947 (1990).

200 *Id.*

201 *See id.* at 947, 949-50.

202 *Id.* at 947.

203 *Id.*

204 *Id.* at 948.

205 *Id.* at 948, 950.

AAI and Lee Hospital were not joint employers.[206] The NLRB merely mentioned in dicta that had the two been joint employers, *Greenhoot* would have related, and the unit would require joint employer consent for the NLRB to certify it.[207]

Even if the NLRB found Lee Hospital and AAI to be joint employers, a CRNA bargaining unit still should not have required employer consent under *Greenhoot*. *Greenhoot* required employer consent where employees of a supplier-employer sought to certify a unit across a number of user employers. Conversely, the CRNAs in *Lee Hospital* all worked for the same user-employer, Lee Hospital.[208] They wanted to certify a unit for the purpose of bargaining with their common user-employer.[209] That they might have been jointly employed by AAI should not have mattered. The argument in *Lee Hospital* had nothing to do with Greenhoot's multi-employer bargaining involving different user employers.[210]

In the years following *Lee Hospital*, however, the NLRB adopted the dicta and began to expand the holding of *Greenhoot*.[211] It implemented a rule that required joint employer consent, even where the unit in question was for a single user's solely and jointly employed employees who passed the community of interest test.[212] By requiring the consent of both employers, the NLRB created a new barrier that prevented temporary employees from gaining inclusion in their user employer's bargaining unit.

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[206] *Id.* at 950.

[207] *Id.* at 948.

[208] *See id.* at 947-50.

[209] *Id.* at 947.

[210] *M.B. Sturgis, Inc.*, 2000 NLRB LEXIS 546, at 35 (Aug. 25, 2000).

[211] E.g., *Hexacomb Corp.*, 313 N.L.R.B. 983 (1994); *Int'l Transfer of Fla.*, 305 N.L.R.B. 150 (1991)..

[212] *See id.*

In the last decade, virtually no temporary employees have succeeded in obtaining the consent of both joint employers, which barred them from collective bargaining.[213] In conjunction with the rapid growth of contingent employment practices, the NLRB reconsidered the precedence it established in 2000 in *Lee Hospital*.[214] *Sturgis* represents this reconsideration.

(3) *Sturgis* decision

Following the court decision in *Lee Hospital*, no temporary employee has successfully obtained the consent from both joint employers. As a result, the 'consent requirement' prohibited temporary employees from participating in the collective bargaining process. This issue was highlighted during NLRB, revisiting the *Lee Hospital* precedence, and in August, 2000, this precedence was overruled in the *M.B. Sturgis Inc.* decision. The decision of *Sturgis* accepted the illegality of the majority in *Lee Hospital*. However, *Sturgis* is comprised of two independent cases. Therefore, we must examine the facts of each case, constituting *Sturgis*, and analyze the majority and minority ruling of NLRB.

a. *M.B. Sturgis, Inc.*

The first employer, M.B. Sturgis, Inc. (hereinafter "Sturgis"), produces and sells flexible gas

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[213] *Prince Mgmt. Corp.*, 1995 NLRB LEXIS 389, at 20 (May 2, 1995); *Hexacomb Corp.*, 313 N.L.R.B. 983 (1994); *Brookdale Hosp. Med. Ctr.*, 313 N.L.R.B. 592 (1993); *Flatbush Manor Care Ctr.*, 313 N.L.R.B. 591 (1993); *Hughes Aircraft Co.*, 308 N.L.R.B. 82 (1992); *Int'l Transfer of Fla.*, 305 N.L.R.B. 150, 150-151 (1991); *see also* Summers, *supra* note 1, at 513.

[214] *See Sturgis*, 2000 NLRB LEXIS 546, at 3.

hoses.[215] The Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union Local 108 (Local 108) filed a petition with the NLRB to represent all of the employees at one of Sturgis's local plants.[216] At that time, the plant solely employed thirty-four or thirty-five employees, and it also employed ten to fifteen "temporary" workers, supplied by Interim, Inc. (hereinafter "Interim"), a national corporation that provides temporary help personnel.[217] Local 108 sought to represent only those thirty-four or thirty-five permanent employees of Sturgis, but Sturgis wanted to include the temporary workers as well.[218]

The temporary employees and permanent employees worked side by side, performing the same functions and working the same number of hours.[219] Both groups were also subject to the same supervision.[220] The temporary employees were not, however, permitted to work more than forty hours a week, whereas the permanent employees could work more than forty hours a week.[221] Interim hired and set the wages and benefits of the temporary employees.[222]

Both Interim and Sturgis agreed that they were joint employers for the purpose of the NLRA.[223] Moreover, Sturgis gave its consent for the temporary employees to organize.[224] Interim, however, did not give consent.[225] Local 108 did not want to include the temporary

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[215] *Id.* at 10.

[216] *Id.*

[217] *Id.*

[218] *Id.* at 10-11.

[219] *Id.* at 10.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 11.

[225] *Id.*

workers in the union, arguing that *Greenhoot* and *Lee Hospital* precluded their inclusion without Interim's approval.[226]

b. *Jeffboat Division*

The other case involved in the *Sturgis* decision dealt with a similar situation, only in this case, the employer refused to give consent while the union petitioned to represent the temporary employees. The employer, Jeffboat Division (American Commercial Marine Service Company and TT&O Enterprises, Inc.), is an inland shipbuilder, operating a large shipyard in Indiana on the Ohio River.[227] At the time of the petition, Jeffboat employed 600 production and maintenance employees, all of whom were represented by Local 89.[228] Jeffboat also employed thirty first-class welders and steamfitters who were supplied by a temporary supplier firm, TT&O Enterprises (hereinafter 'TT&O'), and were not represented by the union.[229] Local 89 sought to accrete[230] these employees into the existing collective bargaining unit, but Jeffboat and TT&O both refused to give their consent.[231]

Like the temporary workers of M.B. Sturgis, Jeffboat's temporary steamfitters and welders had much in common with the 600 permanent employees. Jeffboat supervisors assign, direct, and oversee all of the work of the temporary employees.[232] In addition, the supervisors have the

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[226] *Id.*

[227] *Id.* at 12-13.

[228] *Id.* at 13.

[229] *Id.*

[230] *See infra* note 140 and accompanying text (defining accretion).

[231] *Sturgis*, 2000 NLRB LEXIS 546, at 14.

[232] *Id.* at 13.

authority to discipline temps for poor performance or for breaking any of Jeffboat's rules and regulations, and they are also responsible for monitoring the time that TT&O-supplied workers spend on different assignments at Jeffboat.[233]

c. The NLRB's holding and the reasoning

The NLRA fails to provide an exact definition of "employee";[234] rather, the NLRB usually examines a given situation to determine the employer.[235] More than one entity may employ any particular worker. If the NLRB determines the employer, it then must resolve whether that employer is a joint employer or a multi-employer. The NLRB considers employers jointly if they "share or co-determine those matters governing essential terms and conditions of employment,"[236] i.e., the "right of control" test.[237] For example, in *Sturgis*, the NLRB began by

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[233] *Id.*

[234] National Labor Relations Act §2(3), 29 U.S.C. §159 (1994): "The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise ... and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor ... or by any other person who is not an employer as herein defined."

[235] Archibald Cox et al., LABOR LAW 98 (13th ed. 2001).

[236] *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982).

[237] For a discussion of the right of control test, the alternative economic realities test, and a hybrid of the two, *see* Bita Rahebi,*Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. Rev. 1105, 1115-21 (2000). In *Laerco Transp. & Warehouse*, the NLRB held that "[t]o establish joint employer status, there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." 269 N.L.R.B. 324 (1984). Rahebi goes on to analyze what factors the courts have considered in determining joint employer status. *Id.* These factors include whether the user retains authority to supervise the workers daily ((citing *NLRB v. Western Temp. Servs., Inc.*, 821 F.2d 1258, 1266 (7th Cir. 1987); *Browning-Ferris Indus.*, 691 F.2d at 1122; *TLI, Inc.*, 271 N.L.R.B. 798; *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 247 (7th Cir. 1988); *Clinton's Ditch Coop. Co. v. NLRB*, 778 F.2d 132, 138-39 (2d Cir. 1985)); hire and fire ((citing *W.W. Grainger*, 860 F.2d at 247; *Clinton's Ditch Coop.*, 778 F.2d at 138; *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969));discipline (citing *Clinton's Ditch Coop. Co.*, 778 F.2d at 138); set work rules and conditions (citing *W.W. Grainger*, 860 F.2d at 247); give instructions and assignments

deciding that the users, M.B. Sturgis and Jeffboat, were joint employers with their suppliers Interim and TT&O, respectively.[238] The NLRB based this determination on whether the employers "meaningfully affect[ed] matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[239]

In general, a union and an employer must agree on the bargaining unit appropriate to any given workplace. In the event that they are unable to agree, the NLRB has the power under § 9 of the NLRA[240] to determine an appropriate unit.[241] The appropriateness of a given petitioned-for bargaining unit depends on the NLRB's evaluation of the group's "community of interest."[242] Relevant factors include: (1) similarity in the scale and manner of determining the earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills, and training of the employees; (5) frequency of contact or interchange among employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common

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((citing *G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1531 (7th Cir. 1989)); refuse referrals (citing *W.W. Grainger*, 860 F.2d at 247); and determine compensation ((citing *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

238 331 N.L.R.B. 1298.

239 *Id.* at 1301 ((citing *TLI, Inc.*, 271 N.L.R.B. 798 (1984)). The NLRB's analysis corresponded almost wholly with the "right of control" test described by Rahebi. *See* Rahebi, *supra* note 57, at 1116-18 (2000).

240 NLRA § 159(b).

241 Under the NLRA, the NLRB has broad discretion to pick an appropriate unit, though the statute does not mandate the selection of any particular one. *See NLRB v. Target*, 547 F.2d 421 (8th Cir. 1977). So long as the NLRB provides support for its determination and does not act "arbitrarily or capriciously," there is no judicial review of NLRB bargaining unit determinations. *Id.* at 423 ((citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-91 (1947); *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805 (8th Cir. 1975); *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1378 (8th Cir. 1975)). *See also Leedom v. Kyne*, 358 U.S. 184 (1958), where the Supreme Court held that the NLRB had overstepped its bounds and contravened § 9 of the NLRA when it included professional employees in a unit with non-professional employees, without giving the former opportunity to vote for inclusion.

242 *See Varying Unit Determinations at Trucking Terminals Do Not Reflect Favoritism Toward Union,* NLRB Says, 154 LAB. REL. REP. 33 (BNA) at d21 (Jan. 20, 1997).

supervision and determination of labor-relationship policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) common desires of the affected employees; and (12) extent of union organization.[243]

None of these factors is ranked more important than the others.[244] As such, the results vary widely from case to case. For example, when applied to the workforce within a penal institution, a sufficient community of interest exists between work-release workers and production and maintenance workers, despite the authorities having ultimate control over the workers.[245] In contrast, despite sharing similar characteristics, a Doo-Wop singing group affiliated with a particular entertainment center did not share a sufficient community of interest with the "Character Strollers and Heroes," also affiliated with the center.[246]

The NLRB has broad discretion when determining whether a particular bargaining unit is appropriate. The Ninth Circuit in *Globe Discount City* ruled that it had "long been recognized that the NLRB is given great latitude in determining the unit appropriate for the purposes of collective bargaining, and that the NLRB's unit determination will not be disturbed unless it is arbitrary or capricious."[247] The Supreme Court, in *United Insurance*, also recognized that a NLRB determination between two conflicting views would not be set aside even if another

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[243] *NLRB's Exclusion Of Quality-Control Employees From Unit Gave Controlling Weight to Extent of Organizing by Union*,150 LAB. REL. REP. 353 (BNA) at d16 (Nov. 20, 1995), (citing *N.L.R.B. v. St. Francis College*, 562 F.2d 246 (9th Cir. 1977)).

[244] *Id.*

[245] *Work-Release Inmates Can Vote in NLRB Election*, 158 LAB. REL. REP. 1 (BNA) at d3 (May 4, 1998).

[246] *In re Universal Studio Tour*, 93 Lab. Arb. (BNA) 1 (Apr. 5, 2001). In that case, although the Doo Wop singers interacted with the Character Strollers during their performances, such interaction was not part of the show. The interaction, according to Arbitrator Gentile, was not seen as making the Character Strollers part of the Doo Wop singer's performance, nor did it make the Doo Wop singers Character Strollers. As such, the Doo Wop singers did not belong in the same collective bargaining unit as the Character Strollers.

[247] *Gallenkamp Stores Co. v. N.L.R.B.*, 402 F.2d 525, 530 (9th Cir. 1968).

"court would, as an original matter, decide the case the other way."[248]

In *Sturgis*, the NLRB found that a user and supplier did not have to provide consent for the NLRB to form a bargaining unit composed of both contingent and core workers because they were joint employers. The arrangement did not constitute a multi-employer situation.[249] This conclusion was based on the NLRB's finding that employees of a single employer made an appropriate bargaining unit where the workers shared a community of interest.[250] In this decision, the NLRB overruled its decision in *Lee Hospital*[251] and returned to its prior stance under *Greenhoot*.[252] Thus, where there are only two workers involved, their consent is not necessary to combine core and contingent workers. However, consent is necessary if there are more than two user agencies involved.[253]

With the *Sturgis* and *Jeffboat* situations presenting similar material facts, the NLRB was faced with deciding on one glaring issue: "Whether and under what circumstances employees who are jointly employed by a user employer and a supplier employer can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer."[254] Following *Lee Hospital*, the regional directors in both *Jeffboat* and *Sturgis* stopped their inquiries and barred the inclusion of temps in the units as soon as they discovered

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[248] *N.L.R.B. v. United Ins. Co. of America.*, 390 U.S. 254, 260 (1968).

[249] *Id.*

[250] *See infra* Part III for a discussion of the community of interest doctrine.

[251] *Lee Hospital,* 300 N.L.R.B. 947..

[252] *SeevGreenhot, Inc.,* 205 N.L.R.B. 250; *Sturgis,* 331 N.L.R.B. at 1304-08..

[253] *See* Nancy Schiffer argues in her article, *Organizing Contingency Workers: Community of Interest v. Consent*, 17 LAB. LAW. 1, 67 (2001).

[254] *Id.* at 1. Since none of the employers in *Sturgis* disputed their joint employer status, the NLRB needed only to determine what the proper test should be for including jointly employed employees in a user employer's collective bargaining unit.

that there was no joint employer consent.[255] The NLRB, however, found that this was no longer the proper inquiry and clarified that the appropriate test for including temps in user employer units is a determination of community of interest.[256]

In its analysis, the NLRB used the statutory language behind the issue to justify its conclusion. It cited Section 9(b) of the NLRA as giving the NLRB the power to determine whether the appropriate collective bargaining unit should be "the employer unit, craft unit, plant unit, or subdivision thereof."[257] It then clarified that an appropriate employer unit can be "a unit encompassing all of an employer's employees, or subgroup of such employees."[258] The NLRB correctly asserted that a unit of all the user employer's employees consists of those employees solely and jointly employed by it.[259] From this conclusion, the NLRB then determined that the temporary employees of both Jeffboat and Sturgis could be considered part of the "employer unit," because they were employed alongside the other employees who were solely employed.[260] In other words, that the temporary employees were also employed by a supplier employer should have no bearing on whether they constituted part of the user employer's bargaining unit.

The decision held that the only relevant question should be whether or not the two sets of employees shared a community of interest.[261] Reiterating the traditional "community of interest" test, the NLRB commented that a proper determination of an employer unit "examines a variety

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[255] *Id.* at 43.

[256] *Id.* at 40.

[257] *Id.* at 35 (citing section 9(b) of the NLRA).

[258] *Id.*

[259] *Id.* at 36.

[260] *Id.*

[261] *See id.* at 42.

of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved."[262] Notably in this decision, the NLRB did not actually do an analysis to determine whether the Sturgis and Jeffboat employees satisfied the community of interest test, but remanded the cases to the regional directors for this determination. [263]

Although the NLRB did not ultimately rule on the fate of the Jeffboat and Sturgis employees, its holding and the reasoning behind it overturned the test used during the last ten years for determining collective bargaining units of user employers. The NLRB explicitly overruled *Lee Hospital*.[264] It also narrowed the holding of *Greenhoot*, which had been used to justify the *Lee Hospital* decision. [265] The NLRB explained that it was not overruling *Greenhoot*,[266] but rather, limiting the holding to true multi-employer units, with bargaining units consisting of the employees from multiple-user employers, "whose only relationship to each other is that they obtain employees from a common supplier employer."[267] Following the *Sturgis* NLRB's interpretation, a true multi-employer situation necessitating consent should only exist where a union tries to represent employees of a supplier employer in a unit that spans across user-employers. "*Lee Hospital* did not involve multi-employer bargaining and therefore no consent was required."[268]

In sum, the NLRB's analysis sets out that the first question to ask is whether joint employer

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[262] *See id.* at 40-41; *see*, e.g., *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962); *Swift & Co.*, 129 N.L.R.B. 1391, 1394 (1961); *Cont'Baking Co.*, 99 N.L.R.B. 777, 782-83 (1952).

[263] *Sturgis*, 2000 NLRB LEXIS 546, at 57.

[264] *Id.* at 3.

[265] *See id.* at 37-38.

[266] *See id.*

[267] *Id.* at 38.

[268] *Id.* at 35.

status exists.[269] If no such relationship exists, then the inquiry stops because *Sturgis* only applies to joint employees.[270] If the user and supplier employers are joint employers, then the next step is to determine whether a community of interest exists between those who are jointly and soley employed by the user employer.[271] If such a community exists, then the NLRB will sanction an employer unit consisting of both the temporary employees and permanent employees of the user employer.[272] Consent from the supplier or the user employer is not necessary at any point in the analysis.

(4) Oakwood Care Center decision[273]

The NLRB of the Bush administration under the *Oakwood Care Center* case reversed the *Sturgis* case by a 3:2 majority vote and revitalized the consent rule, under the following reasoning.

The interpretation of 'corporate bargaining unit' by NLRB under *Sturgis* evolved from its statutory meaning. The NLRB had to decide whether the appropriate bargaining scope of the bargaining unit should be in the form of a corporate bargaining unit, an occupational bargaining unit, or a subsidiary bargaining unit, to guarantee a full autonomous exercise of the rights regulated under the NLRA for each individual case. Under the law, the largest application scope

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[269] *See id.* at 18. The NLRB commented that it would not decide in Sturgis whether or not the test for joint employers should be expanded. *Id.* This comment seems to address and dismiss the possibility of moving the joint employer test away from the present "right to control test." *See generally*, Rahebi, *supra* note 57 (elaborating on the differences between the "right to control test" and "economic realities test," and advocating a "hybrid test" for joint employer determination).

[270] *Sturgis*, 2000 NLRB LEXIS 546, at 18.

[271] *See id.* at 41-42.

[272] *See id.* at 42.

[273] *Oakwood Care Center,* 343 N.L.R.B. 659 (2004).

of bargaining units is the 'corporate bargaining unit,' and other defined units of bargaining groups represent subsidiary units of a single corporate unit. However, if these types of workers agree independently, on the establishment of multiple-user units, the NLRB will consistently approve the legitimacy of these bargaining units.

The majority in *Sturgis* implied that the bargaining unit, comprised of workers employed by corporate users and those jointly employed by corporate users and suppliers, establishes a unit of an employment used by a single user. The majority objected to the reasoning and definition afforded by the majority because it is inconsistent with the definition and meaning of corporate bargaining unit under NLRA. Furthermore, the majority relied on the decision of the court in *Greenhoot* and *Lee Hospital* where workers employed under a single and joint user were defined strictly as workers of different users, and including them all under the same penumbra of a single bargaining unit is, in turn, establishing a multiple user bargaining unit.

Under the traditional definition embodied by NLRB, joint employer consists of two or more employers (for example A and B) commonly sharing the regulatory authority in prescribing the essential employment conditions of the bargaining unit. Each employee of the bargaining unit should provide his labor services to one user, in other words, to a joint employer entity. Workers of the bargaining unit under *Sturgis* provided their labor services to two or more different users. Under this regime, in some circumstances multiple-users could establish common labor conditions. However, in some incidences, parts of a single labor condition for the workers could be established differently by different users. The critical issue here is that members of one labor unit must abide by different labor standards set by different users, and others are only obliged to follow the labor standards set by one single user. Therefore, the users within the two unified groups have a different user entity. Under this paradigm, it is physically impossible to alter the

legal leger domain.

The arguments of policy in *Sturgis* face many problems that are similar to the complexity behind interpreting Section 9(b) of the NLRA. Although the court in *Sturgis* presumed that workers employed by an individual user would bargain to the set labor regulations, the reality of the bargaining unit failed to meet this novice expectation of the court. This inconsistency is clearly shown through the following examples. First, although the income of workers under a joint employer should be regulated by the corporate supplier, it has some impact on the income of workers of a single employer, which falls under the management of the corporate user. Second, although the corporate user has absolute control over the issuance and policies concerning holidays and paid vacations, corporate suppliers can also exercise their influence on vacation policies of workers under a joint employer. These two examples demonstrate how the division of bargaining rights of workers under the common bargaining unit could distort the negotiation process between the laborer and the users as well as show the possible alteration of the legal status of users during the labor bargaining process. The status of corporate users as customers of corporate suppliers can effectively limit the legitimate authority of a corporate supplier of their selection rights during the bargaining process. However, this fragmentation of rights only results in the disturbance of effective bargaining.

In addition, the bargaining regime presumed under *Sturgis* fails to provide full legitimate protection for the workers. The decision of the court in *Sturgis* encouraged one labor union, composed of workers employed by single and multiple users with two different users, to bargain independently with two different users, where each user only has the power to regulate part of the labor condition of the said bargaining unit. This bargaining structure encourages the fragmentation of the workers' bargaining unit, and, fundamentally, subordinating them to

conflicting interests, thus contradicting the NLRA standards. For example, in many incidences, the income of supplier workers is determined by corporate suppliers, and the income of single employees are determined by the corporate user. This, in turn, results in the sacrifice of one employment income (e.g., supplier worker) in return for the interest of other workers (single employees) and vice versa. Therefore, for workers to exercise their full rights against the bargaining counterparts, NLRA says that workers should establish a group under a common interest with the defined users. The current regime that rejects the approval of employees under different users is contradictory to this basic principle.

The decision of the NLRB in *Oakwood* drew firmly distinguished the bargaining unit of common user workers not requiring the consent of the users with the bargaining unit of common workers requiring such approval and single employees. Each worker in a bargaining unit should provide his or her labor services to one user, the real entity of the common user. Therefore, the common user bargaining unit, described under the majority reasoning, fails to satisfy the strict definition of the multiple user bargaining unit.

6. The Joint Employer Doctrine Under the FLSA

The FLSA is a federal law that prescribes minimum wage and overtime pay. The overtime pay provision stipulates that more than 50% of the wage will be added for the work exceeding forty hours per week, but with a great number of exceptions to its application.

The FLSA stipulates that in the relationship with employers under the same law, workers are the ones who work for the interest of employers either directly or indirectly, including a public agency.[274] When interpreting this provision, courts have defined 'employers,' in light of factual status of contracting parties. Goldman's explanations shed light on the specific elements.[275]

"For example, is the employer of the typist temporarily assigned from a company that specialized in providing temporary help? Is it the insurance company whose work the typist is performing, or is it the company that assigned the typist to work at the insurance company for a day, a week, or the like? As with the problem of independent contractors, in American law the critical factors shaping this decision and the decision itself, shift depending on the purpose for which the distinction is being made. Thus, the individual may be treated as the insurance company's employee for occupational safety purposes but as the employee of the company making the work assignments for minimum wage purpose. That result can be justified on the

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[274] The reason that the FLSA prescribed the range of employers in a wider sense is that it aims to exclude the concept of 'employer' in the 'relation between employee/employer,' long established in case law (*Mednick v. Albert Enterprises, Inc.* 508 F.2d 297 (5th Cir. 1975); *Walling v. Atlantic Greyjound Corp.* 61 F. Supp. 992 (D.C.E.D. 1945); *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28 (1961). A public agency has been included (AM. JUR. 2d, vol. 48A, The Lawyers Cooperative Publishing Company/Bancroft-Whitney Company, 1979).

[275] Goldman, L. Alvin (2002), *United States of America*, R. Blanpain ed., INTERNATIONAL ENCYCLOPAEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS, Vol.14, p.81.

grounds that the owner of the work sites can best protect the worker's safety but wage standards are satisfied."

Users of the FLSA include business owners who did not enter into a formal contract, in which the original owner and the other are considered to be joint employer, when employing special workers.[276] This is called joint employer doctrine, which applies to the relationship of joint employment.

Courts consider that economic realities should be used, when deciding whether it is joint employment or separate employment.[277] When the individual is decided as a joint employer, all the labor provided to all the related business owners during the workweek is regarded as one labor under the purpose of the Act. In this case, each entity will be held liable for the total employment, "either individually or jointly," in compliance with all of the applicable provisions of the Act ". . . with respect to the entire employment for the particular workweek."[278] For example, if we assume that Company A and Company Z, are joint employers, and an employee

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[276] AM. JUR. 2d, vol. 48A, p.560

[277] *See Golberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *see also Howard v. Malcolm*, 852 F.2d 101, 104 (4th Cir. 1988); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *Bonnette v. Cal. Health & Welfard Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir. 1973).

[278] 29 C.F.R. §791.2(a) (2000). Section 791.2(a) states: "A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers." *Id.*

works twenty hours for Company A and forty hours for Company Z in the same workweek, the FLSA will require that overtime wages be paid on the twenty hours worked in excess of forty hours. Moreover, both Company A and Z can be held individually responsible for the overtime compensation owed under the FLSA. By imposing full liability for unpaid or underpaid wages on all employers, the joint employer rule helps to ensure that workers will be paid their lawful wages.[279]

Here are three typical cases where joint employment relationship was taken as a basis; (1) a partner participated in the management of apartment complexes with retail stores that another person owned; (2) several shoe stores were managed independently, but shoe stores they were branches of a parent company, therefore, they could not decide where to locate the stores, and the parent company changed the personnel; (3) the owner of a cattle ranch and the cattle auction company, and their owner employed one worker to manage the ranch and the cowshed.[280]

Goldman explains that the joint employment relationship, according to the rights of the related business owner who can control the behavior of workers, allows both the general and special employer to split the legal obligation, under the minimum wage law. However, industrial safety and health regulations fall under the obligation of a general employer, and unfair labor practices fall under the obligation of a special employer. Under normal working conditions, both a general employer and a special employer can be held liable, jointly, for the three regulations.[281]

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[279] Richard J. Burch, *A Practitioner's Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L. J. 393, 404-405 (2001-2002).

[280] AM. JUR. 2d, col. 48A, pp.561.

[281] Goldman, L. Alvin, *supra* 82-83

7. The Joint Employer Doctrine Under Title VII

(1) Determination of Employers by the Standard of Common Law

According to the precedents set by Title VII, the EEOC states that if the joint employer doctrine gets approval, employers must have "exercised substantial control over significant aspects of the compensation, terms, condition, or privileges of plaintiff's employment."[282] With respect to the substantial control factor, contingent workers generally have employment relationships with staffing firms,[283] and staffing firms fall into the category of employers, since they hire, place, and pay the worker as well as withhold taxes, provide workers' compensation coverage, and have the right to discharge workers.

According to this standard, the client will be the employer only if working conditions are controlled either in whole or in part by the client, based on the right to direct and control test.[284] The standard to judge the status of joint employers is similar to those of employees.

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[282] *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. at 507.

[283] *Magnuson*, 808 F. Supp. 500 (E.D. Va. 1992); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984); *judgment aff'd*, 770 F.2d 157 (2d Cir. 1985).

[284] *Reynolds v. CSX Transp., Inc.*, 115 F.3d 860 (11th Cir. 1997), *cert. granted, judgment vacated on other grounds*, 524 U.S. 947, 118 S. Ct. 2364, 141 L. Ed. 2d 732 (1998). According to Title VII and the ADA, discriminating entity must be "engaged in an industry affecting commerce" and have "fifteen or more employees." 42 U.S.C. § 2000e(b) (2002); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003); *Anderson v. Pac. Mar. Assoc.*, 336 F.3d 924, 929 (9th Cir. 2003). On the other hand, the ADEA requires an employer to have "twenty or more employees" and to affects interstate commerce. 29 U.S.C.A. §§621 *et seq.*

(2) Prohibition of Discriminatory Interference

According to the EEOC guidance, even if a staffing firm or its client does not qualify as the worker's employer, it can be liable for discriminating against the workers. That is to say, antidiscrimination statutes prevent employer's discrimination against its own employees and discriminatory interferences in job opportunities with the other users (the third party, which is usually a staffing firm).[285]

(3) Liability: Summary of EEOC rulings

a. Discriminatory assignment practices

A staffing firm is obligated, as an employer, to make job assignments in a nondiscriminatory manner. . . . It also is obligated as an employment agency to make job referrals in a nondiscriminatory manner.

- "If a worker is denied a job assignment by a staffing firm because its client refuses to accept the worker for discriminatory reasons, the staffing firm is liable for it discriminatory assignment decision, as an employer of the workers assigned to client (for discriminatory job assignments), as a third party interferer (for discriminatory

[285] 42 U.S.C.A. §§12203(b), 12112(a), 2000e-2(a); *King v. Chrysler Corp.*, 812 F. Supp. 151 (E.D. Mo. 1993); *Amarnare v. Merril Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984), *judgment aff'd*, 770 F.2d 157 (2d Cir. 1985); *Fairman v. Saks Fifth Avenue*, 1988 U.S. Dist. LEXIS 13087 (W.D. Mo. 1988).

interference in the workers' employment opportunities with the firm's client), and/or as an employment agency (for discriminatory job referrals). A staffing firm is liable if it honors a client's discriminatory assignment request or if it knows that its client has rejected workers in a protected class for discriminatory reasons and for that reason refuses to assign individuals in that protected class to that client. Furthermore, the staffing firm is liable if it administers on behalf of its client a test or other selection requirement that has an adverse impact on a protected class and is not job-related for the position in question and consistent with business necessity.

Client: The staffing firm's client is liable if it sets discriminatory criteria for the assignment of workers.

- "If a worker is denied a job assignment by a staffing firm because its client refuses to accept the worker for discriminatory reasons, a client that rejects workers for discriminatory reasons is liable either as a joint employer or third party interferer if it has the requisite number of employees to be covered under the applicable anti-discrimination statute.

b. Discrimination at work site

Client: A client of a staffing firm is obligated to treat the workers assigned to it in a nondiscriminatory manner.

- If a client discriminates against a worker assigned by a staffing firm, if the client qualifies as an employer of the worker, it is liable. Even if the client does not qualify as an employer of the worker, it is liable for discriminating against that individual if the client's misconduct interferes with the worker's employment opportunities with the staffing firm, and it the client has the minimum number of employees to be covered under the applicable discrimination statute.

Staffing firm: Where the client fails to fulfill this obligation, and the staffing firm knows or should know of the client's discrimination, the staffing firm must take corrective action within its control. The staffing firm should not assign other workers to that work site unless the client has undertaken the necessary corrective and preventive measures to ensure that the discrimination will not recur. Otherwise, the staffing firm is liable along with the client if a worker later assigned to that client is subjected to similar misconduct.

- If a client discriminates against a worker assigned by a staffing firm, the firm is liable if it participates in the client's discrimination. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.

- The adequacy of corrective measures taken by a staffing firm depends on the particular facts. Corrective measures may include, but are not limited to: 1) ensuring that the client is aware of the alleged misconduct; 2) asserting the firm's commitment to

protect its workers from unlawful harassment and other forms of prohibited discrimination; 3) insisting that prompt investigative and corrective measures be under taken; and 4) affording the worker an opportunity, if (s)he so desires, to take a different job assignment at the same rate of pay.

c. Discriminatory wage practices

A staffing firm and client may not discriminate in the payment of wages on the basis of race, sex, religion, national origin, age, or disability under Equal Pay Act (hereinafter 'EPA') and Title VII. Wage differences that are not based on sex, but on bona fide distinctions between temporary and permanent workers, can be justified under EPA as based on a "factor other than sex." A sex-based wage disparity violates Title VII even if the jobs are not substantially equal under EPA standards (substantially equal skill, effort, and responsibility).

d. Allocation of remedies

According to the EEOC guidance,

If the Commission finds reasonable cause to believe that both a staffing firm and its client have engaged in unlawful discrimination, how are back wages and damages allocated between the respondents? Where the combined discriminatory actions of a staffing firm and its client result in harm to the worker, the two respondents are jointly and severally liable for back pay, front pay, and compensatory damages. This means that

the complaint can obtain the full amount of back pay, front pay, and compensatory damages from either one of the respondents alone or from both respondents combined.

Punitive damages under Title VII and the ADA and liquidated damages under the ADEA are individually assessed against and borne by each respondent in accordance with its respective degree of malicious or reckless misconduct. This is because punitive damages are designed not to compensate the victim for his or her harm, but to punish the respondent.

Of course, no respondent can be required to pay a sum of future pecuniary damages, damages for emotional distress, and punitive damages, in excess of its applicable statutory cap.

The investigator should contact the legal unit in his or her office for advice in determining how to allocate damages between the parties.

(a) Computation of Monetary Relief

The first step is to compute lost wages (including back and front pay); compensatory damages for both pecuniary loss and emotional distress; and punitive damages. This computation should be made without regard to the statutory caps on damages and except for punitive damages, without regard to either respondent's ability to pay. This initial computation will establish the charging party's total wage and other compensable losses, as well as the full calculation of punitive damages.

(b) Back Pay, Front Pay, and Past Pecuniary Damages

The next step is to determine the allocation between the respondents of back and front pay and past pecuniary damages. The charging party can obtain the full amount of these remedies because they are not subject to the statutory caps. Then they are not subject to the statutory caps. The Commission can pursue the entire amount from either the staffing firm or the client, or from both combined. However, the total amount actually paid cannot exceed the sum of back and from wages and past pecuniary damages owed to the worker.

(c) Application of the Statutory Cap on Damages

The final step is to determine each respondent's liability for compensatory and punitive damages subject to the statutory caps. The total amount paid by a respondent for compensatory damages for emotional distress and future pecuniary harm, and for punitive damages, cannot exceed its statutory cap. Thus, while the initial determination of the appropriate amount of compensatory and/or punitive damages is made without regard to the caps, the caps may affect the allocation of damages between two respondents as well as the total damages paid to the charging party. In aaplying the caps to the actual allocation of damages, the following principles apply:

For compensatory damages subject to the caps, each respondent is responsible for any portion of the total damages up to its cap.

For punitive damages, each respondent is only responsible for the damages which

have been assessed against it and only up to its applicable statutory cap.

After the fact-finder has determined the amount of compensatory damages for emotional distress and future pecuniary harm, and the amount of punitive damages for which either or both respondents are liable, these amounts should be allocated between the two respondents in order to yield the maximum payable relief for the charging party.

If the total compensatory damages are within the sum of the two respondents' caps, the damages should be allocated to assure that the full amount is paid.

If one or both respondents are liable for punitive damages as well as compensatory damages, and the total sum of damages in within the applicable caps, the damages should be allocated, both between the respondents, and between compensatory and punitive damages for each respondent, to assure full payment. Thus, each respondent should pay the full amount of punitive damages for which it is liable, and any portion of the compensatory damages up to its statutory cap.

If the sum of damages exceeds the sum of the applicable caps, the damages should be allocated, both between the respondent and between compensatory and punitive damages for each respondent, to maximize the payment to the charging party.

8. Congressional Action for Employee Benefits

(1) Part-Time and Temporary Workers Protection Act of 1993 (HR 2188 IH)

This Bill's purpose is to allow certain individuals seeking part-time employment to be eligible receive unemployment compensation, to require the Secretary of Labor to establish and carry out an annual survey relating to temporary workers, and to protect part-time and temporary workers relating to pension and group health plans.

SEC. 2. ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION OF CERTAIN INDIVIDUALS SEEKING PART-TIME EMPLOYMENT.

(a) GENERAL RULE- Subsection (a) of section 3304 of the Internal Revenue Code of 1986 (relating to requirements for approval of State unemployment compensation laws) is amended by striking `and' at the end of paragraph (17), by redesignating paragraph (18) as paragraph (19), and by inserting after paragraph (17) the following new paragraph:

(18) in applying the State law provisions relating to availability for work, active search for work, or refusal to accept work, the term `suitable work' shall not include any work where the individual would normally perform services for more hours per week than the number of hours per week for which the individual normally performed services in the individual's last job in the base period, and'.

SEC. 3. ANNUAL BUREAU OF LABOR STATISTICS SURVEY RELATING TO TEMPORARY WORKERS.

The Secretary of Labor, acting through the Commissioner of the Bureau of Labor Statistics, shall establish and carry out an annual survey identifying--

(1) the characteristics of temporary workers in the United States;

(2) the relationship between such workers and the establishments at which such workers are temporarily employed; and

(3) where appropriate, the relationship between such workers and their permanent employers.

SEC. 4. PROTECTION OF PART-TIME AND TEMPORARY WORKERS.

(a) TREATMENT OF EMPLOYEES WORKING AT LESS THAN FULL-TIME UNDER PARTICIPATION, VESTING, AND ACCRUAL RULES GOVERNING PENSION PLANS-

(1) Participation rules-

(A) IN GENERAL- Section 202(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1052(a)(3)) is amended by adding at the end the following new subparagraph:

`(E)(i) For purposes of this paragraph, in the case of any employee who, as of the beginning of the 12-month period referred to in subparagraph (A)--

`(I) has customarily completed 500 or more hours of service per year but less than 1,000 hours of service per year, or

`(II) is employed in a type of position in which employment customarily constitutes 500 or more hours of service per year but less than 1,000 hours of service per year,

completion of 500 hours of service within such 12-month period shall be treated as completion of 1,000 hours of service.

`(ii) For purposes of this subparagraph, the extent to which employment in any type of position customarily constitutes less than 1,000 hours of service per year shall be determined with respect to each pension plan in accordance with such regulations as the Secretary may prescribe providing for consideration of facts and circumstances peculiar to the work-force

constituting the participants in such plan.'.

(B) CONFORMING AMENDMENT- Section 204(b)(1)(E) of such Act (29 U.S.C. 1054(b)(1)(E)) is amended by striking `section 202(a)(3)(A)' and inserting `subparagraphs (A) and (E) of section 202(a)(3)'.

(2) VESTING RULES-

(A) IN GENERAL- Section 203(b)(2) of such Act (29 U.S.C. 1053(b)(2)) is amended by adding at the end the following new subparagraph:

`(E)(i) For purposes of this paragraph, in the case of any employee who, as of the beginning of the period designated by the plan pursuant to subparagraph (A)--

`(I) has customarily completed 500 or more hours of service per year but less than 1,000 hours of service per year, or

`(II) is employed in a type of position in which employment customarily constitutes 500 or more hours of service per year but less than 1,000 hours of service per year,

completion of 500 hours of service within such period shall be treated as completion of 1,000 hours of service.

`(ii) For purposes of this subparagraph, the extent to which employment in any type of position customarily constitutes less than 1,000 hours of service per year shall be determined with respect to each pension plan in accordance with such regulations as the Secretary may prescribe providing for consideration of facts and circumstances peculiar to the work-force constituting the participants in such plan.'.

(B) 1-YEAR BREAKS IN SERVICE- Section 203(b)(3) of such Act (29 U.S.C. 1053(b)(3)) is amended by adding at the end the following new subparagraph:

`(F)(i) For purposes of this paragraph, in the case of any employee who, as of the beginning

of the period designated by the plan pursuant to subparagraph (A)--

`(I) has customarily completed 500 or more hours of service per year but less than 1,000 hours of service per year, or

`(II) is employed in a type of position in which employment customarily constitutes 500 or more hours of service per year but less than 1,000 hours of service per year,

completion of 250 hours of service within such period shall be treated as completion of 500 hours of service.

`(ii) For purposes of this subparagraph, the extent to which employment in any type of position customarily constitutes less than 1,000 hours of service per year shall be determined with respect to each pension plan in accordance with such regulations as the Secretary may prescribe providing for consideration of facts and circumstances peculiar to the work-force constituting the participants in such plan.'.

(3) ACCRUAL RULES- Section 204(b)(4)(C) of such Act (29 U.S.C. 1054(b)(4)(C)) is amended--

(A) by inserting `(i)' after `(C)'; and

(B) by adding at the end the following new clauses:

`(ii) For purposes of this subparagraph, in the case of any employee who, as of the beginning of the period designated by the plan pursuant to clause (i)--

`(I) has customarily completed 500 or more hours of service per year but less than 1,000 hours of service per year, or

`(II) is employed in a type of position in which employment customarily constitutes 500 or more hours of service per year but less than 1,000 hours of service per year,

completion of 500 hours of service within such period shall be treated as completion of

1,000 hours of service.

`(iii) For purposes of clause (ii), the extent to which employment in any type of position customarily constitutes less than 1,000 hours of service per year shall be determined with respect to each pension plan in accordance with such regulations as the Secretary may prescribe providing for consideration of facts and circumstances peculiar to the work-force constituting the participants in such plan.'.

(b) Treatment of Employees Working at Less Than Full-Time Under Group Health Plans.

(1) IN GENERAL- Part 2 of subtitle B of title I of such Act is amended--

(A) by redesignating section 211 (29 U.S.C. 1061) as section 212; and

(B) by inserting after section 210 (29 U.S.C. 1060) the following new section:

`TREATMENT OF PART-TIME WORKERS UNDER GROUP HEALTH PLANS

`SEC. 211. (a) IN GENERAL- A reduction in the employer-provided premium under a group health plan with respect to any employee for any period of coverage solely because the employee's customary employment is less than full-time may be provided under such plan only if the employee is described in subsection (b) and only to the extent permitted under subsection (c).

`(b) REDUCTIONS APPLICABLE TO EMPLOYEES WORKING LESS THAN FULL-TIME-

`(1) IN GENERAL- An employee is described in this subsection if such employee, as of the beginning of the period of coverage referred to in subsection (a)--

`(A) has customarily completed less than 30 hours of service per week, or

`(B) is employed in a type of position in which employment customarily constitutes less than 30 hours of service per week.

`(2) REGULATIONS- For purposes of paragraph (1), whether employment in any type of

position customarily constitutes less than 30 hours of service per week shall be determined with respect to each group health plan in accordance with such regulations as the Secretary may prescribe providing for consideration of facts and circumstances peculiar to the work-force constituting the participants in such plan.

`(c) AMOUNT OF PERMISSIBLE REDUCTION- The employer-provided premium under a group health plan with respect to any employee for any period of coverage, after the reduction permitted under subsection (a), shall not be less than a ratable portion of the employer-provided premium which would be provided under such plan for such period of coverage with respect to an employee who completes 30 hours of service per week.

`(d) DEFINITIONS- For purposes of this section--

`(1) GROUP HEALTH PLAN- The term `group health plan' has the meaning provided such term in section 607(1).

`(2) EMPLOYER-PROVIDED PREMIUM-

`(A) IN GENERAL- The term `employer-provided premium' under a plan for any period of coverage means the portion of the applicable premium under the plan for such period of coverage which is attributable under the plan to employer contributions.

`(B) APPLICABLE PREMIUM- For purposes of subparagraph (A), in determining the applicable premium of a group health plan, principles similar to the principles applicable under section 604 shall apply.'.

(2) CONFORMING AMENDMENTS-

(A) Section 201(1) of such Act (29 U.S.C. 1051(1)) is amended by inserting `, except with respect to section 211' before the semicolon.

(B) The table of contents in section 1 of such Act is amended by striking the item relating to

section 211 and inserting the following new items:

`Sec. 211. Treatment of part-time workers under group health plans.

`Sec. 212. Effective date.'.

(c) EXPANSION OF DEFINITION OF EMPLOYEE TO INCLUDE CERTAIN INDIVIDUALS WHOSE SERVICES ARE LEASED OR CONTRACTED FOR- Paragraph (6) of section 3 of such Act (29 U.S.C. 1002(6)) is amended--

(1) by inserting `(A)' after `(6)'; and

(2) by adding at the end the following new subparagraph:

`(B) Such term includes, with respect to any employer, any person who is not an employee (within the meaning of subparagraph (A)) of such employer and who provides services to such employer, if--

`(i) such person has (pursuant to an agreement with such employer or any other person) performed such services for such employer (or for such employer and related persons (within the meaning of section 144(a)(3) of the Internal Revenue Code of 1986)) for a period of at least 1 year (6 months in the case of core health benefits) at the rate of at least 500 hours of service per year, and

`(ii) such services are of a type historically performed, in the business field of the employer, by employees (within the meaning of subparagraph (A)).'.

(d) Effective Dates.

(1) IN GENERAL- Except as provided in paragraph (2), the amendments made by this section shall apply with respect to plan years beginning on or after January 1, 1994.

(2) SPECIAL RULE FOR COLLECTIVELY BARGAINED PLANS- In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee

representatives and 1 or more employers ratified on or before the date of the enactment of this Act, paragraph (1) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for `January 1, 1994' the date of the commencement of the first plan year beginning on or after the earlier of--

(A) the later of--

(i) January 1, 1994, or

(ii) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after the date of the enactment of this Act), or

(B) January 1, 1996.

(3) PLAN AMENDMENTS- If any amendment made by this section requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after January 1, 1995, if--

(A) during the period after such amendment made by this section takes effect and before such first plan year, the plan is operated in accordance with the requirements of such amendment made by this section, and

(B) such plan amendment applies retroactively to the period after such amendment made by this section takes effect and such first plan year.

A plan shall not be treated as failing to provide definitely determinable benefits or contributions, or to be operated in accordance with the provisions of the plan, merely because it operates in accordance with this paragraph.

(2) Equity for Temporary Workers Act of 1999 (HR 2298 IH)

This bill's purpose is to provide temporary employees with the same benefits as permanent employees. Equity for Temporary Workers Act of 1999 prohibits employers from discriminating against any temporary employee with respect to wages, hours, and other terms and conditions of employment.

This bill makes a temporary employee eligible to receive any benefit offered by an employer to permanent employees after the temporary employee works for the employer for 1,000 hours during a 12-month period, whether placed by the employer, a temporary help agency, or staffing firm, or under a leasing arrangement by a third party.

This bill requires equal pay for temporary employees because of the Fair Labor Standard Act of 1938 prohibits employers from discriminating employees on the basis of employment status, by paying wages to temporary employees in the same establishment at a rate less than that at which the employer pays full-time employees for equal work on jobs of the performance which require equal skill, effort, and responsibility, and which are performed under similar working conditions. The bill exempts from such prohibition any such payments made pursuant to: (1) a seniority system, (2) merit system, (3) a system that measures earning by quantity or quality of production, or (4) a differential based on any other factor other than employment status.

This bill amends the Occupational Safety and Health Act of 1970 to require employers to furnish each employee a place free from recognized hazards that are causing or are likely to cause death or serious physical harm.

The bill sets forth enforcement provisions with respect to violation of this Act, including civil actions by employees and administrative and injunctive actions by the Secretary of Labor.

SEC. 2. TEMPORARY WORKER RIGHTS.

(a) DISCRIMINATION- No employer shall discriminate with respect to wages, hours, and other terms and conditions of employment against any temporary employee.

(b) BENEFITS- After a temporary employee works for an employer for 1,000 hours during a 12-month period, whether placed in the employ of such employer by the employer, by a temporary help agency or staffing firm, or under a leasing arrangement by a third party, such temporary employee shall be eligible to receive any benefit offered by the employer to other permanent employees.

SEC. 3. EQUAL PAY FOR TEMPORARY EMPLOYEES.

(a) GENERAL RULE- An employer having employees subject to section 6 of the Fair Labor Standards Act of 1938 shall not discriminate, within any establishment in which such employees are employed, between employees on the basis of employment status by paying wages to temporary employees in such establishment at a rate less than the rate at which the employer pays wages to full-time employees in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to--

(1) a seniority system;

(2) a merit system;

(3) a system that measures earning by quantity or quality of production; or

(4) a differential based on any other factor other than employment status.

(b) WAGE REDUCTION- An employer who is paying a wage rate differential in violation of this section shall not, in order to comply with the provisions of this section, reduce the wage rate of any employee.

(c) LABOR ORGANIZATION- No labor organization, or its agents, representing the employees of an employer having employees subject to section 6 of the Fair Labor Standards Act of 1938 shall cause or attempt to cause such an employer to discriminate against an employee in violation of this section.

(d) UNPAID WAGES- For purposes of administration and enforcement, any amounts owing to any employee that have been withheld in violation of this section shall be deemed to be unpaid minimum wages or unpaid overtime compensation under section 5.

(e) DEFINITION- As used in this section, the term `labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employers participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

SEC. 4. LIABILITY TO ALL PERSONS ON WORKSITE.

Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 654(a)(1)) is amended to read as follows:

`(1) shall, at the place of employment of the employer, furnish to each person at such place a place which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to such persons; and'.

SEC. 5. ENFORCEMENT.

(a) CIVIL ACTION BY EMPLOYEES-

(1) LIABILITY- Any employer who violates section 2 or 3 shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2 or 3 proves to the satisfaction of the court that the act or omission which violated such section was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of such section, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) RIGHT OF ACTION- An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) FEES AND COSTS- The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) LIMITATIONS- The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) ACTION BY THE SECRETARY-

(1) ADMINISTRATIVE ACTION- The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2 or 3 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) CIVIL ACTION- The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A).

(3) SUMS RECOVERED- Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) LIMITATION-

(1) IN GENERAL- Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation

for which the action is brought.

(2) WILLFUL VIOLATION- In the case of such action brought for a willful violation of section 2 or 3, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) COMMENCEMENT- In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) ACTION FOR INJUNCTION BY SECRETARY- The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary--

(1) to restrain violations of section 2 or 3, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) SOLICITOR OF LABOR- The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

SEC. 6. DEFINITIONS.

For purposes of this Act:

(1) EMPLOYEE- The term `employee' means any individual who performs services for wages, salary, or other reimbursement under any contract of hire, written or oral, express or implied with an employer. This individual also works for an employer at least 1,000 hours per year.

(2) EMPLOYER- The term `employer' means any person engaged in commerce or in any

industry or activity affecting commerce who employs 100 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

(3) PERMANENT EMPLOYEE- The term `permanent employee' means any individual who is hired for an indefinite period of time as an employee and is accorded benefits.

(4) SECRETARY- The term `Secretary' means the Secretary of Labor.

(5) TEMPORARY AGENCY- The term `temporary agency' means any person regularly undertaking with or without compensation to procure employees for an employer temporarily or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(6) TEMPORARY EMPLOYEE- The term `temporary employee' means any employee who is not permanent.

(3) ERISA Clarification Act of 1999 (HR 2299 IH)

This purpose of the ERISA Clarification Act is to amend Title I of the Employee Retirement Income Security Act of 1974 to ensure proper treatment of temporary employees under employee benefit plans. ERISA Clarification Act of 1999 defines the year of service to include all service for the employer as an employee under the common law, whether the worker is paid through an employment agency, payroll agency, temporary help agency, staffing firm, or any other entity that is not the worker's employer under the common law. This Act requires any exclusion from a pension plan to be made an uniform basis, stated in the plan, and based on reasonable job classifications and objective criteria. This Act prohibits excluding workers from a pension plan for an indefinite period of time: (1) beyond a year of service; or (2) by designating the worker as

a part-time, temporary, leased, agency, or staffing firm employee, where the worker is an employee under the common law and has served the plan's minimum service period. This Act requires every plan instrument to contain eligibility criteria that complies with such requirements and prohibitions with respect to exclusions.

SEC.2. EXCLUSIONS FROM PLAN AFFECTING MINIMUM PARTICIPATION REQUIREMENTS.

Section 202 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1052) is amended by adding at the end the following new subsections:

(c) `Year of service' for purposes of this section includes all service for the employer as an employee under the common law, regardless of whether a worker is paid through an employment agency, payroll agency, temporary help agency, or staffing firm or any other entity which is not the employer of the worker under the common law.

(d) Any exclusion from a pension plan must be made on a uniform basis, must be stated in the plan, must be based on reasonable job classifications, and must be based on objective criteria. An exclusion violates this section if it has the effect of giving an employer or plan fiduciary authority to exclude workers from a pension plan for an indefinite period of time, beyond a year of service as defined in subsection (c) of this section, or to otherwise exclude workers from a pension plan for an indefinite period by designating the worker as part-time employee, temporary employee, leased employee, agency employee, or staffing firm employee, where the worker is an employee of the employer under the common law and has served the plan's minimum service period.'.

SEC. 3. OBJECTIVE ELIGIBILITY CRITERIA IN PLAN INSTRUMENTS.

Section 402(a)(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C.

1102(a)(1)) is amended by adding at the end the following new sentences: `Every such instrument shall contain eligibility criteria which (A) include or exclude employees on a uniform basis, (B) are based on reasonable job classifications, and (C) are based on objective criteria stated in the instrument itself. No plan instrument may permit an employer or plan sponsor to exclude an employee from pension or welfare benefits by simply designating the employee as in an ineligible category, even though the worker, under objective criteria, meets the plan's eligibility criteria.'.

SEC. 4. EFFECTIVE DATE.

(a) IN GENERAL- Subject to subsection (b), the amendments made by this Act shall apply with respect to plans for plan years beginning on or after January 1, 2001.

(b) COLLECTIVE BARGAINING- In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before the date of the enactment of this Act, the amendments made by this Act shall not apply to plan years beginning before the later of--

(1) the date on which the last of such collective bargaining agreements relating to the plan terminates (determined without regard to any extension thereof agreed to after the date of the enactment of this Act), or

(2) January 1, 2001.

For purposes of paragraph (1), any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by this Act shall not be treated as a termination of such collective bargaining agreement.

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Indiana University Maurer School of Law, Bloomington, U.S.A.
SJD (Doctor of Juridical Science) (Aug. 2004 ~ Dec. 2010)
LLM Thesis (Master of Laws) (May 2003 ~ Jan.2010) (revised)
Ewha Womans University, Seoul, Republic of Korea
Doctoral program in Law: coursework completed (Sep.1996 ~ May.1998)
Master of Law (Mar.1993 ~ Aug.1995)
Bachelor of Law (Mar.1989 ~ Feb.1993)
Ewha Girls' High School, Seoul, Republic of Korea (Mar. 1986 ~ Feb. 1989)

SCHOLARSHIPS AND AWARDS

Merit Scholarship (2009), Indiana Univ. Maurer School of Law
Appenzeller Memorial Scholarship (Mar.2004), International Foundaton for Ewha Womans Univ.
Ewha (Doctoral) Graduate Research Fellowship (Sep.1997 ~ May.1998), Ewha Womans Univ. (First-ever beneficiary, Full Academic Scholarhip)
Master Representative for the Master of Law Program's commencement (May.1995)
Full Academic Scholarship (Master of law)
Graduated as MAGNA CUM LAUDE in Bachelor of Law program; Recipient of KIM-EDA Award (Feb.1993) (Recipient of highest honors among six disciplinary fields)
Korean University Student Representative for National Research Foundation of Korea (Fellowship to China) (1992)
Dean's List (1991)
Honor Scholarships (1st semester 1990, 1991)
Full Academic Scholarship (Bachelor of law)

PROFESSIONANAL EXPERIENCE

1. Teaching and Research Experience

Lecturer at Hallym University, College of Social Science, Department of Law
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Senior researcher at Korea Labor Institute (KLI) (Dec.1998 ~ Sep.2004)
Lecturer at Korea National Open University, College of Social Science, Department of Law
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Researcher at KLI (Sep.1996 ~ Nov.1998)
Research Assistant at KLI (May.1994 ~ Feb.1995)

2.Other Experience

Member of Labor Reform Forum (Nov.2002 ~ Mar.2003)
Coordinator of Korea Society of Labor Law (Jan.2002 ~ Dec.2002)
Member of Social Insurance Integration Center (Jan.1998 ~ Dec.1998)
Member of the Seoul National University Society of Labor Law (Jan.1998 ~ Present)
Member of Korea Society of Labor Law (Jan.1996 ~ Present)
Member of Democratic Legal Studies Association (Jan. 1996 ~ Present)

RESEARCHPAPERS AND PUBLICATIONS

1. Books

LEGAL ISSUES OF INDUSTRIAL UNION AND COLLECTIVE BARGAINING AT INDUSTRIAL LEVEL (co-authored), (2010)

REFORM PLAN OF TEACHER'S UNION IN KOREA (co-authored), (2010)

CONTINGENT WORKERS IN THE UNITED STATES (revised), Indiana University, Bloomington (Jan. 2010)

ADR SYSTEM IN SELECTED COUNTRIES (co-authored), (2009)

A COMPARATIVE STUDY ON THE REMEDY FOR UNFAIR DISMISSAL (co-authored), KLI (Dec. 2002)

A STUDY ON THE LEGAL AND INSTITUTIONAL SYSTEM FOR REDUCTION OF WORKING HOURS (co-authored), KLI (Feb. 2002)

SOCIAL INSURANCE INTEGRATION (co-authored), KLI (Dec. 1999)

A STUDY ON IMPROVING THE RETIREMENT PLAN FOR KOREA WATER RESOURCES CORPORATION (co-authored), Korea Ministry of Labor (1998)

A STUDY ON THE LEGAL STATUS OF LABOR UNION PREDECESSORS, Korea Ministry of Labor (1998)

A CRITICAL REVIEW OF THE EXAMINATION AND RE-EXAMINATION SYSTEM OF INDUSTRIAL ACCIDENT COMPENSATION INSURANCE ACT (co-authored), Ministry of Labor (Dec. 1998)

WORKER'S GUIDEBOOK TO THE LABOR STANDARD ACT (co-authored), Ministry of Labor (1996 ~ present)

WORKER'S GUIDEBOOK TO THE EMPLOYMENT INSURANCE ACT (co-authored), Ministry of Labor (1996 ~ present)

A SURVEY OF PUBLIC OPINIONS ON THE AMENDMENTS TO THE LABOR LAW OF KOREA (co-authored), KLI (1996)

LAOR LAW CASE DIGEST, KLI (1996 ~ 2001)

A CRITICAL REVIEW OF THE EMPLOYMENT INSURANCE ACT FOR THE PERSPECTIVE OF EMPLOYMENT SECURITY LAW (unpublished Master's thesis, Ewha Womans University) (Aug. 1995)

2. Articles

The Remedy for Unfair Dismissal in the UK, LAB. L. REV.NO.19, The SNU Society of Labor Law (Dec. 2003).

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Japan's leaves to Care for Sick Family Members, A STUDY TO LEGALIZE TEMPORARY LEAVES TO CARE FOR SICK FAMILY MEMBERS, Korean Women's Development Institute (KWDI) (1993)

3. Translation Work

ILO LABOUR LEGISLATION GUIDELINES, KLI (2004)

MEDIA APPEARANCE

Employment Insurance Law for Women, Donga TV (1995)

Interview on Representative Korean University Student, The Ewha Weekly (1992)