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The Declining Fortunes of American Workers: Six Dimensions and an Agenda for Reform

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THE DECLINING FORTUNES OF AMERICAN WORKERS: SIX DIMENSIONS AND AN AGENDA FOR REFORM

Stephen F. Befort*

Abstract

At the turn of the century, I undertook an assessment of the then-current state of workplace rights and obligations. I concluded that the balance of power between employers and workers was “badly skewed” in favor of employers. This Article revisits that topic for the purpose of assessing twenty-first-century trends through the lens of six workplace dimensions. They are: workforce attachment, union–management relations, employment security, income inequality, balancing work and family, and retirement security. An examination of these dimensions reveals that the status of U.S. workers has significantly declined during the first sixteen years of the twenty-first century. This Article then sets out a proposed agenda for reform designed to recalibrate the current imbalance in the respective fortunes of employees and employers.

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INTRODUCTION

The American workplace is subject to less regulation than the rest of the industrialized world.¹ U.S. employers are free to hire and fire employees at will.² U.S. law does not mandate paid parental leave or a minimum period of paid vacation leave.³ The vast majority of the U.S. economy is union-free.⁴

At the turn of the century, I undertook an assessment of the then-current state of workplace rights and obligations. I concluded that the balance of power between employers and workers was “badly skewed” in favor of employers.⁵ This Article revisits that topic to assess twenty-first century trends. The clear and unvarnished conclusion is that the disequilibrium has only worsened and meaningful reform is necessary to enhance fundamental workplace fairness.

1. STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS* 48 (Stanford Univ. Press, 2009).

2. *Id.*

3. *Id.*

4. *See id.* at 108.

5. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 422 (2002).

Part I of this Article examines six dimensions that have contributed to the declining fortunes of American workers. These dimensions are:

1. Workforce attachment;
2. Union–management relations;
3. Employment security;
4. Income inequality;
5. Balancing work and family; and
6. Retirement security.

Each of these dimensions reveals that the rights of U.S. workers have significantly diminished during the first sixteen years of the twenty-first century.

Part II sets out a needed agenda for reform focused on the six dimensions listed above. While the current fractious political environment is not likely to support broad-based reform, significant legal and policy changes are sorely needed to enhance workplace equity and voice.

I. ASSESSING WORKPLACE FAIRNESS THROUGH SIX DIMENSIONS

This Article examines six work-related dimensions in an attempt to gauge the changing fortunes of American workers. Unfortunately, the trend is not bearing in a favorable direction.

A. *Workforce Attachment*

The predominant employment model in the United States for much of the twentieth century was that of a “core worker system” characterized by long-term employment relationships.⁶ Employers during this period generally found it advantageous to promote long-term tenure by providing competitive wage rates, training and development plans, and internal lines of progression and promotion.⁷

6. RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* 12 (1989). As explained by Belous:

Core workers have a strong affiliation with an employer and are treated by the employer as having a significant stake in the company. Core workers can be thought of as being part of the so-called corporate family. They show long-term attachment to a company and have a real measure of job stability.

Id. at 5.

7. SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945*, at 254–69 (1985); Matthew W.

But the core worker system has significantly diminished, displaced by a growing “contingent workforce” who provide work other than on a long-term, full-time basis.⁸ Some contingent workers, such as independent contractors and leased workers are not “employees” of the entity for whom they provide services.⁹ Others, such as part-time and temporary employees, have the legal status of employees, but with a lesser degree of attachment to the workplace than that exhibited by traditional “core” employees.¹⁰ Although it is difficult to determine the exact number of contingent workers due to varying definitions, the U.S. General Accountability Office estimated in 2015 that contingent workers account for approximately 40% of all American workers, up from 30% a decade earlier.¹¹

Two additional categories of workers also exhibit attributes of precarious work relationships. Workers who perform work in the gig or sharing economy constitute one of those categories.¹² Uber drivers and Amazon Mechanical Turk taskers are examples of this “crowdwork.”¹³ What makes crowdwork unique is the division in identity between the entity that directs the work (i.e., Uber) and the recipient beneficiaries of that work (i.e., Uber passengers).¹⁴ This unique structure helps explain the widespread and controversial litigation contesting whether crowdworkers should have the status of employees or independent contractors.¹⁵ In a recent article, Professor Miriam Cherry describes the

Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 751–52.

8. See Befort, *supra* note 5, at 366–67; BELOUS, *supra* note 6, at 5–6; see also Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 564 (1996) (noting a greater than 30% increase in contingent workers between 1980 and 1996).

9. Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158 (2003).

10. *Id.*

11. U.S. GOV'T ACCOUNTABILITY OFFICE, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 4 (2015), www.gao.gov/products/GAO-15-168R.

12. Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0.

13. See generally Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143 (2011) (assessing crowdsourcing through a case-study of Amazon's Mechanical Turk); Henry Ross, *Ridesharing's House of Cards: O'Connor v. Uber Technologies, Inc. and the Viability of Uber's Labor Model in Washington*, 90 WASH. L. REV. 1431 (2015) (discussing Uber's employment model).

14. See Felstiner, *supra* note 13, at 145–46.

15. See generally Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577 (2016) (summarizing the status of various worker lawsuits within the on-demand economy).

work performed by fourteen million American crowdworkers as a modern type of piecework characterized by deskilled tasks and low pay.¹⁶

In his book, *The Fissured Workplace*, Professor David Weil describes yet another group of workers—those spun off by lead companies through such strategies as subcontracting and franchising.¹⁷ These workers are not usually categorized as contingent workers since they are employees of the spun-off entities.¹⁸ However, Weil describes how fissuring depresses wages and regulatory compliance.¹⁹ The leaner lead companies, Weil concludes, attempt to have it both ways: imposing work standards on spun-off firms while avoiding the legal obligations that flow from direct employment.²⁰

Contingent work arrangements are attractive to employers as a means to maximize labor market flexibility. Advances in technology and transportation have spawned a global marketplace and incentivized firms to enhance competitiveness through flexible work arrangements.²¹ Contingent workers add to the flexibility of the workforce by enabling companies to adjust personnel and staffing needs while avoiding “the expense of cyclical hiring and lay-off periods.”²² Firms expand their workforce by hiring contingent workers in boom times, and then let the contingent workers go when cycles turn downward.²³

While employers reap many benefits from this greater labor market flexibility, the increase in contingent work comes with several costs for employees and unions. As I explained in my turn-of-the-century article: “Contingent workers tend to earn less pay . . . [and] are less likely to enjoy employer-paid health care coverage and other employee benefits. Contingent workers generally receive less training and are often more unemployed. They also feel less loyalty and commitment to their employers.”²⁴

16. *Id.* at 577–78, 600–02.

17. See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

18. *Id.* at 272–74.

19. *Id.* at 15–18.

20. *Id.* at 183.

21. See Befort, *supra* note 9, at 160.

22. *Id.*; Maria O’Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849, 858 (1995).

23. SAMUEL ESTREICHER & STEWART J. SCHWAB, *FOUNDATIONS OF LABOR AND EMPLOYMENT LAW* 25 (2000).

24. Befort, *supra* note 5, at 416; Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 520 (1997).

In addition, many contingent workers have not voluntarily chosen their work status.²⁵ Some studies have indicated that as many as 60% of temporary employees and 20% of part-time employees would prefer more traditional full-time jobs.²⁶

Perhaps the most significant problem that the rise in nonstandard employment arrangements poses, however, is the fact that many of these workers fall outside of the regulatory safety net constructed for the employment relationship. This occurs because American labor and employment regulations extend only to “employee[s].”²⁷

Courts generally use either of two tests to determine employee status. The most frequently used standard is the common law agency test.²⁸ This test primarily focuses on the employer’s “right to control not only the result accomplished by the work, but also the details and means by which that result is accomplished.”²⁹

A somewhat more inclusive “economic realities”³⁰ test is used to determine employee status under the Fair Labor Standards Act of 1938 (FLSA)³¹ and the Family and Medical Leave Act (FMLA).³² A Department of Labor opinion letter summarized this approach, stating that “an employee, as distinguished from a person who is engaged as a business of his own, is one who, as a matter of economic reality follows the usual path of an employee and is dependent on the business for which he serves.”³³

25. See U.S. DEP’T OF LABOR, REPORT AND RECOMMENDATIONS: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 35 (1994).

26. POLLY CALLAGHAN & HEIDI HARTMANN, ECON. POLICY INST., CONTINGENT WORK: A CHART BOOK ON PART-TIME AND TEMPORARY EMPLOYMENT 19 (1991), <http://www.epi.org/files/2014/contingent-work.pdf>.

27. See Befort, *supra* note 5, at 417; 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, 883 (1995) (“Under our social welfare system, the receipt of statutory protection or benefits is dependent on a person meeting the definition of ‘employee’ under the relevant statute.”).

28. RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

29. 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, 248 (1997) (internal quotations omitted); Befort, *supra* note 5, at 417.

30. *Id.*

31. 29 U.S.C. § 201 (2012).

32. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727, 730, 731 (1947); *Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 422 (2d Cir. 2016); 29 C.F.R. § 825.105 (2016).

33. U.S. DEP’T LABOR WAGE AND HOUR DIVISION, FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (2007), <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf>.

The U.S. Supreme Court reinvigorated the common law standard in its 1992 decision in *Nationwide Mutual Ins. v. Darden*.³⁴ In that case, the Court rejected the use of an economic realities test in determining employee status for The Employment Retirement Income Security Act of 1974 (ERISA) purposes, suggesting that the broader standard was limited in application to the FLSA.³⁵ The Court instead adopted a thirteen-factor formulation of the common law test.³⁶

As I summarized in my 2002 article:

The [restrictive] *Darden* test is problematic for several reasons. For one thing, the test can produce unpredictable results. Any formula with thirteen variables is bound to have considerable play in the joints. . . .

The *Darden* test is also prone to entrepreneurial manipulation. As the final report of President Clinton's blue-ribbon Dunlop Commission noted, the [common law] test provides employers with both "a means and incentive to circumvent the employment policies of the nation." . . . [Many employers] structure work arrangements so that subcontractors and leased employees fall on the non-employee side of the *Darden* divide.

Finally, the [restrictive] common law test is inconsistent with the fundamental objectives of modern labor and employment legislation. . . . By focusing primarily on the right to control, the test denies the benefits of protective social legislation to many workers who labor under subordinate economic circumstances. As Professor Marc Linder puts it, the common law test is rooted in a "denial of socioeconomic purpose."³⁷

Contingent work arrangements also contribute to union decline. Contingent workers, with their weak affiliation with the enterprise, are a difficult group to organize.³⁸

34. 503 U.S. 318 (1992).

35. *Id.* at 325–26.

36. *Id.* at 323–24.

37. Befort, *supra* note 5, at 419–20 (footnotes omitted) (first quoting U.S. DEP'T OF LABOR, *supra* note 25, at 38; and then quoting Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y 187, 187 (1999)).

38. See Befort, *supra* note 5, at 370–71; Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 551 (2001).

Thus, in comparison to the turn of the century, the number of American workers engaged in contingent work relationships continues to grow.³⁹ As more workers fall outside the regulatory safety net, they increasingly perform routinized tasks, earn less income, and face the prospect of precarious job tenure.

B. *Union–Management Relations*

Unions are the most significant voice mechanism for American workers.⁴⁰ But that voice has lost volume with declining union membership.

1. The NLRA and Union Density

The National Labor Relations Act (NLRA) is the principal federal statute regulating labor/management relations in the private sector.⁴¹ Although the NLRA does not apply in the public sector,⁴² most states have enacted labor relations acts applicable to public employers and employees.⁴³ Many of these statutes provide rights and obligations similar to the NLRA, with the notable exception that a majority of the state statutes do not protect the right to strike.⁴⁴

The NLRA protects three types of employee conduct. First, the NLRA protects the right of employees to engage or not engage in organizational activities.⁴⁵ A second right conferred by the NLRA is the right of employees to bargain collectively through their selected union representative, with both employers and unions obligated to negotiate in “good faith.”⁴⁶ Finally, the NLRA protects the right of employees to engage in “concerted activities for . . . mutual aid or protection.”⁴⁷

Collective rights arising under the NLRA are enforced through administrative procedures under the auspices of the National Labor Relations Board (NLRB).⁴⁸ Enforceable rights also are created by collective bargaining agreements negotiated pursuant to the NLRA. “[T]he vast majority of such agreements provide for a ‘just cause’

39. See *supra* note 11 and accompanying text.

40. BEFORT & BUDD, *supra* note 1, at 107–08.

41. 29 U.S.C. §§ 151–169 (2012).

42. *Id.* § 152(2).

43. See MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 292–94 (2d ed. 2011).

44. See *id.* 292–94, 557.

45. 29 U.S.C. § 157; see Befort, *supra* note 5, at 357–59.

46. 29 U.S.C. § 158(d).

47. *Id.* § 157.

48. 29 U.S.C. § 153(a), (d); *id.* § 160(c).

limitation on employee discipline and discharge,” enforceable through a “grievance procedure culminating in binding arbitration.”⁴⁹

The decline of the American union movement is a long-running story. Union membership in the United States peaked in 1954 at 34.7% of the nonagricultural labor force and then began a long and steady decline.⁵⁰ Union density dropped to 27.3% in 1970 and continued downward to 16.1% in 1990.⁵¹ By the turn of the century, union density stood at 13.5%.⁵² The decline has slowed, but not stopped, as the most recently available data for 2016 show union membership at 10.7% of the nonagricultural labor force.⁵³ Looking only at the private sector, union members comprise just 6.4% of the current private-sector labor force.⁵⁴

2. Employer Opposition and Deficiencies in the NLRA’s Regulatory Structure

A number of factors, such as globalization⁵⁵ and the drive for flexible employment practices,⁵⁶ have contributed to union decline. These factors, however, do not explain why the decline in union density has been more severe in the United States than in many other western industrialized countries.⁵⁷

Two other factors may explain the steepness of the U.S. decline. First, a unique attribute of the American system of labor relations is the active opposition of U.S. employers to union organization efforts. Second, weaknesses in the NLRA regulatory scheme treat many anti-union tactics as lawful and fail to deter adequately others that are not.⁵⁸

Four examples illustrate the remedial shortcomings of the NLRA. First, the NLRA remedies illegal employer actions, such as the discharge of leading employee organizers with only a cease and desist order

49. See Befort, *supra* note 5, at 359.

50. MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl.1 (1987).

51. Charles B. Craver, *The Relevance of the NLRA and Labor Organizations in the Post-Industrial, Global Economy*, 57 *LAB. L.J.* 133, 133–34 (2006); Befort, *supra* note 5, at 361.

52. See Befort, *supra* note 5, at 361.

53. Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, *Union Members Summary* (Jan. 26, 2017), <http://stats.bls.gov/news.release/union2.nr0.htm>.

54. See *id.* (reporting that 7.1 million public sector employees belonged to a union as compared to 7.4 million private sector employees). As of 2016, 34.4% of all government workers were union members, accounting for nearly half of total union membership. *Id.*

55. See Befort, *supra* note 5, at 362–64.

56. *Id.* at 366–71.

57. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 14–15 tbl.2.1 (1994).

58. Befort, *supra* note 5, at 372–75.

coupled with reinstatement and back pay.⁵⁹ The NLRA does not provide for fines, punitive damages, or any other “penalty.”⁶⁰

The NLRA’s relatively weak remedial scheme also lessens the effectiveness of the act’s bargaining mandate. The only remedy recognized under the NLRA for a party’s refusal to engage in good faith bargaining is an order requiring that party to return to the bargaining table.⁶¹

Third, an additional shortcoming of the NLRA scheme flows from an employer’s ability to hire permanent replacements to fill the positions of striking employees. An employer lawfully may decline to reinstate a striker at the conclusion of a strike so long as the position continues to be occupied by a replacement employee.⁶²

Finally, employers have increasingly discovered the offensive lockout as a powerful coercive weapon.⁶³ Until 1965, the NLRA permitted employers to engage in a lockout only as a defensive shield against certain union activities, but in that year the Supreme Court held that an employer could initiate an offensive lockout in support of bargaining demands.⁶⁴ The NLRB subsequently expanded the parameters of the permissible offensive lockout by ruling that employers need not wait until impasse to institute a lockout⁶⁵ and could hire temporary employees to continue operations during a lockout.⁶⁶ The offensive lockout has proved such a successful and devastating weapon that, by 2011, a majority of major work stoppages were the result of lockouts rather than strikes.⁶⁷

59. 29 U.S.C. § 160(c) (2012).

60. See Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1776, 1789 (1983); Befort, *supra* note 5, at 373.

61. Ex-Cell-O Corp., 185 N.L.R.B. 107, 110 (1970), *rev’d*, 449 F.2d 1046 (D.C. Cir. 1971), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971); see Befort, *supra* note 5, at 373–74. The Supreme Court has ruled that the NLRB is without power to impose substantive contract terms in the event of a violation, even where the NLRB has concluded that an employer has acted in a manner designed to frustrate the bargaining process. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).

62. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938); *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369–70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); Befort, *supra* note 5, at 374–75.

63. See generally Douglas E. Ray & Christopher David Ruiz Cameron, *Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of American Ship Building Company v. NLRB*, 31 ABA J. LAB. & EMP. L. 325 (2016) (describing the increased usage and impact of the offensive lockout over the past five decades).

64. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

65. *Harter Equip., Inc.*, 280 N.L.R.B. 597, 600 (1986).

66. *Darling & Co.*, 171 N.L.R.B. 801, 803 (1968).

67. See Press Release, Bureau of Labor Statistics, 280 Major Work Stoppages in 2011 (Feb. 8, 2012), http://www.bls.gov/news.release/archives/wkstp_02082012.htm. The Bureau of Labor Statistics defines “major work stoppages” as those involving 1,000 or more workers. *Id.*

In short, U.S. labor law is not kind to employees who want union representation. Given management's natural economic leverage in the workplace, the significance of employer-opposition activities is not lost on the employee electorate.⁶⁸

This dimension, accordingly, also shows a decline in worker fortunes. Union density rates have dropped from 13.5% in 2000 to 10.7% in 2016.⁶⁹ In 2011 alone, twelve states adopted legislation curtailing public-sector bargaining rights in one fashion or another.⁷⁰ And, employers increasingly are successful in using lockouts and replacement workers to enhance their bargaining leverage. Employee voice in the form of union representation has lost volume since the turn of the century.

C. *Employment Security*

In the absence of a statute or contract to the contrary, the default status of employment relationships in the United States is governed by the at-will rule.⁷¹ According to the classic formulation of the rule, "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."⁷²

The American at-will rule flouts prevailing international norms. Virtually all other industrialized nations have adopted legislation that requires some variant of a just-cause standard for an employee's dismissal.⁷³ These statutes are consistent with the International Labor Organization's Convention No. 158, which states that

the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.⁷⁴

The latter half of the twentieth century witnessed the emergence of

68. BEFORT & BUDD, *supra* note 1, at 111.

69. *See supra* notes 52–53 and accompanying text.

70. *See generally* Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149 (2012) (discussing changes to public employee collective bargaining in twelve states).

71. *See* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 68–70 (2000). *See generally* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (describing the development and historical antecedents of the employment-at-will rule).

72. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519–20 (1884).

73. *See* Befort, *supra* note 5, at 404–06.

74. Convention No. 158 Concerning Termination of Employment at the Initiative of the Employer, June 22, 1982, 1412 U.N.T.S. I-23645.

both statutory and common law limitations on the at-will doctrine. On the statutory side, federal statutes imposed the most significant limitations, prohibiting discrimination based on such characteristics as race,⁷⁵ gender,⁷⁶ age,⁷⁷ and disability.⁷⁸ Meanwhile, primarily during the 1980s and 1990s, state courts adopted three judge-made limitations as described below.

Most jurisdictions permit an employee to maintain a tort action claiming that a discharge decision offends public policy.⁷⁹ Courts have held that public policy considerations bar employers from terminating employees who refuse to commit an unlawful act,⁸⁰ exercise statutory rights,⁸¹ perform a public function,⁸² or report an employer's unlawful conduct.⁸³ With respect to the last type of conduct, a number of jurisdictions also have enacted statutes specifically prohibiting employee discharges for such "whistleblowing" activities.⁸⁴

75. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b) (2012) (prohibiting discrimination on the basis of race).

76. See *id.* (prohibiting discrimination on the basis of sex).

77. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (2012) (prohibiting discrimination on the basis of age).

78. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2012) (prohibiting discrimination on the basis of disability).

79. See Befort, *supra* note 5, at 381-82; Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 400-05 (1989) (citing forty-three states as recognizing the public policy cause of action).

80. See, e.g., Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (refusal to violate antipollution laws by dispensing leaded gas into cars designed for unleaded gas); Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1333-34 (Cal. 1980) (refusal to participate in an unlawful price-fixing scheme); Remington Freight Lines, Inc. v. Larkey, 644 N.E.2d 931, 938 (Ind. Ct. App. 1994) (refusal to drive an illegally overloaded truck).

81. See, e.g., Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 173 (N.C. 1992) (finding public policy cause of action for employee who was fired for refusing to work for less than the statutory minimum wage); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (finding public policy cause of action for employee discharged for filing workers' compensation claim).

82. See, e.g., Nees v. Hocks, 536 P.2d 512, 517 (Or. 1975) (recognizing public policy claim for employee terminated because of desire to serve jury duty).

83. See, e.g., Fox v. MCI Commc'ns Corp., 931 P.2d 857, 862 (Utah 1997) (finding public policy cause of action for employee who was discharged for informing law enforcement authorities of fraudulent sales practices); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981) (finding public policy claim for employee discharged for reporting criminal conduct to authorities); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980) (finding public policy cause of action for employee who was discharged for reporting labeling misrepresentations to employer).

84. See, e.g., The Whistleblower Protection Act of 1989, 5 U.S.C. § 2301(b)(9) (2012) (protecting federal employees from retaliation for whistleblowing); MICH. COMP. LAWS §§ 15.361-369 (2016) (protecting both private- and public-sector employees from retaliation for blowing the whistle on illegal acts); see also MARK ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT

As I identified in an earlier article, the majority of states also recognize a contract-based exception to the at-will employment rule.⁸⁵ The courts in these states imply contractual obligations, such as some form of job security or disciplinary procedure, from an employer's unilateral promise such as one expressed in an employee handbook or policy statement.⁸⁶

Finally, a few jurisdictions go further and read a covenant of good faith and fair dealing into employment agreements.⁸⁷ This covenant requires that each party in an employment relationship refrain from acting in bad faith so as to frustrate one another's expectations of receiving the benefits of their bargain.⁸⁸

Since the turn of the century, however, courts have whittled down the scope of these three common law claims. State courts have employed a variety of strategies in cabining the reach of the public policy tort claim. Three examples are illustrative.

First, a number of decisions have refused to extend the public policy tort claim beyond its basic origins. The Minnesota Supreme Court, for example, has ruled that the public policy exception does not apply to a termination in response to an employee's application for unemployment benefits.⁸⁹ Even though a number of jurisdictions recognize a public policy claim in favor of an employee terminated for exercising a statutory right, the Minnesota court determined that the common law claim in that state was limited to an employee's good faith refusal to violate a statute.⁹⁰ Similarly, in *Bammert v. Don's Super Valu, Inc.*,⁹¹ the Wisconsin Supreme Court declined to find a public policy claim in an employer's retaliatory termination of an employee whose husband arrested the

LAW 923 (4th ed. 1998) (reporting that 37 states have enacted some form of statutory protection for employees reporting illegal activity).

85. See Befort, *supra* note 5, at 382; Chagares, *supra* note 79, at 400–05 (citing forty-one states as recognizing an implied contract exception to the at-will rule).

86. See, e.g., *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 317 (Ill. 1987) (finding that an employee handbook may be contractually binding); *Wooley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985) (finding that an implied disclaimer in an employee handbook is enforceable without a clear disclaimer); see also Befort, *supra* note 5, at 382.

87. See Befort, *supra* note 5, at 382; see, e.g., *Mitford v. de Lasala*, 666 P.2d 1000, 1003 (Alaska 1983) (ruling against an employer who discharged an employee in effort to avoid profit-sharing liability); *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1365 (Nev. 1987) (ruling against an employer who dismissed an employee in an effort to avoid retirement benefit payments).

88. See Befort, *supra* note 5, at 382; see, e.g., *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1253 (Mass. 1977) (holding in favor of salesman fired by employer in an attempt to avoid paying future bonus payments under a contractual arrangement).

89. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 148 (Minn. 2014).

90. *Id.* at 151.

91. 646 N.W.2d 365 (Wis. 2002).

employer's spouse for driving while intoxicated.⁹² While a dissenting opinion argued in favor of "a strong public policy in vigorous enforcement of the law,"⁹³ the majority opinion cited "[I]ine-drawing" concerns about protecting conduct undertaken by someone other than the terminated employee.⁹⁴

Second, some courts have ruled that protection for whistleblowing applies only to reports of behavior prohibited by statute but not to conduct that is fraudulent or reprehensible.⁹⁵ The U.S. Circuit Court of Appeals for the Eighth Circuit, applying Minnesota law, ruled that the state's Whistleblower Act would not protect reports alleging practices that were "wrong," "unethical," "decept[ive]," and "fraud[ulent]."⁹⁶

Third, some states will not forbid retaliation against employees who report illegal conduct if the illegality primarily implicates private interests as opposed to truly important public concerns.⁹⁷ In this regard, the Iowa Supreme Court has held that a report of illegal conduct will be protected only if it "captures the communal conscience and common sense of our state in matters of public health, safety, morals, and general welfare."⁹⁸ This approach empowers judges to decide that some whistleblowing reports are worthy of protection while others are not.

While the courts have marginally limited the reach of the public policy exception, they have eviscerated the other two common law claims. Although it is true that most jurisdictions have recognized that unilateral employer statements, such as those contained in employee handbooks, may contain enforceable promises,⁹⁹ the widespread use of disclaimers has largely negated that effect in practice. Generally speaking, a disclaimer is a provision within a policy document that states that nothing contained in the document should be construed as a contract and that the employment relationship may be terminated on an at-will basis.¹⁰⁰ A substantial majority of U.S. courts find that a clearly stated disclaimer will bar the enforcement of employer policy statements.¹⁰¹ In accordance

92. *Id.* at 367.

93. *Id.* at 373 (Bablitch, J., dissenting).

94. *Id.* at 372.

95. *See, e.g.,* Dean v. Consol. Equities Realty, LLC, 914 N.E.2d 1109, 1113 (Ohio Ct. App. 2009).

96. Chial v. Sprint/United Mgmt. Co., 569 F.3d 850, 853–55 (8th Cir. 2009).

97. *See, e.g.,* Lamson v. Crater Lake Motors, Inc., 216 P.3d 852, 858 (Or. 2009); Barker v. State Ins. Fund, 40 P.3d 463, 470 (Okla. 2001).

98. Berry v. Liberty Holdings, Inc., 803 N.W.2d 106, 110 (Iowa 2011).

99. *See supra* note 85 and accompanying text.

100. *See* Chagares, *supra* note 79, at 386.

101. *See* Bryce Yoder, *How Reasonable Is "Reasonable"? The Search for a Satisfactory Approach to Employment Handbooks*, 57 DUKE L.J. 1517, 1535 (2008); *see, e.g.,* Boulton v. Inst. of Int'l Educ., 808 A.2d 499, 505 (D.C. 2002); Phipps v. IASD Health Servs. Corp., 558 N.W.2d

with prevailing unilateral contract analysis, this result follows because the disclaimer effectively nullifies any construction of a handbook or other policy statement as an enforceable offer.¹⁰² In addition, a clear majority of states find that an employer may modify or revoke previously issued policy statements on a unilateral basis.¹⁰³ As a result, very few policy statements are enforceable via the contract-based exception.¹⁰⁴

Most states have declined to recognize the covenant of good faith and fair dealing as a limitation on an employer's at-will prerogative. Some courts have decided not to recognize the covenant because of the difficulty in determining the subjective bad faith element.¹⁰⁵ More commonly, courts have rejected the covenant claim on the grounds that it is inherently inconsistent with the at-will presumption.¹⁰⁶

Even in those states that have recognized the covenant claim, courts have curtailed its utility. The California case of *Guz v. Bechtel National, Inc.*¹⁰⁷ is a decision on point.¹⁰⁸ In that case, an employee challenged his discharge by asserting both an implied contract claim and a covenant of good faith and fair dealing claim.¹⁰⁹ The California Supreme Court ruled that a covenant claim is "either inapplicable or superfluous" in that context.¹¹⁰ The claim is inapplicable because it cannot create any new or different rights than those provided by the underlying contract claim.¹¹¹ And it is superfluous in that the remedy for breach of the covenant is limited to the same contract-based remedies as the implied contract claim.¹¹² In essence, under *Guz*, a covenant claim adds value only if the

198, 204 (Iowa 1997); *Massey v. Krispy Kreme Doughnut Corp.*, 917 So. 2d 833, 841 (Ala. Civ. App. 2005).

102. See Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 348–49 (1992); Yoder, *supra* note 101, at 1535.

103. See Brian T. Kohn, Note, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 819 (2003). *But cf.* *Demasse v. ITT Corp.*, 984 P.2d 1138, 1144–46 (Ariz. 1999) (requiring mutual assent and additional consideration to support such a change).

104. See Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 125 (2009).

105. See, e.g., *Parmer v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Haw. 1982) (rejecting the covenant because it would necessitate "judicial incursions into the amorphous concept of bad faith").

106. See, e.g., *City of Midland v. O'Bryant*, 18 S.W.3d 209, 213–14 (Tex. 2000); *Nelson v. Crimson Enters., Inc.* 777 P.2d 73, 74 (Wyo. 1989); *Jeffers v. Bishop Clarkson Mem'l Hosp.*, 387 N.W.2d 692, 695 (Neb. 1986).

107. 8 P.3d 1089 (Cal. 2000).

108. *Id.* at 1094.

109. *Id.*

110. *Id.* at 1109.

111. *Id.* at 1110.

112. *Id.* at 1112 (citing *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988)).

contractual promise being breached in bad faith involves something other than a promise of job security or termination procedures.

In sum, the scope of common law limitations on wrongful discharge has narrowed since the turn of the century. As contingent work rises and unionization declines, the traditional expectation that good work will be rewarded with employment longevity continues to ebb.¹¹³

D. *Income Inequality*

From the end of World War II into the 1970s, “substantial economic growth and broadly shared prosperity” characterized the American economy.¹¹⁴ However, beginning in the 1970s, income growth noticeably slowed for middle and lower income households while it continued for higher earning households.¹¹⁵ This trend has resulted in a sharp rise in income inequality, which is now greater than at any time since the Great Depression.¹¹⁶

The numbers tell a compelling story. Between 1979 and 2007, real household income for the bottom quintile (20%) of the American population income group grew at a relatively weak rate of 10.8%.¹¹⁷ In contrast, real income growth for the top-earning quintile grew at a much more robust 88.7%.¹¹⁸ Even more dramatically, the top 5% of families realized average gains of 145.7%.¹¹⁹ In terms of their respective shares of total household income growth during that period, 74.5% was attributable to gains realized by the highest-earning quintile, while only 0.7% was attributable to gains realized by the lowest-earning quintile.¹²⁰

As of 2011, the top quintile of household earners garnered more than half (51.1%) of total U.S. income, with the top 5% alone accounting for 22.3%.¹²¹ In contrast, the bottom quintile accounted for a meager 3.2%

113. See Befort, *supra* note 5, at 388–91 (discussing the decline of the social contract underpinning long-term employment relationships).

114. CHAD STONE ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY 1 (2016), http://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_1.pdf.

115. *Id.*; Drew Desilver, *U.S. Income Inequality, on Rise for Decades, Is Now Highest Since 1928*, PEW RES. CTR. (Dec. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/#>.

116. STONE ET AL., *supra* note 114, at 1; Desilver, *supra* note 115.

117. LAWRENCE MISCHER ET AL., *THE STATE OF WORKING AMERICA* 108 (12th ed. 2012).

118. *Id.*

119. *Id.*

120. *See id.* at 24.

121. U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: HOUSEHOLDS, TABLE H-2 (Sept. 13, 2016), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html>.

of total income.¹²² A particularly startling snapshot of this trend is that chief executive officers of major U.S. companies earned approximately 277 times more than the average worker in 2007, representing a more than seven-fold increase since 1979.¹²³

This inequality is even more drastic in light of the impact of productivity and taxation. Between 1973 and 2011, U.S. workforce productivity grew by 80.4%.¹²⁴ This figure exceeded the real income growth of the bottom quintile of households by more than seven times (10.7%), and more than doubled the median growth of household income (39.2%) over this period.¹²⁵ This disparity is even more pronounced given that 85.9% of the income growth for the middle fifth of American workers resulted from increased hours of work as opposed to increases in hourly compensation.¹²⁶ Clearly, capital rather than labor disproportionately enjoyed the fruits of this increased productivity.

Meanwhile, U.S. income tax rates have become considerably less progressive.¹²⁷ As chronicled by the Economic Policy Institute, “[e]ffective tax rates by income fifth have converged rapidly in recent years, and average federal tax rates for the top 1 percent of households fell from 37.0 percent in 1979 to 29.5 percent in 2007.”¹²⁸ A reduction in progressive tax rates exacerbates income inequality by boosting the take-home pay of top earners relative to earners in other brackets.¹²⁹

In terms of international comparisons, the United States has one of the most unequal income distributions in the developed world, with the fourth highest Gini coefficient among the 34 OECD countries.¹³⁰ Once

122. *Id.*

123. WEIL, *supra* note 17, at 49.

124. MISCHÉL ET AL., *supra* note 117, at 173, 237.

125. *See id.*

126. *Id.* at 35, 123.

127. *See* JOEL FRIEDMAN ET AL., CTR. ON BUDGET AND POL’Y PRIORITIES, RECENT TAX AND INCOME TRENDS AMONG HIGH-INCOME TAXPAYERS 1 (2006), <http://www.cbpp.org/sites/default/files/atoms/files/4-10-06tax5.pdf> (discussing the progressivity of the individual income tax and the increasing burden the taxpayers bear as a result of tax cuts); *see generally* Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, 21 J. ECON. PERSPS. 3 (2007) (discussing the three changes the federal tax system has undergone and the impact this has had on its progressivity).

128. MISCHÉL ET AL., *supra* note 117, at 87.

129. BEFORT & BUDD, *supra* note 1, at 73–74.

130. *See* ORG. FOR ECON. COOPERATION AND DEV., IN IT TOGETHER: WHY LESS EQUALITY BENEFITS ALL 20, 56 (2015) (the Gini Index provides a summary statistical measure of income inequality), http://www.keepeek.com/Digital-Asset-Management/oecd/employment/in-it-together-why-less-inequality-benefits-all_9789264235120-en#.WTCq8hPyy-Y.

the impact of taxes and transfers are taken into account, the United States jumps to second place, behind only Chile.¹³¹

The gap between high-end and low-end earners has grown since the turn of the century. In 2000, the lowest quintile of earners received 3.6% of aggregate income while the highest quintile received 49.8% of aggregate income.¹³² By 2014, these shares were 3.1% and 51.2%, respectively.¹³³

The factors contributing to the growing income inequality in the United States include a number of those discussed in this Article, such as globalization, the increase in contingent work, and declining union density.¹³⁴ Whatever the cause, the continuing increase in income inequality is a matter of concern, diminishing the American dream and creating for many an unsustainable lifestyle of acute stress.¹³⁵

E. *The American Worker Time Crunch*

The time that workers devote to work has substantially increased over the past few decades. Two parallel forces have led this surge. First, many women who were full-time caregivers in the past have joined the workforce and now divide their time between family care and paid work. Second, workers across the board are putting in significantly more time at work.¹³⁶

1. The Working Family Caregiver and the FMLA

The typical family of 1970 consisted of a breadwinner dad and a stay-at-home mom.¹³⁷ Today, dual-earner and single-earner households predominate. By 2000, dual-earner couples represented a solid majority of all married couples,¹³⁸ and the proportion of families headed by a

131. See Drew Desilver, *Global Inequality: How the U.S. Compares*, PEW RES. CTR. (Dec. 19, 2013), <http://www.pewresearch.org/fact-tank/2013/12/19/global-inequality-how-the-u-s-compares/>.

132. U.S. CENSUS BUREAU, *supra* note 121.

133. *Id.*

134. See generally MISCHEL ET AL., *supra* note 117, at 241–86.

135. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 212–14 (2001).

136. See BEFORT & BUDD, *supra* note 1, at 68.

137. JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY AND GENDER INEQUALITY 43–44 (2004) (finding that 51.4% of all households in 1970 fit into this category).

138. *Id.* at 43 (reporting that dual-earner couples represented 59.6% of all married couples in 2000); see KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 4 (2013), http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf (finding approximately 60% of two-parent households with children have two working parents).

single working mother jumped from 9.9% in 1970 to 21.9% in 2000.¹³⁹

One of the most significant characteristics of the new work/family structure is that women, the principal caregivers of the former model, have joined men in working outside the home. In 1975, 39% of women with children under the age of six were in the labor force.¹⁴⁰ By 2000, that share had risen to 65%.¹⁴¹ The average number of hours worked by women has essentially doubled since the 1960s.¹⁴²

Thus, in the new typical arrangement of the twenty-first century, both mom and dad engage in paid work. Yet, with women still bearing the bulk of family caregiving chores, the competing pressures of work and family serve to dampen disproportionately the long-term work attachment of female workers.¹⁴³

As I described in an earlier article:

The federal government's principal attempt at providing some balance to the pressures of work and family was the enactment of the Family and Medical Leave Act of 1993. The FMLA entitles eligible employees to a total of twelve weeks of leave per twelve-month period: (a) to care for a newborn child or a child newly placed with the employee for adoption or foster care; (b) to care for an employee's child, parent, or spouse with a serious health condition; or (c) to care for an employee's own serious health condition. The FMLA requires the employer to maintain health insurance coverage during the leave period and to return the employee to his or her previous position or to a position with equivalent benefits, pay, and other terms and conditions of employment following the end of the leave period. Significantly, FMLA mandated leave is unpaid in nature.¹⁴⁴

139. JACOBS & GERSON, *supra* note 137, at 51.

140. PARKER & WANG, *supra* note 138, at 10.

141. *Id.*

142. BLS REPORTS, U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A HANDBOOK 1 (2014), <https://www.bls.gov/cps/wlf-databook-2013.pdf>. John A. Knowles, *Why Are Married Men Working So Much? An Aggregate Analysis of Intra-Household Bargaining and Labour Supply*, 80 REV. ECON. STUD. 1055, 1060–61 (2013).

143. See Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. PUB. POL'Y 615, 620 (2004); see also JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 1 (2010); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 386–87 (2001); Claire Cain Miller & Liz Alderman, *Why U.S. Women Are Leaving Jobs Behind*, N.Y. TIMES (Dec. 12, 2014), https://www.nytimes.com/2014/12/14/upshot/us-employment-women-not-working.html?_r=0.

144. Befort, *supra* note 143, at 620–21 (footnotes omitted).

As a vehicle for balancing work and family demands, the FMLA has three major shortcomings. First, because of its complex coverage formula,¹⁴⁵ FMLA protections do not extend to more than 40% of U.S. workers.¹⁴⁶ Second, subtle and not-so-subtle pressures from both employers and society influence otherwise eligible employees not to take their full leave allowance.¹⁴⁷ Potential leave takers—especially men—worry that taking leave may be perceived as a lack of dedication to work and harm career prospects.¹⁴⁸ Finally, in contrast to virtually all other industrialized countries, FMLA leave in the United States is unpaid.¹⁴⁹ As a result, many American workers do not take leave because they cannot afford to do so.¹⁵⁰ This group of non-leave takers is disproportionately single, non-salaried, and with children at home.¹⁵¹

2. The Pervasive Worker Time Crunch

The problem of balancing work and non-work time demands is not limited solely to caregivers. American workers generally are

145. To be eligible for FMLA leave, an employee must have been employed by their current employer for at least twelve months, worked at least 1,250 hours for that employer during the preceding twelve-month period, and be employed at a worksite having fifty or more employees. 29 U.S.C. §§ 2611(2)(A)–(B), 2611(4) (2012); 29 C.F.R. §§ 825.110–.111.

146. See ABT ASSOCS., INC., U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 1–2 (2012), <https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

147. See Symposium, *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 404–11 (2007) (providing examples of employer retaliation for employees taking or seeking leave for family care purposes); Claire Cain Miller & David Streitfeld, *Big Leaps for Parental Leave, if Workers Actually Take It*, N.Y. TIMES (Sept. 1, 2015), http://www.nytimes.com/2015/09/02upshot/big-leaps-for-parental-leave-if-workers-actually-follow-through.html?_r=2 (describing pressures against exercising leave rights).

148. See Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–79 (1994) (describing employer hostility and peer pressure as factors that discourage men from taking leave); Lauren Weber, *Why Dads Don't Take Paternity Leave*, WALL ST. J. (June 12, 2013), <http://www.wsj.com/articles/SB10001424127887324049504578541633708283670?alg=y&mg=id-wsj> (describing social stigma that inhibits taking leave for family care purposes).

149. See OECD FAMILY DATABASE, KEY CHARACTERISTICS OF PARENTAL LEAVE SYSTEMS 2 (2016), http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf; Gretchen Livingston, *Among 41 Nations, U.S. Is the Outlier When It Comes to Paid Parental Leave*, PEW RES. CENTER (Sept. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/>.

150. WESTAT, U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS § 2.2.4 (2000), <https://www.dol.gov/whd/fmla/toc.pdf> (survey reporting that among those employees who desired to take family or medical leave in 2000, the most common reason (77.6%) for not taking leave was not being able to afford it); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 3 n.7 (2005).

151. See WESTAT, *supra* note 150, at § 2.2.3.

experiencing a significant and growing time-crunch phenomenon that comes with its own set of problems.

The number of hours American employees work has increased dramatically in the past few decades. The average full-time American employee now works approximately 180 more hours each year as compared to thirty-five years ago.¹⁵² The increase in total family unit working time is even greater, with the average American household tallying more than 220 additional hours of paid work per year during this span.¹⁵³ That amounts to five and one-half additional weeks of full-time work each year by the adult members of the average U.S. household. U.S. workers put in relatively long average working hours by comparison to other industrialized countries.¹⁵⁴ A 2009 analysis of working hours in thirteen OECD countries, for example, depicted the United States as having the second highest average number of annual hours worked, trailing only South Korea.¹⁵⁵ That study also revealed that the average American employee worked approximately 300 more hours per year than workers in Germany and France.¹⁵⁶

Some of this discrepancy results from the fact that Americans have access to less vacation than do workers in other countries.¹⁵⁷ Nearly all Western European countries statutorily mandate minimum annual vacation periods of four to six weeks.¹⁵⁸ In contrast, the average

152. Lawrence Mischel, *Vast Majority of Wage Earners Are Working Harder, and for Not Much More*, ECON. POL'Y INST. (Jan. 30, 2013), <http://www.epi.org/publication/ib348-trends-us-work-hours-wages-1979-2007/>.

153. MISCHEL ET AL., *supra* note 117, at 37 (documenting an increase of 222 household working hours per year from 1979 to 2007); Elise Gold, *Longer Hours, Not Higher Wages, Have Driven Modest Earnings Growth for Most American Households*, ECON. POL'Y INST. (July 23, 2015), <http://www.epi.org/publication/longer-hours-not-higher-wages-have-driven-modest-earnings-growth-for-most-american-households/> (reporting an annual increase of 289 hours per average household from 1979 to 2007).

154. SANGHEON LEE ET AL., INT'L LABOUR OFFICE, *WORKING TIME AROUND THE WORLD: TRENDS IN WORKING HOURS, LAW AND POLICIES IN A GLOBAL COMPARATIVE PERSPECTIVE* 26 (2009).

155. See SUSAN E. FLECK, MONTHLY LABOR REVIEW, INTERNATIONAL COMPARISONS OF HOURS WORKED: AN ASSESSMENT OF THE STATISTICS, 31 (2009), <https://www.bls.gov/opub/mlr/2009/05/art1full.pdf>.

156. See *id.*; see also OECD STAT, AVERAGE ANNUAL HOURS ACTUALLY WORKED PER WORKER (2017), <https://stats.oecd.org/Index.aspx?DataSetCode=ANHRS>. (reporting the annual hours worked per person employed in 2002 to be 1,810 in the United States, 1,431 in Germany, and 1,487 in France).

157. See Befort, *supra* note 143, at 630.

158. See Richard N. Block, *Work-Family Legislation in the United States, Canada, and Western Europe: A Quantitative Analysis*, 34 PEPP. L. REV. 333, 340–43 (2007); Phyllis T. Bookspan, *A Delicate Imbalance—Family and Work*, 5 TEX. J. WOMEN & L. 37, 73 (1995).

American worker in the private industry receives two to three weeks of paid vacation per year.¹⁵⁹

A number of factors have contributed to this rise in working hours.¹⁶⁰ First, since the late 1970s, the real hourly wages earned by American employees have been relatively stagnant, with real wages actually decreasing between 1979 and 2007 for workers in the bottom decile for annual income.¹⁶¹ Accordingly, many employees are working more hours in order to maintain household income levels.¹⁶²

Employers also have financial incentives to squeeze more working time out of their employees. One such incentive prompts employers to require salaried employees to work longer hours. Salaried employees are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA),¹⁶³ and employers do not incur increased costs by requiring salaried employees to work additional hours.

Similarly, the increasing cost of employee benefits encourages employers to require longer work weeks. The growth in such benefits has far outpaced that of wages in the past half century. In 1948, employer-paid benefits accounted for only 5.1% of employee compensation, but by 2011, such benefits constituted 19.8% of compensation.¹⁶⁴ The costs of these fringe benefits are usually fixed for a full-time employee without regard to how many hours the employee actually works, and employers have an economic incentive to meet labor needs by increasing the number of hours worked rather than by increasing the number of employees.¹⁶⁵

3. Implications of the Worker Time Crunch

As employees spend more time at work and fewer families operate under the breadwinner/homemaker model, workers increasingly are caught in a serious time crunch. Work and family obligations are competing for a shrinking amount of free time. This work/family tension is further exacerbated for the growing portion of the work force who must navigate irregular and unpredictable work schedules.¹⁶⁶ In short, the

159. Robert W. Van Giezen, *Paid Leave in Private Industry Over the Past 20 Years*, U.S. BUREAU OF LABOR STATISTICS (Aug. 2013), <http://www.bls.gov/opub/btn/volume-2/paid-leave-in-private-industry-over-the-past-20-years.htm>.

160. Befort, *supra* note 143, at 631–32.

161. Mischel, *supra* note 152.

162. *Id.*

163. 29 U.S.C. § 213(a) (2012); 29 C.F.R. § 541.1–3.

164. MISCHEL ET AL., *supra* note 117, at 181.

165. Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 284 (2002).

166. See Lonnie Golden, *Irregular Work Scheduling and Its Consequences*, ECON. POL'Y INST. (Apr. 9, 2015), <http://www.epi.org/publication/irregular-work-scheduling-and-its-consequences.html>.

worker time crunch translates into less leisure time¹⁶⁷ and more stress.¹⁶⁸

In contrast to the other measures of worker fortunes, this dimension is the only one not to worsen demonstrably in the years since 2000. Available data shows that the average number of hours annually worked by American workers actually decreased slightly during this period, beginning with the period of the Great Recession in 2009.¹⁶⁹

F. Retirement Security

The components of a financially secure retirement are often analogized to a three-legged stool.¹⁷⁰ Legs representing three sources of retirement income support the financial platform of the stool: (1) Social Security; (2) pension plans; and (3) personal savings.¹⁷¹ With shortfalls projected for all three legs, the financial prospects for future retirees are looking more shaky than secure.¹⁷²

1. Social Security

It is well known that a budgetary train wreck looms on the horizon for the Social Security system.¹⁷³ The 2015 Annual Report of the Social Security and Medicare Boards of Trustees provides a snapshot of the problem.¹⁷⁴ Beginning in 2020, total Social Security benefit outlays will exceed projected tax revenues and interest income.¹⁷⁵ This negative balance will continue to worsen over time with the result of the combined Social Security Trust Fund being fully exhausted by 2034.¹⁷⁶ Over the course of the seventy-five-year projection period, Social Security will fall

167. Stephanie Armour, *U.S. Workers Feel Burn of Long Hours, Less Leisure*, USA TODAY (Dec. 18, 2003), https://usatoday30.usatoday.com/money/workplace/2003-12-16-hours-cover_x.htm.

168. See JACOBS & GERSON, *supra* note 137, at 84 (reporting that 55.5% of women and 59.8% of men experience some conflict in balancing work, personal life, and family life); PARKER & WANG, *supra* note 138 (reporting that 56% of working mothers and 50% of working fathers find it to be difficult to balance work and family).

169. See OECD STAT, *supra* note 156.

170. See, e.g., Andrew A. Samwick, *The Effects of Social Security Reform on Private Pensions*, in PRIVATE PENSIONS AND PUBLIC POLICIES 189, 190 (William G. Gale et al. eds., 2004).

171. Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 939 (2007).

172. *Id.*

173. Star Parker, *Latest Evidence of a Social Security Train Wreck*, WND (July 5, 2016), <http://www.wnd.com/2016/07/latest-evidence-of-a-social-security-train-wreck/> (noting the “dramatic” fiscal issues currently facing the Social Security program).

174. See generally SOC. SEC. AND MEDICARE BOARDS OF TRS., STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2015 ANNUAL REPORTS (2015), <https://www.ssa.gov/oact/TRSUM/tr15summary.pdf>.

175. *Id.* at 9.

176. *Id.* at 12.

\$11.1 trillion short of the funding necessary to maintain current benefit levels.¹⁷⁷

Much of this shortfall has to do with demographic changes affecting the size of the benefit-receiving cohort as compared to the size of the wage-earning, taxpayer cohort.¹⁷⁸ Two principal factors impact this equation. The first is increasing life spans. When the federal government set the retirement age at sixty-five in the 1930s, the average American life expectancy at birth was fifty-eight years for men and sixty-two years for women.¹⁷⁹ Today, life expectancy in the United States is approximately seventy-eight years.¹⁸⁰ Second, the number of new baby boom retirees will far outpace the projected growth in the number of future wage earners.¹⁸¹

Unless some solution is adopted, retirees will receive only 79% of scheduled benefits in 2034, and this percentage will continue to decrease for the remainder of the seventy-five-year projection period.¹⁸² This decline will have a severe impact on the many Americans who depend on Social Security benefits as their principal source of retirement income. At present, the Social Security program provides more than one-half of all income for 66% of retirees and constitutes the sole source of income for 21% of current beneficiaries.¹⁸³ While some combination of increased taxation, reduced benefits, and a change in the full-retirement age could provide a long-term solution, the requisite political will for such a compromise remains out of reach.¹⁸⁴

177. U.S. GOV'T ACCOUNTABILITY OFFICE, SOCIAL SECURITY REFORM: ANSWERS TO KEY QUESTIONS 23 (2015).

178. See Befort, *supra* note 171, at 943–44.

179. *Social Security History*, SOC. SECURITY ADMIN., <https://www.ssa.gov/history/lifeexpect.html> (last visited June 1, 2017).

180. INFOPLEASE, *Life Expectancy at Birth by Race and Sex, 1930-2010*, <http://www.infoplease.com/ipa/A0005148.html> (last visited June 1, 2017).

181. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 177, at 22, 27–29; PETER A. DIAMOND & PETER R. ORSZAG, SAVING SOCIAL SECURITY: A BALANCED APPROACH, 74–77 (2004). While the number of retirees is projected to grow by 90% between 2000 and 2030, the number of wage-earning taxpayers is projected to grow by only 15%. CONG. BUDGET OFFICE, SOCIAL SECURITY: A PRIMER 31–32 (Sept. 2001), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/32xx/doc3213/entirereport.pdf>. As a result, the number of workers per beneficiaries will drop from a ratio of 3.3 to a ratio of 2.0 by 2030. Stephen C. Goss, *The Future Financial Status of the Social Security Program*, SOC. SECURITY BULL. (2010), <https://www.ssa.gov/policy/docs/ssb/v70n3/v70n3p111.html>.

182. SOC. SECURITY AND MEDICARE BOARDS OF TRS., *supra* note 174, at 10.

183. SOC. SECURITY ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 11 (2008), <http://www.ssa.gov/policy/docs/statcomps/supplement/2007/supplement07.pdf>.

184. See Befort, *supra* note 171, at 945.

2. Pension Plans

My 2007 article on retirement security also provided this description of basic pension plan design:

Pensions in the United States fall into two broad categories: defined benefit plans and defined contribution plans. Traditional defined benefit plans provide a predetermined, specified retirement benefit, usually in the form of a life annuity, linked to pre-retirement earnings. . . . Defined benefit plans typically are funded solely by the sponsoring employer, and plan contributions are held in a single trust on behalf of all participants.

Defined contribution plans, such as employer-sponsored 401(k) plans, in contrast, promise only a contribution rate to an employee's individual account, and both employers and employees typically contribute to such plans. Individual workers must make a number of key decisions concerning defined contribution plans, such as whether to participate, how much to contribute, how to allocate investments, and when and how to withdraw funds.

A crucial distinction between the two plan types concerns which party bears the investment risk associated with plan assets. In defined benefit plans, the employer bears the risk of investment shortfalls, while in defined contribution plans, individual employees bear this risk.¹⁸⁵

The most significant problem with the current pension regime in the United States is the lack of overall coverage. While estimates vary by methodology, most studies agree that less than half of all private-sector workers in the United States currently participate in an employer-sponsored pension plan.¹⁸⁶ Moreover, the participation rate has been declining. Since 2000, private-sector participation has fallen by approximately 4–7%.¹⁸⁷ Put another way, more than seventy million

185. *Id.* at 946–47 (footnotes omitted).

186. *See id.* at 953–55; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2015 (2015) (48%); CRAIG COPELAND, EMP'T BENEFIT RESEARCH INST., EMPLOYMENT-BASED RETIREMENT PLAN PARTICIPATION: GEOGRAPHIC DIFFERENCES AND TRENDS 9 (2014), https://www.ebri.org/pdf/EBRI_IB_405_Oct14.RetPart.pdf; ALICIA MUNNELL & DINA BLECKMAN, CTR FOR RETIREMENT RESEARCH AT B.C., IS PENSION COVERAGE A PROBLEM IN THE PRIVATE SECTOR? 2 (2014), http://crr.bc.edu/wp-content/uploads/2014/04/IB_14-7-508.pdf (reporting participation at 43% based on data from U.S. Census Bureau, Current Population Survey).

187. *See* COPELAND, *supra* note 186, at 27 (reporting a decrease of 3.6%); MONIQUE MORISSEY, ECON. POLICY INST., THE STATE OF AMERICAN RETIREMENT: HOW 401(K)S HAVE

American workers face the prospect of retirement with no pension leg on their already shaky retirement stool.¹⁸⁸

One of the factors contributing to decreased pension coverage is the continued decline in the number of defined benefit plans sponsored by private employers. In 1980, 38% of private-sector workers participated in a defined benefit plan, but that proportion plummeted to 15% by 2015.¹⁸⁹ The principal motivation for employers to jettison defined benefit plans is to avoid funding and administrative costs while shifting the risk of investment loss to employees.¹⁹⁰

Participation is also diluted in the growing number of defined contribution plans. The total number of U.S. employees participating in defined contribution plans grew more than five-fold from 1975 to 2012.¹⁹¹ But more than one-fifth of all employees covered by an employer-sponsored 401(k) plan choose not to participate in that plan.¹⁹²

The transformation of the U.S. pension environment from one dominated by defined benefit plans to one dominated by defined contribution plans¹⁹³ comes with its own set of problems. Since defined

FAILED MOST AMERICAN WORKERS 8 (2016), <http://www.epi.org/files/state-of-american-retirement-final.pdf> (reporting a decrease of 7%).

188. COPELAND, *supra* note 186, at 30.

189. Michael Molinski, *Disappearing Pensions Hurt U.S. Economy as Well as Workers*, USA TODAY (Apr. 23, 2016), <https://www.usatoday.com/story/money/2016/04/23/pensions-economy-workers/83292892/>; see also William J. Wiatrowski, *The Last Private Industry Pension Plans: A Visual Essay*, MONTHLY LAB. REV. 3–4 (Dec. 2012) (reporting a similar drop in private sector defined benefit plans from 35% in the early 1990s to 18% in 2011).

190. Jack VanDerhei, *Issue Brief No. 291: Defined Benefit Plan Freezes: Who's Affected, How Much, and Replacing Lost Accruals*, EMP. BENEFIT RES. INST. 6 (2006), http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-20063.pdf.

191. COPELAND, *supra* note 186, at 6–7.

192. ALICIA H. MUNNELL ET AL., CTR. FOR RETIREMENT RESEARCH AT B.C., THE PENSION COVERAGE PROBLEM IN THE PRIVATE SECTOR 1 (2012), http://crr.bc.edu/wp-content/uploads/2012/09/IB_12-16-508.pdf (reporting that 21% of covered employees choose not to participate). This negative choice typically reflects inertia, an inability to pay, or a conscious choice to prefer current disposable income over deferred retirement benefits, even when participation is incentivized by an employer's promise of a matching contribution. See ALICIA MUNNELL & ANNIKA SUNDEN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS 55–67 (2004); James F. Moore & Olivia S. Mitchell, *Projected Retirement Wealth and Savings Adequacy*, in FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 68, 87 (Olivia S. Mitchell et al. eds., 2000). The prevalence of non-participation has actually decreased since the Pension Protection Act of 2006 removed barriers to permitting employers to automatically enroll employees in 401(k) plans. See generally Barbara A. Butrica & Nadia S. Karamcheva, *Automatic Enrollment, Employer Match Rates, and Employee Compensation in 401(k) Plans*, MONTHLY LAB. REV. (May 2015), <https://www.bls.gov/opub/mlr/2015/article/automatic-enrollment-employer-match-rates-and-employee-compensation-in-401k-plans-1.htm>.

193. See GOV'T ACCOUNTABILITY OFFICE, RETIREMENT SECURITY: MOST HOUSEHOLDS APPROACHING RETIREMENT HAVE LOW SAVINGS 6 (2015) (stating that three-quarters of private-

contribution plans utilize self-managed individual accounts, “[they] demand that [beneficiaries and] retirees make complex financial decisions that they are often poorly prepared to make.”¹⁹⁴ As a result, defined contribution participants often save too little, invest poorly, and do not properly manage post-retirement assets.¹⁹⁵ Coupled with the fact that employees frequently move in and out of coverage with job changes, many defined benefit recipients approaching retirement have amassed far smaller accumulations than would have been projected under optimal circumstances.¹⁹⁶

Even public employees have experienced a recent deterioration in their pension status. Admittedly, public employees have a higher rate of pension coverage and a higher rate of defined benefit plan participation.¹⁹⁷ But economic and political pressure during the Great Recession has led to forty-one states enacting significant changes to at least one state retirement plan.¹⁹⁸ These changes generally either increased employee contributions or provided for a reduction in benefits and/or cost-of-living adjustments.¹⁹⁹

3. Personal Savings

The Bureau of Economic Analysis (BEA), a division of the U.S. Commerce Department, has tracked personal savings data since 1929. The annual personal savings rate depicts the amount of disposable income

sector pension participants in 1975 had defined benefit plans, but less than one-third did so as of 2012).

194. Jeremy R. Cooper, *Are Defined Contribution Pension Plans Fit for Purpose in Retirement?*, 37 SEATTLE U. L. REV. 511, 521 (2014); see also Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71, 88–89 (2002) (discussing how defined contribution plan participants often lack the financial knowledge and literacy needed to make important investment decisions).

195. See Cooper, *supra* note 194, at 521 (discussing how plan participants make poor saving, investment, and budgeting decisions due to internal framing mechanisms); Collen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 329–31 (2007) (discussing the tendency of participants to make decisions having adverse consequences because of psychological biases).

196. Alicia H. Munnell & Laura Quinby, *Pension Coverage and Retirement Security*, CTR. FOR RETIREMENT RES. AT B.C. (2009) (reporting that a typical 401(k) participant approaching retirement had only one-fourth of the accumulations projected for optimal participation conditions).

197. See Wiatrowski, *supra* note 189, at 3.

198. See Eric M. Madiar, *Public Pension Benefits Under Siege: Does State Law Facilitate or Block Recent Efforts to Cut the Pension Benefits of Public Servants?*, 27 A.B.A. J. LAB. & EMP. L. 179, 180 (2012).

199. *Id.*; see also Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL’Y 617, 618 (2010) (discussing the legal status of pension obligations in the various states and the legality of legislation modifying those obligations).

that is not expended in personal outlays over the course of a year.²⁰⁰ For most of the period from 1974 to 1993, the personal savings rate hovered in the range of 7–11%.²⁰¹ However, the rate has declined over the past twenty years to the 2–6% range.²⁰² For 2015, the BEA reported a 5.1% personal savings rate.²⁰³ This downturn in personal savings exacerbates the impact of shortfalls in Social Security and employer-sponsored pension programs.

Of course, capital gains obtained through the ownership of real estate and stock equity holdings can offset some of the drop in personal savings.²⁰⁴ However, even if the less predictable prospect of capital gains are added to the personal resource reservoir, the combination still falls far short of the combined savings rate of 15% recommended by many experts.²⁰⁵ And, these gains tend to accrue primarily to top earners rather than to future retirees as a class.²⁰⁶

4. Summary

Worker fortunes have also declined along this dimension since 2000. The timeframe for averting a Social Security meltdown has narrowed, while the cost of a short-term solution has increased. Fewer workers participate in employer-sponsored pension plans, and the rate of personal savings has declined. As a bottom line, the combination of increased longevity and asset shortfalls suggests that about one-half of all households are at risk of having insufficient retirement income to maintain a desirable standard of living.²⁰⁷

200. Press Release, U.S. Dep't of Commerce, Bureau of Economic Analysis, Personal Income and Outlays, March 2016 (Apr. 29, 2016), <https://bea.gov/newsreleases/national/pi/2016/pi0316.htm>.

201. Press Release, U.S. Dep't of Commerce, Bureau of Economic Analysis, Annual Personal Income, DPI, PCE and Personal Saving: Levels and Percent Changes (Apr. 29, 2016), http://www.bea.gov/bea/newsreleases/national/pi/2016/pdf/pio316_hist.pdf.

202. *Id.*

203. *Id.*

204. See generally Michael K. Evans, *Less-Than-Zero Savings? Don't Believe It*, 254 INDUSTRY WEEK 48 (Dec. 2005).

205. Jonathan Clements, *Forget the Rule of Thumb: Saving 10% of Your Salary Is No Longer Enough*, WALL ST. J., July 20, 2005, at D1; Mary Beth Franklin, *How Much Is Enough?* 60 KIPLINGER'S PERS. FIN. 69, 70 (Feb. 2006).

206. See CHRISTIAN WELLER & EDWARD N. WOLFF, RETIREMENT INCOME: THE CRUCIAL ROLE OF SOCIAL SECURITY 28 (2005).

207. See Befort, *supra* note 171, at 962; JACK VANDERHEI, EMP. BENEFIT RESEARCH INST., ISSUE BRIEF NO. 396: WHAT CAUSES EBRI RETIREMENT READINESS RATINGS TO VARY: RESULTS FROM THE 2014 RETIREMENT SECURITY PROJECTION MODEL 6 (2014), http://www.ebri.org/pdf/briefspdf/EBRI_IB_396_Feb14.RRRs2.pdf (finding approximately 42% of households to be at risk).

II. AGENDA FOR REFORM

Since the beginning of the twenty-first century, the status of American labor and employment law has gone from being “badly skewed” in favor of employer interests²⁰⁸ to being even more tilted in management’s favor. Legal and public policy reforms are needed to correct this imbalance.

This Section provides an agenda of proposed reforms. This agenda is not meant to be exhaustive or provide a detailed examination of the realm of possible reforms. Instead, what follows is a checklist of recommended reforms aimed at the issues raised by the six dimensions discussed in the preceding section of this Article. And while it is clear that the political will for such reform is currently lacking, that may (and should) change in the future.

A. *The Contingent Workforce*

1. Extending Regulatory Protection to Dependent Contractors

The current tests for determining employee status for purposes of protective regulation are cumbersome and inadequate. An approach that a number of countries have adopted is to recognize a third category of workers that falls in between that of employees and independent contractors. These “dependent contractors” technically are not employees under the traditional legal tests, but nonetheless are recognized as deserving of some employee-like legal protections by virtue of working in positions of economic dependence.²⁰⁹ Employment protection laws in countries such as Canada,²¹⁰ Sweden,²¹¹ Germany,²¹² and the Netherlands,²¹³ for example, treat dependent contractors similar to employees for some purposes but not others. Ontario’s Labour Relations Act provides a useful definition of a covered “dependent contractor” as:

208. Befort, *supra* note 5, at 422–23.

209. *Id.* at 454–55.

210. Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7, 24–25 (1999). Compare Labour Relations Act, S.O. 1995, ch. 1, sched. A, § 1(2) (Can.), and *Drew Oliphant Prof’l Corp. v. Harrison*, 2011 ABQB 216 (Can.), with Employment Standards Act, R.S.B.C. 1996, ch. 113, § 1(1) (Can.).

211. Ronnie Eklund, *A Look at Contract Labour in the Nordic Countries*, 18 COMP. LAB. L. J. 229, 240–42 (1997); see also § 1 Lag Om Medbestämmande I Arbetslivet [Law on Co-Determination in the Workplace] (SFS 1976:580) (Swed.).

212. Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL’Y J. 77, 94–95 (1999); see also Tarifvertragsgesetz [TVG] [Collective Bargaining Act], Sept. 9, 1949, Bundesgesetzblatt, Teil I [BGBl I] at 25, § 12a (Ger.); Arbeitsgerichtsgesetz [ArbGG] [Labour Court Law], Aug. 9, 2015, Bundesgesetzblatt, Teil I [BGBl I] at 31, § 5 (Ger.).

213. Taco van Peijpe, *Independent Contractors and Protected Workers in Dutch Law*, 21 COMP. LAB. L. & POL’Y J. 127, 141, 152 (1999); see also Buitengewoon Besluit Arbeidsverhoudingen oktober 5 1945, Stb. 1945 (Neth.).

a person, whether or not employed under a contract of employment . . . who performs work or services 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 the relationship of an employee than that of an independent contractor.²¹⁴

The United States should follow suit and extend the reach of employee-protection statutes that serve core societal goals to economically dependent contractors.

2. Enhancing the Portability of Benefits

Employee benefits should be made more portable in nature. This could be accomplished by linking benefits with workers and their careers rather than with a particular employing entity.²¹⁵

As an example, state unemployment compensation laws could be altered to permit more employees who work in part-time and temporary positions to qualify for some proportion of unemployment benefits. Similarly, Congress could amend ERISA to provide that employees who work for more than one employer may accumulate periods of service to meet the minimum vesting periods for a pension plan. In both situations, the cost of providing these benefits could be prorated among the various employing entities. As one commentator has summarized, “the very logic of organizing benefits [only] around employment is a flawed concept.”²¹⁶

B. *Union–Management Relations*

1. Card-Check Certification

An important agenda item for labor law reform is the adoption of a card-check certification process for determining representation status. Such a step would retain the principle of majority rule, but in an environment free from the intimidation and misinformation all too typical of a contested election campaign.²¹⁷ Under this system, which is used in a number of Canadian provinces,²¹⁸ and under the United Kingdom’s

214. Labour Relations Act, R.S.O. ch. 1, Sched. A., § 1(1) (Can.).

215. See BEFORT & BUDD, *supra* note 1, at 140–41.

216. JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE 14 (Princeton Univ. Press 2003).

217. Befort, *supra* note 5, at 435.

218. Roy L. Heenan, *Canada*, in I INTERNATIONAL LABOR AND EMPLOYMENT LAWS 21–26 to 21–27 (2d ed. 2003).

Employment Relations Act of 1999,²¹⁹ an employer would be obligated to recognize and negotiate with a union that presents signed authorization cards from a majority of the employees in an appropriate unit.²²⁰ Such a proposal was embodied in the Employee Free Choice Act proposal that passed the House of Representatives in 2007, but it did not make its way through the Senate chambers.²²¹

2. Curbing the Use of Replacement Employees

Labor law reform should also curtail the permissible use of replacement workers by employers during strikes and lockouts.²²² Legislation adopted in Ontario provides a possible model in the context of strikes. The Ontario statute authorizes struck employers to hire temporary, but not permanent, replacement workers for the first six months of a lawful strike.²²³ Only if a strike continues beyond that point may employers deny reinstatement to those strikers who have been replaced.²²⁴ In terms of employer-instigated lockouts, an employer's right to hire replacement workers should be limited in time to something in the range of three to six months.²²⁵

3. Enhanced Remedies

The remedies for unfair labor practices need to be enhanced to deter illegal anti-union activities. At a minimum, the National Labor Relations Board should be empowered to remedy discriminatory discharges in a manner similar to the Age Discrimination in Employment Act by including an award of liquidated damages in an amount up to the size of the compensatory award.²²⁶

C. *Employment Security*

The United States should join the rest of the industrialized world and enact a statute that broadly addresses the issue of employment security.²²⁷ This statute should adopt a unitary, just-cause standard for termination that would be informed by existing statutes, but supplant them as independent causes of action. This statute should also establish a

219. Nancy Peters, *The United Kingdom Recalibrates the U.S. National Labor Relations Act: Possible Lessons for the United States?*, 25 COMP. LAB. L. & POL'Y J. 227, 233–34 (2004).

220. *Id.*

221. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).

222. *See* Befort, *supra* note 5, at 442.

223. Labour Relations Act, R.S.O. ch. 1, sched. A, § 80 (Can.).

224. *Id.*

225. *See* Ray & Cameron, *supra* note 63, at 360.

226. 29 U.S.C. § 626(b) (2012).

227. *See* Befort, *supra* note 5, at 424–32.

streamlined administrative structure for determining individual cases that replaces the current multiplicity of claims and forums. Finally, this statute should establish a reasonable cap on monetary damages that could be doubled or tripled upon a finding that the lack of good cause for termination was attributable to unlawful discrimination.²²⁸

D. *Income Inequality*

1. Increase the Minimum Wage

The federal Fair Labor Standards Act mandates a minimum wage for covered employees of \$7.25 per hour.²²⁹ In real dollar terms, the value of the federally mandated minimum wage has fallen by more than 12% since 1967.²³⁰ As the movement for a \$15 minimum wage has underscored,²³¹ a substantial increase in the minimum wage would boost the earnings of low-wage workers and it is overdue.²³²

2. Expand the Earned Income Tax Credit

A second tool for combating the growth in income inequality is to expand the size and reach of the Earned Income Tax Credit (EITC) program. The EITC was enacted in the 1970s with the slogan “make work pay” and has been expanded several times since then.²³³ The EITC provides a tax credit that reduces the income tax liability of low-income workers and, in some instances, provides an actual wage supplement to workers and their families. As one commentator has written, “the cheapest, least bureaucratic method of raising working people above the poverty line is to continue expanding the EITC.”²³⁴

3. Adopt a More Progressive Income Tax

A third device for reducing income inequality would be to revert to a more progressively indexed rate of income taxation. Substantial tax cuts enacted in the 1980s and 2000s disproportionately benefited high-income

228. See BEFORT & BUDD, *supra* note 1, at 165–69.

229. 29 U.S.C. § 206(a)(1).

230. MISCHEL ET AL., *supra* note 117, at 279.

231. See generally Eric Morath et al., *Push for \$15 Minimum Wage Heats Up; As California and New York Pursue Hike, Opponents and Proponents Debate the Economic Impact*, WALL ST. J. (Mar. 31, 2016), <http://www.wsj.com/articles/race-for-15-minimum-wage-heats-up-1459.html>.

232. Rebecca M. Blank, *Fighting Poverty: Lessons from Recent U.S. History*, 14 J. ECON. PERSP. 3, 14 (2000).

233. See BEFORT & BUDD, *supra* note 1, at 271.

234. KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* 271–73 (1999).

taxpayers.²³⁵ A return to a more progressive income tax would transfer some of the income of high-salary earners to social service programs designed to boost the prospects of the working poor.²³⁶

E. *Worker Time Crunch*

1. Paid Leave for Caregivers

The United States should join other industrialized democracies and require paid leave for employees with caregiver responsibilities. If adopted as an amendment to the FMLA, employees could use this leave to care for sick or disabled family members or for newborn or newly adopted children. Possible sources of funding include unemployment insurance, temporary disability insurance, or tax incentives.²³⁷ At this point, five states already have adopted legislation mandating paid caregiver leave.²³⁸

2. Right-to-Request Legislation

Germany and the Netherlands have enacted statutes that grant full-time employees the right to request a reduced workload for any reason, even one that is unrelated to caregiver responsibilities.²³⁹ The employer must grant such a request unless legitimate business reasons preclude it, and an employee may institute legal proceedings to challenge an employer's refusal.²⁴⁰ The United Kingdom has adopted a more limited statute under which employees who are parents of children under age six or of disabled children under age eighteen have the right to request a flexible work schedule from their employers for the purpose of caring for those children.²⁴¹ While employers have a duty to discuss those requests, the U.K. statute does not authorize a substantive review of the employer's

235. See BEFORT & BUDD, *supra* note 1, at 155.

236. *Id.*

237. See Lester, *supra* note 150, at 16; Anne Wells, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067, 1075 (2004).

238. NAT'L P'SHIP FOR WOMEN AND FAMILIES, STATE PAID FAMILY LEAVE INSURANCE LAWS 1 (2017), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/state-paid-family-leave-laws.pdf>.

239. ARIANE HEGEWISCH, INST. FOR WOMEN'S POLICY RESEARCH, FLEXIBLE WORKING POLICIES: A COMPARATIVE REVIEW vi (2009), http://www.equality-ne.co.uk/downloads/426_Flexible-Working-Policies.pdf.

240. Susanne D. Burri et al., *Work-Family Policies on Working Time Put into Practice: A Comparison of Dutch and German Case Law on Working Time Adjustment*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 321, 328 (2003).

241. DEP'T OF TRADE AND INDUS., FLEXIBLE WORKING: THE RIGHT TO REQUEST AND THE DUTY TO CONSIDER 2 (2003), <http://webarchive.nationalarchives.gov.uk/+www.dti.gov.uk/files/file21364.pdf>.

business judgment.²⁴² The United States should consider the adoption of a “right to request” statute that protects the right of employees with caregiver obligations with respect to any child under the age of eighteen or to any parent over the age of sixty-five to seek modified work schedules.²⁴³

F. Retirement Security

1. Saving Social Security

Congress needs to take action to make the Social Security system solvent. As I have written elsewhere, this could be accomplished through a combination of three relatively modest benefit and tax adjustments: (1) increasing the full-retirement age to sixty-seven and indexing additional adjustments to future changes in life expectancy; (2) returning the maximum taxable earnings base for the Social Security payroll tax to a figure equivalent to 90% of national income from work-related earnings; and (3) indexing benefit levels based on an individual worker’s after-tax wage earning history.²⁴⁴

2. Encouraging Personal Saving

U.S. law currently encourages personal savings through a variety of tax preferences. But these preferences primarily benefit high-income earners. Sound policy reform should focus on providing additional incentives to low- and middle-income workers. One potential path would be to enhance the reach of the Saver’s Credit.²⁴⁵ The Saver’s Credit provides a matching contribution in the form of a tax credit for voluntary individual contributions to 401(k) plans, IRAs, and similar retirement savings arrangements.²⁴⁶ The legislation adopts a progressive structure with the rate of government subsidy falling as household income rises.²⁴⁷ The Saver’s Credit, however, currently only confers a benefit on taxpayers who have a federal income tax liability against which to apply the credit.²⁴⁸ The benefits of the Saver’s Credit should be expanded in

242. Employment Act, 2002, ch. 22, pt. 4, §§ 47(2)(80G)–(H), 47(3)(47E)(1); The Flexible Working (Procedural Requirements) Regulations 2002, SI 2002 No. 3207(6).

243. See Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108 (2010).

244. Befort, *supra* note 171, at 966–70.

245. *Id.* at 984–85.

246. IRS, *Retirement Savings Contributions Credit (Saver’s Credit)*, <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit> (last visited June 2, 2017).

247. See 26 U.S.C. § 25B (2012).

248. See J. Mark Iwry et al., *The Saver’s Credit: Expanding Retirement Savings for Middle- and Lower-Income Americans*, BROOKINGS (Mar. 1, 2005), <https://www.brookings.edu/research/>

two ways. First, the government should substitute a monetary payment in lieu of an income tax credit for individuals who make a matching contribution to a qualifying pension or savings program, but who do not have a sufficient tax liability to make use of the tax credit.²⁴⁹ Second, Congress should mandate employers with more than ten employees and no pension coverage to establish “automatic IRAs” funded by withholding 3% of an employee’s salary.²⁵⁰

CONCLUSION

This Article chronicles a continuing decline in the fortunes of American workers. U.S. workers are working more hours, but receiving a diminished share of overall income. They are experiencing a decline in both job quality and job security. Unions continue to evaporate and lose clout. Retirement security is increasingly precarious.

The imbalance in power between workers and employers is unacceptable by several measures. The current disequilibrium does not serve the basic equity objective of producing fair workplace relationships and outcomes. It diminishes employee voice in basic workplace decision-making. And the disparity between the haves and the have-nots threatens long-term social stability.

Legal and policy reforms are needed if we hope to recalibrate the current imbalance and move toward a climate of shared prosperity. The agenda for reform set out in this Article may seem unobtainable given the current political stalemate, but at some point, circumstances may coalesce to make meaningful change preferable to a continuance of the downward spiral.

the-savers-credit-expanding-retirement-savings-for-middle-and-lower-income-americans/.

249. *Id.*

250. See MUNNELL ET AL., *supra* note 192, at 6. While individual employees should be able to opt out of such a plan, the default of automatic enrollment would enhance the level of participation.

