Texas Wesleyan Law Review

Volume 10 | Issue 1 Article 8

10-1-2003

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DOI: https://doi.org/10.37419/TWLR.V10.I1.6

THE SLIPPERINESS OF STABILITY: CONTRACTING FOR FLEXIBLE AND TRIANGULAR EMPLOYMENT RELATIONSHIPS IN THE NEW ECONOMY

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I. INTRODUCTION

Our era has been called the "age of flexibility." The need for flexibility is what is said to be driving the new economy, and in turn, driving new policies, new regulatory approaches, and more experimentation with alternative forms of governance. The question of how to deal with new flexible arrangements in the context of employment usually raises strong reactions from legal scholars, ranging from harsh opposition to enthusiastic support. Yet, it is first important to emphasize that the question of what is "flexibility" is itself complex and open to debate. Do less regulatory protections for workers provide more or less flexibility in the market? The answer depends on your perspective. Employers gain perhaps a greater range of possibilities for how to construe their employment arrangements, but some workers may find themselves with less bargaining power and less flexibility in choosing their vocational paths.

A recent report by the International Labor Organization (ILO) describes flexibility as a "nebulous term" that tends to embody a range

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of meanings, some of them conflicting.[1] From the perspective of businesses, the new market is understood to be driven by the need for greater flexibility, that is, the ability to respond, adjust, and adapt rapidly and dynamically to changing environments and conditions.[2] To this end, flexibility is found in various forms of the economic enterprise. The type of flexibility primarily invoked in the context of employment relations is defined in industrial organization literature as "*numerical flexibility*."[3] This refers to the dynamic adjustment of the number of workers who are employed by the firm, variations in the size of the workforce by employment arrangements, or usages of labor that do not produce a traditional employment relationship.[4] Under numerical flexibility, economists differentiate between (a) *external numerical flexibility*, the adjustment of employees through dynamic hiring and firing,[5] and (b) *externalization*, which involves the use of the labor of enterprises or individuals who have not entered into an employment contract with the firm.[6] *Internal numerical flexibility* (sometimes referred to as *temporal flexibility*) is the practice that allows greater variation in work schedules, or flextime routes, even for *core workers*.[7] All of these variations consist of what is often referred to as the move from stable to *contingent* employment.

A related but broader type of flexibility involves management and production processes of the enterprise. The lessening of limitations that are imposed on the ways a firm can act creates *decision-making flexibility*. For example, the ease and range of the practices it employs, in order to recruit and hire new workers, as well as to utilize, order, and fire existing workers. This type of flexibility also involves the ability to diversify other management and market practices. For

1. SHAUNA L. OLNEY, UNIONS IN A CHANGING WORLD: PROBLEMS AND PROSPECTS IN SELECTED INDUSTRIALIZED COUNTRIES 42 (1996).

2. Paul Miller, *Strategy and the Ethical Management of Human Resources*, 6 HUM. RESOURCE MGMT. J. 5, 13 (1996).

3. *See, e.g.*, BENNETT HARRISON, LEAN AND MEAN 130 (1994). *See also* Brian Easton, *Symposium on New Zealand's Employment Contracts Act*, 28 CAL W. INT'L L.J. 209, 216 (1997) (citing Bernard Brunhes, *Labour Flexibility in Enterprises: A Comparision of Firms in Four Eupropean Countries*, *in* LABOUR MARKET FLEXIBILITY: TRENDS IN ENTERPRISES 13 (1989). The Organization for Economic Cooperation and Development (OECD) "defines the following five types of flexibility: (1) *External numerical flexibility*: the number of employees is adjusted" (2) "*Externalisation*: part of the firm's work is provided by enterprises or individuals who" have not entered into an employment contract with the firm; (3) *Internal numerical flexibility*: adjustment of the number of working hours, "the number of workers remains unchanged; (4) *Functional flexibility*:" job assignments are dynamically adjusted; (5) "*Wage flexibility*: labour costs, and thus wages, are adjusted." *Id.*

4. Easton, *supra* note 3, at 216.

5. *Id.*

6. *Id.*

7. Brunhes, *supra* note 3, at 14–15 (1989). *See generally* Drago et al, *The Willingness-to-Pay for Work/Family Policies: A Study of Teachers*, 55 INDUS. & LAB. REL. REV. 22 (2001) (discussing flexibility and work/family policies—cost-benefit analysis and willingness to pay from employer and employee sides).

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DOI: 10.37419/TWLR.V10.I1.6

example, managerial flexibility may include shifts to less hierarchical organization of work, including decentralization, use of self-managed-teams, and participatory processes. Other examples include *wage flexibility* (sometimes called "pay flexibility"), which involves a shift to more individualized wage differentials, based on economic fluctuations, changing demand, merit, and measures of performance;[8] and *assignment flexibility* that allows a company to use workers for a larger number of tasks.[9]

It is easy from this perspective to collapse economic flexibility with a no-regulation or a freedom of contract regime, assuming that less statutory regulation always increases flexibility in the market. However, it is important to emphasize that even from a market perspective, this is not necessarily the case. According to an ILO report, "'deregulation' and 'flexibility' are 'more opposite . . . than synonymous.'"[10] While such a strong statement might be contested, the range of possibilities for flexibility challenges an opposite conclusion. The enabling function of a regulatory regime is necessary for the regular operation of any market.

Courts facing these changes have had to deal with questions of flexibility and the ways it may affect differently situated individuals and groups in the new economy. In the following sections, this Article focuses on a particular set of "flexibilization" arrangements in the employment relationship—the use of a third party labor intermediary for the supply of workers to a firm. While the concept of flexibility is often used as a buzzword for a range of developments in the new economy, we will continue to draw attention to the fact that flexibility and stability are always relative, existing in some form and degree in any organizational structure. The questions that policy makers must first ask when faced with claims about the necessity, legality, and desirability of flexibility is: flexible in what way and compared to what other possibilities? The range of flexible arrangements in the labor market that have developed in recent years is vast.

This Article argues for the need for new laws and adequate guidelines for today's flexible staffing arrangements. Flexible employment arrangements in the new market are simultaneously efficiency-driven and developed through continuous political and legal action. While the employment agency industry is potentially a welfare-enhancing

8. *See* Yves Stevens & Bea Van Buggenhout, *The Influence of Flexibility as a Motor of Changing Work Patterns on Occupational Pensions as Part of Social Protection in Europe*, 21 COMP. LAB. L. & POL'Y J. 331, 335–36 (2000); Tiziano Treu, *Labor Flexibility in Europe*, 131 INT'L LAB. REV. 497, 507–08 (1992).

9. *See* J. WILLIAM PFEIFFER, THE 1994 ANNUAL: DEVELOPING HUMAN RESOURCES 79–80 (J. William Pfeiffer ed., 1994).

10. OLNEY, *supra* note 1, at 60 n.4 (citation omitted). Olney explains that this is because "deregulation stimulates labor turnover and a reduction of the core workforce, diminishing the incentive to provide the training needed to raise productivity based on worker innovation." *Id.*

sector in certain environments, it also produces new forms of mistreatment of workers in the absence of adequate regulatory incentives. These new economic structures necessitate the development of a new normative model that allows certain forms of market flexibility yet maintains the social norms that continue to inform fair employment policies.

Part II of this Article explores the range of taxonomies and categories that have developed in the flexible staffing industry. This Article sets forth the argument that the complexity and variety that characterize the industry is not accidental, but a product of legal and economic struggles for recognition of flexible employment arrangements as legitimate practices in the new economy. Part III further describes the various factors that motivate the emergence of flexible employment from the perspective of employers and workers. These factors include both legitimate economic needs and problematic attempts to evade legal protections. Part IV then moves to a third set of factors that motivate flexible staffing arrangements—those of the flourishing employment agency industry. This Part further describes the public efforts of the staffing industry to legitimize its status in the triangular employment context, including the advocacy, lobbying, and public relations efforts by its trade associations. Part V is an analysis of the recent efforts by courts, administrative agencies, and legislative commissions to define the legal parameters of the various new flexible employment arrangements. Drawing on comparative insights, as well as the problems and inconsistencies among recent cases, Part V demonstrates the inadequacies of the existing common law doctrine in addressing these new challenges and suggests alternative doctrines and policies that would be better suited to achieve the necessary balance between flexibility and fairness.

II. Taxonomy and Categorization of Flexible Staffing Arrangements

The new economy, marked by a dramatic decline in unionization and rapid changes in production patterns, and driven by other things such as technological advances and globalization, has brought new forms of work and employment.[11] Within these realities, the traditional firm is no longer the sole employer in the market. As businesses seek more flexibility in their hiring and production practices, they increasingly utilize a variety of subsequent firms to meet their changing employment needs. More and more workers find themselves seeking work through a third-party employment agency. The

11. *See* Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimension of Power in Shifting Patterns of Work*, 4 U. Pa. J. Lab. & Emp. L. 121, 148 (2001).

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DOI: 10.37419/TWLR.V10.I1.6

temporary help industry is rapidly growing.[12] An illustration of the scope of the employment agency industry is that Manpower, Inc. has been reported to be the single largest private employer in the United States in recent years.[13]

The taxonomy of the flexible staffing industry is vast. At times referred to as "placement agencies," "staffing agencies," "referral agencies," "leasing firms," "temporary help agencies," "manpower agencies," "temp-hiring firms," "labor-only contractors," "employee leasing," "vendors," "temporary services," "contract management," "facilities management," "day labor providers," "labor contracting firms," "technical services suppliers," "job shops," "search firms," and most recently, "professional employer organization" (PEO). This multiplicity of different terms indicates the different functions, classifications, self-definition, legal statuses, and conceptual differentiation of the roles and responsibilities of these enterprises operating within the labor market. The long list is not accidental. It reflects the struggle for flexibility in flexible work arrangements. In turn, it relates to, and produces an equally long list of worker terminology, ranging from "temporary agency employees," through the oxymoron, "permatemps,"[14] to "self-employed," "freelancers," and "independent contractors." In turn, a taxonomy is produced referring to the "client," "contractor," "labor-user," "special employer," or traditional employer, who uses a flexible staffing arrangement.

Again, the long taxonomy is not accidental. In fact, the re-labeled workers who have already been company employees for several years represent a high percentage of contingent work.[15] Many of these relabeling processes involve the usage of a third-party intermediary, the complex offspring of the traditional employment agency. Three main categories emerge within the employment agency industry. The first category is the traditional agency, which the Author generally terms as the *referral-placement service*, involves a simple listing of job openings for job seekers.[16] The second category, the *staffing*, or *temporary help agency*, is an enterprise that has an available pool of workers that it sends out to replace absent employees or for short-term positions in a

12. Mark H. Grunewald, *The Regulatory Future of Contingent Employment: An Introduction*, 52 WASH. & LEE L. REV. 725, 727 (1995); Anne E. Polivka, *Contingent Workers & Alternate Work Arrangements, Defined*, MONTHLY LAB. REV. 3, 3 (1996).

13. Janice Castro, *Disposable Workers*, Time, Mar. 29, 1993 at 43, 43.

14. *See* John Cook, *Microsoft Limits Amount of Time Temps Can Work: New Policy Could End Its 'Permatemp' Problem*, SEATTLE POST-INTELLIGENCER, Feb. 19, 2000, at B3.

15. *See* Judith E. Bendich, *When Is a Temp Not a Temp?*, TRIAL, Oct. 2001, at 42, 43.

16. *See generally* Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-home Care Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89 (2001) (exploring formal and informal groups and organizations that serve as a link between employers and in-home core jobs in the United States and Israel).

workplace.[17] The third category, the *leasing firm*, otherwise self-defined as the PEO, is a company which assumes responsibility for payroll, benefits, and other human resource functions of the long-term workers of another workplace and is set up with the particular purpose of becoming a surrogate employer.[18]

These different categories have emerged through economic arrangements and legal battles. Early on, the first type of enterprise, the referral agency, was regulated by most states and was required to obtain a state license, based on evidence of "good character" or community need, to post bond, and to keep records for inspection.[19] Some states also regulated maximum placement fees and prohibited misrepresentation or referral to workplaces in which there was a labor dispute in progress.[20]

The two latter types of enterprises, the staffing and leasing agencies, have struggled to distinguish themselves from this first category, in order (a) not to be classified as employment agencies, so as to avoid state regulation of this earlier category; and, more importantly, (b) to be classified as the employers of the workers, so that the user-client of these workers will avoid such classification.[21] Therefore, in some sense, and as demonstrated in other papers in this Symposium, these new economic realities have flipped the contract/status dilemma. While in the past, the move from status to contract was seen as a liberating move for workers, it is the worker today who is struggling to maintain the status of employee. Legislatures and courts continue the attempt to balance between the status and contract spectrum and to sort between legitimate and illegitimate arrangements.

17. *See* American Staffing Association, ASA Staffing Facts, *at* http://www.staffingtoday.net/aboutasa/staffingfacts.shtm (last visited Sept. 18, 2003) (on file with the Texas Wesleyan Law Review). The American Staffing Association was formely called the National Association of Temporary Services. American Staffing Association, ASA Brief History, *at* http://www.staffingtoday.net/aboutasa/asahistory.htm (last visited Sept. 18, 2003) (on file with the Texas Wesleyan Law Review).

18. *See* Carrie Aaron, *PEO Census 2000 Results!*, 3 PEO Network Inc., *at* http://www.Peonetwork.com/articles/2000_peocensus.pdf (last visited Oct. 25, 2003) (on file with the Texas Wesleyan Law Review).

19. George Gonos, *The Contest Over "Employee" Status in the Postwar United States: The Case of Temporary Help Firms*, 31 L. & Soc'y Rev. 81, 90 n.12 (1997).

20. *Id. Compare* Olasen v. Nebraska, 313 U.S. 236, 246–47 (1941) (allowing regulation of fees charged by employment agencies), *with* Adams v. Tanner, 244 U.S. 590, 596–97 (1917) (holding unconstitutional a law prohibiting private employment agencies from charging a fee to employees).

21. Martha I. Finney & Deborah A. Dasch, A Heritage of Service: The History of Temporary Help 86 (1991); Gonos, *supra* note 19, at 90. *See* Mack A. Moore, *Proposed Federal Legislation for Temporary Labor Service*, 26 Lab. L.J. 767, 767 (1975).

III. Factors That Motivate Flexible Staffing Arrangements

The question of differentiation between economic needs of firms and the desire to evade the law is a difficult one in the context of flexible staffing, even more so given the many different types and constructs that have recently emerged. Flexible employment has become widespread as a result of many different factors. The immediate explanation that is provided by economists is that flexible work is a response to the new economic challenges posed by technology and global competition.[22] The use of contingent workers allows employers to meet fluctuating production needs caused by rapid shifts in demand as well as the implementation of new technologies. The supply of contingent work allows increased hiring during periods of economic prosperity, while at times of cutbacks, employers can downsize without exposing core workers to layoffs.[23] The same is done to meet the particular short-term needs of the company. Thus, employers downsize, or in its updated, indeed legitimizing, version, "rightsize," their firms into leaner organizations by using flexible staffing arrangements and third-party intermediaries. In terms of efficient human resource management, the use of intermediaries often allows employers to reduce administrative costs. It may also help employers evaluate employees before hiring them on a regular basis.

From a legal perspective, flexible staffing arrangements, when legally approved, allow employers to avoid employer status with respect to some of their workers, thus reducing the number of employees covered by a collective agreement, where one exists, or reducing the number of employees covered by certain statutory provisions and benefit plans. The desire to avoid employee protection policies raises significant concerns. The tactic of setting up third party intermediaries to avoid the status of employer is called "payrolling" in the business world.[24] By creating a double-tiered workforce, employers are often thought to be designing a subterfuge structure in order to avoid paying benefits to some of their less critical employees while retaining more valuable employees under the traditional array of employee standards. From the perspective of workers, such contingency in employment relations, especially when created by a unilateral restructuring of the workforce by an employer, violates the social contract between employers and workers, which has historically included the recognition that the employment relationship carries with it certain social provisions, opportunities, and rights.[25] This not only creates a

22. Steven J. Arsenault et. al, *An Employee by Any Other Name Does Not Smell as Sweet: A Continuing Drama*, 16 Lab. L.J. 285, 285–86 (2000).

23. *See id.* at 286.

24. *See* Bendich, *supra* note 15, at 42.

25. Brian K. Steverson, *Temporary Employment and the Social Contract*, Online J. Ethics 1–2 (on file with the Texas Wesleyan Law Review).

group of second-class workers, but may also have an effect on the core labor relations, as employers constantly have an available supply of leased employees with lowered expectations.[26]

While economic justifications are regularly advanced to explain the increase of these arrangements, it has been well recognized that some employers use contingent work arrangements precisely for avoiding employer-related responsibilities and in order to circumvent employment and labor laws. In fact, some scholars have characterized the user-employer's evasion of responsibility as the *raison d'etre* of intermediary employment agencies.[27] Indeed, a report of the U.S. Department of Labor concludes that many firms make use of different types of contingent work "not for the sake of . . . efficiency but in order to evade their legal obligations."[28]

These are all demand side factors, that is, motivation from the perspective of businesses used for flexible staffing arrangements. On the supply side, the dilemma is similarly a real one. It should be understood that, from the perspective of workers, a unified description of a contingent workforce is misleading. Contingent workers are often vulnerable workers, disproportionately consisting of minorities and women, and most often working in low-skilled, low-wage jobs.[29] Recent studies suggest that workers of temporary employment agencies generally earn less than workers in similar positions that are employed

26. *See, e.g.*, Frances Raday, *The Insider-Outsider Politics of Labor-Only Contracting*, 20 COMP. LAB. L. & POL'Y J. 413, 443 (1999).

27. *See* Sergio Ricca, *Private Temporary Work Organization and Public Employment Services: Effects and Problems of Coexistence*, 121 INT'L LAB. REV. 141, 147–48 (1982). It is not rare to find highly negative accounts of the intermediary industry by labor lawyers, such as the following:

> Labor-only contracting produces a special potential for commercial exploitation. The contractors need almost no resources to set up "business"—essentially, a telephone will do. The primary requisite for success is unemployment which provides the "raw material" for such ventures. The profit margin is assured by the lowering of employees' wages and conditions. The labor-contractor's employee is especially vulnerable. The employee will not be covered or protected by any workplace-specific benefits for in-house employees since, even if classified as an employee and entitled to employee protection, he or she will not be the user's employee and will not be entitled to the wages and conditions guaranteed for the user's employees by collective agreements, extension orders, or workplace regulations. In this, the labor-contractor's employee is disadvantaged even vis-à-vis other contingent workers who, once classified as employees, will become entitled to the same benefits as all other in-house employees.

Raday, *supra* note 26, at 416.

28. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 36 (1994) [hereinafter DUNLOP COMM'N].

29. *See generally* Lobel, *supra* note 16, for a discussion on the multiple vulnerabilities of migrant women who suffer the disadvantages of working in informal underground economies and performing invisible, undervalued core work.

in a traditional dual relationship.[30] Contingency in their hiring arrangements is thus understood to institutionalize "a virtually continuous bidding process," leading to a constant downward pressure on wages.[31] Yet, it is also important to realize that certain contingent workers are in fact relatively powerful players in the market—such as highly skilled professional freelancers or consultants who prefer to maintain their independence and work for several workplaces on a contingent basis and with individualized contracts.[32] Employment agencies are becoming increasingly specialized and target particular industries, such as the well-paid high-tech professionals, or the generally more vulnerable health care workers.[33] The workers employed in such arrangements are no longer only low-wage low-skill workers, but include technicians, software programmers, engineers, artists, accountants, paralegals, and even lawyers.[34]

Even within the range of the majority of contingent workers, who have relatively little bargaining power, it is significant to note that some groups find the availability of the contingent employment option desirable for a variety of reasons, including the ability to work and attend to family demands, schooling and work combinations,[35] and "moonlighting" opportunities to increase their earnings. Alongside these interests however, many of those who work in a contingent form, or are simply labeled that way, are in fact people interested in full-time, conventional employment.

IV. Employment Agencies as Forceful Third-Party Actors: Direct Efforts to Legitimize the Industry

In addition to the demand and supply factors, the third factor that interacts with and complicates these different competing forces is the impact that the rapid spread of third-party intermediaries has had on the market. The appearance of intermediaries has not only served as an *enabling mechanism* for efficient implementation of contingent work patterns, but also has been a *driving force* behind the increased triangulation of employment relations. Employment agencies are themselves industries with economic interests that cannot be conflated

30. *See* Sharon R. Cohany et al., *Counting the Workers: Results of a First Survey, in* Contingent Work: American Employment Relations in Transition 41, 51 (Kathleen Barker & Kathleen Christensen eds., 1998).

31. Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527, 1532 (1996).

32. Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 Stetson L. Rev. 1, 2 (1996).

33. *Id.* at 12 (citing Susan Diesenthouse, *In a Shaky Economy, Even Professionals are 'Temps'*, N.Y. Times, May 16, 1993, at F5).

34. Diesenthouse, *supra* note 33, at F5.

35. *See* Paul Osterman et al., Working in America: A Blueprint for the New Labor Market 51 (2001) (arguing that teens do not deserve the same kind of protection when working in summer jobs as other contingent workers who support a family).

with either side of the traditional dual relationship. Indeed, these industries have actively pointed to several valid reasons why their growing significance in the labor market should be recognized. Mostly, these reasons involve the comparative advantage of large-scale, specialized intermediaries in relation to small or medium-sized businesses. If employment agencies are flourishing industries that are larger than the workplaces with which they contract, then they acquire the advantage of size. Indeed, this can be understood as a self-reinforcing circle, and as mentioned earlier, firms such as Manpower, Inc. are becoming some of the largest employers in different countries across the world.[36]

The size advantage holds a range of benefits for the employment relationship. First, small employers are likely to "pay as much as forty percent more for employer benefits than do larger companies . . . ."[37] Second, compliance with the many employment and labor laws requires knowledge and expertise that small employers often lack. Moreover, many laws, such as Title VII, the Family and Medical Leave Act, COBRA, and the ADA, require a statutory minimum number of employees in order for an employer to fall within their scope.[38] In a large number of industries, firms have become smaller and less stable, thus making them more likely violators of fair labor standards.[39] In such contexts, imposing responsibilities on larger labor market intermediaries, either directly as intermediaries or as employers, potentially provides more security for contingent workers. Therefore, in certain environments, employment agencies may potentially serve to formalize the informal by increasing the availability of information, standards, fair practices, and knowledge building in the market. Third, employment agencies may well be competing over the market share of individual contingent, employer-less workers (legally known as "independent contractors"), not just the share of the user-client's legally recognized employees. Employment agencies routinely enter into exclusive agreements with the user-employer that preclude the ability of firms and workers to secure jobs except through the agency, and thus may be increasing their share over similar dual relationships.[40] If this is the case, the recognition of the role of the flexi-

36. *See supra* note 13 and accompanying text.

37. Gregory L. Hammond, *Flexible Staffing Trends and Legal Issues in the Emerging Workplace*, 10 LAB. LAW. 161, 168 (1994).

38. *See, e.g.*, Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (2000); Title VII, 42 U.S.C. § 2000e(b) (2000).

39. *See, e.g.*, Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 295–311 (2003) (discussing how the garment industry has become a pervasive violator of labor laws as a result of the use of subcontractors).

40. Harris Freeman & George Gonos, Temp and Staffing Firms as Company Unions: A Sociolegal Reclassification of For-Profit Labor Market Intermediaries 5 n.5 (Oct. 2002) (unpublished manuscript, on file with the Texas Wesleyan Law Review) (citation omitted).

ble staffing intermediary may in fact enhance employment *stability* rather than flexibility. Finally, as an industry-in-itself, the employment agency operation produces its own employees that work in the business of linking, producing a triangular transaction that benefits government taxation. Furthermore, the operation creates a new space that generates its own jobs, income, and culture.

Throughout its growth, the employment agency industry has struggled to legitimize itself and to gain recognition in the market and in the public sphere. The industry has been conscious of the tensions among the various factors that have motivated its emergence. It is particularly conscious of the significance of legitimizing, labeling, and achieving legal recognition. The industry has been intensely involved in defining and redefining its sphere of existence. In the process of defending their own existence, agencies also actively distinguish themselves from one another. In addition, the industry has been aggressively promoting the legal adoption of definitions it drafts. Finally, it has been involved in establishing its legitimacy as an industry to sustain its role as an employer, through elaborate codes of ethics, narration of its history, and the production of statistics and studies.

Aware of the importance and power of naming, these new actors have given much attention to categories and classifications in their formal self-definitions. The American Staffing Association (ASA), which according to its own reports, represents a $62 billion dollar U.S. industry,[41] defines itself as the voice of the staffing industry, "promot[ing] the interests of our members through legal and legislative advocacy, public relations, education, and the establishment of high standards of ethical conduct."[42] Its members provide services of "temporary help, permanent placement, temporary-to-permanent placement, long-term and contract help, managed services (often called "outsourcing"), training, human resources consulting, and PEO arrangements . . . ."[43] Founded in 1966 as the *Institute of Temporary Services*, the association expanded its name in the 1970s to the *National Association of Temporary* Services, and in 1994, to National Association of Temporary *and Staffing* Services.[44] The association explained that the expansion was done because many of its members offered more than temporary help services.[45] Yet, five years later, the

41. American Staffing Association, Staffing FAQs, *at* http://www.staffingtoday.net/aboutasa/staffingfaqs.html (last visited Sept. 18, 2003) (on file with the Texas Wesleyan Law Review).

42. American Staffing Association, About ASA, *at* http://www.staffingtoday.net/aboutasa/index.html (last visited Sept. 18, 2003) (on file with the Texas Wesleyan Law Review).

43. *Id.*

44. American Staffing Association, ASA Brief History, *at* http://www.staffingtoday.net/aboutasa/asahistory.htm (last visted Sept. 18, 2003) (on file with the Texas Wesleyan Law Review).

45. *Id.*

name was again changed to the American Staffing Association, "to better reflect the full range of staffing and human resources services offered by member companies."[46] The more recent *National Association of Professional Employer Organizations* (NAPEO) also changed its name at the beginning of the 1990s from its original name, *National Staff Leasing Association* (NSLA), which was founded in 1984.[47] This is especially revealing since the new name captures the legal category of *employer*, coupling it with the connotation of the professionalization of this status.

The name changes of the associations have been purposeful. These organizations have been actively working with federal and state regulators to formalize and stabilize the industry. Early in the 1950s, the question of whether temporary help agencies were employers or employment agencies was litigated in state courts mainly by Manpower, Inc.[48] Later on, the industry negotiated with state legislatures, which resulted in several deregulation victories.[49] More recently, NAPEO "has negotiated with the National Association of Insurance Commissioners, the National Council on Compensation Insurance, the Interstate Conference of Employment Security Agencies, the Internal Revenue Service, the U.S. Department of Labor, and numerous other federal and state agencies . . . [and] testified in support of regulation of the industry across the country."[50] NAPEO "has published its Positions on Key Employee Leasing Issues, which contain the association's views on a variety of issues, including COBRA group health care coverage continuation rights, union organizing activity," and taxation issues.[51]

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46. *Id.*

47. Aaron, *supra* note 18, at 6.

48. *See* Gonos, *supra* note 19, at 91 (While Florida and Pennsylvania courts held that Microsoft was not an employment agency but an independent contractor, Nebraska and New Jersey courts held that it was an employment agency subject to state licensing laws and other regulations, and not the actual employer of the workers assigned to the user-employer.). Nebraska held that Manpower functioned as an intermediary in the labor market, procuring work for job applicants and supplying work to user-employers. Nebraska v. Manpower of Omaha, 73 N.W.2d 692, 697 (Neb. 1955).

49. *Id.*

50. Hammond, *supra* note 37, at 3 n.5.

51. *Id.* The NSLA formulated its self-definition:

> Employee leasing is a contractual relationship under which:
> (1) the leasing company assigns workers to client locations, and thereby assumes responsibility as an employer of the leased workers assigned to the client locations;
> (2) direction and control of the leased employees is the right and responsibility of the leasing company and may be shared with the client, consistent with the client's responsibility for its product or service;
> (3) the leasing company pays and reports wages and employment taxes of the leased employees out of its own accounts;
> (4) the employment relationship between the leasing company and its leased employees is intended to be long term and not temporary; and

The industry continues to be active in advocacy and litigation. The American Staffing Association states:

> Every industry must pool its resources to deal with the myriad legislative and regulatory issues facing it. Trade associations are the most effective way for individual companies, both large and small, to express their views to policymakers because only the association can speak for the industry as a whole. This is ASA's role.[52]

In June 2003, the American Staffing Association submitted a long memorandum to the U.S. Department of Labor responding to the request for public comment on the proposed rule to revamp the "white-collar" exemption rules under the Fair Labor Standards Act, arguing that changes in the federal overtime rules are necessary to accommodate the needs of today's flexible workforce.[53] Similarly, the association submitted a comment to the Department of Labor outlining concerns about how some state jobs programs, under the Workforce Investment Act unfairly compete with staffing firms and also urged policy changes that would increase the role of staffing firms in those programs.[54] In the recent Microsoft litigation on the status of its "leased employees," an amici curiae brief in support of Microsoft's stance was submitted by the Information Technology Association of America, the American Staffing Association, the Association of Private Pension and Welfare Plans, and the National Technical Services Association, arguing that the court's decision that the leased employees were in fact Microsoft's employees, "exposes the thousands of businesses that use staffing firm employees for legitimate business rea-

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(5) the leasing company retains the right to hire, reassign, and fire the leased employees.

Employee leasing enhances regulatory compliance, expands statutory protections for employees, improves human resources risk management, and increases the availability of cost-effective benefits to employees and businesses.

Id. at 165–66 (citation omitted).

52. American Staffing Association, About ASA—Membership Benefits *at* http://www.staffingtoday.net/aboutasa/benefitdetails.htm (last visted Sept. 18, 2003) (on file with the Texas Wesleyan Law Review).

53. Letter from Edward A. Lenz, Senior Vice President, American Staffing Association, to Tammy McCutcheon, Administrator, U.S. Department of Labor 1 (June 27, 2003) *at* http://www.staffingtoday.net/memberserv/publicaffairs/flsa_comments2003.pdf (on file with the Texas Wesleyan Law Review).

54. Letter from Edward A. Lenz, Senior Vice President, American Staffing Association, to Maria Flynn, U.S. Department of Labor 1 (June 28, 2002) (on file with the Texas Wesleyan Law Review) *at* http:www.staffingtoday.net/memberserv/ASA_Comments_on_WIA.pdf. *See also* Orly Lobel, *Regulating Coexistence in the New Economy: Cross-Sector Collaboration in a Workforce Development Approach* 38–41 (2003) (unpublished Hauser Center working paper) (on file with the Texas Wesleyan Law Review) (discussing the competition among private for-profit sector employment agencies, public agencies, and the non-profit sector under the recent Workforce Investment Act).

sons to lawsuits for retroactive employee benefit coverage by plaintiffs looking for a windfall."[55]

To professionalize and publicly establish its legitimacy, the industry, and particularly its associations, include on their websites Codes of Ethics and Professional Operating Standards that their members are asked to adhere to.[56] The ASA Code of Ethics declares itself as being "in the best interests" of all three sides of the triangle—workers, businesses and intermediaries—or as it describes, "of the staffing services industry, its customers, and its employees."[57] The member agencies are ethically required to "maintain the highest standards of ethical conduct," and among other things to satisfy all applicable employer obligations, including payment of the employer's share of social security, state and federal unemployment insurance taxes, and workers' compensation—and to explain to employees that the staffing firm is responsible for such obligations.[58] As is evident from these various activities, the industry is not only reacting to the needs of businesses but is creating a market for itself by innovation, marketing, and strategic collective action. The picture that is uncovered is of an industry, which is moving to establish its status, both economically and legally, as the new archetypical employer.

V. Spheres of Contractual Statuses: Common Law Mediates the Intermediary

A. *The Common Law Relationship*

While the industry has struggled to define itself, courts have also grappled with defining the parameters in triangular employment relationships. During the 1980s and early 1990s, Microsoft began to fill many of its full-time employment vacancies with what it internally referred to as "freelancers," that it wanted to legally define as "independent contractors."[59] These workers were distinguished from Microsoft's regular employees by a series of mostly symbolic characteristics.[60] The freelancer had a different colored badge, a different type of e-mail address, was not invited to company parties, and received a different orientation session.[61] The wages that the freelancers received came through Microsoft's accounts payable department

55. Contingent Workforce: Courts Ruling on Contingent Staff Left Standing by U.S. Supreme Court, 3 Pens. & Ben. Rep. (BNA) 208 (Jan. 11, 2000) (citation omitted).

56. *See, e.g.*, American Staffing Association, Code of Ethics, *at* http://www.staffingtoday.net/aboutasa/codeofethics.shtml (last visited Oct. 14, 2003) (on file with the Texas Wesleyan Law Review).

57. *Id.*

58. *Id.*

59. Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1189–90 (9th Cir. 1996) [hereinafter *Microsoft I*].

60. *Id.* at 1190.

61. *Id.*

while the regular employees dealt with the payroll department.[62] Despite these efforts to distinguish the two types of workers, in 1989 and 1990, the Internal Revenue Service (IRS) determined that "freelancers" were actually common law employees.[63] Microsoft reacted vigorously to these rulings, terminating the employment relationship with its freelancers and offering them an option to continue their work as employees of an employment agency that Microsoft set up.[64] Most of the freelancers accepted the offer and were converted to "temporary agency employees," although they continued to perform exactly the same work.[65] Even though these employees had originally signed a form stating that they were "independent contractors" and thus not eligible for benefits, after their conversion they sued Microsoft for benefits, mainly a company-assisted Savings Plus Plan (SPP), a section 401(k) retirement plan, and stock option eligibility (an Employee Stock Purchase Plan (ESPP)).[66] The government agency administrating the plans, governed by Washington state law, accepted Microsoft's classification of the workers and agreed that the workers had contractually waived their rights to any benefits.[67] Following this decision, the workers filed a class action suit that the district court denied, basing its decision on the voluntary nature of the agreements signed by the plaintiffs.[68] The plaintiffs then appealed to the Ninth Circuit Court of Appeals.[69] The court held that the plaintiffs were *common law employees* for the purpose of the stock option plan and had not waived their rights to these benefits by signing a statement declaring them independent contractors.[70] Eventually, Microsoft settled the case for $97 million dollars.[71]

The Ninth Circuit Court explained:

> [T]he Workers were employees, who did not give up or waive their rights to be treated like all other employees under the plans. The Workers performed services for Microsoft under conditions which made them employees. They did sign agreements, which declared that they were independent contractors, but at best that declaration was due to a mutual mistake, and we know that even Microsoft does

62. *Id.*
63. *Id.*
64. *Id.* at 1191.
65. *Id.*
66. *Id.* at 1190–91. Microsoft had each temporary employee sign a document that read: "[A]s an Independent Contractor to Microsoft, you are self-employed and are responsible to pay all your own insurance and benefits." *Id.* at 1190.
67. *Id.* at 1191.
68. *See id.* at 1192.
69. *Id.*
70. *Id.* at 1197.
71. Jennifer DiSabatino, *Microsoft to Pay $97 Million to Settle "Permatemp" Case*, E-MAIL NEWSLETTER (Computerworld), Dec. 12, 2000, *at* http://www.computerworld.com/careertopics/careers/story/0,10801,55093,00.html (last visited Sept. 25, 2003) (on file with the Texas Wesleyan Law Review).

> not now seek to assert that the label made them independent contractors.[72]

The court understood the personnel system of Microsoft as a way large corporations use flexible arrangements as a means to avoid employee benefits and to increase company earnings.[73] However, Justice Trott, in his dissenting opinion in *Microsoft I*, accused the majority of "playing analytical gymnastics" in order to fit the plaintiffs into the desired categories.[74]

> By tone and by choice of words, the majority seems subtly to accuse Microsoft of reprehensible conduct towards its workers. Microsoft is identified as "refusing" to pay its workers fringe benefits as though it did something wrong in creating the contractual relationships in this case. Later in the opinion the majority charges Microsoft with "misrepresenting" to the plaintiffs their employment status and with taking advantage of them. They clothe Microsoft with a Dickensian anti-labor attitude. Such characterizations spring full-bloom from the first sentence of the majority's opinion where "avoiding payment of employee benefits" and "increasing profits" foreshadow the negative coloration of the infidel Microsoft's role in this drama.[75]

Similarly, Justice O'Scannlain, dissenting in *Microsoft II*, agreed with Justice Trott's accusation, claiming that this was "a simple contracts case."[76]

The nature of flexible work arrangements, their drive, and the question of whether they are a result of voluntary or involuntary relationships between labor and capital are at the bottom of these adjudicatory debates. One of the most significant challenges that the courts face in this context is applying traditional standards of employment relations to non-traditional situations. Because there are both legitimate and illegitimate reasons for flexibility in employment relations, the law should neither aim to categorically prohibit, nor unconditionally allow the creation and implementation of multiple, flexible arrangements. Rather, the law needs to be flexible in the treatment of the diverse structures of economic flexibility. The legislature and the courts must take on the difficult task of sorting out the good from the bad, real triangulation from a dualities-in-disguise. Yet, within the existing framework of legal classification of employment relations, the

72. Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1012 (9th Cir. 1997) [hereinafter *Microsoft II*]. In a subsequent settlement, Microsoft agreed to pay the permatemps $97 million. Jennifer DiSabatino, *Microsoft to Pay $97 Million to Settle "Permatemp" Case*, E-MAIL NEWSLETTER (Computerworld), Dec. 12, 2000, *at* http://www.computerworld.com/careertopics/careers/story/0,10801,55093,00.html (last visited Sept. 25, 2003) (on file with the Texas Wesleyan Law Review).

73. *Microsoft I*, 97 F.3d at 1189.

74. *Id.* at 1203 (Trott, J., dissenting).

75. *Id.* at 1202 (Trott, J., dissenting).

76. *Microsoft II*, 120 F.3d at 1019 (O'Scannlain, J., dissenting).

adjudicatory task is often problematic. The tension between normatively balancing these different substantive considerations through a system that was built upon earlier understandings of a dual employment relationship is captured by the *Microsoft I* dissent's phrase, "analytical gymnastics."[77] Despite the dissent's allegation that the majority did not understand the case as it should have been—as "a simple contract case,"[78] both the majority and the dissent operated under the conventional assumptions of bipartite, employment contract law.

The legal treatment of employee status is a complex web of rules, standards, tests, categories, and classifications. The common law provides a balancing test of who is an employee, which consists of multiple factors, including: the involvement in the recruitment; the exercise of control over the employee; the method and manner of work; control over appearance; who addresses performance problems and attendance; who is entitled to terminate the relationship; and who supplies the tools for the job.[79] Over the years, and in reaction to the increasing complexities of flexible work arrangements, more factors have been added to the test. For example, for the purposes of federal tax classification, the IRS provides Form SS-8 that includes twenty questions to determine the classification of an "employee," building on the common law multi-factor test developed by the courts over many decades.[80] Because most employment statutes only contain a circular definition of employment, that is, an employer is defined as one with an employment relationship with an employee, while an employee is defined as a person employed by an employer, the common law multi-factor test is often used.[81] The questions of status determination and the classification of the employment relationship is signifi-

77. *Microsoft I*, 97 F.3d at 1203 (Trott, J., dissenting).

78. *Microsoft II*, 120 F.3d at 1019 (O'Scannlain, J., dissenting).

79. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989). The Court noted the factors of the inquiry to include: the right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*

80. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, FORM SS-8, DETERMINATION OF EMPLOYEE WORK STATUS FOR PURPOSES OF FEDERAL EMPLOYMENT TAXES AND INCOME TAX WITHHOLDING (1997). *See also Cmty. for Creative Non-Violence*, 490 U.S. at 751–52 (discussing the development of the common law multi-factor test developed by the courts over many decades to determine the classification of an employee).

81. Lara Turcik, *Rethinking the Weighted Factor Approach to the Employee Versus Independent Contractor Distinction in the Work for Hire Context*, 3 U. PA. J. LAB. & EMP. L. 333, 336, 338 (2001).

cant for a wide range of issues including employee benefits, torts, anti-discrimination, workers' compensation, unemployment insurance, liability insurance, and intellectual property issues. The test also implicates dozens of statutes such as the Occupational Health and Safety Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Civil Rights Act, and the Americans with Disabilities Act.[82] The application of the test often varies from statute to statute, as well as from case to case.[83] At times, each factor is given equal weight in the balancing process; at other times, some factors are deemed more important than others.[84] When facing a triangular relationship, the analysis becomes even more complicated.

The court in *Microsoft III* did not recognize the increased complexities of a triangular employment arrangement.[85] In addressing the triangular relationship between the worker, the temporary agency, and the client, the court reasoned that this relationship was "not wholly congruent with the two-party relationship involving independent contractors . . . . Even if for some purposes a worker is considered an employee of the agency that would not preclude his status of common law employee of Microsoft. The two are not mutually exclusive."[86]

However, while acknowledging that such new arrangements were "not wholly congruent" with traditional work relations, the court used the traditional common law test in order to classify the workers of Microsoft, putting much weight on the notion of control.[87] Relying on other recent cases, the court referred to the general common law of agency, under which "[a] servant . . . permitted by his master to perform services for another may become the servant of such other in performing the services."[88] In another recent case, *Burrey v. Pacific Gas & Electric Co.*,[89] which was cited in the *Microsoft III* case, the court recognized that "workers leased from an employment agency could be the common law employees of the recipient of their services," yet the latter status would continue to be determined through the traditional common law factors.[90] The plaintiffs in *Burrey* worked for a gas company as temporary employees until the company informed them that they would continue to perform the same work but as employees of an employment agency.[91] Several years later, the gas

82. *See, e.g.*, 42 U.S.C. § 2000e(b).
83. *See* Turcik, *supra* note 81, at 338.
84. *Id.* at 341; Jennifer Sutherland Lubinski, Comment, *The Work for Hire Doctrine Under* Community for Creative Non-Violence v. Reid*: An Artist's Fair Weather Friend*, 46 CATH. U. L. REV. 119, 139 (1996).
85. Vizcaino v. U.S. Dist. Court for W. Dist. of Wash., 173 F.3d 713, 723 (9th Cir. 1999) [hereinafter *Microsoft III*].
86. *Id.*
87. *See id.* at 723–24.
88. RESTATEMENT (SECOND) OF AGENCY § 227 (1958).
89. 159 F.3d 388 (9th Cir. 1998).
90. *Microsoft III*, 173 F.3d at 724.
91. *Burrey*, 159 F.3d at 390.

company entered into a contract with a different agency, and consequently informed the plaintiffs that they would continue working at the gas company as employees of the new employment agency.[92] Although the retirement and savings plans provided by the gas company were made available to "employees" but not to "leased employees,"[93] the court reasoned:

> [T]he determination of whether someone is a leased employee is made *after* determining whether the individual is a common-law employee of the recipient. Thus, an individual who is not a common-law employee of the service recipient could nevertheless be a leased employee of the service recipient. Similarly, the fact that a person is or is not found to perform services under primary direction or control of the recipient for purposes of the employee leasing rules is not determinative of whether the person is or is not a common-law employee of the recipient.[94]

In *Renda v. Adam Meldrum & Anderson Co.*,[95] the court similarly held that the plaintiffs, who worked for the defendant as leased employees, fell under the common law definition of employee, concluding for the purposes of plan participation under ERISA that the leased workers could not be excluded from the retirement plan.[96] By contrast, in *Abraham v. Exxon Corp.*,[97] the court held that an employer could bar leased employees, working in the firm through an employment agency, from participating in the firm's ERISA plan, since the exclusion was part of the explicit terms of the plan.[98] As demonstrated in these cases, even when the courts reach decisions that are responsive to the needs of workers, methodologically, the courts continue to simply use the traditional common law employee test without exploring the complex relationship and structures of triangular employment and the possibilities and comparative advantages of new participants and new arrangements in the labor market. Therefore, the same analysis continues to be applied to both independent contractors and workers employed through employment agencies.

B. *Contractual Status*

The rigidity of classification efforts under the common law test, that is, the requirement to fit into a certain category, "employee," reached via a highly malleable labeling mechanism, is coupled with a related tension—the double move of contract/status. Normally, employers

92. *Id.*
93. *Id.* at 391.
94. *Id.* at 393 (citing S. REP. NO. 104-281, at 93 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1567).
95. 806 F. Supp. 1071 (W.D.N.Y. 1992).
96. *Id.* at 1079, 1082, 1084.
97. 85 F.3d 1126 (5th Cir. 1996).
98. *Id.* at 1128, 1131.

cannot contract out of the employment relationship. Employment standards are mostly mandatory rather than dispositive or default requirements. While "the movement of the progressive societies has hitherto been a movement *from Status to Contract*,"[99] it is now usually workers who are interested in the recognition of their status as a common law employee. Those who oppose the growing prevalence of triangular work relations fear that the move to flexible arrangements will represent yet another shift in the pendulum from status to contract and back to status—and back to contract. The idea behind the transition from status to contract has been the rejection of classification of people in ways that will pre-determine their rights regardless of what they decide for themselves. Freedom of contract allows individuals to determine the terms of their relationship.

Yet, in contemporary legal regimes, each definition of the work relationship status carries with it consequences as to the social conditions, benefits, and guarantees of work. As it has been legally developed, the determination that a relationship is one of "employment" is a status that entails crucial conditions for the work life of laborers. Thus, the courts have engaged in the double move of *contractual status*. On the one hand, courts have stated once and again that the employer's internal classification of its workers is not determinate of the status of the relationship. On the other hand, the nature and details of the relationship determined by law is highly influenced by the explicit and implicit understandings that exist between the different sides of the contractual relations. As we have seen, one of the most influential factors that guide the courts' decisions is the degree to which the triangulation has been voluntarily reached by both sides of the employment relationship.

For example, in *Microsoft III*, the court determined that Microsoft had not excluded the workers from coverage in "clear and explicit language," *and* that the contract signed by the employee declaring them "independent contractors" was not to be accepted.[100] The result is that a contract that misclassifies the employment relationship and contains, alongside the misclassification, a waiver of certain eligibilities is less likely to be upheld by a court than a contract that simply contains the same waiver of eligibilities without classifying the relationship.

The proliferation of legally recognized arrangements, statuses, and terminology coupled with a multi-factor, balancing test allows the

99. HENRY MAINE, ANCIENT LAW 165 (Charles M. Harr ed., Beacon Press 1963) (1861). This is not unique to labor, and similar patterns appear in marriage law and in housing law. *See* Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 47–48 (1978); Hiram H. Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 KAN. L. REV. 369, 369, 377 (1961).

100. *Microsoft III*, 173 F.3d at 723.

courts to reach context-sensitive decisions. Similarly, the double-move of contractual status—the recognition that employment relations are reached through contract, coupled with the insistence that status is not to be opted out from by contract—all attempt to mediate between the need for flexibility of the market and the need for employee protection and accountability. At the same time, these moves produce a different kind of flexibility that is not adequately accounted for in the context of emerging triangular relations in the new economy.

Even in a conventional dual relationship, the existing regulatory and adjudicatory structures have proven inadequate in ensuring socially responsible practices in the new world of work. Referred to by one scholar as "simulated statutory purposelessness," the existing common law test does not effectively address the diversity of arrangements and the purposes of these arrangements in the current market.[101] Indeed, the doctrine is often a "denial of socioeconomic purpose," rather than an acknowledgment of multiple dynamically shifting market realities for unequally situated individuals.[102] The existing legal regime carries with it uncertainty, along with an uneven ability of business and workers to impact future results. The common law multi-factor test produces unpredictable results and is prone to manipulation by those who can plan ahead and make ex-ante legal information available to them. For these reasons, labor scholars often predict that victorious decisions for labor such as the *Microsoft* decision will not have a long lasting effect.[103] In these cases in which decisions have been reached in a highly contextual manner, costs are likely to find a way to the entity with less bargaining power in any case.[104] Moreover, such decisions can be understood as further pushing the institutional learning of employers and of the employment agency industry, simply making them better at explicitly excluding contingent employees from certain rights and eligibilities. Thus, the legal proliferation of categories produces a flexibility of which some actors will be better situated to take advantage of.

The current contractual status hybrid result is inconsistent with the objectives of social legislation. If the purpose of protective employment laws is to ensure that workers, as weaker players in the market, will receive fair and reasonable compensation for their work, the focus on the right to control coupled with the title status definitions of the individual firm fails to reach those who are most likely to need such

101. 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 J. 187, 227 (1999).

102. *Id.* at 187.

103. *See* Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301, 324 (1999).

104. *See id.*

protection. Ad hoc, case-by-case decisions enable courts to draw the links between the actual user of labor and the protected class despite a third-party intermediary. As such, the law pierces the veil of the intermediaries by rejecting some of the classifications emerging in efforts to produce economic flexibility. At the same time, the development of this legal flexibility contributes to the constitution of the veil of uncertainty. The law contributes to the industry-designed complexity by accepting some of the classifications construed by the industry, by advancing new categories through ad hoc, case-by-case adjudication, and by layering the imaginative spectrum with additional mechanisms that ensure some accountability while producing other ways for the industry to opt-out of legally binding requirements.

In addition to the benefit eligibility cases described above, courts are currently facing these problems in a wide variety of contexts. Recent cases have dealt with the triangulation of work relations from several aspects in employment and labor law. For example, for the purposes of preventing employment discrimination under Title VII, the Equal Employment Opportunity Commission (EEOC) has recently concluded that under most circumstances of triangular relationships, both the user-employer and the employment agency can be held liable for discrimination or harassment suffered by temporary employees.[105] For collective bargaining purposes, the National Labor Relations Board has ruled that it is permissible to compose a bargaining unit consisting of employees who are employed through an employment agency (described in the case as a "temporary supplier firm") together with employees who are directly employed by the user-employer,[106] as "long as the two groups share a sufficient community of interests."[107] Again, labor scholars fear that this decision may well be short-lived without the introduction of more comprehensive legal responses to these new issues.[108]

C. *The Dunlop Commission and Recent Policy Proposals*

In the 1994 final report of the Dunlop Commission on the Future of Worker-Management Relations, the commission recognized that the "single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors."[109] Yet, the com-

105. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: APPLICATION OF EEOC LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), *at* http://www.eeoc.gov/docs/conting.html (last visited Oct. 4, 2003) (on file with the Texas Wesleyan Law Review).

106. M.B. Sturgis, Inc., 331 N.L.R.B. 1298, 1305, 1303 (2000).

107. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 456–57 (2000).

108. *Id.* at 456–57.

109. DUNLOP COMM'N, *supra* note 28, at 37.

mission described the existing common law test as providing employers with "a means and incentive to circumvent the employment policies of the nation."[110] The incentives are to avoid costs and overcome limiting public regulation; the means is to use some form of the diverse range of flexible work arrangements that exist in the new economy.[111] The commission reasoned that the test for defining employee status "is based on a nineteenth-century concept whose purposes are wholly unrelated to contemporary employment policy."[112] Therefore, the commission recommended the legislative adoption of a single economic reality standard to be applied in determining the coverage of employment and labor laws.[113]

Questions about the classification of certain groups of workers should constantly be linked in public policy debates to the reach of protective legislation for nontraditional employees. As the Dunlop Commission suggested, a significant move in this direction could be the "economic realities" test to determine employee status, or rather to determine eligibilities, "as a matter of *economic reality* follows the usual path of an employee and is dependent on the business which he serves."[114] During the past years, the courts have mostly been reluctant to replace the common law test with the economic realities test in ascertaining employee status under employment statutes.[115] Yet, the economic realities test seems more capable of dealing with the competing and complex factors for determining rights and responsibilities in the new economy. The economic reality test is also more congruent with the emergence of a spectrum of triangular employment arrangements. While the common law test, which focuses primarily on the issue of control, assumes a dual relationship and thus looks for the one firm which is most fit to be labeled "employer," the economic realities test asks about the economic dependency of the worker within the structure she or he is employed. Thus, in a triangular relationship, economic dependency can be spread upon both the user-employer and the employment agency and determined according to the different benefits and claims at stake. The economic realities test can ask questions about the comparative advantage of each of the potential employers—the user-employer and the employment agency—in their activities vis-à-vis workers.

The court in *Microsoft*, as well as in other recent cases, did not adequately account for the diverse nature of factors and incentives that lead to flexible employment relations. Rather, these decisions mostly

110. *Id.* at 37–38.

111. Befort, *supra* note 107, at 419.

112. DUNLOP COMM'N, *supra* note 28, at 37.

113. *Id.* at 36.

114. Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 466 (1999) (citation omitted).

115. *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

focus on the conventional dichotomies and balances between contract and status restricted by the idea of a conventional dual-sided relationship. The potential and risks emerging from triangular relationships have rarely been explored by the case law in a sustained manner. The continuing dominance of a dual contractual relationship in employment relationships limits the understanding of both the downside and the possible benefits of the employment agency industries. Moreover, the inconsistency of the case law creates uncertainty for both employers and workers and results in inefficiencies for all actors in the new economy.

The complex economic and social nature of the changing employment relations requires a comprehensive rethinking of the substantive rights and eligibilities that firms owe to those whose services they employ. Courts should recognize the existing practices that distinguish between different types of employment agencies, different motivators of flexible arrangements, and variances in contingent practices. The continuing predominance of the centuries-long common law employment test is insufficiently geared to account for new triangular employment relations. Hence, along with the introduction of the economic realities test in adjudication, specific regulations of employment agencies, and administrative guidelines as to employment agencies' treatment are key to addressing the new complexities of triangular work relations. Currently, there is no federal law that regulates the responsibilities and roles of private for-profit employment agencies and their relationships with both workers and user-employers.[116] Many of these questions are also largely unregulated at the state levels. Even when regulated by state law, current regulation lacks a comprehensive treatment of the complexities of the different categories, roles, and interactions that exist today in triangular work relations.[117] Several recent bills have been introduced in the House of Representatives, each dealing with the problematic nature of flexible work arrangements.[118] These legislative initiatives as well as others

116. Freeman, *supra* note 40 (manuscript at 2, 5). In addition to implicating employment agencies as sharing in the responsibilities of employers, some scholars have suggested, for example, that these new entities should be reclassified as a new form of labor organization, functionally equivalent to the older form of a union hiring hall. *Id.*

117. *See supra* Part II.

118. *See* H.R. 1525, 106th Cong. (1999) (the Independent Contractor Clarification Act of 1999, an effort to provide simplified rules for determining whether an individual is an employee or an independent contractor); H.R. 2298, 106th Cong. (1999) (the Equity for Temporary Workers Act of 1999, which would prohibit any discrimination with respect to wages, hours, and other terms and conditions of employment against any temporary employee); H.R. 2299, 106th Cong. (1999) (the ERISA Clarification Act of 1999, which would amend ERISA to require employer to include all service (including service as a temporary worker) in determining an employee's years of service and would require that any exclusion from a pension plan be made on a uniform basis, that it be stated in the plan, and that it be based on a reasonable job classification and on objective criteria). An employer would not be allowed to exclude work-

must be debated in the public arena. A revitalized employment law needs to be introduced to concepts of tri-party responsibilities. As described previously in part III, new intermediaries in the market have the potential to enhance the stability in the market at the same time that they enable flexibility.[119] For example, employment agencies have the potential of helping to increase the portability of benefits in a reality of contingency. Thus, they can provide the needed institutional continuity for mobile workers to accumulate benefits such as health and retirement plans. Yet, to do so responsibly, public policy must consider the ways in which the provision of benefits could be prorated among the various employing entities, including new for-profit intermediaries.[120]

D. *Comparative Insights*

Finally, the comparative perspective provides some helpful insights into the need for legal innovation when facing these new dynamic realities. It should be noted that around the world, even countries with a higher commitment to extensive labor standards than the United States are undergoing flexiblization processes.[121] Indeed, even the labor-oriented strong historic stance of the International Labor Organization (ILO) against employment agencies, and its skeptical view of non-standard forms of employment, was partly reversed in 1997, by the adoption of a new convention on employment agencies, replacing the 1949 treaty that had endured until then.[122] The old convention generally restricted the roles of employment agencies to only two activities: worker recruitment and placement.[123] In contrast, the new "Convention Concerning Private Employment Agencies" expands the roles of employment agencies as employers, regulates a broader range

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ers from a pension plan by designating the employee as a part-time, temporary, leased, or agency employee where the employee is actually a common law employee of the employer and has served the required minimum service period under the plan. *See* H.R. 2299.

119. *See supra* Part III.

120. Befort, *supra* note 107, at 459 ("Contingent work arrangements are not likely to decrease in the foreseeable future and trying to prevent their use is likely to be a futile endeavor. By increasing the portability of benefits, the law can accommodate rather than obstruct the prevalence of these nonstandard work arrangements."); *see generally* The Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. §§ 1181–82 (1994 & Supp. II 1996) (illustrating how provision of benefits for employees could be handled).

121. *See generally* Aaron B. Sukert, *Marionettes of Globalization: A Comparative Analysis of Legal Protections for Contingent Workers in the International Community*, 27 SYRACUSE J. INT'L L. & COM. 431 (2000) (discussing increased flexible work arrangements throughout European and other industralized nations).

122. *See* The Convention Concerning Private Employment Agencies, Convention C181, 1997, *at* http://www.ilo.ogr/ilolex/english/iloquery.htm (last vistited Oct. 25, 2003) (on file with the Texas Wesleyan Law Review).

123. *See id.*

of their activities, and requires countries to allocate responsibilities to both the employment agencies and the user-employers.

At the European Union level, the European Employment Strategy committee has indicated that one of its goals is the achievement of "flex-security" for European workplaces.[124] Many countries, including the social-democratic Scandinavian countries are rethinking their legal regimes to accommodate flexible employment arrangements. For example, Sweden has implemented a dramatic change in its laws; in 1993, it enacted the Act on Private Employment Exchange and Hiring Out of Employees.[125] The "law marks the end of an extremely restrictive regulatory" regime that lasted nearly sixty years and removed virtually all restrictions on flexible employment arrangements.[126] At the same time that countries are liberating their laws to enable flexible arrangements, they are developing new legal categories and mechanisms for the inclusion of new arrangements within the radar of social legislation. Thus, the comparative perspective can provide directions for reform.

For example, in Canada a new legal category, "dependent contractor," is developing under which individuals who do not fall under the traditional "employee" definitions but are nonetheless in such a relationship with "the business for which they perform services that they should be accorded the same protections and other economic rights as employees."[127] In Germany, a similar category of "employee-like persons" are defined as employees for the purpose of many employment and labor law provisions because "[t]hey are economically dependent and are in similar need of social protection."[128] Similarly, Sweden has developed a category of dependent employees and has regulated the relationships among leasing firms, user employers, and workers.[129] These shifts demonstrate the tensions between the need to recognize the expanding existence of triangular employment arrangements, to provide regulatory incentives that will motivate fair and socially responsible arrangements, and to limit illegitimate structures that defy public policy.

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124. David M. Trubek & James S. Mosher, *New Governance, Employment Policy, and the European Social Model*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY 33, 41–42 (Jonathan Zeitlin & David M. Trubek eds., 2003).

125. Reinhold Fahlbeck, *Flexibility: Potential and Challenges for Labor Law*, 19 COMP. LAB. L. & POL'Y J. 515, 522 (1998).

126. *Id.*

127. Marsha S. Berzon, *Employer Evasion of Collective Bargaining and Employee Protective Statutes Through Independent Contractor Status*, 13 LAB. L. EXCHANGE 1, 12 (1994) (alteration in original).

128. Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL'Y. J. 77, 88 (1999).

129. *See* Ronnie Eklund, *A Look at Contract Labor in the Nordic Countries*, 18 COMP. LAB. L.J. 229, 240–42, 249, 251–52 (1997).

VI. CONCLUSION

Flexible employment relations are becoming a reality for many individuals in the new world of work. In such a reality, the traditional employer is no longer the single significant, and often not even the primary, actor of the labor market. Social reform efforts to improve working conditions and employability are shifting to other actors. Increasingly, private for-profit intermediaries, such as employment agencies, serve important roles in shaping the economy and determining the nature of labor relations. An exploration of the development and function of flexible employment arrangements reveals the ways in which seemingly efficiency driven arrangements and categories are developed through continuous political and legal action. Third-party employment agencies have the potential of becoming welfare-enhancing and socially responsible actors. However, they are also likely to produce new forms of mistreatment and exclusion in the absence of adequate regulatory incentives. New economic structures in the labor market necessitate the development of a new normative model for fair and just employment relationships that enables flexibility while preserving the social values that underlie our tradition of employment policy.