On the Clock versus on the Books: The Appropriate Method for Counting Employees under Title VII, the ADEA and Other Labor Laws

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INTRODUCTION

The make up of the American labor force has changed drastically in the last few years. The current trend of corporate downsizing and cost-cutting has led to the increased use of “contingent” or non-traditional workers whose schedules resemble anything but the traditional nine-to-five. By the broadest definition, contingent employees which, by some estimates, constitute one third of the entire workforce, include individuals working for temporary help agencies, independent contractors, part-time employees, and workers employed by the day. Because Americ-

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2. See Richard S. Belous, The Rise of the Contingent Work Force: The Key Challenges and Opportunities, 52 WASH. & LEE L. REV. 863, 867 (1995) (setting forth his oft-cited current estimate of temporary, part-time and self-employed workers to be at twenty-five to thirty percent of the work force). Recently, however, the United States Bureau of Labor Statistics released the first-ever survey on the contingent work force. The study estimated that contingent workers comprised between two to five percent of the work force. However, the study failed to include part-time and leased employees. See Pamela Mendels, Temp Workers Want Permanence; Feds Issue First Study of ‘Contingents’, NEWS-DAY, Aug. 18, 1995, at A49.


4. Cooper, supra note 1, at 526. Richard Belous further describes contingent workers as employees who have a weak affiliation with their employer, no stake in the com-
can labor statutes were drafted based on assumptions of full-time traditional work arrangements, employers are able to circumvent those laws by manipulating their work forces to include more leased and part-time employees. The result is that contingent employees often find themselves outside the scope and protection of the law.

Because so many workers no longer fit into the traditional images contemplated by labor laws, the definitions of the words "employer" and "employee" have now become crucial thresholds in providing workers' rights. Although the issue seems facially narrow, it has resounding implications for the security and preservation of the American worker's rights. Given that many employers misclassify or reclassify their employees for the very purpose of avoiding the requirements and liability associated with social security, unemployment insurance, workers' company, and are not considered part of the corporate family. Belous, supranote 2, at 865. In addition, he points out that contingent workers do not have long-term job attachment and no stability. Id.


6. However, this is not an entirely new tactic. Employers have tried to avoid labor legislation throughout history. For example, in 1944, the Supreme Court was called on to decide whether "newsboys" who distributed newspapers for Hearst Publications were considered employees under the National Labor Relations Act (NLRA). NLRB v. Hearst Publications, Inc. 322 U.S. 111 (1944). Hearst's position was that it was not required to collectively bargain with the newsboys because they were not "employees" under the NLRA but rather acted as independent contractors. Id. Interestingly, the Court upheld the NLRB's "News and Herald" collective bargaining units which consisted of all full-time newsboys engaged to sell papers in Los Angeles. Id. at 132. The Court found that "[b]oot-jackters, temporary, casual and part-time newsboys [were] excluded." Id. Hearst Publications demonstrates the mindset that only traditional full-time workers deserved recognition and protection under the labor laws. Therefore, while management has always tried to maneuver around labor legislation, the new twist is that the increasing groups of part-time and contingent workers have become the focus of management's efforts to avoid worker protections.

7. See Mary E. O'Connell, Contingent Lives: The Economic Insecurity of Contingent Workers, 52 WASH. & LEE L. REV. 889, 894-96. (1995). Professor O'Connell cites to a 1993 General Accounting Office (GAO) report which reveals that the recipient rate for unemployment insurance benefits is only 39%, that is, six in ten unemployed workers who have applied for benefits since 1990 have been denied. Id. at 894 (citing U.S. GEN. ACCOUNTING OFFICE, GAO/NRD-93-107, REPORT TO THE CHAIRMAN, SENATE COMMITTEE ON FINANCE, U.S. SENATE: UNEMPLOYMENT INSURANCE: PROGRAM'S ABILITY TO MEET OBJECTIVES JEOPARDIZED 2 (1993) [hereinafter GAO REPORT]). The denials are due, in large part, to the increase in eligibility criteria which effectively close out the ever-growing population of contingent workers. For example, each state requires that applicants have worked a minimum number of weeks or earned a certain wage within a specified period of time in order to provide unemployment, thereby excluding those who work part-time for low wages and short duration. Id. at 895 (citing GAO REPORT, supra, at 3). The GAO report also found that employers manipulate employees' hours and wages to prevent them from
pensation, the Civil Rights Act,\(^8\) the Age Discrimination in Employment Act\(^9\) (ADEA), the Employee Retirement Income Security Act\(^10\) (ERISA), and the Family Medical Leave Act\(^11\) (FMLA), the issue of what constitutes or defines employment becomes integral in the battle to secure worker protections. This article will illustrate one example of how labor laws are often being "skirted" by employers who manipulate the make up of their workforce.

This article focuses on how the definitions used in Title VII and the Age Discrimination in Employment Act (ADEA) have been construed by the federal courts in diverging ways. Because the laws are designed so that an employer comes under the jurisdiction of the federal courts based on how many employees it "has", a threshold question in Title VII and ADEA litigation is how to count the number of workers a company employs.

The Federal courts have recognized the "payroll approach" and the "on the job method" as the two primary ways of counting employees for determining whether the statutory minimum is met. Various circuits have adopted a method of counting an employee as "employed" for a particular week if he or she is on the company's payroll.\(^12\) The "payroll method" naturally provides the broadest protections for labor. The alternative interpretation, the "on the job" method claims to adhere to the "plain meaning" of the statutory definitions and considers a person "employed" for a particular work week only if they are present at work during every day of that week.\(^13\) This "on the job" reaching the eligibility minimums. \textit{Id.} at 896 (citing GAO REPORT, \textit{supra}, at 38).

10. \textit{Id.} §§ 1001-1461.
11. \textit{Id.} §§ 2601-2654.
13. \textit{See, e.g.,} Zimmerman v. North Am. Signal, 704 F.2d 347 (7th Cir. 1983); EEOC v. Metropolitan Educ. Enters., Inc., 60 F.3d 1225 (7th Cir. 1995); EEOC v. Garden and Assocs., Ltd., 956 F.2d 842 (8th Cir. 1992); Richardson v. Bedford Place Housing Phase I
method, by definition, excludes workers who do not come to work every day during the work week.

Although the Equal Employment Opportunity Commission (EEOC) has endorsed the "payroll method," the question of which method is appropriate has yet to be answered by either the Supreme Court or Congress. However, on November 6, 1996, the Supreme Court heard argument on this issue and will likely render a decision in the coming months. This article outlines many of the issues that the Supreme Court should consider when addressing whether the "payroll method" or the "on the job" method will be used to count employees in Title VII and ADEA cases.

Part I of this article outlines the issue concerning the two primary interpretations that have emerged in Title VII and ADEA litigation. Part II deals with management and labor's respective positions on the issue and the motivations for each entity's advocated interpretation. Part III outlines the ramifications of the issue in terms of the changing face of American labor and the increased use of contingent, or non-traditional full-time workers over the recent decade. Part IV presents the argument that the "payroll method" is the appropriate method of counting employees given the expanded use of part-time workers and the way management, labor and the law have historically considered and relied on the employment relationship.

I. THE "ON THE JOB" VERSUS THE "PAYROLL" METHOD

Under Title VII, an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year." The ADEA definition is exactly the same as stated in Title VII except that an employer must have twenty employees to be governed by the


14. See Policy Guidance: Whether Part-time Employees are Employees Within the Meaning of § 701(b) of Title VII and § 11(b) of the ADEA, 2 EEOC Compl. Man. (CCH) at 2167, 2313-14 (Apr. 20, 1990) [hereinafter EEOC Policy Statement]. "The Commission's position is that all regular part-time employees are counted whether they work part of each day or part of each week . . . ." Id. The Commission further stated, "[p]ublic policy considerations weigh in favor of the broadest possible interpretation and dictate against the consequences that a stricter construction would have." Id.


statute. Although the definitions ostensibly seem straightforward, the statutes do not explicitly detail a method of counting employees to determine whether an employer comes under the jurisdiction of the law. Two different methods of determining who is employed for purposes of Title VII and the ADEA have emerged in the various federal circuits; one based on when an employee punches the clock, the other based on whether an employee is on the payroll.

A. The "On the Job" Method

The Seventh Circuit in EEOC v. Metropolitan Educational Enterprises,18 reexamined the standard it had formulated in its landmark case of Zimmerman v. North American Signal Company19. In Zimmerman, the main issue was whether North American Signal was an "employer" under the Age Discrimination in Employment Act (ADEA).20 The ADEA's definition was very similar to that used by Title VII at that time.21 North American Signal barely missed the requisite number of employees under the statute by counting only salaried or full-time workers and excluding part-time employees.22 Noting the lack of legislative history regarding the section, the court considered the arguments of the parties.23 Mr. Zimmerman worked as vice president for North American Signal for sixteen years before being fired at the age of 67.24 He asserted that North American discharged him solely because of his age.25 Further, he argued that all employees who appeared on the company's payroll for a given week should be counted for that week based on the proposition that the "employment relationship is not broken on the day [an employee] does not work, at least if he returns the next week, as most North American [Signal] workers seem to do."26

18. 60 F.3d 1225 (7th Cir. 1995), argued sub nom. Walters v. Metropolitan Educational Enterprises, Inc. (consolidated with EEOC v. Metropolitan Educational Enterprises, Inc.), Nos. 95-259, 95-779 (Supreme Court Nov. 6, 1996).
19. 704 F.2d 347 (7th Cir. 1983).
20. Id. at 352-54.
21. The ADEA definition reads as follows: "(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 29 U.S.C. § 630(b).
22. Zimmerman, 704 F.2d at 347.
23. Id. at 352.
24. Id. at 347.
25. Id.
26. Id. at 353.
The court however held that the language “for each working day” was inconsistent with Mr. Zimmerman’s advocated “payroll” approach.\textsuperscript{27} Although the court recognized that the ADEA is “remedial” in nature, which traditionally indicates that it be broadly interpreted,\textsuperscript{28} it formalistically stated that “a court should not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous.”\textsuperscript{29} The court agreed with North American Signal that the words “for each working day” meant an employee would be counted as employed during a particular work week only if he or she was present during each day of the week.\textsuperscript{30} In addition, the court stated that the definitional restriction chosen by Congress could have been drafted in a number of ways in order to exempt small employers from the Act’s coverage, for instance by creating a minimum based on the number of employees on the payroll of a company, but that it explicitly did not.\textsuperscript{31}

However, a look into the legislative history of Title VII reveals a heated debate and concern over the depth of coverage of the Act. For example, Senator Dirksen, a co-sponsor of Title VII mentioned, that after exhaustive testing, the original Senate committee report on the bill recommended the Civil Rights Act apply to businesses with only eight employees.\textsuperscript{32} Senator Dirksen also noted that several statutes begin with a requirement of merely one employee. He stated, “Are we going to make fish of one and fowl of another? Are we going to set thirty-one percent of our working people in one category and say that the law does not apply to them: whereas in the case of the remaining sixty-nine percent, the law would apply?”\textsuperscript{33} The Zimmerman Court,

\textsuperscript{27} Id.
\textsuperscript{29} Zimmerman, 704 F.2d at 353-54.
\textsuperscript{30} Id. at 354. \textit{But see} EEOC Policy Statement \textit{supra} note 13, at 5, for the counter argument that:

[The phrase ‘for each working day’ is sufficiently flexible to allow a construction which will effectuate the legislative intent. Even a literal reading of ‘for each working day’ lends itself to a payroll standard inasmuch as ‘for each working day’ does not literally mean “at work,” nor does the statutory language of section 701(b) or section 11(b) contain any limitation indicating that only those individuals actually at the work site on each working day are to be considered employees under Title VII.]

\textsuperscript{31} Zimmerman, 704 F.2d at 354. \textit{See} 110 CONG. REC. 13,087 (1964) (revealing a debate as to how to keep small businesses from coming under the purview of the law).
\textsuperscript{32} 110 CONG. REC. 13,087.
\textsuperscript{33} Id.
however, found the legislative history of Title VII to be useless in determining the depth of its coverage.

1. Zimmerman revisited. As previously noted, the Supreme Court is currently reviewing the "on the job" standard first established by the Seventh Circuit in Zimmerman.\textsuperscript{34} The Court granted certiorari to review EEOC v. Metropolitan Educational Enterprises,\textsuperscript{35} a case in which the Seventh Circuit revisited its Zimmerman decision in light of "recent legislative developments".\textsuperscript{36} The claim in Metropolitan was brought under Title VII, but the court noted that the Zimmerman reasoning under the ADEA was dispositive.\textsuperscript{37} The EEOC brought suit on behalf of Darlene Walters who claimed she had been dismissed in retaliation for her filing of a gender discrimination charge against her employer. The Commission argued that the recent passage of the Family and Medical Leave Act (FMLA)\textsuperscript{38} indicated that Congress endorsed the payroll method over the Zimmerman "on the job" approach.\textsuperscript{39} To support its argument, the EEOC pointed out that the Senate Report for the FMLA states:

The quoted [definition of employer] parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, "[e]mploy... employees for each working day is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be considered for this purpose.\textsuperscript{40}

\textsuperscript{34} Walters v. Metropolitan Educational Enterprises, Inc. (consolidated with EEOC v. Metropolitan Educational Enterprises, Inc.), Nos. 95-259, 95-779 (argued Nov. 6, 1996).
\textsuperscript{35} 60 F.3d 1225 (7th Cir. 1995).
\textsuperscript{36} Id. at 1225.
\textsuperscript{37} Metropolitan, 60 F.3d at 1227 n.2. The Court stated that "the ADEA's definition is 'essentially identical to Title VII's', [and that] 'courts routinely apply arguments' to the two interchangeably." Id. at 1227 (quoting EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995)).
\textsuperscript{39} Metropolitan, 60 F.3d at 1227. Specifically, the plaintiff's position was that the FMLA has included a definition of "employer" that closely parallels that in the ADEA and Title VII. The definition of "employer" in the FMLA reads: "any person engaged in commerce or in any activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i) (emphasis added). The EEOC's argument is that because § 2611(3) of the FMLA references the Fair Labor Standards Act (FLSA) (29 U.S.C. § 203(e) definition of "employee" ("any individual employed by an employer"), the all-inclusive payroll approach to counting employees should be used.
In addition to the legislative history argument, the EEOC asserted that its own guidelines promulgated since Zimmerman advocate the payroll method and that such method is consistent with public policy goals.41

The Seventh Circuit held steadfast to its decision in Zimmerman. It again offered formalistic justifications for its position that employees must be present at work each working day in order to be counted as "employed." The court curtly stated that in passing the FMLA, Congress had no special sanction to interpret the actions of a previous Congress. Therefore, the Metropolitan Court was not persuaded by the argument that Congress, in passing the FMLA, was trying to avert the problems created by the Title VII and ADEA definitions of "employer." Moreover, regarding the EEOC's guidelines, the court remarked, "[w]hile we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction."43 The court also based its reasoning on stare decisis and stated, "[r]egarding the circuit split, it is enough to note the large number of recent cases on both sides of the issue; that some courts have disagreed with our analysis while others have adopted it hardly presents a pressing reason to overturn settled precedent."44

The Eighth Circuit, as well as various district courts, have also adopted the Seventh Circuit's "plain meaning" or "on the job" approach enunciated in Zimmerman and Metropolitan.45 Most have echoed the rigid reasoning of the Seventh Circuit as well. In fact, there has been a recent flood of cases where the courts upheld Zimmerman with a host of new black letter rationales that only patronizingly acknowledge the purpose and intent behind the enactment of Title VII and the ADEA. In Richardson v. Bedford Housing Phase I Associates,46 the court mentioned that Congress could have applied Title VII to all businesses affecting commerce, but instead, "whether a product of political compromise or an explicit recognition that small economic enterprises cannot bear the regulation and risk of liability under Title VII, a strict threshold was set."47 The Richardson

42. Id.
43. Metropolitan, 60 F.3d at 1229-30 (emphasis added).
44. Id. at 1229.
45. See cases cited supra note 13.
47. Id. at 371.
Court also ironically suggested that the congressional debate over the 1972 amendment to Title VII, which reduced the threshold from twenty-five to fifteen employees, centered "only" on the assertion that the reduction would lead "to more employers being covered, discrimination being reduced and whether such a change might overload the court dockets."\(^{48}\)

B. The Payroll Method

The First and Fifth Circuits have rejected the Zimmerman "on the job" model in favor of the "payroll approach" to settle the threshold jurisdictional question of how to count employees for Title VII and ADEA purposes. Five and half months after the Zimmerman Court endorsed the "on the job" method, the First Circuit in Thurber v. Jack Reilly's, Inc.\(^{49}\) adopted the "payroll" method after a discussion of the broader intent of Title VII.\(^{50}\) The Thurber Court stated that, "[w]hile Congressional debate revealed concern for the over-regulation of small family or neighborhood businesses, the legislative history generally weighs heavily against the [employer's] position."\(^{51}\) Specifically, the court found that a co-sponsor of Title VII stated that the definition of employer was borrowed from the Unemployment Compensation Act.\(^{52}\) Under that statute, the employee is to be counted for each day that an employment relationship exists regardless of whether the employee reported to work each day.\(^{53}\) Contrary to the Seventh Circuit's position in Zimmerman, the Thurber court found nothing in the record or in the Title VII definition that indicated the Congressional intent to require that employees report to work each day in order to be included.\(^{54}\)

Emphasizing the spirit and remedial character associated with the purpose of Title VII and the ADEA, Thurber and its progeny have promoted the idea that employers with part-time workers were intended to be governed by those laws.\(^{55}\)

\(^{48}\) Id.

\(^{49}\) 717 F.2d 633 (1st Cir. 1983).

\(^{50}\) Id. at 633-35. The Congressional purpose in passing Title VII is to eliminate "inconvenience, unfairness and the humiliation of discrimination." Ouirano v. University Fed. Credit Union, 617 F.2d 129, 131 (5th Cir. 1980); Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391 (8th Cir. 1977).

\(^{51}\) Thurber, 717 F.2d at 634.

\(^{52}\) Id. See generally Unemployment Compensation Act (26 U.S.C. § 3304 (1954)).

\(^{53}\) Thurber, 717 F.2d at 634. See also Rev. Rul. 55-19, Regulation 107 § 403.205 (1955). This rule had been in effect nine years prior to the passage of Title VII.

\(^{54}\) Thurber, 717 F.2d at 634.

sult, many plaintiffs argue that the definitions used in the laws should be given the broadest interpretation "consistent with their benevolent purpose." 56

It is important to note that many, if not all, of the employers who are accused of discriminating and who have challenged subject matter jurisdiction, are either marginally under the requisite number fifteen (when their part-time or leased employees are not counted) or are so situated that the bulk of their employees simply don't work every day of the week. 57 The First and Fifth Circuits' approach in counting employees maintained on the payroll basically prohibits the splitting of hairs in situations where a gross violation has occurred and, in doing so, effectuates Congress's intent.

The First and Fifth Circuits have also noted the importance of something that the Seventh and Eighth circuits have failed to give credence to—that with the increased use of non-traditional full-time workers, there is now more than ever the potential for abuse and resultant lack of protection under Title VII and the ADEA. In Metropolitan, the Seventh Circuit recognized the issue but stated:

Plaintiffs also present a parade of horribles that could result from continued application of Zimmerman. Most notably, an employer's ability to evade the strictures of antidiscrimination legislation simply by structuring operations to avoid having the jurisdictional minimum present on each working day. Yet in more than a decade since this court ruled in Zimmerman, this parade has had conspicuously few participants. 58

Likewise, in Goudeau v. Dental Health Services, 59 the court agreed that Congress clearly did not intend to cover all employees and that, in determining how to count employees for the purpose of determining who is an employer, "[o]nly in the rare marginal case will the task become more burdensome, and even then it is unlikely that it will be difficult." 60

On the other hand, the decision in Pascoutoi v. Washburn-McReavy Mortuary was almost prophetic when it noted that, "[i]n this day of changing work conditions and habits the Court

Minn. 1975).

56. Pascoutoi, 11 Fair Empl. Prac. Cas. (BNA) at 1325.
57. See cases cited supra note 13.
58. Metropolitan, 60 F.3d at 1230. However, it is important to note that Zimmerman has been cited by courts situated in all circuits, as well as in various Fair Employment Practice (F.E.P.) decisions well over 100 times. A significant number of those decisions have perpetuated the "on the job" standard pronounced in Zimmerman.
60. Id. at 1144.
cannot say that a person must work 40 hours or more during any seven day period.\textsuperscript{61} Likewise, in \textit{Gorman v. North Pittsburgh Oral Surgery Associates},\textsuperscript{62} the court also realized that the changing nature of the workforce created an opportunity for abuse under the ADEA. The \textit{Gorman} court criticized the \textit{Zimmerman} "on the job" method by saying that, "[u]nder [that] construction, a business that operates almost entirely with part-time labor could escape the prohibitions of the ADEA, despite the number of workers actually employed."\textsuperscript{63} Recently, in \textit{Edwards v. Esau}\textsuperscript{64} the court stated, "[u]nder the Zimmerman approach a company could avoid the reach of Title VII by manipulating the schedules of part-time employees regardless of the number of employees actually on its weekly payroll. Thus, adopting the Zimmerman approach is to recognize that employers may structure their work forces so as to avoid Title VII coverage."\textsuperscript{65}

Even one decision which upheld the \textit{Zimmerman} case questioned the soundness of the "on the job" approach given the potential for abuse. In \textit{Wright v. Kosciusko Medical Clinic Inc.},\textsuperscript{66} a district court within the Seventh Circuit, stated:

\begin{quote}
It seems to the Court that the far sounder interpretation of these statutes is that an employer 'has' an employee not only if he or she works on a particular day, but rather if he or she is on the company's payroll. During all of 1988 and 1989, more than twenty persons, if asked for whom they worked, would have identified Kosciusko Medical Clinic as their 'employer'. More importantly, these were all persons who had a genuine 'employment' relationship with the defendant.\textsuperscript{67}
\end{quote}

The \textit{Wright} Court noted such factors as regular performance of duties and whether each worker was entitled to certain financial benefits and legal protections as appropriate considerations.

\begin{itemize}
\item \textsuperscript{61} \textit{Pascutoi}, 11 Fair Empl. Prac. Cas. (BNA) at 1325. The plaintiff alleged sex discrimination because as a female mortician she was denied the opportunity to perform certain jobs and to participate in staff meetings. The Defendant in \textit{Pascutoi} had claimed that although it had 15 or more employees during the appropriate time period, in no week did its employees work every working day. Because the court elected the broader "payroll" interpretation, the plaintiff was not barred on jurisdictional grounds from pursuing her claim. \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 214.
\item \textsuperscript{64} 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. Oct. 31, 1994).
\item \textsuperscript{65} \textit{Id.} at 714.
\item \textsuperscript{66} 791 F. Supp. 1327 (N.D. Ind. 1992).
\item \textsuperscript{67} \textit{Id.} at 1331.
\end{itemize}
in counting "employees." However, the Wright Court, in the true tradition of the Seventh Circuit, effectively stated its hands were tied and that, "it [was] not th[e] court's place to disregard circuit precedent."

In Title VII and ADEA cases, the plaintiff is ultimately at the mercy of the court's decision regarding the appropriate method of counting employees to determine jurisdiction under the statutes. If a circuit court chooses to adopt the "on the job" approach, it effectively accepts a corporation's freedom to manipulate its workforce. Conversely, if a circuit court endorses the payroll approach, it is necessarily providing protection to all workers "on the books." The logical next question is, therefore, what is at stake for these two factions?

II. LABOR VERSUS MANAGEMENT

At first glance, it should seem obvious why workers would prefer to be counted under the "payroll" method and why employers would advocate for the application of the "on the job" method. Employees would much rather be afforded the protection of the all-inclusive "payroll method" than find out that because they are not present every day of the work week they are not really "employed." However, it is worth taking a step back to consider the modern context in which both labor and management operate. Today's workplace bears only scant resemblance to that which prompted the formulation of many labor laws.

A. Management's Motives

As law professor, now NLRB Chair, William Gould points out, "the economy has now become globalized, and trade unions that functioned in industries previously oligopolistic are now no longer immune to foreign and domestic competition." The need to compete in a global economy is often cited as the primary reason why employers feel the need to utilize a "flexible"

68. Id.
69. Id. at 1332.
70. See WILLIAM B. GOULD, AGENDA FOR REFORM (1993) (exploring issues confronting the changing nature of employer/employee relationships since the passage of the NLRA).
71. See Silverstein & Goselin, supra note 5, at 35 (summing up the problem of workers being excluded from the protection provided by some labor laws because, "Congress, in drawing the statutory criteria, did not contemplate their role in the economy and considered protective legislation to be appropriate only for the full-time, permanent employee under the direct control of a single employing enterprise.").
workforce. By cutting down the number of hours an employee works or by "downsizing," firms can cut labor costs even at the expense of decreasing productivity and the reliability of the workforce. According to economist Eileen Appelbaum, the pursuit of "static flexibility" means that employers are looking for "cheap labor and immediate adjustment to changing market conditions" via the destandardization of the terms of employment, making hours of work more flexible and unpredictable... The filling of temporary needs has also been suggested as another justification for the increase in leased employees, a neighbor to the part-time employee, included in the amorphous definition of the "contingent workforce."

Traditionally, sectors such as the service and trade industries are the predominant employers of part-time labor. As Chris Tilly points out, the increase in part-time work is explained by the rapid expansion of these industries. The expansion of the service industry was, in turn, caused by the shift of "industry composition of employment" away from manufacturing toward industries such as trade and services. The "shift" also accounts for the explosion of temporary agencies which are the primary supplier of the "secondary" employers of contingent and part-

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75. Eileen Appelbaum, Structural Change and the Growth of Part-Time and Temporary Employment, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE, supra note 73, at 70.


77. Tilly, supra note 73, at 15.

78. Id.

79. Secondary employers are employers who lease employees from an employment agency. The agency is thus considered the "primary" employer. Id.
time labor. In fact, it is astonishing to note that today the nation's largest employer is not General Motors or IBM, but Manpower, Inc., a temporary employment service.

Despite the Seventh Circuit's opinion in *Metropolitan*, the reality is that, in many instances, the strategy behind management's shift from being a primary employer to leasing temporary and part-time employees is to skirt the liability associated with insurance, social security, the Employee Retirement Income Security Act (ERISA), Title VII and the ADEA, not to mention a host of other labor laws. For example, the 1993 Family and Medical Leave Act (FMLA) applies to companies with fifty or more employees. One corporate president was quoted as saying, "Fifty is the magic number," meaning she consciously keeps her payroll to under fifty employees to avoid coming under the purview of the FMLA. As another example, in

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80. *Id.*
83. For example, the Travelers Insurance Company keeps a "well-publicized on-call pool of retirees," whose individual hours do not exceed 960 hours per year (just under ERISA's statutory threshold of 1000 hours) "to prevent them from accruing additional pension credits that would increase their pension." Carre, *supra* note 73, at 78-79.
84. Even author Maria O'Brien Hylton, who staunchly admonishes proposals for increasing protection for the "new work force," acknowledges in her article, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849, 858-59 (1995), that:
   An employer seeking to avoid Title VII coverage, thereby preserving the ability to discriminate on the basis of race, color, sex, religion and national origin, might seriously consider hiring contingent workers once there are thirteen or fourteen core employees. Properly structured, the contingent workers would not "count" as employees for purposes of the statute, and the employer would remain free from Title VII's dictates.

Hylton does, however, suggest as an alternative to additional labor regulation, lowering the "trigger" or threshold requirements of existing regulations such as Title VII. *Id.* at 860. "Such a measure would reduce the incentives to hire contingent workers in order to maintain working environments infected by bias." *Id.*
85. See generally Dennard & Northrup, *supra* note 76.
87. Dennard & Northrup, *supra* note 76, at 690. It should be noted that this employer is assuming that if sued for a violation of the FMLA, a federal court would impose the payroll method and therefore, she must keep her payroll to no more than the statutory threshold number of 50 in order to argue her company is not covered by the statute. *Id.* at 689-90. However, many corporate executives manipulate their workforces, i.e. payrolls, so that even if they have more than the statutory minimum, part-time and contingent employees comprise the majority of their employees and thus would not be counted under the *Zimmerman* on the job method.
1993 Bank of America fired thousands of full-time tellers and loan officers and rehired them as part-time employees. The reclassification allowed the bank to eliminate their health, pension, and vacation benefits. Richard Belous, Vice President and Chief Economist at the National Planning Association in Washington, D.C. stated it is not surprising that many employers have made a "'rational' utility-maximizing decision to violate federal and state labor laws because the probability of punishment is often low and the fines are often cheap."

Therefore, from the employer's perspective, it is most beneficial to sever any ties with its labor beyond the time its workers punch the time clock. Modern workplace organization has thus been described as "a small cast of full-time permanent employees augmented by a much larger, ever-changing population of part-time, temporary and other contingent workers operating at all levels of a firm's hierarchy."

**B. The Employee's Perspective**

As for the employee who wishes to be counted based on his or her employment relationship, in a climate where part-time labor is even more "at the will" of the employer than permanent full-time employee, job security, along with other benefits are

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89. Id. See also Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1189 (1996) (where the Ninth Circuit prefaced an opinion by stating that, "[Large corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits. This practice has understandably led to a number of problems legal and otherwise."). Microsoft had attempted to restrict retirement plan eligibility to "common law employees" who were paid through the payroll department. Id. at 1195. It maintained that employees who were paid through the accounts receivable department could not be paid in a manner that would comply with I.R.S. requirements and therefore, these employees were not intended to be covered by its 401(k) plan. Id. This case demonstrates yet another way an employer can manipulate the status of their employees in an attempt to deny benefits.


91. Silverstein & Goselin, supra note 5, at 5.

92. Professor Mary E. O'Connell points out that "the roots of employment law lie in the ancient relation of master and servant, not in the Johnny-come-lately law of contract" and that "by law or custom, masters owed many obligations to their servants." O'Connell, supra note 7, at 897. In this article, O'Connell gives a thorough account of how "employer provision has been a cornerstone of economic well-being in the United States from pre-industrial times to the present day." Id. at 902.
increasingly non-existent. For example, part-time workers are more likely than full-time workers to be disqualified from receiving unemployment insurance benefits during the eligibility screening process. It is also estimated that while nearly half of full-time workers receive pension benefits, only fifteen percent of part-time employees have employer-sponsored plans. This is due in part to the fact that the Employee Retirement and Income Security Act (ERISA) currently requires that employees must work more than 1,000 hours per year (twenty hours per week) to be included in a company’s retirement plan. It is surprising to note that over 450,000 federal workers are employed in temporary and part-time positions without any benefits at all. The largest bulk of part-time employees have no choice but to rely on their spouse’s full-time employer for health and dental benefits.

The evolving history of the traditional labor-management relationship has made labor dependent on the employer. Most

93. It is a fact that part-time employees are left largely outside of the representation of unions who often shun them as a threat to their very own existence. One labor leader has stated that the use of contingent workers “undermines efforts to develop and maintain a highly skilled and experienced workforce.” Carnevale Congressional Testimony, supra note 73, at 61 (quoting Leased Employees Lawyers Debate Advantages, Drawbacks of Rise of Use of Contingent Workers, Pens. & Ben. Daily (BNA) Aug. 13, 1993)). It was also suggested that the use of contingent workers is a detriment to “labor-management cooperation . . . because these workers are going to be less invested in the process due to their employment status with the company.” Id.

94. New Eligibility Standards for UI Benefits Recommended By Commission, Daily Exec. Rep. (BNA) No. d21, at A-179 (Sept. 15, 1995). However, according to the study, part-time workers are most likely to be disqualified for failing to meet weeks of employment, high quarter, and base-period, and earnings requirements, not definitional requirements. Id. Nevertheless, their part-time hours and contingent schedules are the cause of the deficiencies that disqualify them (i.e. low pay, irregular patterns of employment). See also Tilly, supra note 73, at 37.

95. 140 CONG. REC. S14247 (daily ed. Oct. 5, 1994) (introduction of the Contingent Workforce Equity Act by Senator Metzenbaum). For an alternative perspective that ERISA, as amended, encourages employers to extend pension benefits to contingent workers, see Stewart J. Schwab, The Diversity of Contingent Workers and the Need for Nuanced Policy, 52 WASH. & LEE L. REV. 915, 923-25. However, Schwab makes light of the fact that those who are kept under the statutory minimum of 1000 hours are still closed out of the benefits no matter how willing an employer is to induct them into its plan again, a problem at the threshold. Id.

96. Tilly, supra note 73, at 38.

97. Id.

98. Id. at 22.

99. Gwen Thayer Handelman, On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment, 52 WASH. & LEE L. REV. 815. “Employment has served as the primary institutional mechanism through which the United States has met the population’s basic social welfare needs, and the employment relationship has
industrial jobs were unstable during the turn of the century. For example, Daniel T. Rogers described the workforce between the years of 1900-1920 as "strikingly mobile." "At the Armour meat-packing plant in Chicago, for example, the average daily payroll numbered about eight thousand during 1914. But to keep that many employees, the company hired eight thousand workers during the course of the year, filling and refilling the places of transients." Labor historians observe that in the early twentieth century, businesses formed a "social contract" with labor by taking on increased responsibility for their worker's welfare. Historian David Montgomery points out that:

[u]ntil World War I, and for some people considerably later, most ordinary laborers' work was purely contingent, where people were hired mostly for the day. That kind of practice was used mainly for work that didn't require much training—but it was extremely widespread. It tended to become less and less common over the 1920s, 30s and 40s when employers wanted to stabilize their workforces and wanted people they could train who would not disappear on them.

Professor Joe McCartin adds that businesses increasingly bore the costs of employee benefits as the rise of unions and the prominence of the pro-labor and pro-collective bargaining legislation appeared during the New Deal Era on through the 1960s. Some argue that today the use of contingent workers is aimed at "undercutting established unions and the establishment of unions, because contingent workers are so fearful of

been the principal determinant of social welfare." Id.

100. Sanford M. Jacoby & Sunil Sharma, Employment Duration and Industrial Labor Mobility in the United States, J. of Econ. Hist., Mar. 1992, at 161. This article discusses stability and tenure of workers in industrial labor markets in the late nineteenth and early twentieth centuries. Id.


102. Id. at 163.


104. Id. See also H.W. Arthurs, Labour Law Without the State?, 46 U. Toronto L.J. 4, 16 (1996) (discussing that "[w]hen one speaks of detachment of the workforce, as it was tacitly assumed to be fifty years ago, one was speaking of a workforce whose attitudes were shaped by experience of the depression and the war, a workforce of rising—but essentially modest—expectations, a relatively homogeneous workforce, and especially a male workforce."). For a discussion about the new economy—"[g]lobalization, the incongruent spaces and diminished roles of the nation state, the reorganization of production, management and work", see Arthurs, supra.

105. Contingent Workers, supra note 103, at C-207.
jobs and so easy to lay off. . . . It is an anti-union as well as cost-cutting tactic.” AFL-CIO Economist Markley Roberts notes that, as a higher percentage of contingent workers make up the workforce, “you have more people who are uncertain about their job tenure and more reluctant to challenge the company.” Professor Montgomery noted that the practice of replacing full-time workers with contingent employees to fight unionization dates back to the early decades of the 20th century.

It is somewhat understandable why unions would shun part-time and contingent workers who are perceived to represent a threat to their very existence. However, history illustrates that unions should welcome the opportunity to induct the “new” type of worker into their membership. For example, the American Federation of Labor (AFL) refused to allow women and blacks entrance into their apprenticeship programs. A resolution was even proposed at the AFL’s 1898 national convention which urged confinement of women to the home. New highly specialized unions sustained their power by restricting entry into their trade, by excluding women, blacks and Asians. However, other early unions were very inclusive and successful, such as the United Mine Workers who capitalized on the opportunity to represent all groups, and in doing so, sought to organize labor into one massive union to provide strength in numbers. It has been proven that unions can represent temporary and part-time workers without jeopardizing full-time employment opportunities. In fact, it has been suggested that some unions have even benefitted by making available the option of part-time employment to their workers which creates greater scheduling flexibility.

106. Id.
107. Id.
108. Id.
109a. Id. at 63.
110. Id. at 63.
112. Id.
113. Virginia L. duRivage, New Policies for the Part-Time and Contingent Workforce, supra note 73, at 117. She mentions that “unions have sought to include these workers in their bargaining units.” Id. As an example, duRivage references the United Auto Worker’s agreement with Mazda Motors Corp. Id. duRivage also mentions, however, that in the manufacturing industry “unions have been successful in restricting or prohibiting use of part-time and contingent employees.” Id.
114. SHELDON FRIEDMAN ET. AL., RESTORING THE PROMISE OF AMERICAN LABOR LAW
It has been argued that because most national union leaders are older and tend to perpetuate the antiquated exclusionary philosophies of the '50s and 60s, they fail to understand or even perceive the need to organize non-traditional employees in white collar sectors such as the service industry. The exclusion of part-time workers, however, has less to do with the prejudices that motivated the AFL membership policies than it has to do with the fact that, "unions and employers have traditionally viewed part-time and temporary workers outside of the scope of collective bargaining." This traditional view has been fostered in part by the laws that govern unionization. Virginia du Rivage argues that the reason unions face difficulties in representing part-time and contingent employees is "employee classification schemes associated with the diversification of employee work schedules as well as the failure of labor law to protect contract workers." Virginia duRivage explains that the NLRB determines what are "appropriate bargaining units," that is the units for which the Board holds a "representational election." She states, "[t]he Board has been inconsistent in its rulings as to whether part-time and contingent workers should vote along with full-time employees in representational elections." Likewise, Dorothy Sue Cobble explored the need to unionize in a post-industrial society and at the top of her list regarding labor law reform is the expansion of the definition of "employee" under the NLRA, for purposes of exercising rights to collective bargaining. The problem of inconsistencies in interpreting employment definitions is strikingly familiar—just as some part-time employees are denied protection under labor laws because the courts are inconsistent in interpreting definitions, part-time employees are often denied union membership benefits because of inconsistencies in NLRB determinations regarding their status.

317 (1994).
117. Id. at 117.
118. Id.
119. Id.
120. Id.
121. Friedman, supra note 114, at 295.
The 1990s are similar to the time before 1920 in the sense that employers are increasingly employing contingent labor and that unions are either largely ineffective\textsuperscript{122} or unwelcoming of part-time and contingent labor. Therefore, workers can no longer rely on their employers or their unions to protect and provide for their welfare.\textsuperscript{123}

In addition to the fact that part-time workers are often denied employment benefits, they are also in many cases forced to take their low-paying positions. In the part-time sector, over six million workers are involuntarily working at their jobs, in the sense that they would prefer to be employed in full-time positions but cannot find full-time work.\textsuperscript{124} Not only are they working less, they are earning less. On the average, part-time workers earn sixty-two cents for every dollar earned by full-time workers.\textsuperscript{125} The fact that part-time labor is paid considerably less than its full-time colleagues is reflective of the skill level required in part-time positions. Tilly states that, "[e]mployers are hunting for part-timers in the low skill jobs that make up secondary labor markets. The involuntary full-timers are those in jobs requiring greater skill, where retention part-time jobs are rationed only to the most deserving employees."\textsuperscript{126} In the past, workers with greater skill have always been able to earn a higher wage. Analysts have expressed the fear that the wage differential between full-time skilled and part-time unskilled workers will, in a sense, create a two-tiered labor market.\textsuperscript{127}

\textsuperscript{122} Holly Sklar, We Need a New Economic Bill of Rights, S.F. EXAMINER, Sept. 4, 1995, at A17 (Sklar argues that "union jobs provide much better wages and benefits than their non-union counterparts, but they are fast disappearing. The unionized percentage of the U.S. workforce was just 15.5 percent in 1994").

\textsuperscript{123} Economist Dan Lacey states, "We've entered an era in which the individual, not the giant corporation, is the engine of the economy and in which graduation-to-grave job security is obsolete." Labor Day '89 Will Mark the End of a Dramatic Decade, PR Newswire, Aug. 25, 1989, available in LEXIS, News Library, PRNEWS File.


\textsuperscript{125} Id. See Connolly, supra note 109, for the proposition that the wage gap and inferior terms and conditions of employment associated with part-time work is the result of hidden gender discrimination against those who do not fit a 'male model' of a traditional full-time worker.

\textsuperscript{126} Tilly, supra note 73, at 33.

\textsuperscript{127} Virginia Baldwin Hick, Full-Time Jobs Decline for Nation's Workforce; Security Erodes as More Part-Timers Clock In, ST. LOUIS POST-DISPATCH, Sept. 6, 1993, at A1. Hick fears the nations will evolve into "a core workforce of elite workers and huge masses of people who are contingent, with lesser benefits, lesser pay and a lesser lifestyle." Id. However, as Silverstein and Goselin point out, since involuntary part-time and temporary workers are comprised largely of female and African Americans, they are already experiencing differentials in wages, benefits and opportunities. See Silverstein &
Labor would obviously contend that while the perceived needs of management may have changed, the needs of workers, especially part-time and contingent workers, have remained the same and even increased. The part-time employee's plea to the court, in say the context of an employment discrimination charge under Title VII or the ADEA, would then be to protect that worker in the spirit of those laws until such time as those laws, which currently reflect traditional employment relationships, "catch up."

III. SIGNIFICANCE AND IMPACT OF THE DILEMMA

The issue of making uniform the "payroll" method of counting employees throughout the Federal circuits has wide ramifications. First, as Judge Ripple stated in his concurrence in the Seventh Circuit's recent Metropolitan decision, "[t]his issue is one, however, that deserves definitive legislative attention. The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago." However, aside from the fact that the inconsistency among the circuits must be reconciled, the question takes on importance for other reasons. While the problem of how to count employees for purposes of determining who is an "employer" under Title VII and the ADEA has existed for over two decades, it becomes even more crucial in light of the expanded use of part-time and non-traditional labor during that time. The prophesy of Pacutoi, also shared by the EEOC, is being fulfilled--employers in some areas of the country are effectively escaping the mandates provided by the employment discrimination statutes because they have largely comprised their workforce of part-time labor who, by definition, are not "on the job" or present at work every day.

The issue has additional significance in that part-time workers are not the only aggrieved employees who suffer if the "on the job" approach is applied. In many cases, where this method has successfully enabled employers to argue they were not "employers" under the statutes, it was a full-time employee who actually brought the suit. The situation where a traditional full-time employee is barred on jurisdictional grounds from asserting a claim of employment discrimination because of the make up of his employer's workforce is an anomaly because

Goselin, supra note 5, at 3 n.5.
128. Metropolitan, 60 F.3d at 1230.
the full-time employee has a "legitimate" or traditional employment relationship.

The question of how an employee should be counted based on his or her employment relationship or on his or her mere physical presence also has significance because it goes to the very heart and intent behind Title VII and the ADEA. Title VII outlaws discrimination based on race, sex, color, religion, or national origin. The ADEA prohibits employment discrimination based on age. A worker may file suit if he or she feels that an employer has discriminated against him or her based on membership in one of the protected groups. Studies continually show that part-time workers in the United States are "primarily female, young or old," and that "two-thirds of part-time workers are women, and another 16 percent are men ages 16 to 21 or 65 and over." Regardless of how the demographic breakdown might reflect the employment choices of these particular groups, the fact that Title VII and the ADEA were drafted with the intent of protecting these very groups is significant. The conclusion can then be drawn that since part-time workers are comprised largely of persons in protected classes, it only makes sense to include them when counting employees in order to determine jurisdiction under the ADEA and Title VII.

IV. THE NECESSITY OF THE EMPLOYMENT "RELATIONSHIP"

Aside from the impact that applying the "on the job" versus the "payroll" method has in individual cases, the reason why courts should use the "payroll" method instead of one that determines the existence of an "employer" based on something that is well within the control of business, is that an approach which recognizes a labor-management relationship is consistent with

133. Tilly, supra note 70, at 12.
134. Id. But see Belous, supra note 90, at 888 (pointing out that while the number of men who are part-time workers has increased from 1985-1993, the number of women holding part-time positions has declined slightly). Belous also states that while women constitute a significant portion of the contingent labor force, men represent 54.3% of the business services portion and over sixty percent of the "services to building" subset of contingent labor. Id. at 870.
135. Belous, supra note 90, at 870.
the balance that the law seeks to achieve between employers and employees, and because it contributes to a healthy economy.136

The history of labor-management relations is often characterized as a struggle,137 and in an environment in which employee representation is decreasing, partly because employees are being forced into non-traditional employment forms such as part-time and leased positions, management seems to be gaining the upper hand. Professor Mary E. O'Connell commented:

Employment is inherently a conundrum, for it is simultaneously a transaction and a relation. It is a contract, and it is a way of life. Indeed, one can view employment as a constantly shifting balance, with relation dominating at some points and transaction at others. But the break has never been complete—until, perhaps, now. The defining feature of contingent employment may be that it renders work a nearly pure transaction, stripped of any pretense of relation between employer and employee.138

However, an examination of the types of tests historically used in law reveals that society has come to recognize the existence and necessity of the "employment relationship." As laws designed to protect the rights of workers become ineffective because they do not recognize the non-traditional employee, and with Congress being controlled by Republicans hostile to labor,139 it becomes even more important for the courts to interpret statutory definitions as providing protection for contingent workers.

A. Existing Legal Framework

Under Title VII, the ADEA and various other labor laws, whether a person is considered an employee is determined by applying one of three common law tests: either the hybrid eco-

136. The NLRA was designed "to avert the substantial obstruction to the free flow of commerce which results from strikes and other forms of industrial strife or unrest by eliminating the causes of that unrest (inequality of bargaining power)." NLRB v. Hearst Publications, 322 U.S. 111, 126 (1944).
138. O'Connell, supra note 7, at 896.
139. See Peter Szekely, Obstacles Face Sweeney in Rebuilding Union Strength, Reuters, Oct. 26, 1995, available in LEXIS, News Library, REUBUS File. This article points out that the current Congress is threatening to weaken protections regarding a ban on employer-dominated unions, workplace safety laws and the length of the work week. Id. The article also talks about the opportunity for unions to expand and provide services to contingent workers. Id.
nomic realities test/common law agency test,\footnote{140} the pure economic realities test developed under the Fair Labor Standards Act,\footnote{141} or the pure common law agency test.\footnote{142} All three approaches are designed to determine the same thing—whether an employment relationship exists.

There are several factors common to each of the three tests such as: (1) the degree of control company exercises over the person, (2) opportunities the individual creates for company's profit or loss, (3) investment in facilities, (4) permanency of the relationship, and (5) skill required.\footnote{143} Often when the threshold question of whether a company comes under the jurisdiction of Title VII or the ADEA, the next question is whether the plaintiff is an "employee" under the statute. The second step is inher-

\footnote{140} Today most courts use the hybrid test to determine employee status under Title VII and the ADEA. The factors used in this test, first set forth in Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979), are as follows: the kind of occupation, with reference to whether the work is usually done with supervision; the skill required; whether the employer or the individual in question furnishes the equipment used and the place of work; the length of time during which the individual has worked; the method of payment; the manner in which the work relationship is terminated (i.e. with notice); whether annual leave is afforded; whether the worker accumulates retirement benefits (this characteristic seems circular to me—we will provide benefits of Title VII if this worker is receiving benefits) and likewise whether the employer pays social security taxes and; the intention of the parties.

\footnote{141} 29 U.S.C. § 201 (1994). A minority of circuit courts have adopted this test for Title VII and ADEA purposes. The pure "economic realities" test determines a person's status as an employee based on whether that person is economically dependent for his livelihood on the business to which the person performs a service. Five factors used to make this determination are: (1) the extent of the employer's supervision and control over the worker; (2) the kind of occupation and skill required and if skills are obtained on the job; (3) responsibility for the cost of operation and equipment; (4) the method of payment and benefits; (5) the length of job commitment and or expectations. \textit{Id.}

\footnote{142} See Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992). The Supreme Court adopted the common-law test for determining who qualifies as an employee under ERISA and described the test such that:

\textit{[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship of 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.} \textit{Id. at 323-24.}

\footnote{143} Carnevale Congressional Testimony, \textit{supra} note 73, at 63. Carnevale points out that the test emphasizes economic dependence on the company. \textit{Id. See also} Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992).
ently circular in that in the first step required the counting of employees. How does one count what has not yet been defined?

In a purely logical sense, it is unreasonable to, on the one hand, define an employee in terms of a dependent relationship, a two-sided interaction, and on the other hand define an employer based purely on the attendance (and not the relationship) of employees. The inconsistency was pointed out in Armbruster v. Quinn,144 where the court noted that to conclude one is an employee for the purposes of Title VII and yet find that he or she is not to be considered as an employee for the purpose of meeting the fifteen-employee jurisdictional requirement would frustrate the very intent of the Act.145

It is also important to note that leased employees have been allowed by the courts to sue their "secondary" employers146 for violations of Title VII and the ADEA on theories of "joint employer" status. In such cases, courts have shown more leniency in allowing leased employees, which arguably have a more tenuous employment relationship than part-time workers, to be protected under these laws. Consequently, it is up to the courts to acknowledge the new type of employment relationship and recognize that this "gap" enjoyed by management is closed for part-time employees as well.

B. Impact on the Economy

Because of the increased use of contingent or non-traditional labor, it would be detrimental to the economy to define workers based on their mere presence at work instead of by their relationship to their employer because productivity and efficiency may be lost due to the loss of worker loyalty.147 Management claims the need to compete in a global economy necessitates downsizing and cost cutting by manipulating workers' hours and titles148 so they do not qualify for benefits. This type

144. 711 F.2d 1332 (6th Cir. 1983).
145. Id. at 1340.
146. Secondary employers are employers who lease employees from an employment agency. The agency is thus considered the "primary" employer.
147. Arne Kalleberg, Part-Time Work and Workers in the United States: Correlates and Policy Issues, 52 WASH. & LEE L REV. 771, 791 (1995). Another possible detrimental effect of allowing employers to disavow the employment relationship would be that society would be forced to increase social insurance in order to provide the benefits discontinued by employers. See O'Connell, supra note 7, at 904.
148. "Employers who treat their workers as independent contractors avoid paying half of the Social Security and Medicare taxes, pay no unemployment insurance or workers' compensation, and avoid the health, pension, vacation and other benefits paid to employees." Shannon P. Duffy, Bias Suit Debates Title VII Definitions; Action Against
of short-sighted goal arguably sacrifices productivity and consumption in the domestic economy. For example, Management Consultant Scott Setrakian stated:

There is a spiritual dimension to working in a team structure that is facilitated by longevity, familiarity, fighting from the same foxhole and evolving and maturing together. While this is not solely the province of full-time employment, it's my observation that it is primarily in that province, and that a wholesale replacement of 10 full-time employees by 20 half-time employees would . . . result in material long-term dislocation of a company's culture, spirit and momentum.

Setrakian also argues that production suffers when loyalty and moral declines. Likewise, Professor Arne Kalleberg suggests that management's approach to reducing payroll may lower work effort decreasing productivity and product quality. There is also validity to the related argument that workers' evaluation of their jobs depend on their assessment of the relation between their work values and their job rewards. It was noted that several workers are in contingent or part-time positions involuntarily due to lack of more favorable alternatives. Therefore, we must remember that dissatisfaction regarding compensation is likely to breed poor quality.

The very impetus behind the introduction of reform measures such as the Contingent Workforce Equity Act is to pro-

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149. Silverstein & Geselin supra note 5, at 24-25 (arguing that "the disappearance of traditional jobs irrevocably results in the disappearance of the desired employee behavior. There is simply no incentive for contingent work employees as currently used to participate in improving productivity or for employers to invest in the training of their contingent workforce.").


151. Id.

152. Kalleberg, supra note 147, at 791.

153. Id. at 787.

154. 140 CONG. REC. S14247 (daily ed. Oct. 5, 1994) (introduction of the Contingent Workforce Equity Act by Senator Metzenbaum). The bill was never enacted and when Senator Metzenbaum retired, it was not sponsored by another member of the senate. However, the arguments made by Senator Metzenbaum in support of the bill have been used to support many of the newer proposals in regards to either providing increased protection for contingent workers or providing disincentives for employers to create con-
vide greater financial security to American contingent workers. The federal bill, once introduced by Senator Metzenbaum, was designed to close legal loopholes and, as a result, dissuade employers from eliminating full-time positions. As the now former Senator stated, "We need a high wage, high productivity strategy to ensure U.S. competitiveness into the next century. But the increasing use of contingent labor—a central feature of a low-wage strategy—takes us in the opposite direction." Former Senator Metzenbaum also remarked on the practice's effect on the employer-employee relationship by saying, "It devalues workers, and breaks the bonds that have traditionally linked workers and employers, a critical component of a high-productivity workplace."

It was Henry Ford's dream to enable each one of his employees to own the Model T. In the spirit of that idea, Senator Metzenbaum also supported his bill by saying that the trend of increased use of contingent labor "may pose a substantial risk to the free enterprise system as a whole, because these workers will no longer be able to purchase the very products they are making, to buy a car or afford a mortgage, or contribute much to the economy. In addition, the more contingent our work force becomes, the more dependent workers will be on government programs . . . ."

**CONCLUSION**

American workers should continue to be recognized and counted on the basis of their employment relationship and not merely on their presence in the workplace. The manipulation of the American work force from stable traditional full-time positions to largely involuntary part-time arrangements has resulted in a lack of protection for employees under various labor laws. It is significant that the Supreme Court is currently addressing the split in the Federal circuits regarding whether employees should be counted under Title VII and the ADEA according to their status on the payroll or on the job. Essentially, the issue is one of either reaffirming traditional notions of em-

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155. 140 CONG. REC. S14247.
156. Id.
157. Id.
158. Id.
ployer-employee relations or of abandoning the idea that employment means security for the individual and for the economy.