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César Cuauhtémoc García Hernández
garciacn@bc.edu

FEEBLE, CIRCULAR, AND UNPREDICTABLE: OSHA'S FAILURE TO PROTECT TEMPORARY WORKERS

César Cuauhtémoc García Hernández*

Abstract: Millions of people work in poorly paid jobs as temporary workers. These workers are hired by a temporary-help firm, but perform work for another company. As such, their status as "employees" of the company for which they actually perform work and on whose premises they generally labor is frequently challenged. This ambiguous employment status means that temporary workers fall outside the scope of federal workplace safety and health protections. This Note addresses the Occupational Safety and Health Act (OSHA), the nation's principal federal legislation governing working conditions, as it pertains to temporary workers, as well as judicial interpretations that limit the safety and health protections OSHA extends to temporary workers. Rather than adhere to a formulaic interpretation of OSHA as the Supreme Court currently instructs, this Note urges courts to adopt Congress's stated intent in enacting OSHA—the protection of all workers.

> *Outside it's 100 degrees and inside it's like 200. It's real hot in there. They don't have windows. When it's 90 degrees, we're just sweating. The sweat is just pouring off us. We just have fans but no ventilation.*
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> —Latina food packer in Chicago[1]

Introduction

Working conditions for low-skilled workers in the United States of America (USA)[2] are not pleasant.[3] Physical facilities may be decrepit,

* Managing Editor, Boston College Third World Law Journal (2006–2007). Le doy gracias a mis padres, Eufrocina Hernández García y Jesús María García, por su inspiración constante. In particular, I would like to thank my mother, whose daily toil as a temporary worker in South Texas factories spurred my interest in this issue.

[1] Rebekah Levin & Robert Ginsburg, Sweatshop Working Group, Sweatshops in Chicago: A Survey of Working Conditions in Low-Income and Immigrant Communities 30 (2000), *available at* http://www.impactresearch.org/documents/sweatshopreport.pdf.

[2] I will abbreviate "United States of America" as "USA" throughout this Note to recognize and respect the common use of the phrase "united states" in the names of many American nations.

overcrowded, dangerous, and unhealthy.[4] Hazardous electrical wiring, unsanitary bathrooms, blocked fire exits, poor ventilation, and insufficient lighting are common.[5] Workers are often required to work compulsory overtime, sometimes putting in seventy to one-hundred hour workweeks.[6] The use of compulsory overtime contributes to workers' overexertion, increased occupational illnesses, crippling workplace accidents, and generally poor health.[7] Furthermore, managers regularly subject workers to psychological abuse.[8] Workers are constantly supervised, surveillance is routine, discipline is meted out arbitrarily, intimidation and harassment are readily utilized, and workers' movements are controlled.[9]

In addition to difficult working conditions, today's workers in the USA face an increasingly bifurcated labor force split between "core" workers and "contingent" workers.[10] While "core" workers are generally understood to perform standard work—that which is perceived as permanent and full-time—members of the "contingent" workforce do not enjoy such stable employment.[11] That is, contingent workers are employed on bases that are not perceived as long-term and full-time.[12]

Within the contingent workforce operates a subset of workers generally labeled "temporary."[13] Temporary workers are hired by one company, referred to as a temporary-help firm, and assigned to work for another company, known as a "user firm."[14] Current laws regulating

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[3] *See generally* Miriam Ching Yoon Louie, Sweatshop Warriors: Immigrant Women Workers Take on the Global Factory (2001) (discussing the working conditions and labor-organizing efforts of women of color working in factories in the USA).

[4] *See* Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 Loy. U. Chi. L.J. 291, 297 (2003).

[5] *Id.*

[6] *Id.*

[7] *See* Shirley Lung, *Overwork and Overtime*, 39 Ind. L. Rev. 51, 56 (2005).

[8] *See id.*

[9] *See id.*

[10] Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 Berkeley J. Emp. & Lab. L. 153, 158 (2003); *see* Clyde W. Summers, *Contingent Employment in the United States*, 18 Comp. Lab. L.J. 503, 504 (1997) (noting the increased use of contingent workers in the last thirty years).

[11] Maria L. Ontiveros, *A Vision of Global Capitalism that Puts Women and People of Color at the Center*, 3 J. Small & Emerging Bus. L. 27, 29 (1999).

[12] *See* Befort, *supra* note 10, at 158.

[13] *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351, 367 (2002).

[14] *See* Katherine V.W. Stone, From Widgets to Digits: Employment Regulation for the Changing Workplace 68 (2004); George Gonos, *The Contest over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms*, 31 L. & Soc'y Rev. 81, 85 (1997).

workplace safety and health conditions disfavor the temporary workforce, which is composed disproportionately of women and people of color.[15] By unduly utilizing these groups and paying them less than core workers,[16] the temporary workforce perpetuates long-standing racial, ethnic, and gender segmentation in the USA's labor market.[17]

Into this labor context of a modern workforce polarized between core and contingent workers[18] and historically entrenched racial, ethnic, and gender segmentation,[19] enters the Occupational Safety and Health Act (OSHA), the principal federal legislation governing workplace conditions.[20] At its most fundamental level, OSHA is designed to achieve safer and healthier workplaces.[21] Technically, OSHA protections apply identically to core and contingent workers.[22] However, contingent workers do not enjoy the same degree of "practical protection" as core workers[23] because contemporary workplace legislation is

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[15] *See* Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 880 (1995); Summers, *supra* note 10, at 514.

[16] *See* Anne E. Polivka et al., *Definition, Composition, and Economic Consequences of the Nonstandard Workforce, in* NONSTANDARD WORK: THE NATURE AND CHALLENGES OF CHANGING EMPLOYMENT ARRANGEMENTS 41, 47, 73 (Françoise Carré et al. eds., 2000); Dau-Schmidt, *supra* note 15, at 880.

[17] *See* Françoise J. Carré, *Temporary and Contracted Work in the United States: Policy Issues and Innovative Responses* 5 (Org. for Econ. Cooperation & Dev., Vol. VI Working Paper No. 87, 1998); *see also* Joya Misra, *Latinas and African American Women in the Labor Market: Implications for Policy, in* LATINAS AND AFRICAN AMERICAN WOMEN AT WORK: RACE, GENDER, AND ECONOMIC INEQUALITY 408, 413 (Irene Browne ed., 1999) (noting that analyses of gender segregation illustrate that women have been concentrated in low-paying occupations and that women of color are often concentrated in low-paying occupations and particular jobs within those occupations); Barbara F. Reskin, *Occupational Segregation by Race and Ethnicity Among Women Workers, in* LATINAS AND AFRICAN AMERICAN WOMEN AT WORK, *supra*, at 183–84 (stating that occupational segregation by sex contributes to sex-based differences in working conditions, and that ethnicity is an important basis of workplace inequality).

[18] *See* Befort, *supra* note 10, at 158.

[19] *See* Carré, *supra* note 17, at 5; *see also* Barbara F. Reskin, *Segregating Workers: Occupational Differences by Race, Ethnicity, and Sex, in* INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE FORTY-SIXTH ANNUAL MEETING 247, 254 (Paula B. Voos ed., 1994) (finding that workers' race, ethnicity, and sex affect their access to occupations).

[20] *See generally* Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651–678 (2000).

[21] *See* 29 C.F.R. § 1977.1(a) (2005).

[22] *See* Katherine M. Forster, Note, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 557 (2001).

[23] *See* Anthony P. Carnevale et al., *Contingent Workers and Employment Law, in* CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 221, 281 (Kathleen Barker & Kathleen Christensen eds., 1998); Forster, *supra* note 22, at 557.

a regulatory patchwork "riddled with loopholes"[24] that often results in illusory protection for contingent, especially temporary, workers.[25] Simply, contemporary labor law "does not play fair with [contingent and temporary] workers."[26]

The origins of modern-labor legislation hint at an asymmetrical employment paradigm between employers and workers.[27] Modern-labor legislation was developed to protect workers from the harsh effects of the at-will employment doctrine.[28] Originally developed by state courts in the 1880s,[29] the at-will doctrine allows an employee to leave a job at any time.[30] While the at-will doctrine's flexibility seemingly empowers workers to become full participants in the market for labor, this flexibility also enables employers to fire a worker for a good reason, a bad reason, or no reason at all.[31] In short, the at-will doctrine limits job security and presumes equal bargaining power for employers and workers.[32] Low-skilled workers, however, receive only the job insecurity promised by the at-will doctrine, while shouldering the burden of functioning in the labor market equipped with less bargaining power than employers.[33] In particular, the at-will doctrine gives employers disproportionate bargaining power to dictate the terms of the employment contract.[34]

This Note explores the practical protections that OSHA provides temporary workers. The Introduction addressed the current employment landscape in which temporary workers labor. Part I examines the

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[24] Befort, *supra* note 13, at 352; Lung, *supra* note 4, at 294.

[25] *See* Lung, *supra* note 4, at 294.

[26] Befort, *supra* note 13, at 352.

[27] *See* Stone, *supra* note 14, at 24; Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. Rev. L. & Soc. Change 557, 560–61 (1996); Summers, *supra* note 10, at 519.

[28] *See* Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 St. John's L. Rev. 141, 170–83 (1998) (discussing state legislation enacted to address the "harshness of employment at-will" and proposing similar federal legislation); *see also* Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 655 (2000) (noting that the at-will doctrine is limited by many state and federal statutes, especially employment discrimination laws); *cf.* Stone, *supra* note 14, at 49 (identifying the demise of internal labor markets—self-regulating expectations held by employers and employees—in the late twentieth century as sparking public concern with the at-will doctrine).

[29] Stone, *supra* note 14, at 24.

[30] Middleton, *supra* note 27, at 560.

[31] *See* Stone, *supra* note 14, at 133.

[32] *See* Middleton, *supra* note 27, at 560.

[33] *See* Summers, *supra* note 10, at 519.

[34] *Id.*

development and contemporary construction of the temporary workforce. Special emphasis is placed on the unique employment relationship developed by the temporary-help industry (THI) in the 1970s and the demographics of the modern, temporary workforce. Part II discusses the limited protections that OSHA currently provides temporary workers. This section presents the judicial tests used to determine employment status and the implications of those tests for temporary workers. Lastly, Part III critically examines various administrative and judicial opinions that apply the dominant employment-status tests to interpret what constitutes an "employer" and "employee." This section proposes methods for improving the workplace safety and health protections temporary workers receive under OSHA. In particular, this Note concludes by urging the adoption of a purposive interpretation of OSHA to ensure that Congress's intended goal, to actually protect workers, is realized in regard to temporary workers.

I. From Core to Temporary: The Nature and Growth of the THI

A. *Identifying Temporary Workers*

Understanding temporary workers necessarily begins with an understanding of the contingent workforce.[35] However, no unanimity exists regarding who or what constitutes the contingent workforce.[36] Some scholars propose a definition of contingent work that places primary emphasis on the existence or lack of job security, entailing a close

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[35] *See* Stone, *supra* note 14, at 72. No consensus exists that this segment of the labor pool should even be labeled "contingent." *See id.* Indeed, the phrase "precarious employment" has been offered as a replacement to "contingent." *Id.* Precarious employment is work that lacks an explicit or implicit promise of continuity. *Id.* Essentially, precarious employment is the opposite of long-term employment. *Id.* The precarious employment rubric includes temporary workers as well as people who have steady, full-time employment but lack a "reasonable *expectation* of job security." *Id.* at 73. In spite of the disagreement about the use of "contingent" versus "precarious," the term "contingent" is much more commonly found in the literature. *But cf. id.* at 72 (offering "precarious" as a substitute for "contingent"). *See generally* Contingent Work, *supra* note 23; Dau-Schmidt, *supra* note 15; Summers, *supra* note 10. Therefore, the use here of "contingent" facilitates locating this Note within other analyses of this segment of the labor force.

[36] *See* Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 Wash. & Lee L. Rev. 863, 864 (1995). Attempts to define this "amorphous" group have often been abandoned. *See* Befort, *supra* note 10, at 158; *see also* Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. Tex. L. Rev. 661, 663 (1996) ("[T]here are few things as resistant to useful generalizations as the contingent workforce.").

analysis of whether the job is expected to continue.[37] Others are proponents of a definition that contrasts contingent work with the permanent, full-time nature of core employment.[38] Yet others propose a definition that contrasts workers and employers by emphasizing "democratic deficits" as the primary difference between employers and contingent workers.[39] Since employers "always retain a position of power over their employees," contingent workers perpetually suffer a democratic deficit in the employment relationship.[40]

Statistical analyses of the contingent workforce have included an array of workers and widely varying approximations of the size of the contingent workforce.[41] Using data from 1995, at least three estimates of the contingent workforce were made using three different definitions of contingent work.[42] The narrow estimate included only wage and salary workers who had their jobs for one year or less and expected the job to last for an additional year or less.[43] This estimate indicated that 2.2%, or 2.7 million, of the total people employed in the USA were contingent workers.[44] The middle estimate expanded on the narrow estimate by adding the self-employed and independent contractors who had been in their employment arrangement for less than or up to one year and expected to be there for another year or less.[45] This estimate postured that 2.8% of the people employed in the USA were members of the contingent workforce.[46] The broad estimate notably eliminated the one-year limitation and included self-employed workers and all wage and salary workers who did not expect their jobs to continue indefinitely.[47] Not surprisingly, the third estimate suggested that a much larger percentage of the total employed in the country were contingent workers—4.9%, or six million peo-

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[37] *See* Sharon R. Cohany et al., *Counting the Workers: Results of a First Survey, in* Contingent Work, *supra* note 23, at 41.

[38] *See* Ontiveros, *supra* note 11, at 29. *See generally* Befort, *supra* note 10, at 158 (describing the term "contingent workforce" as a "catch-phrase" that embraces "a diverse group of non-core workers who provide work other than on a long-term, full-time basis").

[39] *See* Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. Toronto L.J. 357, 381 (2002).

[40] *See id.*

[41] *See* Cohany et al., *supra* note 37, at 46 tbl.2.1.

[42] *See id.*

[43] *See id.* at 43.

[44] *See id.* at 45, 46 tbl.2.1.

[45] *See id.* at 44.

[46] *See* Cohany et al., *supra* note 37, at 46 tbl.2.1.

[47] *See id.*

ple.[48] While these three groupings presented widely divergent estimates, the contingent workforce generally includes workers categorized as temporary workers,[49] independent contractors,[50] contracted workers,[51] leased employees,[52] and part-time employees.[53]

As a subcategory of the contingent workforce, temporary work is also ambiguously defined.[54] Indeed, the only definitional agreement that exists with respect to temporary work is that temporary workers are non-permanent workers.[55]

In devising a definition of temporary work, the importance of the work's actual duration remains contested.[56] Given the lay definition of "temporary," temporary work "generally is understood to be either for a short fixed term or to continue only from day to day, week to week, or

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[48] *See id.* at 45, 46 tbl.2.1. Using an identical definition, another analysis estimated that, in 1999, 4.3% of the total workers employed in the USA were contingent workers. *See* Dale Berman & Lonnie Golden, *Nonstandard and Contingent Employment: Contrasts by Job Type, Industry, and Occupation, in* Nonstandard Work, *supra* note 16, at 167, 174; Cohany et al., *supra* note 37, at 46 tbl.2.1. The decline between 1995 and 1999 in the proportion of total employment that was contingent was a result of the slowing growth of economic expansion. Berman & Golden, *supra*, at 174.

[49] *See* Befort, *supra* note 13, at 367. Temporary workers are defined as non-permanent employees. Piano v. Ameritech/SBC, No. 02 C 3237, 2003 WL 260337, at *3 n.1 (N.D. Ill. 2003). Temporary jobs lack continuity and are intended to exist for only a relatively short period. *See* Befort, *supra* note 10, at 158; Summers, *supra* note 10, at 505.

[50] *See* Befort, *supra* note 13, at 367. Independent contractors are self-employed and provide companies with specialized services on a contract basis. *See id.* at 367 n.108.

[51] *See id.* at 367. Contracted work occurs when a company uses workers employed by another company to perform services that its own employees used to perform. *See* Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge for the Future*, 10 Lab. Law. 143, 146 (1994). Examples of contract work include maintenance and housekeeping services. *Id.*

[52] *See* Befort, *supra* note 13, at 367; Befort, *supra* note 10, at 158. Leased employees are workers who are selected by the company that intends to use the labor, then hired by a leasing agency, and leased to the company that intends to use their labor. *See* Summers, *supra* note 10, at 514. Leased workers are meant to be long-term or permanent workers rather than temporary. *See id.* In addition, leased workers are most often used for professional- and management-level work. *See id.*

[53] *See* Befort, *supra* note 13, at 367. Part-time jobs are those that provide substantially less than the customary workweek. Summers, *supra* note 10, at 505.

[54] *See infra* notes 55–61 and accompanying text.

[55] *See* Piano v. Ameritech/SBC, No. 02 C 3237, 2003 WL 260337, at *3 n.1 (N.D. Ill. 2003). While the non-permanent nature of temporary work includes people who work directly for companies as their legal employees (i.e., direct-hire temporaries) on a temporary basis, this Note is limited to a discussion of those individuals who are hired through temporary-help firms. *See* Polivka et al., *supra* note 16, at 42–43; Forster, *supra* note 22, at 545 n.20.

[56] *See, e.g.*, Gonos, *supra* note 14, at 84–85; Summers, *supra* note 10, at 509.

month to month."[57] In practice, however, one company may hire workers and assign them to work for another company for months or even years.[58] As such, the signifier "temporary" is a misnomer because the limited duration of temporary work assignments has never been the defining characteristic of this type of work.[59] In addition, the at-will doctrine also calls into question the use of job duration as a definitional aspect of temporary work.[60] Since most jobs can be terminated at any time without notice and without severance pay, the at-will doctrine renders almost all employment "legally temporary."[61] Perhaps as a result of these challenges to the importance of job duration, the Occupational Safety and Health Review Commission (OSHRC), the agency charged with adjudicating allegations of OSHA violations, also places little emphasis on duration when determining whether an employment relationship exists.[62]

B. *The THI's Triangular Employment Framework*

While the specific boundaries of the type of work that falls within the temporary work category remain nebulous, a common understanding does exist regarding the THI's organizational structure.[63] The THI operates in a triangular employment framework formed by the worker, the temporary-help firm (THF), and the user firm.[64] The THF recruits workers,[65] pays them directly,[66] and is responsible for paying payroll taxes,[67] including social security and unemployment insurance.[68] Gen-

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[57] *See* Summers, *supra* note 10, at 509. *Webster's Dictionary* defines "temporary" as "lasting, existing, serving, or effective for a time only." Webster's Encyclopedic Unabridged Dictionary of the English Language 1462 (1996). It adds, "Temporary implies an arrangement established with no thought of continuance but with the idea of being changed soon." *Id.*

[58] *See* Stone, *supra* note 14, at 68.

[59] *See* Gonos, *supra* note 14, at 84–85.

[60] *See* Stone, *supra* note 14, at 133; Summers, *supra* note 10, at 509.

[61] *See* Summers, *supra* note 10, at 509.

[62] *See* Sec'y of Labor v. Froedtert Mem'l Lutheran Hosp. (*Froedtert II*), No. 97–1839, 2004 WL 2308763, at *8 (O.S.H.R.C. Jan. 15, 2004); *see also* 29 U.S.C. § 661 (2000) (describing the function of the OSHRC).

[63] *See* Stone, *supra* note 14, at 68; Carlson, *supra* note 36, at 688; Cohany et al., *supra* note 37, at 63; Gonos, *supra* note 14, at 85; Summers, *supra* note 10, at 511.

[64] Gonos, *supra* note 14, at 85.

[65] *See* Cohany et al., *supra* note 37, at 63.

[66] *See* Stone, *supra* note 14, at 68; Carlson, *supra* note 36, at 688; Cohany et al., *supra* note 37, at 63.

[67] Summers, *supra* note 10, at 511.

[68] Cohany et al., *supra* note 37, at 63.

erally, the THF does not provide workers with materials or tools.[69] Legally, the THF is the workers' employer.[70] Consequently, the THFs "assume, ostensibly at least, responsibility for formal compliance with the key legal requirements connected with this [employer] role."[71]

After recruiting workers, the THF assigns them to a user firm,[72] an organization that contracts with the THF to receive workers.[73] In return for workers, the user firm pays a fee to the THF.[74] At the worksite, the user firm supervises the day-to-day performance of temporary workers.[75] Usually, the user firm exercises direct control of temporary workers working on their premises.[76] Temporary workers are not technically employed until they begin work on the user firm's premises.[77]

The triangular employment framework gives new meaning to the employment relationship as it pertains to the legal standards governing workplace conditions.[78] In the THI employment model, the work performed becomes the service, the THF becomes the employer, the user firm's purchase of the service transforms the user firm into the customer, and the worker's use of the THF renders workers into consumers.[79] More importantly, given the legal and financial obligations imposed by employer status, the formal designation of THFs as legal employer to temporary workers creates the THI's primary reason to exist—allowing the user firm to enjoy the benefits of labor while avoiding many of the legal obligations attached to employer status.[80]

C. *Evolution of the THI*

Between the 1940s and the 1970s, the THI transformed itself into a major component of the USA's labor market.[81] The THI was born in

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[69] *See* Gonos, *supra* note 14, at 88.

[70] *See* Stone, *supra* note 14, at 68; Gonos, *supra* note 14, at 85.

[71] Gonos, *supra* note 14, at 85.

[72] *See id.*

[73] *See* Stone, *supra* note 14, at 68.

[74] *See* Carlson, *supra* note 36, at 688; Summers, *supra* note 10, at 511; *see also* Katherine Van Wezel Stone et al., *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 Emp. Rts. & Emp. Pol'y J. 233, 238 (2006) (noting that the fee paid by user firms is enough to cover wages, overhead costs, including employment taxes, and profits).

[75] *See* Stone, *supra* note 14, at 209; Carlson, *supra* note 36, at 688.

[76] *See* Gonos, *supra* note 14, at 88.

[77] *Id.*

[78] *Id.* at 104–05.

[79] *Id.* at 105.

[80] *See id.* at 90, 103, 85–86.

[81] *See infra* notes 82–91 and accompanying text.

the manufacturing-centered economy of the late 1940s.[82] After World War II, the USA's economy gradually shifted from manufacturing-centered to service-centered while experiencing "heightened international competition, greater fluctuations in demand, increased costs of fringe benefits, a decline in unionization, and shifts in labor force composition."[83] Until the mid-1970s, the prevailing employment paradigm consisted of full-time and continuous work unless otherwise stated.[84] This employment arrangement would end only if the employee failed to perform satisfactorily or was no longer needed by the employer.[85]

Throughout the 1950s and 1960s, the THI quietly but consistently lobbied legislators to alter the dominant employment practice of hiring workers full-time and continuously.[86] In the midst of the country's transition from a manufacturing-based economy to one dependent upon service industries, the THI's lobbying resulted in explosive growth for the industry.[87] In the late 1960s, THFs successfully persuaded Congress and state governments to deem THFs a worker's employer for purposes of complying with labor and employment laws.[88] Since many federal regulations governing workplace standards apply only to workers who have been formally labeled "employees," formal recognition of THFs as employers shifted the cost of complying with those regulations onto the THF.[89] Partly as a result of THI lobbying,[90] by the 1970s the stage was set for THFs to become a "permanent fixture" in many workplaces.[91]

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[82] Dau-Schmidt, *supra* note 15, at 879; Gonos, *supra* note 14, at 90.

[83] *See* Cohany et al., *supra* note 37, at 62; Dau-Schmidt, *supra* note 15, at 879.

[84] *See* Summers, *supra* note 10, at 503.

[85] *See id.*

[86] *See* Cohany et al., *supra* note 37, at 62; Summers, *supra* note 10, at 504.

[87] *See* Cohany et al., *supra* note 37, at 62.

[88] *See* Stone, *supra* note 14, at 68. *See generally* Gonos, *supra* note 14, at 93–94 (stating that by 1971 all but two states adopted legislation sought by the THI, including twelve states that explicitly exempted THFs from regulation).

[89] *See* Befort, *supra* note 10, at 417; Gonos, *supra* note 14, at 85.

[90] *See* Gonos, *supra* note 14, at 90.

[91] *See* Cohany et al., *supra* note 37, at 62; *see also* Marcello Estevão & Saul Lach, *The Evolution of the Demand for Temporary Help Supply Employment in the United States*, *in* Nonstandard Work, *supra* note 16, at 123, 140 (confirming that the increased use of temporary workers was due to a change in the hiring practices of private companies such that THFs were incorporated into sectors of the labor market where THFs were not previously present).

In the last quarter-century, the number of workers hired by THFs has ballooned.[92] In 1980, there were 400,000 temporary workers.[93] Eight years later this number had more than doubled, reaching 1.1 million.[94] By 1993, there were approximately 1.6 million workers hired by THFs.[95] In that year, Manpower, Inc., the nation's largest THF, alone was credited with employing over 500,000 temporary workers.[96] Most recently, in 2001, there were approximately 2 million people working for THFs.[97]

D. *Benefits of Temporary Work for Employers and Workers*

The growing reliance on temporary workers in the contemporary labor market results largely from employers' desire to avoid workplace regulations.[98] Most importantly, user firms benefit from the legal characterization of THFs as the temporary workers' employer because that characterization allows user firms to avoid expensive legal obligations imposed upon employers by labor laws.[99] Firms perceive temporary workers to be less expensive than core workers[100] because the former do not receive unemployment insurance[101] or workers' com-

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[92] Belous, *supra* note 36, at 865 tbl.1. In this period, there has been a corresponding increase in the contingent workforce. *See* Befort, *supra* note 10, at 158; Summers, *supra* note 10, at 504.

[93] Belous, *supra* note 36, at 865 tbl.1.

[94] *Id.*

[95] *Id.*

[96] *See* Summers, *supra* note 10, at 511. Indeed, the next year *Fortune Magazine* declared Manpower the USA's largest private employer. Jaclyn Fierman, *The Contingency Work Force,* Fortune Mag., Jan. 24, 1994, at 31.

[97] Stone, *supra* note 14, at 67. Today, three companies—Manpower, Kelly Services, and Olsten—dominate the temporary work landscape. *See* Cohany et al., *supra* note 37, at 62.

[98] *See* Befort, *supra* note 13, at 361, 416.

[99] *See* Stone, *supra* note 14, at 69; *see also* Befort, *supra* note 13, at 369 (arguing that the lack of regulatory protection has allowed many firms to "consciously" become adept at manipulating the factors used to determine whether a worker is an employee in order to avoid the legal requirements imposed by employee status); Gonos, *supra* note 14, at 86 (noting that it is "widely recognized" that employers in the USA use temporary workers precisely to evade legal obligations because the financial benefits are "considerable").

[100] *Cf.* Polivka et al., *supra* note 16, at 83 (positing that the lower probability of contingent workers receiving health insurance "suggests that employers may be using these arrangements to reduce costs"). *But see* Shulamit Kahn, *The Bottom-Line Impact of Nonstandard Jobs on Companies' Profitability and Productivity, in* Nonstandard Work, *supra* note 16, at 235, 241 (revealing that company officers disagree about the extent of cost savings resulting from the use of THFs); Stanley D. Nollen & Helen Axel, *Benefits & Costs to Employers, in* Contingent Work, *supra* note 23, at 126, 136 (challenging the actual cost savings of contingent workers by taking into account training costs, turnover rates, performance and productivity levels, and costs of unavoidable legal obligations).

[101] *See* Befort, *supra* note 13, at 369.

pensation insurance,[102] are paid less than core workers,[103] and are not covered by the National Labor Relations Act (NLRA), the nation's principal collective bargaining legislation.[104]

In addition, reliance on temporary workers enables user firms to flexibly manage personnel.[105] THFs are capable of providing workers "on demand,"[106] to allow user firms to get workers on short notice[107] to meet their temporary-labor needs.[108] As a result, user firms avoid paying for more workers than they need at any given moment.[109]

To some extent, temporary workers also benefit from temporary work status.[110] Temporary work arrangements provide flexibility for people who do not want a steady or long-term job.[111] In addition, temporary work serves as a stopgap measure for the unemployed by providing them with at least some income between jobs.[112] In fact, temporary work can be a bridge to a new job.[113] Lastly, temporary work can provide on-the-job training to workers.[114]

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[102] *See id.*

[103] *See* Belous, *supra* note 36, at 873; Summers, *supra* note 10, at 512; Maria O'Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849, 858 (1995).

[104] *See* Befort, *supra* note 13, at 370. *See generally* National Labor Relations Act (Wagner Act), 29 U.S.C. §§ 151–169 (2000).

[105] Hylton, *supra* note 103, at 858. User firms engage in significant management activities including determining the wages earned by workers. *See* Stone et al., *supra* note 74, at 241. According to Stone, user firms and THFs jointly decide how much money workers earn. *See id.*

[106] *See* Summers, *supra* note 10, at 511.

[107] *See* Cohany et al., *supra* note 37, at 63. While the speed at which a THF provides workers depends on the user firm's needs, the industry's presumption is that a THF can provide workers at a moment's notice to ensure maximum productivity. *See* Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 731 (1995).

[108] *See* Carlson, *supra* note 36, at 688. The temporary nature of temporary work is questionable since the duration of temporary work is often measured in months or years. *See* STONE, *supra* note 14, at 68.

[109] *See* Cohany et al., *supra* note 37, at 63; Summers, *supra* note 10, at 511; *see also* Frances Raday, *The Insider-Outsider Politics of Labor-Only Contracting*, 20 COMP. LAB. L. & POL'Y J. 413, 417 (1999) (stating that THI employment allows user firms to quickly terminate workers "at any time without actually having to dismiss them and hence can avoid the various limitations on the right to dismiss" and the costs associated with dismissal).

[110] *See infra* notes 111–14 and accompanying text.

[111] *See* Cohany et al., *supra* note 37, at 63; Summers, *supra* note 10, at 512.

[112] *See* Cohany et al., *supra* note 37, at 63; Summers, *supra* note 10, at 512.

[113] *See* Summers, *supra* note 10, at 512.

[114] *See* Cohany et al., *supra* note 37, at 63; Summers, *supra* note 10, at 512.

E. *Consequences of Temporary Work*

The benefits of temporary work are in direct correlation with corresponding disadvantages to temporary workers.[115] Workplace- safety protections are eroded in the drive to cut costs.[116] In addition, temporary-work arrangements unfairly place immense risk and economic uncertainty on workers insofar as these arrangements fail to acknowledge that temporary workers are in need of such services as health insurance, paid vacation, family leave, pensions, job security, training opportunities, and promotional opportunities.[117] Furthermore, temporary workers labor within an asymmetrical control paradigm.[118] The triangular employment framework falsely suggests that temporary workers participate in the labor market on equal footing with THFs and user firms.[119] Where the worker's only "power" is to refuse or leave an unpleasant work assignment, it is "a one-sided, small-numbers bargaining problem: where one side has no alternatives, the other side will be able to set the terms of the agreement."[120]

Temporary employment is often reserved for low-skilled work that is poorly remunerated, exacerbating the democracy deficit that characterizes the employer-worker paradigm.[121] The prevalence of low-skilled laborers within the temporary workforce leads to an asymmetrical power dynamic between temporary workers and firms.[122] This asymmetry leads to the job instability that plagues most temporary workers.[123] Temporary workers are more likely than non-temporary workers to become unemployed, involuntarily drop out of the labor force, or have to switch from one employer to another due to job instability.[124] In addition, temporary workers lack control of the number of hours they work.[125]

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[115] *See* discussion *infra* Part I.E.

[116] Summers, *supra* note 10, at 512.

[117] *See* Belous, *supra* note 36, at 875; Ontiveros, *supra* note 11, at 31.

[118] *See* Forster, *supra* note 22, at 544.

[119] *See* Gonos, *supra* note 14, at 105.

[120] Jean McAllister, *Sisyphus at Work in the Warehouse: Temporary Employment in Greenville, South Carolina, in* CONTINGENT WORK, *supra* note 23, at 221, 235.

[121] *See* Davidov, *supra* note 39, at 381; Summers, *supra* note 10, at 510.

[122] *See* STONE, *supra* note 14, at 68.

[123] *See* Carré, *supra* note 17, at 5. Similarly, job instability impacts all contingent workers. *See* Belous, *supra* note 36, at 865; Forster, *supra* note 22, at 547; *see also* Ontiveros, *supra* note 11, at 29 (noting that contingent workers do not have an ongoing expectation that their work will continue).

[124] *See* Ontiveros, *supra* note 11, at 29.

[125] *See* Shirley Lung, *Developing a Course on the Rights of Low-Wage Workers*, 54 J. LEGAL EDUC. 380, 381 (2004).

While four-fifths of temporary workers work full-time,[126] they receive few or no employment benefits.[127] Paid vacation, paid holidays, sick leave, medical insurance, and pension plans are virtually unknown to temporary workers.[128] The lack of employer-provided benefits has repercussions that affect more than just temporary workers.[129] For example, in 1997, 46.4% of temporary workers had health insurance, but 39.4% of those workers received their insurance from somewhere other than their employers.[130] That only 7% of temporary workers received health insurance from their employer suggests that a significant number of workers turned to other private and public sources for health insurance.[131] At the same time, temporary workers receive lower pay than other workers.[132]

Given these disadvantages, many temporary and other contingent workers desire a different work status.[133] Most workers who use THFs do not do so because they prefer temporary work.[134] Only 27% of non-student contingent workers claimed to be satisfied with their work arrangement.[135] Similarly, only 34% of temporary workers report that they prefer their work arrangement.[136] Most want a permanent job, but accept a temporary position because they have not been able to find permanent employment.[137] Indeed, a full two-thirds of temporary workers want a traditional job.[138]

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[126] Cohany et al., *supra* note 37, at 64.

[127] *See* Summers, *supra* note 10, at 510.

[128] *See id.*

[129] *See* Schroeder, *supra* note 107, at 734–35. Schroeder notes that businesses' failure to provide benefits to temporary and part-time workers has significant implications for workers, particularly women, who seek to take advantage of statutory "family-friendly" policies such as medical leave. *See id.*

[130] Carré, *supra* note 17, at 15 tbl.1. Another commentator, citing unpublished industry data, reported that 53% of temporary workers received health insurance through a spouse, parent, or other source. Edward A. Lenz, *"Contingent Work"—Dispelling the Myth*, 52 Wash. & Lee L. Rev. 755, 764 (1995); *see also* Schroeder, *supra* note 107, at 735 (stating that many employers of temporary workers either cannot afford to pay for health insurance for their workers or simply do not want to invest in these workers).

[131] *See* Carré, *supra* note 17, at 15 tbl.1.

[132] *See* Lung, *supra* note 125, at 381; Summers, *supra* note 10, at 510.

[133] *See* Cohany et al., *supra* note 37, at 50; Summers, *supra* note 10, at 510.

[134] *See* Summers, *supra* note 10, at 510.

[135] *See* Cohany et al., *supra* note 37, at 50.

[136] Carré, *supra* note 17, at 4.

[137] *See* Summers, *supra* note 10, at 510.

[138] Cohany et al., *supra* note 37, at 64.

F. *Women and People of Color in the Temporary Workforce*

Women and people of color hold a disproportionate percentage of the rapidly increasing number of jobs available in the THI and contingent workforce.[139] Women are overrepresented in the THI as compared to their share of the total workforce.[140] While women represented 46% of total employment they comprised 55% of temporary workers.[141] Similarly, people of color are overrepresented in relation to their percentage of the nation's total population.[142] In 1995, while between 2.2% and 4.9% of the total employed in the nation were contingent workers, between 13.3% and 13.9% of black workers performed contingent work and between 11.3% and 13.6% of Latino workers performed contingent work.[143]

The use of THFs relocates work out of core labor markets and into secondary markets where workers earn less money and experience greater job instability.[144] In 1995, temporary workers on average earned $1.30 per hour less than regular full-time workers.[145] Earnings differentials are most devastating for people of color and women.[146] While the median earnings of temporary workers working full-time was $290 per week, Latinos working full-time as temporary workers could only count on a median weekly wage of $237 per week.[147] Similarly, the average hourly wage for male temporary workers was $9.19, while female temporary workers on average earned only $8.94 per hour, a difference of several hundred dollars per year.[148] Due to the disproportionate representation of people of color in the THI, the earnings differential "translates into ethnic-based earnings inequal-

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[139] *See* Summers, *supra* note 10, at 510; *see also* Dau-Schmidt, *supra* note 15, at 880 (noting that contingent workers are disproportionately female and African-American); Polivka et al., *supra* note 16, at 47 (identifying an overrepresentation of women and black workers in the THI).

[140] Carré, *supra* note 17, at 2.

[141] *Id.*

[142] *See* Cohany et al., *supra* note 37, at 48 tbl.2.2. In 1995, 12% of the total population was black and 10.3% was Latino. *See* U.S. Census Bureau, 1996 Statistical Abstract of the United States 22 tbl.22 (1996), *available at* http://www.census.gov/prod/2/gen/96statab/pop.pdf.

[143] *See* Cohany et al., *supra* note 37, at 45, 46, 48 tbl.2.2.

[144] *See* Annette Bernhardt & Dave E. Marcotte, *Is "Standard Employment" Still What It Used to Be?, in* Nonstandard Work, *supra* note 16, at 21, 23; Gonos, *supra* note 14, at 86–87; *see also* Polivka et al., *supra* note 16, at 73 (explaining that temporary workers "fairly uniformly earned less than regular full-time workers").

[145] Polivka et al., *supra* note 16, at 75.

[146] *See* Cohany et al., *supra* note 37, at 60 tbl.2.12; Carré, *supra* note 17, at 5.

[147] *See* Cohany et al., *supra* note 37, at 64, 60 tbl.2.12.

[148] *See* Carré, *supra* note 17, at 5.

ity."[149] In addition, black workers have experienced the largest increase in job instability of all workers since the 1970s.[150]

II. OSHA's Applicability to Temporary Workers

Given the THI's rapid growth, the overrepresentation of women and people of color in the THI, and the significant consequences of temporary work, it is important to examine how the contemporary application of OSHA uniquely impacts temporary workers.[151]

A. *Understanding OSHA*

OSHA's objective is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[152] Similarly, federal regulations state that OSHA's purpose is "to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation."[153]

Although courts generally interpret OSHA's main purpose as making workplaces safe from work-related hazards, courts differ in the amount of safety required.[154] For instance, according to the Iowa Supreme Court, OSHA "intended to prevent the first injury, including those of a non-serious nature."[155] The Colorado Supreme Court qualified this goal, writing that OSHA did not mandate "absolutely risk-free workplaces."[156] The Court of Appeals for the First Circuit agreed.[157] In *Irving v. United States*, the court wrote that OSHA aims for a "satisfactory standard of safety," rather than a "guarantee [of] absolute safety."[158]

Regardless of which standard for protection courts use, OSHA charges the Secretary of Labor with creating and enforcing the explicit statutory safety requirements that exist under OSHA.[159] For ex-

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[149] Reskin, *supra* note 17, at 198.

[150] Bernhardt & Marcotte, *supra* note 144, at 23.

[151] *See* Lung, *supra* note 125, at 391 (arguing that it is important to "critically examine law from a distinctly workers' perspective").

[152] 29 U.S.C. § 651(b) (2000).

[153] 29 C.F.R. § 1977.1(a) (2005).

[154] *See* Universal Constr. Co. v. Occupational Safety & Health Review Comm'n, 182 F.3d 726, 730 (10th Cir. 1999); Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n, 531 F.2d 451, 458 (10th Cir. 1976).

[155] Union Pac. R.R. v. Johnson, 264 N.W.2d 796, 799 (Iowa 1978).

[156] *See* Canape v. Petersen, 897 P.2d 762, 764 (Colo. 1995).

[157] *See* Irving v. United States, 162 F.3d 154, 168 (1st Cir. 1998).

[158] *Id.*

[159] 29 U.S.C. § 651(b)(3) (2000). The text of the statute is as follows: "The Congress . . . authoriz[es] the Secretary of Labor to set mandatory occupational safety and health

ample, the Secretary issued regulations requiring clean and dry workplaces, access to potable water and toilets, and the development of emergency action and fire preventions plans.[160] The Act empowers the Secretary to cite employers for violations of OSHA standards.[161] The Act also creates a hierarchy of civil penalties that can be issued to an employer that violates a standard.[162] To determine the penalty for a workplace safety standard violation, OSHA distinguishes among willful or repeated violations, serious violations, not serious violations, failures to correct a violation, and willful violations that result in the death of an employee.[163] Firms that are cited can contest the citation by turning to the OSHRC to adjudicate disagreements.[164]

OSHA places a burden on both employers and employees to adhere to its workplace safety standards.[165] The Act encourages employers and employees "to become aware of, and warn against, possible hazards."[166] The statutory text indicates that employees have separate but dependent responsibilities for maintaining safe and healthful working conditions from those imposed on employers.[167] Specifically, employees are obligated to comply with all of OSHA's rules and regu-

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standards applicable to businesses affecting interstate commerce, and . . . creat[e] an Occupational Safety and Health Review Commission for carrying out adjudicatory functions . . . ." *Id.* OSHA standards apply to employment performed anywhere in the USA unless the type of work is expressly governed by a federal agency other than the Department of Labor. *See* 29 C.F.R. § 1910.5(a)–(b) (2006).

[160] 29 C.F.R. § 1910.141; *see* 29 C.F.R. §§ 1910.38(a), 1910.39.

[161] 29 U.S.C. § 651(b)(3); Indus. Union Dep't. v. Hodgson, 499 F.2d 467, 470 (D.C. Cir. 1974); Farrah-Marisa Chua Short, Comments, *An Experiment in Protecting Workers' Rights: The Garment Industry of the U.S. Commonwealth of the Northern Mariana Islands*, 7 U. PA. J. LAB. & EMP. L. 971, 987 (2005).

[162] Short, *supra* note 161, at 987. The statute allows the Secretary to issue fines ranging from $1000 for giving advance notice of a workplace inspection to no less than $5000 and no more than $70,000 for willfully or repeatedly violating an OSHA requirement. *See* 29 U.S.C. § 666(a), (e).

[163] 29 U.S.C. § 666(a)–(e).

[164] *See id.* § 651(b)(3). The OSHRC is composed of three members appointed by the President for six-year terms. *Id.* § 661(a)–(b). The OSHRC's chairperson appoints administrative law judges who are charged with resolving disputes concerning alleged OSHA violations. *Id.* § 661(j). Any OSHRC decision is subject to judicial review in any federal court of appeals or, in special circumstances, the Court of Appeals for the District of Columbia. *Id.* § 660(a). A reviewing court must give great deference to the OSHRC's interpretation of OSHA regulations. *See* Concrete Constr. Co. v. Occupational Safety and Health Review Comm'n, 598 F.2d 1031, 1033 (6th Cir. 1979).

[165] *See* 29 U.S.C. § 651(b)(2); *cf.* Irving v. United States, 162 F.3d 154, 169 (1st Cir. 1998) (declaring that responsibility for workplace safety does not fall on the federal government).

[166] Carnevale et al., *supra* note 23, at 281; *see* 29 U.S.C. § 651(b)(1), (2).

[167] 29 U.S.C. § 651(b)(2).

lations.[168] For their part, employers are required to provide a hazard-free workplace.[169]

B. *Employment-Status Tests*

On its face, it would appear that OSHA protects all workers identically.[170] However, the statute's explicit goal of providing "every working man and woman in the Nation safe and healthful working conditions" stands in stark contrast to the interpretation that limits OSHA protections only to those workers found to be "employees" of the OSHA violator.[171]

The importance of temporary workers' legal characterization as "employer" and "employee" cannot be overstated because most workplace safety protections are only afforded to those workers statutorily defined as "employees."[172] Indeed, the Court of Appeals for the District of Columbia determined that "OSHA . . . covers every *employer* whose business affects interstate commerce," but qualified this statement by noting, "the protection of the health of *employees* is the overriding concern of OSHA."[173] Implicitly, the court's determination that OSHA covers only "employers" and seeks to protect "employees" limits OSHA's applicability to instances in which an employment relationship exists.[174] Moreover, OSHA defines an "employer" as a "per-

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[168] *See* 29 U.S.C. § 654(b); *see also* 29 C.F.R. § 1910.177(g)(8) (2006) (requiring employees to stay out of the trajectory of a tire when inflating a tire that is on a single piece rim wheel).

[169] *See* 29 U.S.C. § 654(a)(1); Indus. Union Dep't. v. Hodgson, 499 F.2d 467, 470 (D.C. Cir. 1974); *see also Irving*, 162 F.3d at 169 (determining that OSHA "in no uncertain terms, places primary responsibility for workplace safety on employers"); Canape v. Colo. Comp. Ins. Auth., 897 P.2d 762, 764 (Colo. 1995) (determining that OSHA imposes a general obligation upon employers to provide safe working conditions).

[170] *See* Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n, 531 F.2d 451, 457 (10th Cir. 1976) (determining that OSHA applies to "all persons working on the premises").

[171] 29 U.S.C. § 651(b); *see* Carnevale et al., *supra* note 23, at 297; *see also* Dau-Schmidt, *supra* note 15, at 883 (arguing that it is of little use to a temporary worker if she is an employee of a firm that is not responsible for ensuring safe working conditions at the site to which she is assigned). In addition, user firms that contract with THFs often contest the characterization of an employment relationship to avoid being recognized as a temporary worker's "employer." *See Froedtert II*, No. 97–1839, 2004 WL 2308763, at *4 (O.S.H.R.C. Jan. 15, 2004); Sec'y of Labor v. Froedtert Mem'l Lutheran Hosp. (*Froedtert I*), No. 97–1839, 1999 WL 503823, at *2 (O.S.H.R.C.A.L.J. July 1, 1999); Sec'y of Labor v. S. Scrap Materials Co., No. 94–3393, 1997 WL 735352, at *6, *11 (O.S.H.R.C.A.L.J. Nov. 24, 1997).

[172] *See* Carnevale et al., *supra* note 23, at 281; Summers, *supra* note 10, at 511.

[173] *Hodgson*, 499 F.2d at 470, 475 (emphasis added).

[174] *See id.* at 470.

son engaged in a business affecting commerce who has employees."[175] It goes on to define "employees" as "an employee of an employer who is employed in a business of his employer which affects commerce."[176] These circular definitions are, to say the least, uninformative and leave much of the task of determining when OSHA applies to judicial interpretation.[177]

Given the importance of the definition of "employee" and "employer," an analysis of OSHA's practical application to temporary workers must examine the four tests that courts created and historically have relied upon to determine employment status for purposes of labor and employment laws.[178] Initially, courts relied on a test that utilized the common law of agency.[179] Later, this test gave way to an analysis called the economic realities test.[180] Yet another test, the hybrid test, essentially combined the common law and economic realities tests.[181] Most recently, the Supreme Court developed the *Darden* test.[182] A brief examination of each of these tests shows that many opportunities remain for employers to avoid liability.[183]

The common law test, rooted in the *Restatement (Second) of Agency*, stands out as the most restrictive of the four status tests.[184] It focuses largely on the putative employer's right to control the "servant's" workplace activities.[185] The *Restatement* defines "servant" as "a person employed to perform services in the affairs of another and who . . . is subject to the other's control or right to control."[186] Therefore, under the common law test, an employment relationship exists only when a user firm maintains control over the worker's detailed physical performance, rather than merely overseeing a worker's activities.[187] Since

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[175] 29 U.S.C. § 652(5).

[176] 29 U.S.C. § 652(6).

[177] *See* Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974).

[178] *See* Indus. Union Dep't. v. Hodgson, 499 F.2d 467, 477 (D.C. Cir. 1974); Befort, *supra* note 13, at 417–19.

[179] Befort, *supra* note 13, at 417.

[180] *See id.* at 417–19; Dau-Schmidt, *supra* note 15, at 884.

[181] *See* Befort, *supra* note 13, at 418.

[182] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[183] *See* Befort, *supra* note 10, at 163.

[184] *See id.* at 166.

[185] *See* Restatement (Second) of Agency § 220(1) (1958); *see also id.* § 220(2) (listing factors to be considered in addition to control); *id.* § 220 cmt. a (emphasizing the control of a putative employee's physical movements).

[186] *Id.* § 220(1) (1958).

[187] *See* Leone v. U.S., 910 F.2d 46, 50 (2nd Cir. 1990); *see also* Schwieger v. Farm Bureau Ins. Co., 207 F.3d 480, 484–85 (8th Cir. 2000) (determining that a worker was not a company's employee even though the worker submitted regular production reports to a com-

control is the key factor in determining whether a worker is an "employee," a user firm is able to avoid "employer" status by mitigating its interaction with the worker.[188]

The economic realities test takes a more expansive interpretive approach to employment status than advanced by the common law test.[189] As initially conceptualized by the Supreme Court, the test included workers who were employees "as a matter of economic reality" within the definition of "employee."[190] Originally developed under the Social Security Act and expanded to apply to claims lodged under the Fair Labor Standards Act (FLSA), the economic realities test emphasized the workers' dependence for their livelihood on the putative employer under various statutes governing working conditions.[191] Over time, courts began to consider such factors as whether the putative employer had the power to hire and fire temporary workers, supervise and control conditions of employment and employee work schedules, determine the rate and method of payment, and maintain employment records.[192] As the test is now utilized, the worker's dependence on the firm is the most important factor in the analysis.[193]

The hybrid test, in essence, embodies a combination of the common law and economic realities tests.[194] Though it examines the

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pany manager who had the power to reassign her accounts to other workers; was evaluated on her profitability, dress, and attitude; was expected to notify her manager of vacations; and was required to seek the company's approval for any advertising she chose to conduct).

[188] *Cf.* U.S. v. New England Coal & Coke Co., 318 F.2d 138, 142 (1st Cir. 1963) (explicitly rejecting, under the common law test, the proposition that a federal workplace statute that governed "all persons employed by" a company included every worker that the company relied on to complete its work).

[189] *Compare* Restatement (Second) of Agency § 220 cmt. a (1958) (explicitly stating the common law test's emphasis on control of a putative employee's physical movements), *with* Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976) (using the economic realities test, the Court examined a worker's dependence on a firm, in addition to control and other factors, to determine the worker's employment status). Notably, a recent presidential commission recommended adoption of the economic realities test for determining employment status across all federal statutes. Befort, *supra* note 10, at 172.

[190] *See* United States v. Silk, 331 U.S. 704, 713 (1947).

[191] Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (2000); Social Security Act, 42 U.S.C. § 301 (2000). *See generally* Lilley v. BTM Corp., 958 F.2d 746, 750 (6th Cir. 1992) (emphasizing economic dependence in the context of the Age Discrimination in Employment Act); *Usery*, 527 F.2d at 1311 (emphasizing dependence in the context of the FLSA).

[192] *See* Preston v. Settle Down Enters., 90 F. Supp. 2d 1267, 1274 (N.D. Ga. 2000).

[193] *See Lilley*, 958 F.2d at 750; *see also Usery*, 527 F.2d at 1311 ("It is *dependence* that indicates employee status.").

[194] *See* Ontiveros, *supra* note 11, at 669.

economic realities of the employment relationship, the hybrid test, like the common law, particularly emphasizes the putative employer's right to control the means and manner of the worker's performance.[195] Several federal courts adopted the hybrid test in the 1970s and 1980s to effectuate congressional intent in enacting legislation.[196]

The most recent of the commonly used tests for determining employment status is the *Darden* test, named after the 1992 Supreme Court decision in which it was announced.[197] In that case, after examining an independent insurance agent's claim that he was an employee of a nationwide insurance company, the Court found that the economic realities test was a "feeble," circular, and unpredictable determinant of employment status.[198] As a result, it promulgated a thirteen-factor reformulation of the traditional common law test.[199] The Court instructed that employment status should take into account the putative employer's right to control the manner and means of the work; the skill required to perform the work; the source of the instrumentalities and tools used to perform the work; the actual, physical 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; whether the work is part of the hiring party's regular business; whether the hiring party is actually in business; the provision of employee benefits; and the tax treatment of the hired party.[200] While no one factor is decisive, the Court emphasized the putative employer's right to control the manner and means of the work.[201]

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[195] *See* Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979); Befort, *supra* note 10, at 167; *see also* RESTATEMENT (SECOND) OF AGENCY § 220(1) (1958) (emphasizing control of a worker's performance as an integral component of a master-servant relationship).

[196] Befort, *supra* note 10, at 167; *see also* EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3rd Cir. 1983) (considering Congress's intent in enacting Title VII and expressly combining the common law's emphasis on the right to control with the economic realities test); *Spirides*, 613 F.2d at 831 (expressly incorporating common law factors into the economic realities test).

[197] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[198] *See id.* at 321, 324, 326–27.

[199] *See* Befort, *supra* note 10, at 167.

[200] *Darden*, 503 U.S. at 323.

[201] *See id.* at 323–24. The Court then added the other twelve factors as "other factors relevant to this inquiry." *Id.* Similarly, the traditional common law of agency analysis emphasizes the right to control while listing the other factors as some matters, among others, to be considered in determining employment status. RESTATEMENT (SECOND) OF AGENCY § 220(1), (2) (1958).

The various status tests afford employers many legal loopholes through which they can jump to avoid liability for workplace safety conditions.[202] When disputes under OSHA emphasize the extent to which the putative employer controls the worker, the user firm can avoid liability merely by distancing itself sufficiently from the THF's operations and the temporary workers' performance.[203] In effect, the *Darden* test's emphasis on the right to control incentivizes employer efforts to circumvent existing employment regulations.[204] *Darden*'s narrow emphasis on the right to control invites "adroit schemes . . . to avoid the immediate burdens at the expense of the benefits sought by the legislation."[205] For example, an attorney for user firms who "has warned against supervising temps [sic] too closely or letting them attend general staff meetings," advised clients not to request or reject any temporary worker by name, and not to attempt to resolve problems that arise in the course of a temporary worker's performance.[206] Meanwhile, legal liability rests upon THFs even though they are not required to ensure that the user firms to which they send workers comply with OSHA's safety standards.[207]

III. Improving OSHA's Protection of Temporary Workers

OSHA remains the principal federal legislation governing workplace conditions.[208] Therefore, all workers, whether temporary, contingent, or core, need OSHA's protections if the nation's workplaces are to be held to a meaningful and consistent standard of safety and health.[209] Temporary workers deserve particular attention because the nature of temporary work is such that their employment limits the long-term interest that user firms have in the workers' health and safety.[210]

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[202] *See* Befort, *supra* note 10, at 163.

[203] *See* Middleton, *supra* note 27, at 582.

[204] *See* Befort, *supra* note 13, at 419.

[205] *See* United States v. Silk, 331 U.S. 704, 712 (1947).

[206] Walter Olson, The Excuse Factory: How Employment Law Is Paralyzing the American Workplace 299 (1997).

[207] *See generally* Sec'y of Labor v. Manpower Temp. Servs., Inc., No. 76–980, 1977 WL 6891, at *5 (O.S.H.R.C.A.L.J. Jan. 10, 1977) (finding that to require that THFs "satisfy the [OSHA] safety requirements of each and every work situation would impose an unconscionable burden").

[208] *See* 29 U.S.C. § 651 (2000).

[209] *See* Dau-Schmidt, *supra* note 15, at 882.

[210] *See id.*

Expressly and unambiguously extending OSHA to include temporary workers would not come without costs.[211] The existence of a regulatory hierarchy in which core workers receive more workplace safety protection than temporary workers makes temporary workers less expensive than core workers.[212] As a result, federal legislation effectively creates an artificial cost savings incentive to use temporary workers by indirectly subsidizing the financial cost of satisfying legal obligations.[213] However, the goal of modern labor policy, as evidenced by OSHA's protection of workers and the NLRA's guarantee of workers' right to unionize, is not to maximize employer profits.[214] Rather, the goal of modern labor policy is to strike a balance of profits and worker protections.[215] Consequently, labor laws should be crafted to avoid the "race to the bottom"[216] with regard to workplace safety protections for temporary workers that results from *Darden*'s easily manipulable employment status test.[217]

Developing an expanded and simplified OSHA coverage scheme is feasible.[218] Moreover, a uniform interpretation of employment status is an essential step to improving OSHA's effectiveness, enhancing certainty regarding perceptions of the type of employment relationship that exists, and reducing litigation.[219] The premise of a reformulated coverage scheme should be that OSHA's obligations extend to include everyone who performs work at a place of employment regardless of the employment relationship that exists between the worker and the business owner.[220]

Various non-judicial options exist to expand and simplify OSHA coverage.[221] Directly revising the statutory definition of "employee"

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[211] *See* Befort, *supra* note 13, at 422; Dau-Schmidt, *supra* note 15, at 882.

[212] *See* Dau-Schmidt, *supra* note 15, at 882.

[213] *Id.*

[214] 29 U.S.C. § 651; 29 U.S.C. § 151 (2000); Befort, *supra* note 13, at 422.

[215] Befort, *supra* note 13, at 422.

[216] 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, 188 (1999).

[217] *See* Befort, *supra* note 13, at 422.

[218] *See supra* notes 212–13 and accompanying text.

[219] *See* Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1261 (4th Cir. 1974); Linder, *supra* note 216, at 221.

[220] *See* Linder, *supra* note 216, at 224.

[221] *See* Françoise Carré & Pamela Joshi, *Looking for Leverage in a Fluid World: Innovative Responses to Temporary and Contracted Work, in* Nonstandard Work, *supra* note 16, at 313, 316–23; Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. Rev. 239, 266 (1997).

and "employer" to expressly include temporary workers and THFs would most broaden the employment-status criteria.[222] Direct revision of the OSHA definitions would have the benefit of covering the largest number of workers; removing user firm incentives to avoid employer classification, thereby evading legal obligations and their resulting financial costs; and reducing the litigation waged to determine whether an employer-employee relationship exists.[223] However, reliance on statutory revision does not seem viable; congressional efforts to explicitly protect temporary workers have, to date, been unsuccessful.[224] As a result, legislative reforms remain "far from imminent."[225]

Non-governmental organizations (NGOs) have also increased OSHA protections for temporary workers.[226] In particular, labor unions have protected contingent workers through collective bargaining agreements and by creating employment centers, branches of a union that essentially operate as THFs in that they provide unionized temporary workers to user firms.[227] Non-union NGOs have also attempted to protect temporary workers, especially through the formation of independent workers' centers.[228] In spite of these efforts, in practice, temporary workers remain unprotected by OSHA.[229]

Lacking viable non-judicial alternatives, a clearly defined judicial interpretation remains an important route to expanded OSHA protection of temporary workers.[230] Judicial challenges to current interpretations of OSHA are necessary to address the existing presumption that THFs are the legally recognized employer of temporary workers.[231] Recognizing that the definition of "employer" and "employee" are "socially constructed—defined and shaped over time by social, legal, and

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[222] Maltby & Yamada, *supra* note 221, at 266.

[223] *See id.*

[224] *See* Middleton, *supra* note 27, at 583–85.

[225] *Id.* at 620.

[226] *See* Carré & Joshi, *supra* note 221, at 317, 322; Carré, *supra* note 17, at 8.

[227] *See* Middleton, *supra* note 27, at 598–99; Carré, *supra* note 17, at 8.

[228] *See* Middleton, *supra* note 27, at 599–602; Carré, *supra* note 17, at 8; *see also* Vanessa Tait, Poor Workers' Union: Rebuilding Labor from Below 129–30 (2005) (discussing the development of independent workers' centers as community-based labor organizing models comprised largely of temporary and other contingent workers); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. Rev. L. & Soc. Change 397, 401 (2004) (suggesting strategies that would enable workers' centers to increase legal protections).

[229] *See infra* notes 274–77 and accompanying text.

[230] *See infra* notes 231–32 and accompanying text.

[231] *Cf.* Gonos, *supra* note 14, at 87 (implying that the fragile legal foundation that recognizes THFs as a temporary worker's employer is ripe for judicial challenge).

political forces" indicates that these definitions can be judicially interpreted to protect temporary workers under OSHA.[232]

A. *Current State of Employee-Status Interpretation*

Since OSHA does not explicitly address the situation of workers in temporary arrangements, the OSHRC adopted the economic realities test to examine the real-world relationship that exists between workers and firms.[233] The OSHRC's adoption of the economic realities test represented an administrative attempt to expand OSHA's purview beyond circumstances covered by the common law.[234]

In 1992, however, the Supreme Court clearly signaled that the OSHRC's attempt had failed.[235] In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court rejected the economic realities test as it evolved under the FLSA for purposes other than FLSA analyses.[236] In a claim brought by an insurance agent against an insurance company, the Court sought to determine what constitutes an "employee" under the Employee Retirement Income Security Act (ERISA) of 1974.[237] ERISA defined "employee" as "any individual employed by an employer."[238] According to the Court, this statutory definition was "completely circular and explains nothing."[239] The Court determined that, unless the statute explicitly specified otherwise, Congress intended "employee" to be defined in accordance with the reformulation of the common law of agency test that it set forth.[240] Implying that the economic realities test in the ERISA context led to absurd determinations of employment status, the Court remarked that the common law of agency test would not "thwart the congressional design to lead to absurd results."[241]

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[232] *See id.* at 82.

[233] Linder, *supra* note 216, at 196; *see, e.g.*, Sec'y of Labor v. Griffin & Brand of McAllen, Inc., No. 14801, 1978 WL 7060, at *2 (O.S.H.R.C. June 9, 1978); Sec'y v. James E. Roberts Co., Nos. 103 & 118, 1974 WL 4056, at *2 (O.S.H.R.C. Apr. 16, 1974).

[234] *See Griffin & Brand*, 1978 WL 7060, at *2; *James E. Roberts Co.*, 1974 WL 4056, at *2.

[235] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 319 (1992).

[236] *Id.* at 323; *see also* 29 U.S.C. § 202(a) (2000) (aiming to ameliorate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers").

[237] *Darden*, 503 U.S. at 319; *see also* 29 U.S.C. § 1001b(c) (2000) (encouraging and regulating single-employer defined benefit pension plans).

[238] 29 U.S.C. § 1002(6).

[239] *Darden*, 503 U.S. at 323.

[240] *Id.* at 325–26.

[241] *See id.* at 323; *cf.* 29 U.S.C. § 1001b (identifying Congress's motivations for setting the goal of encouraging single-employer defined benefit pension plans).

The Court relied on a key distinction between the definition of "employee" found in ERISA and the FLSA.[242] The Court stated that the FLSA definition is broader than that found in ERISA.[243] Congress, the Court deduced, intended for the FLSA to include some workers who might not qualify as "employees" under agency law principals.[244] As a result, outside a specific FLSA context, the economic realities test was replaced by a return to the common law of agency analysis.[245]

By returning to the common law analysis, *Darden* rendered the statutory purpose of all federal workplace regulations, except the FLSA, irrelevant, while elevating the common law's emphasis on control of a worker's daily workplace activities to that of a major consideration in the employment status calculus.[246] Today, fourteen years after *Darden*, the Court's emphasis on control ostensibly functions as a "principal guidepost" of statutory interpretation for the OSHRC.[247] Absent an express statutory direction to do otherwise,[248] courts are to turn to the principals articulated in the *Restatement (Second) of Agency* which emphasize the extent of the control that the "master" may exercise over the work details.[249]

B. *Conflict Within the OSHRC*

While the contemporary OSHRC has clearly stated that *Darden* guides its determinations of employment status, Commission decisions reached since *Darden* sometimes use *Darden*'s reformulated common law test and at other times use the economic realities tests.[250] For example, in *Secretary of Labor v. Froedtert Memorial Lutheran Hospital* (*Froed-*

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[242] *See Darden*, 503 U.S. at 326; *see also* 29 U.S.C. § 1002(6) (defining, for purposes of ERISA, "employee" as "any individual employed by an employer"); *id.* § 203(e) (defining, for purposes of the FLSA, "employee" as "any individual employed by an employer," but then going on to list a long series of exceptions to this definition); *id.* § 203(g) (defining "employ" for purposes of the FLSA as "to suffer or permit to work").

[243] *Darden*, 503 U.S. at 326; *see* 29 U.S.C. § 203(e) (providing the FLSA defintion of "employee"); *id.* § 1002(6) (providing the ERISA definition of "employee").

[244] *See* 29 U.S.C. § 203(e); *Darden*, 503 U.S. at 326. The Court reasoned that the FLSA defined "'employ' expansively to mean 'suffer or permit to work,'" while ERISA did not. *See* 29 U.S.C. § 203(g); *Darden*, 503 U.S. at 326.

[245] *See Darden*, 503 U.S. at 324.

[246] *See* Linder, *supra* note 216, at 196.

[247] *See Froedtert II*, No. 97–1839, 2004 WL 2308763, at *7 (O.S.H.R.C. Jan. 15, 2004).

[248] *See Darden*, 503 U.S. at 325–26; Carlson, *supra* note 36, at 671.

[249] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958).

[250] *See Froedtert I*, No. 97–1839, 1999 WL 503823, at *7 (O.S.H.R.C.A.L.J. July 1, 1999); Sec'y of Labor v. S. Scrap Materials Co., No. 94–3393, 1997 WL 735352, at *6 (O.S.H.R.C.A.L.J. Nov. 24, 1997).

tert I), a 1999 decision involving a Wisconsin hospital cited for allegedly violating reporting standards for worker injuries, the OSHRC explicitly determined that employment status should be interpreted under common law principals.[251] The hospital challenged the citation claiming it was improper because the alleged violation concerned temporary workers rather than legal employees.[252] There was no dispute that the workers were acquired through two THFs.[253] In applying the common law principals, the Commission's analysis emphasized that an employer is one "who has control over the work environment such that abatement of hazards can be obtained."[254] The OSHRC took into account that the hospital supplied protective equipment, uniforms, tools, and supplies to the temporary workers, in addition to controlling their day-to-day activities.[255] It also considered that the temporary workers performed all their work on the hospital's premises.[256] In the end, the Commission determined that the hospital was in control of the workplace, therefore it was responsible for complying with OSHA with regard to the temporary workers.[257]

Five years later, the OSHRC reiterated the common law principals when the same hospital again challenged a determination that temporary workers were employees under the common law.[258] The hospital admitted to controlling the on-site activities performed by the temporary workers, as the OSHRC found in *Froedtert I*, but argued that "its lack of authority to hire, fire, discipline and pay precluded it from being the temps' employer."[259] Using the common law test, the Commission took into account that the hospital was able to request that the THF replace or remove a particular temporary worker.[260] Though the OSHRC acknowledged that the hospital "did not directly control all aspects" of the temporary workers' assignment or working conditions, it found that, for purposes of OSHA, the workers were employees of the hospital.[261]

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[251] *See Froedtert I*, 1999 WL 503823, at *3, *4.
[252] *See id.* at *2.
[253] *See id.*
[254] *Id.* at *3.
[255] *Id.* at *9.
[256] *Froedtert I*, 1999 WL 503823, at *9.
[257] *Id.*
[258] *See Froedtert II*, No. 97–1839, 2004 WL 2308763, at *1 (O.S.H.R.C. Jan. 15, 2004).
[259] *Id.* at *4.
[260] *Id.* at *6, *2.
[261] *Id.* at *9.

Yet in a separate case, *Secretary of Labor v. Southern Scrap Materials Co.*, decided after *Darden*, the OSHRC elected not to use the *Darden* analysis; instead, it relied on the economic realities test that *Darden* seemingly overruled for OSHA purposes.[262] In this case, a Louisiana scrap metal processing plant was cited for several OSHA violations.[263] The plant contended that the "affected employee" referred to in the citation was employed by a THF rather than by the plant.[264] As part of its economic realities test consideration, the Commission took into account the worker's perception of who constituted his employer; whether the plant had the power or responsibility to control the worker, including the power to fire, hire or modify the worker's employment conditions; whether the worker's ability to increase his wage depended on efficiency rather than initiative, judgment, or foresight; and how the worker's wages were established.[265] The "key factor," the Commission determined, was "the right to control the work."[266] The OSHRC then considered that the plant assigned the worker to the job; provided training; set work hours; provided tools or equipment, including safety equipment; supervised the work; controlled the working conditions; and paid the THF for the worker's service.[267] The Commission found that the temporary worker was indeed the plant's employee under OSHA.[268]

The plant presented a separate challenge to the citation based on its relationship to temporary workers provided by a separate THF.[269] The THF, an independent contractor, provided temporary workers hired to torch cut scrap metal on the plant's property.[270] The THF had an on-site supervisor; paid the workers an hourly wage; furnished the workers with rented housing; provided all equipment; was paid by the plant by the ton of scrap metal that was torch cut; was in the business of providing torch cutting services to scrap yards; was responsible for hiring, firing, and paying workers their wages; and set working

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[262] Sec'y of Labor v. S. Scrap Materials Co., No. 94–3393, 1997 WL 735352, at *6 (O.S.H.R.C.A.L.J. Nov. 24, 1997); *see* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992).

[263] *S. Scrap Materials Co.*, 1997 WL 735352, at *1.

[264] *Id.* at *6.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *S. Scrap Materials Co.*, 1997 WL 735352, at *7.

[269] *See id.* at *11.

[270] *Id.*

conditions.[271] For its part, the plant provided workers with respirators and some safety training, and had the power to stop work if the work was unsatisfactory or unsafe.[272] The Commission determined that temporary workers provided by this THF were not employees of the plant because the plant did not exercise sufficient control over the work they performed.[273]

Scrap Materials and the *Froedtert* decisions illustrate the manipulability inherent in the existing employment-status tests.[274] Indeed, neither the economic realities nor *Darden* tests provide an employment-status interpretation any more informative or predictable than the criteria previously criticized by courts.[275] On the contrary, these cases illustrate the ambiguous nature of the status tests by leaving open the question of how much control a user firm must wield over a temporary worker in order to be legally classified as her employer for purposes of OSHA liability.[276] Statutory ambiguity merely reinforces the democratic deficit that exists between temporary workers and THFs because many temporary workers are low-skilled laborers who have little bargaining power in comparison to user firms.[277]

C. *Adopting a Purposive Interpretation*

To resolve statutory ambiguity in applying OSHA, the Act should be interpreted so as to fulfill "the objectives Congress sought to achieve through this legislation" by applying a purposive approach.[278] A purposive approach ensures that the statute's goals are achieved, rather than merely applied formalistically or mechanically.[279] Use of a purposive approach requires measurement of the success of interpre-

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[271] *See id.* at *11–12.

[272] *Id.* at *12.

[273] *See S. Scrap Materials Co.*, 1997 WL 735352, at *12.

[274] *See Froedtert II*, No. 97–1839, 2004 WL 2308763, at *9 (O.S.H.R.C. Jan. 15, 2004); *Froedtert I*, No. 97–1839, 1999 WL 503823, at *9 (O.S.H.R.C.A.L.J. July 1, 1999); *S. Scrap Materials Co.*, 1997 WL 735352, at *12 (O.S.H.R.C.A.L.J. Nov. 24, 1997); Befort, *supra* note 13, at 369.

[275] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326–27 (1992); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974).

[276] *See Froedtert II*, 2004 WL 2308763, at *9; *Froedtert I*, 1999 WL 503823, at *9; *S. Scrap Materials Co.*, 1997 WL 735352, at *12.

[277] *See* Davidov, *supra* note 39, at 381; *see also* STONE, *supra* note 14, at 68 (noting that temporary work is characterized by power relations that favor employers).

[278] Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974); *see* Canape v. Colo. Comp. Ins. Auth., 897 P.2d 762, 765 (Colo. 1995); Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n, 531 F.2d 451, 458 (10th Cir. 1976).

[279] *See* Davidov, *supra* note 39, at 372.

tations of employment status by the degree to which they effectuate Congress's intent to protect all workers.[280]

Interpreting OSHA purposively is particularly appropriate because of the statute's textual explanation of its goals.[281] In devising the Act, Congress embedded in the statutory text its motivations in enacting the law and its intended goal: "The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."[282] Importantly, the stated purpose identifies "personal injuries and illnesses arising out of work situations" as the problem that OSHA is intended to rectify.[283] Congress did not state nor even suggest that "personal injuries and illnesses arising out of work situations" were only detrimental to the nation's economy when they occurred to particular types of workers.[284] On the contrary, the statute clearly expresses a congressional finding that such injuries and illnesses are economically detrimental whenever they occur because they adversely impact interstate commerce.[285] Furthermore, while the Senate explicitly addressed injuries and illnesses prevalent in various industries, it did not discuss the employment status of the injured or ill workers it intended OSHA to cover.[286] The only limitation included within the statutory purpose is that the injury or illness must arise from engagement in a "work situation."[287] Consequently, all individuals who are injured or become ill from a work situation fall within the purview of the statute's purpose as contemplated by the Senate and explicitly stated in its text.[288]

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[280] *See* 29 U.S.C. § 651(a) (2000).

[281] *See id.*

[282] *Id.* The Senate Report attached to OSHA states that OSHA's purpose is "to reduce the number and severity of work-related injuries and illnesses which . . . are resulting in ever-increasing human misery and economic loss." S. REP. NO. 91-1282, at 5177 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5177, 5177. The Senate noted that in the four years leading to OSHA's enactment more people in the USA were killed at work than in the Vietnam War, and at least 2.2 million people were disabled at work. *Id.* at 5178.

[283] 29 U.S.C. § 651(a).

[284] *See id.*

[285] *See id. See generally* S. REP. NO. 91-1282, at 5179 (discussing such injuries and illnesses as lead and mercury poisoning, respiratory disease, and asbestosis as adversely impacting interstate commerce).

[286] *See generally* S. REP. NO. 91-1282 (making no reference to employment status).

[287] *See* 29 U.S.C. § 651(a).

[288] *See id.*; *supra* note 286 and accompanying parenthetical.

In contrast to their narrow interpretation of employee status, courts have historically applied OSHA's provisions in accordance with the statute's broad purpose.[289] In 1999, the Court of Appeals for the Tenth Circuit decided that OSHA "must be liberally construed" so as to effectuate its remedial purposes.[290] Prior to *Darden*, the Court of Appeals for the Second Circuit found that OSHA's "keystone" is "preventability" of workplace injuries or illnesses without regard to the employment status of the injured or ill worker.[291] Similarly, the OSHRC stated that OSHA's "design" is the "improvement of working conditions and the well-being of employees."[292] Notably, the OSHRC did not specify that working conditions should only improve for employees of the firm responsible for creating or controlling the conditions.[293]

A purposive interpretation of OSHA would reduce manipulability, protect workers regardless of employment status, and effectuate the congressional purpose.[294] Moreover, a purposive application of OSHA would expand the scope of the employment relationship so as to prevent employer manipulation of the appearances of control to avoid legal liability.[295] Such an interpretation would reverse the current course of anti-purposive interpretation that results in exposure of growing segments of the working population to the "unshielded rigors of the labor market."[296] It is important to recognize that the Court's decision in *Darden* to revitalize the common law principals did not erase OSHA's remedial nature.[297]

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[289] *See, e.g.*, Universal Constr. Co. v. Occupational Safety & Health Review Comm'n, 182 F.3d 726, 729 (10th Cir. 1999) (directing that OSHA should be liberally construed so as to effectuate the Act's remedial purpose); Brennan v. Underhill Constr. Corp., 513 F.2d 1032, 1039 (2nd Cir. 1975) (emphasizing that Congress's intent in enacting OSHA was to prevent workplace injuries or illness without regard to the employment status of the injured or ill worker); Sec'y of Labor v. Griffin & Brand of McAllen, Inc., No. 14801, 1978 WL 7060, at *5 (O.S.H.R.C. June 9, 1978) (noting that OSHA's purpose is to promote the safety and health of workers, therefore it should be defined in light of the statutory context rather than given a technical or narrow construction).

[290] *See Universal Constr. Co.*, 182 F.3d at 729.

[291] *See Brennan*, 513 F.2d at 1039.

[292] *See Griffin & Brand*, 1978 WL 7060, at *5.

[293] *See id.*

[294] *See* 29 U.S.C. § 651(a) (2000); Linder, *supra* note 216, at 227, 230.

[295] *See* Linder, *supra* note 216, at 227.

[296] *See id.* at 230.

[297] 29 C.F.R. § 1977.5(a) (2005). *See generally* 29 U.S.C. § 660(a) (as part of the Act's remedial nature it ensures that aggrieved persons can seek relief through the federal courts). Indeed, *Darden*'s return to the common law test explicitly contravenes the Execu-

Conclusion

This Note has explored the intersection of OSHA, the nation's premier federal statute governing working conditions, and temporary workers.[298] In the last thirty years, the THI has become entrenched in the USA's labor landscape.[299] Today, THFs disproportionately employ women and people of color who are paid less than other workers.[300] Through prolonged legislative lobbying by the THI and key judicial interpretations, contemporary jurisprudence facilitates the THI's growing presence in the labor market.[301] Namely, by adopting a triangular employment relationship, contemporary legal practice artificially incentivizes the use of temporary workers.[302] As such, temporary workers operate outside the realm of regulatory protections where they represent less expensive labor options.[303]

The *Darden* analysis, as post-*Darden* OSHRC decisions indicate, leaves temporary workers laboring without a consistent and clearly definable interpretation of employment status.[304] *Darden*'s greatest risk to temporary workers is that they will be recognized as "employees" under OSHA, but only as employees of a THF and not the user firm.[305] Since THFs are not liable for the workplace safety conditions at the sites to which they assign temporary workers, workers are effectively left without workplace safety protections.[306] Such an approach realizes the Tenth Circuit's fear that "in restricting the work area in some artificial manner . . . the employer escapes responsibility for protecting an area [where people work]."[307]

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tive Branch's directive that employment relationships under OSHA should not be based on the common law. 29 C.F.R. § 1977.5(a).

[298] *See* 29 U.S.C. § 651.

[299] *See* Cohany et al., *supra* note 37, at 62.

[300] *See* Summers, *supra* note 10, at 510; Cohany et al., *supra* note 37, at 60 tbl.2.12; Carré, *supra* note 17, at 5.

[301] *See* Stone, *supra* note 14, at 68.

[302] *See* Befort, *supra* note 13, at 419.

[303] *See* Stone, *supra* note 14, at 69; Gonos, *supra* note 14, at 86.

[304] *See Froedtert II*, No. 97–1839, 2004 WL 2308763, at *9 (O.S.H.R.C. Jan. 15, 2004); *Froedtert I*, No. 97–1839, 1999 WL 503823, at *9 (O.S.H.R.C.A.L.J. July 1, 1999); Sec'y of Labor v. S. Scrap Materials Co., No. 94–3393, 1997 WL 735352, at *12 (O.S.H.R.C.A.L.J. Nov. 24, 1997).

[305] *See* Dau-Schmidt, *supra* note 15, at 883.

[306] *See* Sec'y of Labor v. Manpower Temp. Servs., Inc., No. 76–980, 1977 WL 6891, at *5 (O.S.H.R.C.A.L.J. Jan. 10, 1977).

[307] *See* Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n, 531 F.2d 451, 458 (10th Cir. 1976).

It is therefore necessary to reconceptualize the modern interpretation of employment status to fully effectuate the congressional purpose for enacting OSHA.[308] The statute simply does not envision a hierarchy of workplace protections determined by employment status.[309] Consequently, neither should courts.[310]

The rapid growth of the temporary workforce requires a reexamination of OSHA's workplace safety and health protections.[311] As an increasing number of the USA's workers find themselves laboring in the volatile temporary workforce, it is necessary for policymakers to strike a socially sanctioned balance of profits and workers' protections.[312] To embrace OSHA's goal of "assur[ing] so far as possible *every working man and woman* in the Nation safe and healthful working conditions," OSHA must occupy a prominent role in the regulation of working conditions for temporary workers.[313]

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[308] Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974); *see* 29 U.S.C. § 651(a) (2000).

[309] *See* 29 U.S.C. § 651(a).

[310] *See* Universal Constr. Co. v. Occupational Safety & Health Review Comm'n, 182 F.3d 726, 729 (10th Cir. 1999); Brennan v. Underhill Constr. Corp., 513 F.2d 1032, 1039 (2nd Cir. 1975).

[311] *See* 29 C.F.R. § 1910 (2006); Belous, *supra* note 36, at 865 tbl.1.

[312] *See* Befort, *supra* note 13, at 422.

[313] *See* 29 U.S.C. § 651(b) (2000) (emphasis added).