

# **A Flexible Workforce:**

**The changing face  
and the changing pace  
of today's worker**

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**an employer perspective**



**AMERICAN BENEFITS  
COUNCIL**

## ACKNOWLEDGEMENTS

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## EXECUTIVE SUMMARY

Flexible work arrangements are an important part of today's employment marketplace. They accommodate a wide range of practices and lifestyles, including temporary work, employee leasing, self-employment, contracting, home-based work and part-time work. A large majority of employers use some form of nontraditional staffing arrangement. They do so in order to meet the demands of business and workers.

Flexible work arrangements allow companies to more efficiently meet their production needs; thereby helping them to more effectively compete in an uncertain global economy. Flexible work arrangements also help to meet the diversity and changing demographics of the workforce. They allow people to be part of the workforce regardless of their family and household characteristics. Often, such arrangements allow workers to have flexibility while often receiving more compensation up front.

### Why Flexible Workforce Arrangements?

A significant portion of the flexible workforce prefers such arrangements so that they can attend school or meet other personal obligations. Often, employers must offer nontraditional employment arrangements to attract valuable workers.

Employers use flexible workers for a variety of other legitimate reasons. For example, a company may staff to a core level, i.e., hire the number of full-time workers the company knows it will need at all times — and then supplement that employee base with flexible

workers depending on production demands — instead of a continuous cycle of lay-offs and new hiring. A related reason is to obtain the expertise of a particular type of worker when needed.

### Development, Structure and Demographics of the Flexible Workforce

The flexible workforce developed primarily out of the emergence of the “knowledge worker,” individuals with expertise in intellectual or technical areas who are not tied to a particular place of work. In addition, the increase in women entering the workforce, and the prevalence of advanced, post-secondary educational pursuits, created further needs for employment on nontraditional terms. The relative size of the flexible workforce has remained stable in recent years, but some discrete segments, such as temporary agency employees, have grown.

Though the number of temporary agency workers has increased, it has not reached the point of becoming a significant percentage of the total workforce. In addition, temporary workers typically work on short-term assignments and remain temporary workers for less than a year. Barely one percent of such workers, aged 16 to 24 (an age cohort scrutinized by critics of flexible work), spend more than 24 months working in that capacity. In addition, many of the temporary workers that fall within that age category have postponed their entry into the traditional workforce for educational purposes. Temporary work is likely a transitional phase in a worker's life.

### Employee Benefits and Flexible Workers

The perceived disparity between the employee benefit levels of flexible versus traditional workers is lessened when one considers that many flexible workers are really self-employed, and that many other workers have health care coverage from other sources. It is important to note also that some employers that do not offer health care coverage to flexible workers do not offer coverage to any of their employees. Others offer coverage that is declined by the worker because he or she is otherwise covered or does not want to, or cannot, contribute to the cost.

Many of the reasons for the lower level of participation in pension plans among flexible workers are the same as for participation in health plans. The more skilled flexible workers, such as independent contractors and other self-employed workers, tend to do their own retirement planning. Other such workers may not be on the job long enough to qualify for a particular employer's pension plan or simply may choose not to participate, in favor of receiving higher current income.

### Current Legal Framework for Worker Classification

The determination that a worker is an employee has implications in four major areas of the law: employment taxes, benefit plan participation, Internal Revenue Service (IRS) qualification of benefit plans, and other laws relating to employment standards such as wages, safety, and discrimination.

If a worker is properly classified as an employee, the employer is responsible for income tax withholding and Social Security, Medicare, and unemployment taxes. For these purposes,

the term "employee" is defined with reference to its common law meaning, which is based on the facts and circumstances, but primarily considers the control that the employer has a right to exercise over the worker. Though there are ameliorating factors such as a settlement program and a safe harbor, the dynamics of the workplace make it difficult to rely on common law principles to avoid retroactive liability.

The classification of a worker as an employee is also important for purposes of eligibility for participation in employee benefit plans. While only plan participants have standing to bring a claim for benefits under the Employee Retirement Income Security Act (ERISA), the term "participant" is broadly defined as an employee or former employee who may become eligible to receive a plan benefit.

In the benefit plan context, plan terms generally govern eligibility for benefits and may restrict participation to a particular subset of employees. Thus, even though an individual may have standing to sue, he or she may not be successful in a claim for benefits. The unfavorable outcome in the widely publicized [Vizcaino v. Microsoft Corporation](#) case underscored the importance of plan terms and has led to widespread plan amendments to more carefully delineate eligibility provisions.

For purposes of the tax-qualified status of employee benefit plans, the question of worker classification is a double-edged sword. On the one hand, benefit plans must be maintained for the exclusive benefit of employees, i.e., plans generally are not permitted to cover independent contractors or workers that are employees of organizations other than the plan sponsor or its affiliates. On the other hand, under the IRS

benefit plans nondiscrimination rules, plans must cover a certain proportion of rank-and-file employees relative to highly compensated employees. If a certain type of worker is reclassified contrary to the employer's classification, the plan could violate these rules.

The classification of a worker raises a number of additional issues involving compliance with other employment-related laws. For example, if an employer has a threshold number of employees, the employer will be subject to the federal laws on age, disability, race and gender discrimination.

### **Current Issues and Recommendations for Change**

For U.S. companies to be competitive in the global marketplace, to keep our economy strong, and to maintain desired employment flexibility, policymakers should foster the changes in workforce and compensation structure that are currently taking place.

In the absence of a "bright line" definition of "employee," the consequences for misclassification of workers can be harsh. The ability of employers to establish their own guidelines for participation in employee benefit programs should be preserved. The IRS should issue precedential guidance for plan language regarding eligibility.

While not all flexible workers desire access to benefits, those that do should have more opportunities to obtain them. With respect to health care coverage, the American Benefits Council (the Council) recommends consideration of these measures: (1) analyze the impact on the employer provided health care system of expanded tax incentives for the purchase of

health insurance by individuals; (2) restrict state laws that have the effect of increasing the cost of health care; and (3) better educate workers regarding the deductibility of individual health insurance costs and the availability of coverage through state-based health programs. The Council also supports the passage of legislation to permit professional employer organizations to be recognized as the worker's employer for purposes of providing benefit plan coverage to their employees.

The Council also supports the following approaches to encourage retirement security: (1) consider the creation of a prototype model (similar to a 403(b) plan) to which workers and employers could contribute on a voluntary basis; (2) eliminate the provision of employee benefits as a factor from the current law determination of whether a worker is an "employee"; and (3) expand tax incentives to encourage flexible workers to create and contribute to retirement vehicles.

An equally challenging transformation of the American workforce can be expected in the near future. Demographers anticipate a continuing trend toward greater gender and racial/ethnic diversification. In addition, these workers will have greater diversity in their family and household characteristics than ever before, as well as differing educational and training needs. In addition, employers will continue to be challenged by recruitment and retention issues posed by a shortage of skilled workers. Employers will have to devote greater attention to meeting the needs and the desires of their workers with respect to benefits and compensation. Flexible work arrangements are a critically important tool for employers in meeting these challenges and should be strongly encouraged.

## INTRODUCTION

Flexible work arrangements are an important part of today's employment marketplace. Eighty percent of employers use some form of nontraditional staffing arrangement, and many use more than one.<sup>1</sup> These flexible work arrangements take many forms, and are beneficial to workers, employers, and the overall economy. They provide flexibility for workers to engage in the types and ways of work they desire, and flexibility for employers to design their workforces so that they can continue to meet the demands of a global marketplace.

**Today, 80 percent of employers use some form of nontraditional staffing arrangement, and many use more than one.**

The nature of the United States' workforce has changed significantly over the past 50 years, particularly with respect to demographics (a significant increase in women and members of racial and ethnic minorities)

and the shift in employment to the service sector. Many of today's workers have numerous options regarding how, when, and where they work. Employers must provide alternatives that meet workers' demands in order to recruit and retain skilled workers. At the same time, flexible work arrangements allow American companies to more successfully compete with global competitors.

An equally challenging workforce transformation will take place in the near future. In addition to the continuing trend toward greater gender and racial and ethnic diversity, two less well-known demographic trends will further

diversify the workplace. Specifically, there will be more diversity in workers' ages and with regard to workers' household and family characteristics. Both will require increased attention to what workers need and want in the way of benefits, as well as how compensation packages are designed to attract, retain and manage the workforce of the future.<sup>2</sup>

In spite of the many advantages of flexible arrangements for workers, employers, and the economy as a whole, some have challenged the purpose of these arrangements, arguing that they are inappropriately used to avoid the costs associated with traditional workers. For example, there has been concern among some policymakers, fueled in part by exaggeration by advocacy groups and sensationalization by the media, that growth in the number of flexible workers has resulted in more jobs paying lower wages and providing fewer employee benefits. Some express concern that such jobs are largely held by younger workers, who do not have the bargaining clout to demand higher wages and benefits. Often, these concerns are accompanied by proposals that would involve sweeping changes that could adversely affect a broad range of flexible work arrangements.

The facts show that the size of the overall flexible workforce has remained fairly stable since the mid-90's, when statistics on this element of the workforce were first compiled. Although significant growth has occurred in the number of temporary agency workers, that segment of the total workforce is extremely small. Further, young workers generally work in temporary agency jobs for a relatively short period, and researchers have found a link between temporary help employment and low unemployment rates, suggesting that temporary

help employment serves to match employers and employees and reduce unemployment.<sup>3</sup>

There are a myriad of flexible work arrangements, and no one set of rules can be expected to adequately deal with all types of arrangements. Different needs and goals of the parties involved lead to the creation of appropriately tailored work arrangements. Such differences also highlight the critical importance of appropriate and flexible public policies. The purpose of this policy paper is to bring perspective and balance to the discussion of flexible workers and to present the American Benefits Council's (the Council) recommendations on policy issues in this area. The Council believes employers and workers must retain the flexibility to design their employment relationships to the advantage of both groups.

In this paper, the Council's primary focus is on educating and reaffirming that the diversity and resiliency of the flexible workforce should not be undermined by efforts to mandate a one-size-fits-all regulatory regime. Those types of changes could have unintended and counter-productive economic consequences. The Council's recommendations would involve appropriate improvements consistent with that overriding objective.

The following key issues will be addressed:

- ▶ Defining the Flexible Workforce
- ▶ Why Flexible Work Arrangements?
- ▶ Current Structure and Demographics of the Flexible Workforce
- ▶ Employee Benefits and Flexible Workers
- ▶ The Current Legal Framework for Worker Classification and Employee Benefits
- ▶ Recommendations

## DEFINING THE FLEXIBLE WORKFORCE

Flexible work arrangements accommodate a wide range of practices and lifestyles, such as temporary work, employee leasing, self-employment, contracting, home-based work, and part-time work.<sup>4</sup> Flexible work arrangements differ from traditional work arrangements in a number of ways.

In contrast to traditional employment, a typical company's flexible work program allows for variation in the time worked per day or week, the tenure of the employment, or the place of work performance. In addition, companies often hire individuals or other companies to perform specific work on a contract basis.

A study by the Employee Benefits Research Institute describes flexible work arrangements as differing from traditional arrangements in three respects:

- ▶ **Time** – something other than an eight hour, five-day workweek,
- ▶ **Permanency** – something other than a permanent relationship between the employee and the employer, or
- ▶ **Social Contract** – something different from the traditional reciprocal rights, protections and obligations between the worker and the employer (Christensen and Murphee, 1988).<sup>5</sup>

The mix of these variables leads to a wide variety of possible flexible work options suited to meet the needs of the particular situation, individuals, and companies involved. Significantly, these options also evolve over time. For example, the notion of permanence has changed

dramatically over time for all types of workers, including “traditional” employees. Over the past few decades, the notion of a “job for life” has changed to “employment at will” for all employees.<sup>6</sup>

It is important to understand the terms used to describe the flexible workforce to better evaluate the needs of that workforce and the proposals addressing those needs. Sometimes, the flexible workforce is referred to using the terms “contingent workforce” or “workers in alternative work arrangements.” This can be confusing for a number of reasons.

**Flexible work provides valuable opportunities to workers, while allowing employers to provide a stable work environment and limit unexpected layoffs.**

The term “contingent worker” is not always accurately descriptive. For example, a part-time worker is not by definition more or less contingent than another worker simply because he or she is part-time. Also, distinctions can be drawn between a worker who is performing work for a

company contingent upon the occurrence of an event, such as completion of a project, and workers who maintain permanent alternative work arrangements. In other cases, certain types of nontraditional work arrangements, including arrangements involving professional employer organizations (PEOs), are included in discussions even though those arrangements are neither contingent nor flexible, *per se*.<sup>7</sup>

Until recently, there were no systematic measuring tools or common definitions used to describe nontraditional workers. In 1995, the Bureau of Labor Statistics (BLS) conducted the

first supplemental questionnaire to the Current Population Survey relating to these nontraditional workers.<sup>8</sup> This offered the first attempt at a comprehensive and unified measure of nontraditional work arrangements in the United States. Subsequent reports have used the BLS survey, sometimes modifying it to address specific types of nontraditional workers.<sup>9</sup>

For purposes of this paper the term “flexible workforce” will be used to refer to the vast array of nontraditional work arrangements that exist today. Although referred to by a single term, the variations in the types of flexible workers should not be discounted. It is this variation that gives the workforce its name and underscores the importance of flexibility in public policy addressing its needs.

### WHY FLEXIBLE WORKFORCE ARRANGEMENTS?

The many different types of flexible workforce arrangements are important to both workers and employers. Flexible work provides valuable opportunities to workers while allowing employers to provide a stable work environment and limit unexpected layoffs. Use of these arrangements is often necessary to meet customer needs, and seasonal or other demand fluctuations. These arrangements also help employers and workers acquire expertise and needed skills. Finally, and critically important, flexible work improves the ability of employers to attract and retain workers.

The following discussion is intended to describe more fully the value of flexible workforce arrangements, provide the reader with some insight as to the reasons why companies use flexible work arrangements, describe

why many workers prefer these arrangements, and explain the role the marketplace plays in regulating the use of such arrangements.

### As a Business Strategy

In a frequently cited Conference Board survey, over half the companies surveyed reported that using flexible workers is part of a strategic business plan.<sup>10</sup> This strategy is made all the more urgent due to the unpredictable conditions in the U.S. economy and the global marketplace and the need to compete in that marketplace. This practical approach to the workforce became significantly more commonplace during and after the massive downsizing experienced in the 1980s and 90s.<sup>11</sup>

Companies committed to providing flexible workforce arrangements make that commitment based on the belief that a more flexible workforce is essential to the success of the business.<sup>12</sup> As such, companies continually reevaluate their workforce to find the optimum balance between a core workforce and a flexible workforce. Many companies utilize outside sources to determine their workforce balance. Numerous consulting firms provide this type of analysis and help companies benchmark their practices against the “best practices” of their competitors.

For example, one Council member company evaluates its workforce on a job-by-job basis, determining which jobs necessitate institutional knowledge and training and which are more appropriately handled by flexible workers. An electrician working on a product of the company would likely need institutional knowledge and training in order to meet the job's objectives, while an electrician doing maintenance work on the lighting system in a plant

would be less likely to need such knowledge and training. In addition, a worker who is responsible on a regular basis for ordering supplies necessary for production would need institutional knowledge, while another worker without such responsibility may not need institutional knowledge.

At the same time, there are possible drawbacks to allowing too much of a company's workforce to be made up of flexible workers. Companies evaluate those drawbacks regularly. Hidden costs associated with flexible workers and budgets often do not

fully account for the use of such workers. There is often high turnover and lack of familiarity with the company and its policies. Companies must determine how critical the job is to the business of the company and then balance the pros and cons of filling the job with a traditional worker versus a flexible worker.

Sometimes, the job market may work against a company's preferred strategy: companies are always competing for workers, and in some industries, the only way jobs can be filled is by hiring workers who demand flexibility. Even where the worker desires a more traditional arrangement, the worker may choose to remain a flexible worker because the particular traditional jobs that are available may not be as desirable as the job they hold.<sup>13</sup> Clearly employers do not make staffing decisions randomly and the flexible workforce does not grow unchecked.

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### Meeting Consumer Demand

In some industries, the demand for products and/or services is seasonal. Such industries require a larger workforce during high demand periods than during the off-season. The retail industry is one example. Retailers need more staff to meet the demand during the holiday season. Manufacturing is another example. As the demand for lawn and garden equipment picks up each spring, manufacturers produce additional inventory in anticipation of the demand.<sup>14</sup>

Similarly, flexible work is necessary in some industries to meet the daily scheduling needs of customers. Restaurants and retail stores generally experience an increase in traffic at night and on weekends, so they increase staff at those times.

**Many of today's workers prefer to move between projects and jobs rather than be tied to a single job.**

In each of these cases the marketplace drives the need for workers and the employment practices of employers. Flexible workers hired to meet increased demand gain valuable opportunities, whether they are picking up extra earnings for

additional work, filling a gap period between jobs, meeting personal obligations through a flexible work arrangement or are just entering the workforce.

### Attracting and Retaining Quality Workers Requires Flexibility

Many of today's workers prefer to move between projects and jobs rather than be tied to a single job. Council members report that this

desire is particularly prevalent within the technology, engineering and health care professions.

Over the past few decades, tremendous advances in technology have aided the emergence and growing importance of the "knowledge worker." The knowledge worker is not tied to any particular place of employment (unlike the agricultural or manufacturing worker) because he or she owns the tools of production (knowledge rather than land or manufacturing equipment).<sup>15</sup>

Demographics and global competition have resulted in employers vigorously competing for a reduced number of workers who increasingly demand greater flexibility.<sup>16</sup> This is true despite the recent economic downturn. With an increasing number of workers leaving the workforce as baby boomers reach retirement age and a shrinking pool of entrants into the workforce, the softening of the economy has not resulted in enough workers becoming available to significantly reduce the overall competition for skilled workers.<sup>17</sup>

It is not unusual for companies to utilize flexible workers in available positions while recruiting traditional workers. In many instances, the flexible worker is recruited for that position or another available traditional position with the company.<sup>18</sup>

Typically, flexibility is provided through part-time work, flexible hours, temporary/project based work and telecommuting. Flexible work arrangements allow workers to control their schedules, meet familial and other personal obligations and gain work experience. A recent study asked why workers took contingent

work. A majority of workers surveyed cited personal reasons. Among the reasons cited are those in the following chart:

Reasons Cited for Assuming Contingent Work <sup>19</sup>	
Attending school or other training	36.3%
Enjoy the flexibility of the schedule	19.6%
Nature of the work (e.g., seasonal)	9.5%
Have family/personal obligations	5.4%
Want to work for a short period of time	4.3%
To obtain experience/training	4.0%
Other personal reasons	13.3%

### Acquiring Expertise

Flexible workforce arrangements allow companies to acquire short-term expertise. Individuals with specific technical expertise are often hired on a temporary basis to complete a particular project or to staff start-up projects that may or may not succeed. Often companies do not have the resources or expertise to train workers in the skills they need. Staffing firms have addressed this skills shortage by providing training programs and arranging access to trained workers. Significantly, these arrangements also can help workers acquire additional expertise, experience and skills. These temporary arrangements often develop into full-time permanent positions.<sup>20</sup>

### Filling Temporary Gaps in the Workforce

Flexible workforce arrangements are also used

to preserve employee positions while employees are on leave. It may not be appropriate to permanently replace employees who are on leave for an extended period. Replacement costs are high; experience and institutional knowledge are hard to replace, particularly in a competitive labor market; and many forms of leave are legally protected, whereby the position must be preserved for the employee's return. Use of flexible workers to fill gaps in the company's workforce is therefore practical, efficient, and necessary to meet legally imposed requirements (such as the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act).

### Providing Quality Service for the Company's Non-Core Activities

Many companies use long-term flexible workers to provide various services that are not integral to the companies' core business products and services. These flexible work arrangements cover a range of services including (but not limited to) legal, financial, accounting, cafeteria, landscaping and warehousing services.

The particular type of flexible worker providing these services also varies — from self-employed workers (attorneys and accountants) to contract firm workers (cafeteria workers and gardeners). Companies turn to these specialists to provide a level of service they cannot effectively provide internally.

### Providing Jobs in A Weakened Economy

Flexible workers have been used at increased rates when the economy is recovering from a recession.<sup>21</sup> During such uncertain economic times, flexible work arrangements allow

companies to add much-needed jobs, yet still manage the risk that economic recovery will falter. After two of the most recent recessions, 1981-82 and 1990-91, temporary employment in the United States grew by 15.6 percent and 18 percent respectively, compared with 3.5 percent and 1.8 percent growth in overall employment for the same periods.<sup>22</sup> Companies sometimes need to dramatically increase production during the period immediately following an economic recession, and temporary workers provide the means to do so.<sup>23</sup>

The availability of flexible workforce positions may be important to some workers during a recession as well as after one. Workers who have lost permanent positions through downsizing can turn to temporary staffing agencies or contract firms to re-enter the workforce more quickly and easily than if they were seeking another traditional permanent position.

### CURRENT STRUCTURE AND DEMOGRAPHICS OF THE FLEXIBLE WORKFORCE

The lack of consensus over what categories of workers should be considered flexible workers, coupled with the wide variation in the types of workers included in the various categories, makes data analysis difficult. This section provides background information from various studies exploring the current structure of the flexible workforce and its demographics, and further examines the need for flexibility due to the workforce's diversity.

The first step in understanding the structure of the flexible workforce is appreciating its size

relative to the total workforce. BLS surveys have found that, as a percentage of the total workforce, contingent workers represented 4.9 percent (in 1997) and 4.3 percent (in 1999), and workers in alternative work arrangements were 9.9 percent (in 1997) and 9.3 percent (in 1999) of the workforce.<sup>24</sup> Similarly, another 1995 BLS survey indicated that contingent workers accounted for between 2.2 percent and 4.9 percent of the labor force, and workers in alternative work arrangements accounted for 9.9 percent of total employment (i.e., 12.3 million workers in alternative work arrangements).<sup>25</sup>

The second step in understanding the structure of the flexible workforce is understanding the terms used to describe that workforce and the terms used to describe the various categories of flexible workers. The BLS defines "contingent workers" as those workers who "do not have an implicit or explicit contract for ongoing employment." By contrast, workers in alternative work arrangements are defined as those who identified themselves in the survey as independent contractors, on call workers, temporary help agency workers and workers provided by contract firms.

Not all of the workers who identified themselves as working in alternative arrangements are contingent workers by the BLS definition (they do not necessarily consider their employment to be of a finite nature). Therefore, contingent workers as defined by the BLS can be viewed as a subset of workers with alternative work arrangements.

The BLS surveys offer a comprehensive overview of the flexible workforce and are frequently used as the basis for defining the flexible workforce. However, some commenta-

tors argue that the BLS data omits some categories of flexible workers.<sup>26</sup> When these categories are combined with those workers in alternative work arrangements covered by the BLS survey, the portion of the workforce not engaged in full-time “regular” employment totals 31.9 percent.<sup>27</sup>

This statistic has been used to try to persuade policymakers that stringent rules need to be implemented to reduce the number of flexible workers or to require that minimum benefits be provided to flexible workers. This analysis is misleading and such use would hurt workers and employers by hindering their ability to negotiate arrangements that benefit everyone. In fact, the statistic refers to workers not engaged in regular full-time work and includes part-time workers and independent contractors who by definition must negotiate alternative work arrangements.

While the total numbers and percentages of flexible workers have remained fairly stable over recent years, certain segments of the flexible workforce (including temporary help) have experienced significant growth. As the number of workers hired through temporary help agencies has grown, so have the misconceptions about the relative size of this segment of the workforce and how long the workers stay in that segment.

The misconceptions about these workers can be corrected by looking at the statistics closely. Although the number of temporary help agency workers grew by 10 percent between 1995 and 1997 (and contract workers hired through agencies increased by 24 percent over the same period),<sup>28</sup> the total number of workers employed by temporary help agencies is still an

extremely small percentage of the total workforce, and even a small percentage of the flexible workforce.<sup>29</sup>

Moreover, most temporary help agency workers do not remain in their assignments for long periods of time.<sup>30</sup> In 1997, the median length of a temporary help assignment was 5.1 months.<sup>31</sup> Sixty-three percent worked in their assignments for less than six months, while only about 12 percent (approximately 150,000 workers) worked in their assignments for more than two years.<sup>32</sup>

Also, most temporary employees do not work as “temps” for long. In 1997, 54 percent of temporary employees worked in a temporary position for six months or less.<sup>33</sup> Only 14 percent (170,000 workers, or 0.1 percent of the total workforce) worked as “temps” for more than two years, and only six percent (70,000 workers) worked as “temps” for more than four years.<sup>34</sup> This tenure pattern has been found to be consistent over the past fifteen years.<sup>35</sup>

**The total number of workers employed by temporary employment agencies is still an extremely small percentage of the total workforce, and even of the flexible workforce.**

Critics have also focused on the disproportionate number of temporary help workers who are between the ages of 16 and 35. They assert that such temporary jobs hurt young worker’s long-term career prospects. The fact is, however, that most workers do not remain temporary help employees for periods of any appreciable length. In fact, barely one percent of temporary

help employees aged 16 to 24 spend more than 24 months working in that capacity.<sup>36</sup> By contrast, about 70 percent work as temps for six months or less.<sup>37</sup> Interestingly, older workers are more likely to remain as temporary workers for extended periods of time.<sup>38</sup> In fact, one of the most frequently cited reasons that employers use flexible workers is to utilize the expertise of retirees. Clearly, these statistics demonstrate that the temporary help segment of the flexible workforce is a small portion of the total workforce and most of the workers are not in that category for long.

### EMPLOYEE BENEFITS AND FLEXIBLE WORKERS

Criticism of flexible work arrangements has also focused on the provision (or lack thereof) of employee benefits to such workers.<sup>39</sup> On the surface, some data appear to show a significant disparity between the employee benefit levels of contingent versus noncontingent workers. For example, one commentator asserts that, according to the 1997 BLS data, only 13.6 percent of women and 11.6 percent of men in nontraditional jobs receive health insurance coverage from their employers.<sup>40</sup> Unfortunately, the data upon which the criticism is based has numerous flaws.

Several reasons explain why the figures cited above do not accurately reflect the real coverage picture. More than one third of those counted as working in nonstandard arrangements are independent contractors or otherwise self-employed. These persons generally are not (and may not legally be) covered under the client employer's plan, but may provide for their own coverage.<sup>41</sup> Flexible workers who are not self-

employed or independent contractors may receive health care coverage from a source other than their employers, such as through a spouse or parent.<sup>42</sup> Health care coverage from an alternative source is particularly prevalent among younger (ages 19 and under) and older (over age 65) flexible workers, who typically are either dependents of other employed individuals or, for older workers, receive Medicare.<sup>43</sup> Some of these workers who have coverage from other sources may choose to be part of the flexible workforce in order to receive a higher current wage.

It is true that most categories of flexible workers are less likely than traditional full-time workers to have health insurance through their own employer. However, Appendix A shows that, when insurance from other sources is considered, coverage for flexible workers significantly improves for all categories of such workers and compares much more favorably to coverage for standard full-time workers.<sup>44</sup>

More specifically, one study by the Employee Benefits Research Institute concludes that the majority of workers in all flexible work categories and age categories have health coverage from some source. The conclusions from this study are reflected in Appendix B, which identifies, by age group and category of worker, the level of coverage provided by employers versus the level of coverage provided from other sources. Although coverage in the temporary help category is lower, particularly for workers age 20 to 44, those employed in temporary help agency jobs represent only 1.0 percent of the BLS population (1.2 million workers in 1999); and those ages 20 to 44 constitute possibly as little as 0.5 percent of the working population (only 500,000 workers).<sup>45</sup>

<b>APPENDIX A: Percentage of Workers with Health Insurance<sup>46*</sup></b>						
<b>Contingent Workers (1995)</b>						
	All Workers	Estimate 1*	Estimate 2*	Estimate 3*		
<b>With Health Insurance</b>	81.6%	57.4%	58.3%	65.1%		
Own Employer	52.3	10.2	8.7	20.4		
Other Source	29.3	47.2	49.6	44.7		
<b>No Health Insurance</b>	15.8	40.6	39.7	32.2		
<b>Don't Know</b>	2.7	2.0	2.1	2.7		
<b>Contingent Workers (1997)</b>						
	All Workers	Estimate 1*	Estimate 2*	Estimate 3*		
<b>With Health Insurance</b>	81.7%	60.7%	59.3%	66.2%		
Own Employer	52.6	10.9	9.5	20.7		
Other Source	29.1	49.8	49.9	45.5		
<b>No Health Insurance</b>	15.4	37.6	38.4	30.9		
<b>Don't Know</b>	2.9	1.6	2.3	2.9		
<b>Workers with Alternative Work Arrangements (1995)</b>						
	Non-contingent Workers	Temporary Help Agency Workers	Independent Contractors	Workers Provided by Contract Firms	On-call Workers	Workers with Traditional Arrangements
<b>With Health Insurance</b>	82.4%	44.9%	72.7%	69.8%	63.8%	83.0%
Own Employer	53.9	5.7	3.0	42.5	16.9	57.2
Other Source	28.5	39.2	69.7	27.4	46.9	25.8
<b>No Health Insurance</b>	14.9	53.8	25.3	27.6	34.2	14.3
<b>Don't Know</b>	2.7	1.3	2.0	2.6	2.0	2.7
<b>Workers with Alternative Work Arrangements (1997)</b>						
	Non-contingent Workers	Temporary Help Agency Workers	Independent Contractors	Workers Provided by Contract Firms	On-call Workers	Workers with Traditional Arrangements
<b>With Health Insurance</b>	82.4%	46.5%	72.7%	82.0%	66.6%	83.0%
Own Employer	54.1	7.0	2.5	50.2	18.9	57.5
Other Source	28.3	39.5	70.2	31.8	47.7	25.6
<b>No Health Insurance</b>	14.6	49.9	24.7	16.6	30.5	14.0
<b>Don't Know</b>	2.9	3.7	2.6	1.4	2.9	3.0

\* Further details about these statistics are available in the endnotes section.

<b>APPENDIX B: Percentage of Workers with Health Insurance<sup>47*</sup></b>						
<b>By Age Group (1997)</b>						
Age group	All Workers	Contingent Workers (Estimate 3)	Temporary Help Agency Workers	Independent Contractors	Contract Firm Employees	BLS Survey On-call Workers
<b>16-19</b>						
Employer insurance	8.9%	5.3%	10.1%	3.6%	0.0%	7.3%
Other source	62.6	63.7	54.2	65.6	58.2	77.2
<b>Total</b>	<b>71.4</b>	<b>69.0</b>	<b>64.3</b>	<b>69.2</b>	<b>58.2</b>	<b>84.5</b>
<b>20-24</b>						
Employer insurance	38.3	10.9	2.3	6.9	54.8	14.3
Other source	26.6	53.2	27.9	44.9	24.4	43.8
<b>Total</b>	<b>64.9</b>	<b>64.1</b>	<b>30.2</b>	<b>51.9</b>	<b>79.3</b>	<b>58.1</b>
<b>25-34</b>						
Employer insurance	57.4	27.2	6.6	1.8	59.1	22.8
Other source	21.5	31.9	29.0	62.9	26.8	34.0
<b>Total</b>	<b>78.9</b>	<b>59.0</b>	<b>30.2</b>	<b>64.7</b>	<b>85.9</b>	<b>56.8</b>
<b>35-44</b>						
Employer insurance	58.4	25.6	9.0	3.1	46.8	23.3
Other source	26.2	37.2	37.7	67.8	29.1	40.7
<b>Total</b>	<b>84.6</b>	<b>62.8</b>	<b>46.7</b>	<b>70.9</b>	<b>76.0</b>	<b>63.8</b>
<b>45-54</b>						
Employer insurance	59.3	26.6	10.8	2.2	56.1	65.7
Other source	27.7	44.4	43.2	71.9	31.5	23.1
<b>Total</b>	<b>87.0</b>	<b>71.0</b>	<b>54.0</b>	<b>74.1</b>	<b>87.6</b>	<b>88.8</b>
<b>55-64</b>						
Employer insurance	53.9	27.6	4.6	1.6	35.0	60.8
Other source	34.2	54.4	73.1	77.1	49.8	28.7
<b>Total</b>	<b>88.1</b>	<b>81.9</b>	<b>77.7</b>	<b>78.8</b>	<b>84.8</b>	<b>89.5</b>
<b>65 and over</b>						
Employer insurance	23.0	12.6	0.0	3.3	12.2	4.5
Other source	68.5	76.9	100.0	88.4	78.4	82.9
<b>Total</b>	<b>91.5</b>	<b>89.5</b>	<b>100.0</b>	<b>91.7</b>	<b>90.6</b>	<b>87.4</b>

\* Further details about these statistics are available in the endnotes section.

In addition, the transitory and intermittent nature of temporary work, and the fact that many workers do not hold these positions very long, makes it difficult for agency temps to become eligible for employer-provided health insurance benefits.<sup>48</sup>

In fact, there are three basic reasons why some flexible workers do not have health insurance coverage through their employer:

- ▶ the worker's employer does not offer coverage to any of its employees,
- ▶ the worker is offered but declines coverage,<sup>49</sup> or
- ▶ the worker is not eligible for a plan that the employer is providing for other workers.<sup>50</sup>

With respect to the first reason, flexible workers are generally less likely than traditional workers to work for an employer that offers coverage but are significantly more likely to have such insurance from other sources.<sup>51</sup> In addition, when no other health insurance is available, the difference between the percentage of flexible workers not offered coverage through their employer and traditional workers not offered coverage through their employer is small.<sup>52</sup> With regard to the second reason, declination of coverage often depends on the availability of alternative coverage. However, where no other health insurance is available, cost becomes the primary reason for the refusal of coverage.<sup>53</sup> The third reason, ineligibility, is particularly applicable to temporary help workers, who are generally not employed by one particular employer (or are not temporary workers) long enough to qualify for health care coverage.

As with health care coverage, the provision of retirement benefits varies widely by both type

of worker and age. Differences exist in coverage rates between "traditional" workers and flexible workers. Retirement plan coverage rates vary among different types of flexible workers as well, from 4.6 percent of temporary help workers to 39.9 percent of contract firm workers.<sup>54</sup>

Workers in flexible work arrangements are less likely to work for employers that sponsor a plan and are less likely to be eligible to participate in the employer's plan.<sup>55</sup> more specifically, temporary help workers do not work for a client employer long enough to qualify for retirement plan coverage.<sup>56</sup> When eligible to participate, only about one quarter of temporary help workers choose to participate in the plan offered by the employer.

The reasons for lower pension eligibility and participation rates among temporary help workers are varied. Many young temporary help workers choose extra income in lieu of benefits,<sup>57</sup> possibly because retirement, in particular, seems too far off to warrant concern. Also, temporary help workers may have different expectations from their employment than traditional employees. Those who are looking for supplemental income, flexibility, an opportunity to "test out" different employers, or varied work assignments may not be as interested in a pension plan as those in permanent employment.<sup>58</sup>

**Workers in flexible work arrangements are less likely to work for employers that sponsor a retirement plan and are less likely to be eligible to participate in the employer's plan.**

Recent changes in individual retirement account rules will also expand retirement savings options for those who wish to save and are not eligible for an employment-based retirement plan. Thus, while the employment-based health and retirement plan coverage rates for segments of the flexible workforce are lower than the population as a whole, those disparities diminish when other factors are taken into account. In particular, the flexible worker often has access to health coverage elsewhere (e.g., through his or her spouse, Medicare, or another job) and may well also have access to tax-favored retirement savings vehicles.

### CURRENT LEGAL FRAMEWORK FOR WORKER CLASSIFICATION

The use of flexible work arrangements by businesses is set within the parameters of the legal requirements for, and restrictions on, flexible work arrangements. This section explores the current legal environment surrounding the use of flexible workers. In understanding the legal environment, there are two legal worker classifications: employee or independent contractor. This is in contrast to the general parlance of terms used by the business community, the media and others to describe flexible workers. **Whether a worker is an employee or an independent contractor has a host of legal implications for business organizations and the affected individuals. Among other things, whether a worker is an employee (or, in the case of third-party arrangements, which party is the “employer”) is relevant because it determines whether:**

- ▶ the employer must pay employment taxes on, and withhold federal and state income taxes from, amounts paid to the worker;

- ▶ the worker is entitled to participate in employee benefit plans;
- ▶ the worker must be accounted for in determining if the employer’s benefit plans cover a sufficient number of employees to satisfy the tax law requirements for favorable tax treatment; and
- ▶ the employer must comply with other employment-related laws, such as statutes regulating worker’s compensation, minimum wage, work place safety, and employment law nondiscrimination.

This section will highlight each area of law in which a worker’s classification is relevant and describe the consequences of classification as an employee. As discussed below, employers and workers generally use a “facts and circumstances” analysis to determine “employee” status.

Also, court decisions and government rulings applying various laws have identified the issues affecting employers and contingent workers. In general, courts and agencies recognize that employers should have relatively broad latitude within certain legal constraints to staff their businesses and to define which workers are or may be entitled to benefits.

#### Employment Tax

Under the Internal Revenue Code (the Code), a worker’s status as an employee or independent contractor must be known for federal employment tax purposes — specifically, income tax withholding and Social Security, Medicare, and unemployment taxes. Federal employment taxes (including the employer’s obligation to withhold on compensation) are imposed only on wages paid to employees. The Code defines the term “employee” for purposes of employ-

ment taxes as “any individual who under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.” (*IRC § 3121(d)(2)*.) According to the Internal Revenue Service (IRS) Manual:

Under the common law test, a worker is an employee if the person for whom he works has the right to direct and control him in the way he works both as to the final results and as to the details of when, where and how the work is to be done. The employer need not actually exercise control. It is sufficient that he has the right to do so. (*IRS Manual 5(10)43*.)

For purposes of applying the common law rules, the IRS has developed a list of 20 factors.<sup>59</sup> The IRS does not consider these factors a bright line test; rather, in a published ruling, the IRS states that the:

...degree of importance of each factor varies depending on the occupation and the actual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual in order for the individual to be classified as an employee). (*Rev. Rul. 87-41, 1987-1 C.B. 296*.)

Due to the practical difficulties in applying these criteria in individual cases, and the

financial penalties that can be retroactively imposed on employers whose classifications are successfully challenged by the IRS, businesses have urged Congress and the IRS to provide more certainty and give relief from retroactive IRS reclassification.

Congress provided a safe harbor in § 530 of the Revenue Act of 1978. Section 530 protects a business against the IRS retroactively reclassifying workers as employees, provided that the business:

- ▶ has consistently treated the workers (and similarly situated workers) as independent contractors;
- ▶ with respect to the compensation paid the workers, has complied with the Form 1099 reporting requirements for the tax year at issue; and
- ▶ had a reasonable basis for treating the workers as independent contractors. The Small Business Job Protection Act of 1996 made significant modifications to the independent contractor safe harbor provisions contained in § 530, including a shift in the burden of proof from the taxpayer to the government.

The IRS also has responded to business complaints about its overzealous efforts seeking to reclassify workers for employment tax purposes. In 1996, the IRS initiated a formalized, optional settlement program using standard agreements to settle employment tax audits involving worker classification issues. The Classified Settlement Program allows disputes to be settled under financial terms favorable to employers in exchange for the employer agreeing to prospectively reclassify the workers at issue and all others holding substantially similar positions.

In addition, the IRS prepared extensive new training materials for its agents, emphasizing that the factors under the common law tests may change over time as business relationships and work environments change. They put a gloss on the common law standards by grouping the rules into three categories of factors: behavioral control, financial control and the relationship of the parties.

The IRS guidelines also minimize the importance of certain factors (such as, for example, working on a part-time basis, specified hours of work, and whether or not the work is performed on the premises of the service recipient).

**The recent legislative proposals intended to simplify the independent contractor rules could, in some instances, make compliance more difficult.**

Notwithstanding the legislative and regulatory actions intended to ameliorate the harsh consequences of worker reclassification, the changing circumstances of the modern workplace make it difficult for many employers to apply the common law rules and

to protect themselves against retroactive penalties.

Some recent legislative proposals are intended to simplify the independent contractor rules but in some instances could make compliance more difficult. Other proposals would recognize contemporary staffing arrangements by authorizing qualified professional employer organizations to take responsibility for the payment of employment taxes for, and providing employee benefits to, worksite employees of unrelated clients where certain conditions are satisfied.

### Claims for Benefits under ERISA

Worker classification is also important in the Employee Retirement Income Security Act (ERISA) context because it affects whether a worker may bring a claim for benefits under an ERISA-covered plan, including both health and pension plans. Only a “participant or beneficiary” has standing to bring such a claim for benefits. (*ERISA* § 502(a)(1).) A “participant” is defined as an “employee or former employee of an employer . . . who may become eligible to receive a benefit” under a plan maintained by the employer. (*ERISA* § 3(7).)

The U.S. Supreme Court has adopted the common law test for determining “employee” status under ERISA:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (*Nationwide v. Darden*, 503 U.S. 318 (1992).)

The Court stressed that “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”

Even if a worker is deemed an “employee” under the common law Darden test, he or she is not automatically entitled to benefits. Plan terms may still properly exclude a worker, subject to certain limitations, as it may be competitively inappropriate to provide the same benefits to all workers. In this regard, ERISA generally prohibits a plan from conditioning eligibility on minimum age or service requirements beyond the later of age 21 or 1 year of service. (*ERISA* § 202(a)(1)(A); *Code* § 410(a)(1)(A).) Applicable regulations, however, specify that this requirement “does not preclude a plan from establishing conditions, other than conditions relating to age or service, which must be satisfied by plan participants,” including “that an employee be employed within a specified job classification.” (*Treas. Reg.* § 1.410(a)-3(d).)

Thus, most courts have ruled that plan terms may exclude workers based on conditions other than age and service, even if these workers are considered common-law employees. In Wolf v. Coca-Cola Co., 200 F.3d 1337 (11<sup>th</sup> Cir. 2000), the pension plan included “regular employees,” a defined term under the plan. The court held that it was unnecessary to determine whether or not the plaintiff was a common law employee of Coca-Cola because she was not a “regular employee” and, thus, was not eligible under the plan terms.<sup>60</sup> As a precaution, employers frequently obtain written waivers of benefit plan participation.<sup>61</sup> There is substantial authority under ERISA that an individual can give up his or her right to participate in benefits, whether or not eligible under plan terms.<sup>62</sup>

It is important to note that administrative agencies can play a significant role in the classification (or reclassification) of workers. This role should be viewed with the recognition that the classification of workers is necessarily a factual determination and that the determination can be difficult to make. The reclassification of workers may have a significant impact on claims for benefits under ERISA.

The most recent, widely noted case in the classification area involved Microsoft Corporation. Microsoft had supplemented its “regular” workforce with flexible workers who were considered independent contractors not covered under

its employee benefit plans. Microsoft’s settlement of an IRS employment tax examination resulted in the treatment of these workers as “common-law employees” under the IRS’s 20-factor test. In Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9<sup>th</sup> Cir. 1997), the Ninth Circuit found that workers should be included in Microsoft’s section 423 employee stock purchase plan if such workers were determined to be common law employees. With respect to Microsoft’s 401(k) plan, the Court found that it was unclear under the terms of the plan whether such workers were intended to be covered by the plan, and remanded that decision for consideration by the plan’s administrators. In response to the widely publicized Microsoft litigation, many employers amended their plan definitions of “employee” to prevent unexpected retroactive eligibility for benefits where the employer has anticipated no obligation.

**The classification of workers is necessarily a factual determination, and that determination can be difficult to make.**

Although ERISA itself clearly does not require coverage of particular workers, the Department of Labor (“DOL”) and Time Warner recently settled a lawsuit where DOL claimed Time Warner breached its fiduciary duty to properly identify plan participants. Herman v. Time Warner Inc., S.D.N.Y. No. 98-7589 (settlement approved Nov. 17, 2000).

**Many employers have amended their plan definitions of “employee” to prevent unexpected retroactive eligibility for benefits where the employer has anticipated no obligation.**

Time Warner classified workers in various categories, such as temporary, regular, and supplementary. Many of its benefit plans excluded temporary employees and independent contractors. DOL filed suit alleging that the company regularly misclassified workers to exclude them from benefit plans and, in

some cases, adjusted their service to maintain their status as temporary employees. DOL claimed that Time Warner’s actions violated ERISA’s fiduciary requirements to act solely in the interest of participants and in accordance with plan terms. After a procedural lower court ruling favorable to DOL, the parties agreed to a \$5.5 million settlement that will be paid to certain temporary workers and independent contractors.

Another provision of existing law which is available to workers who are wrongfully deprived of employee benefits is section 510 of ERISA. This provision prohibits any person from interfering with any right to which a participant is entitled under an employee

benefit plan. While there has been no definitive case law applying section 510 to worker classification, several claims by workers based on this theory have prevailed on summary judgment motions. E.g., Seamen v. Arvida Realty Sales, 985 F.2d 543 (11<sup>th</sup> Cir. 1993).

### Tax Law Provisions Affecting Employee Benefit Plans

Federal tax law provides substantial incentives to encourage employers to offer employee benefits to their employees. In particular, the Internal Revenue Code provisions for tax-qualified pension and profit-sharing plans, including 401(k) plans, grant:

- ▶ immediate deductibility of plan contributions;
- ▶ tax-deferred buildup of investment earnings;
- ▶ tax-deferred treatment to employees until benefits are actually paid out.

To obtain these tax benefits, plans must satisfy a host of “qualification” requirements intended to further various tax and social policies — including coverage of substantial numbers of rank-and-file employees. The key IRS qualification principles relevant to worker classification issues are highlighted below.

A qualified plan must be established and maintained for the “exclusive benefit of employees.” IRC § 401(a)(2). Thus, employers generally are not permitted to cover independent contractors or workers who are the employees of another organization under their plans. In this regard, after extensive negotiations, the IRS and several employers reached settlement agreements on the coverage of insurance agents, determined to be independent contractors, under the employers’ plans. The

settlement generally preserved the qualification of the plans and the benefits earned for most agents subject to the employers' exercising more direction and control over the agents' work.

Plans are not required to cover all employees, or particular categories of employees, of an employer. (As noted earlier, plans may not impose a minimum service requirement of more than one year or a minimum age requirement greater than 21.) However, a qualified plan must meet one of the following minimum coverage requirements:

- ▶ the plan must benefit a percentage of non-highly compensated employees that is at least 70 percent of the percentage of highly compensated employees benefiting under the plan, or
- ▶ the plan must satisfy a complex "average benefits percentage" test. (*IRC § 410(b)*.)

For the purposes of these tests, union-represented employees and non-resident aliens are not counted, but employees of all affiliated companies generally must be taken into account.

For purposes of applying the IRS nondiscrimination rules, an "employee" includes each "individual who performs services for the employer who is either a common law employee of the employer ... or a leased employee."<sup>63</sup> (*Treas. Reg. § 1.410(b)-9*.) Under current law, a "leased employee" generally is defined as any person who is not an employee of the recipient and who provides services to the recipient if:

- ▶ such services are provided pursuant to an agreement between the recipient and any other person;

- ▶ such person has performed such services for the recipient on a substantially full-time basis for a period of at least 1 year; and
- ▶ such services are performed "under primary direction or control" of the recipient. (*IRC § 414(n)(2)*.)

Employers face serious risks with worker misclassification and IRS qualification requirements. Specifically, a plan's tax qualification could be adversely affected if any of the following situations arise:

- ▶ The plan does not meet the minimum coverage rules, taking into account common law employees and "leased employees."
- ▶ The plan does not cover a worker who is eligible under the terms of the plan (e.g., a worker whom the employer classifies as an independent contractor, but who is classified as an employee of the employer as a legal matter).
- ▶ The plan covers a worker whom the employer classifies as an employee, but who is classified as an independent contractor as a legal matter.

In view of these risks many employers have amended their plans to further clarify which workers are eligible for plan benefits so as to protect against the possibility that reclassification of workers could result in retroactive benefit liabilities or even IRS disqualification of their plans. In 2000, the IRS issued a Technical Advice Memorandum ("TAM") confirming that such plan provisions are consistent with plan qualification rules and recognizing that "the employer has a legitimate business interest in knowing the cost of the worker's compensation at the time the worker is engaged."

Although there are numerous differences, many other employee benefits receive favorable tax treatment and are subject to similar IRS minimum coverage requirements. These benefits include self-insured employer-provided health benefits, group-term life insurance, educational assistance and dependent care assistance. In general, as is the case with qualified plans, these benefits may be granted only to employees, and the tax rules allow employers substantial flexibility to design their plans.

### Other Employment Laws

Whether a worker is considered an “employee” may affect an employer’s responsibility in many

**The IRS has confirmed that ‘the employer has a legitimate business interest in knowing the cost of the worker’s compensation at the time the worker is engaged.’**

other areas of law for which there is no uniform definition of “employee”. For example, a worker’s status may determine whether the employer must comply with non-benefits laws, such as occupational safety statutes or state laws for unemployment insurance.

Compliance with many federal and state employment-related laws is triggered by an employer having a minimum number (usually from 20 to 100) of “employees.” Such laws include the Consolidated Omnibus Budget Reconciliation Act (COBRA) health care continuation rules, the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and Title VII of the Civil Rights Act. Case law in this area generally uses an “economic realities” test to determine if

workers are common law employees, and may treat workers as jointly employed by both the staffing company and employer.<sup>64</sup>

The Fair Labor Standards Act, which regulates minimum wage and overtime requirements, defines “employee” broadly as “any individual employed by an employer.” 29 U.S.C. § 203(e). EEOC guidance sets out a 15-factor test to determine if workers qualify as “employees,” and suggests that a staffing firm and service recipient may be “co-employers” for purposes of employment discrimination laws. See EEOC Notice No. 915.002 (Dec. 3, 1997). Similarly, a recent National Labor Relations Board (NLRB) decision (overturning long-standing NLRB precedent) permits contingent workers having a “community of interest” with traditional workers employed by the “user” employer to join a union with those traditional employees in at least some circumstances.<sup>65</sup> As the above discussion indicates, the law in this area continues to evolve.

## RECOMMENDATIONS

The issues surrounding the flexible workforce are complex. Different segments of the workforce have different attributes and varying access to benefits; therefore, the issues affecting different types of workers will vary, as will the potential solutions. As stated earlier, our economy is continuing to evolve in order to meet the demands, challenges and opportunities of the global marketplace. Placing unreasonable constraints on this evolution may have unintended economic consequences that will reduce flexibility, impede the ability of companies to compete globally, and may ultimately hurt the very workers policymakers are intending to help.

Companies and workers are developing innovative and mutually beneficial approaches to how work is performed and compensated to keep pace with our new and ever-changing economy. Laws and regulations should encourage this fundamentally market-based approach to the employer-employee relationship. In many flexible workforce arrangements, it may not be lawful or appropriate for benefits to be provided through the employer to whom a worker is assigned. The traditional delivery system may be inefficient for some flexible workers. Therefore, solutions for those workers should include providing greater individual access to benefits outside the employment relationship.

For these reasons the Council urges that any changes in the law in this area be carefully considered and targeted. In evaluating the current system, we urge that the following recommendations be given careful consideration.

### **Maintaining Flexibility in Workforce and Compensation Designs**

Our economy is in a state of rapid change. The working relationships that exist today, with greater flexibility in work hours, places of work and benefits, have developed principally over the past several years. Workforce structure and accompanying compensation structures will continue to change in the future as well. In order to allow U.S. companies to be competitive in the global marketplace, to keep our economy strong, and to maintain desired employment flexibility, it is critical that policymakers facilitate and encourage such changes.

If Congress enacts laws affecting flexible work arrangements, the Council urges that these laws

provide flexibility to employers and workers so that they can continue to design relationships and compensation structures to meet their needs. It is important Congress not enact legislation that would impede the development of working relationships and compensation packages that both workers and employers desire.

It is critical to remember that compensation dollars are not infinite and the employer sponsored system is voluntary. Companies forced to pay compensation or benefits packages greater than the market rate for any particular workers will be at a competitive disadvantage and will have to redesign to reduce or eliminate benefits overall.

### **Providing Access for Those Flexible Workers Desiring Benefits**

As we have seen, access to employee benefits varies widely. Access to benefits is an issue for some flexible workers despite their tenure with the client employer (whether they are short-term or longer-term workers). The access issue must be analyzed not only by flexible worker segment but also by type of employee benefit (i.e., health versus retirement plan benefits). Our recommendations are categorized by type of benefit to be provided. Differences among types of flexible workers are noted, as appropriate:

#### **HEALTH CARE BENEFITS ACCESS**

In designing solutions to the issue of health care access it is important to address the different issues presented by different segments of the flexible workforce. The Council supports exploring the following approaches, as well as others, for improving access to health care coverage for flexible workers:

**Provide expanded tax incentives for the purchase of health insurance.**

Current law encourages business to provide health insurance for their workers by permitting them to fully deduct the cost of health care premiums. However, continuous health care cost increases and lack of health insurance for many remain significant concerns. Out of these concerns there appears to be an emerging bipartisan consensus that enhanced tax incentives are needed to assist workers (including workers with flexible work arrangements and particularly those who are without coverage through an employer or who find it difficult to purchase available coverage).

**Important policy issues remain to be resolved such as the structure of any tax relief, the eligibility criteria and the overall impact on employer-provided health care.**

Congress already has determined that the current law full deduction for the cost of health care premiums provided to employers should be extended to the self-employed. This is a critical incentive to encourage independent contractors and other self-employed individuals (both of

which are a significant portion of the total number of workers included in the definition of flexible worker) to purchase health insurance coverage. Currently scheduled to become effective in 2003, the Council supports making the deduction immediately effective. In addition, Congress previously has considered proposals to expand the availability of tax preferences for health insurance.

For example, H.R. 2990, the Quality Care for the

Uninsured Act, approved by the House of Representatives in October 1999, contained such an expanded tax deduction provision. Under this proposal, the individual could deduct the cost of health insurance unless the individual has access to coverage through an employer that pays 50 percent or more of the premium. More recently, the Bush Administration has proposed a refundable tax credit for individuals not participating in public or employer-provided health plans. The credit would be equal to 90 percent of the health insurance premium paid, up to \$1000 per individual covered by the policy and up to \$2000 per family. The credit would be phased out completely after \$30,000 of adjusted gross income for single filers with only one individual covered under the policy. Eligible individuals would be able to receive the credit at the time of the purchase of health insurance, as an alternative to claiming it on an income tax return.

Important policy issues remain to be resolved such as the structure of any tax relief, the specific eligibility criteria and the overall impact on employer-provided health care upon which millions of Americans rely. In order to maintain the tax incentives that induce employers to offer health insurance, it is important that any tax relief be structured so that the value of employer-based coverage is not diluted or terminated. If these important policy issues are addressed, however, an expanded tax-based approach — including a tax deduction based on the amount of premium paid by the worker and a tax credit for those in lower income ranges — should be considered. Such tax relief, if properly structured, would respond to many of the concerns expressed by critics of flexible workforce arrangements and could significantly lower health insurance costs for workers.

**Government should better educate workers regarding the deductibility of individual health insurance costs and the availability of coverage through state-based health programs.** In addition to expanding and facilitating mechanisms to extend health care coverage to flexible workers, the Internal Revenue Service should expand its outreach and education efforts so flexible workers who purchase individual health insurance are cognizant of the tax rules governing such purchases.<sup>66</sup> Government, in addition, should better educate individuals who are eligible to elect state-based coverage (i.e., low-income worker opt-ins to Medicaid at subsidized premiums) about the availability of such coverage. Also, the government should develop educational programs regarding the importance of health care coverage for high school and college students.

**Additional Measures.** The Council supports additional steps that would help to keep health care coverage affordable and accessible. For example, we believe that Congress should approve legislation to preempt the numerous health benefit mandates that have been enacted by states. While often well-intended, these mandates have had the cumulative effect of making health insurance more costly, less able to be tailored to the needs of purchasers, and far less desirable from the perspective of smaller employers when they consider offering health insurance coverage for the first time to their employees.

Similarly, we would urge state legislatures to resist any further legislation that results in the micromanagement of the plan design of health care benefits. Finally, we would encourage Congress to consider ways to support states that

establish health coverage programs for high-risk individuals who are unable to obtain affordable coverage through traditional insurance sources. Such support could include, for example, federal reinsurance of costs beyond a pre-defined maximum spending level by the state for high risk individuals which would help to lower premiums for the coverage provided for participants in these important programs.

#### **ACCESS THROUGH PROFESSIONAL EMPLOYER ORGANIZATIONS**

PEOs partner with their clients (generally small businesses) to provide for the effective and efficient delivery of employee benefits and other services to the client and to workers performing services for the client.

**The law should clearly permit Professional Employer Organizations (PEOs) to provide health and retirement plan coverage for their workers.** H.R. 2807 (107<sup>th</sup> Congress), the Professional Employer Organization Workers Benefits Act of 2001, introduced by Representatives Rob Portman (R-OH) and Ben Cardin (D-MD), and the companion bill, S. 1305 (107<sup>th</sup> Congress), introduced by Senators Bob Graham (D-FL) and Charles Grassley (R-IA), would permit PEOs to provide meaningful health, retirement and other employee benefits to their employees. This legislation should be enacted.

Consistent with the PEO model, the legislation would require that the PEO establish this relationship with most or all of the workers at a worksite. Because these workers maintain an ongoing relationship with the PEO and the PEO's client, they are neither contingent nor flexible under any reasonable definition. Those workers are, however, sometimes included

within definitions of nontraditional employment relationships. Regardless of what they are called, legislation like H.R. 2807 and S. 1305 would provide a vehicle for more employees of small businesses to receive health, retirement, and other benefits.

### Retirement Plan Access

The Council supports exploring the following approaches to improving access to retirement plan coverage for flexible workers:

**Incentives should be expanded to encourage self-employed workers to create and contribute to retirement plans.** As with health plans, independent contractors and other self-employed individuals are generally not covered by the service recipient's retirement plan. Self-employed workers and others not covered should be educated and encouraged (through government tax incentives) to adopt a retirement plan for themselves so that their coverage rate increases.

With regard to incentives, the recent tax relief act contains various IRA expansion provisions to encourage flexible workers to contribute to these retirement vehicles, such as gradually increasing the IRA limits from \$2,000 to \$5,000 and even providing credits for retirement savings by lower-income workers. In addition, the Department of Labor's retirement savings education efforts, in conjunction with private sector efforts, should be expanded. Finally, policymakers should consider revising pension laws to allow older employees to phase into retirement.

**A prototype model similar to a 403(b) plan should be created to which workers and employers could contribute.**<sup>67</sup>

403(b) plans have been extremely successful retirement plan vehicles in the educational and non-profit sectors of the economy. These plans allow any worker to have his or her own "plan" to which both the worker and the employer may contribute. The plan is portable and the worker has control over the investment of the assets. The expansion of this type of plan (or a similar, fully portable plan) to flexible workers should be explored.

**The provision of employee benefits should be eliminated as a factor from the current IRS 20-factor test (or similar tests under other federal laws).**<sup>68</sup> In order to encourage employers to provide health and retirement benefits for their flexible workers, the provision of benefits should not be considered as a factor in determining an individual's employment status.

### Defining the Term "Employee"

Currently, for employee benefit purposes, employers must make a legal determination as to whether a worker is an independent contractor or a common law employee. This is a difficult factual determination, which has resulted in uncertain and inconsistent results over time, generating numerous controversies involving the payment of employment taxes and provision of benefits arising between employers and the IRS. A recent report released by the Joint Tax Committee staff highlighted the numerous policy issues that arise in regard to proposed changes to the current scheme,<sup>69</sup> and recent legislation (S. 837 and H.R. 1783, the Independent Contractor Determination Act of 2001) introduced separately by Sen. Christopher Bond and Rep. Don Manzullo (R-IL) rekindles the debate over the difficulty in classifying independent contractors by proposing a safe

harbor approach to such classification. that could be used in lieu of the 20-factor test. Whatever changes are ultimately adopted could require a host of modifications to other tax and employment laws as well.

Rather than a total restructuring of the 20-factor and Section 530 tests (see Section on Current Legal framework for Worker Classification) as some legislators have proposed, we believe an incremental approach, which would clarify certain factors, is more appropriate. Such an approach should clarify that it is not necessary that all factors be present in any particular situation. An employer's good faith reliance on the worker's assertion as to his or her status should carry significant weight in the classification decision. A safe harbor should be established to provide guidelines for third party arrangements.

Finally, we believe the initiatives instituted by the IRS in 1996, including the classification settlement program and the early appeals function, should be extended and further developed, so employers and the IRS can work cooperatively to resolve these very difficult factual determinations.

### **Misclassification and Its Consequences**

There are instances when the IRS or a court will determine that the employer's classification of a worker is incorrect. Retroactive inclusion of the worker in the employer's qualified benefit plan, in those situations, could have significant adverse consequences for the plan, the plan's participants and beneficiaries, and the employer. Such misclassification could threaten the plan's qualification if the plan covered workers who were not employees or if it did

not cover workers who should have been classified as employees. It is therefore critical that employers be able to protect their plans and their plan participants from such potential retroactive consequences.

In 2000, the IRS recently released a Technical Advice Memorandum (TAM) supporting the inclusion of "plan inoculation" language in qualified plans to protect employers from the retroactive inclusion of misclassified workers. As a technical legal matter, however, a TAM is only applicable to the specific taxpayer to which it is issued. The Council supports the release of more broadly applicable "plan inoculation" guidance by the IRS.

## **CONCLUSION**

Flexible work arrangements benefit the economy by meeting the needs of both employers and employees, improving employment rates and efficiency in the workplace. Although certain general principles should be kept in mind in addressing flex workforce issues, workers in flexible arrangements are not homogenous. Flexible workers have varying needs, with different policy implications.

Policymakers should allow these arrangements to continue to develop in their own ways, based on market values, with minimal interference. Mandating employer-provided health and retirement plan coverage for flexible workers would have unintended and unwanted effects on American businesses, workers, and the economy as a whole. Instead, policymakers should focus on increasing opportunities for flexible workers to have individual access to health and retirement benefits.



## NOTES

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<sup>1</sup> Houseman, "Flexible Staffing Arrangements," Ch 7, p. 2 (August 1999) Ch. 7, p. 2. (published as part of the U.S. Department of Labor's Futurework, Trends and Challenges for Work in the 21st Century) <http://www.dol.gov/dolasp/public>.

<sup>2</sup> Riche, Martha Farnsworth, "The Demographics of Tomorrow's Workplace," Pension Research Council Working Paper (May 2001), p.1.

<sup>3</sup> Lyons, Long-Term Temps: A Rare Breed, Employment Policy Foundation (July 12, 1999) p. 3. <http://www.epf.org/backg>.

<sup>4</sup> Copeland, Fronstin, Ostuw and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207*, (March 1999) p. 3.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> PEO arrangements appeal primarily to small and mid-sized employers who find it cost-effective to contract out their human resources functions rather than hire in-house staff. PEOs and their clients generally enter into written agreements in which the allocation of employer responsibilities between the PEO and the client are explicitly set forth. The PEO assumes the legal and administrative responsibilities of an employer for payroll, benefits, and other human resources functions on behalf of all or most of another firm's workforce at a worksite on an ongoing basis. Unlike temporary help firms, PEOs are not generally "labor suppliers" in the sense of recruiting, screening, and training workers and assuming legal responsibility for the work performed. For this reason, many in the PEO business do not consider themselves engaged in staffing at all and jobs associated with PEO relationships are no more or less contingent or flexible than other jobs.

<sup>8</sup> Copeland, Fronstin, Ostuw and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207*, (March 1999) p. 4.

<sup>9</sup> These include temporary workers hired directly by the service recipient, self-employed workers who are not independent contractors and "regular" workers working on a part-time basis. The needs and circumstances of the self-employed worker are fundamentally different from other workers included in the flexible workforce and are not dealt with in this paper. Houseman, *Flexible Staffing arrangements*, (August 1999) Ch. 4. (published as part of the Department of Labor services, Futurework, Trends and Challenges for Work in the 21st Century) <http://www.dol.gov/dolasp/public>.

- <sup>10</sup> Conference Board, "Contingent Employment," *HR Executive Review* (1995) p. 6.
- <sup>11</sup> Conference Board, "Contingent Employment," *HR Executive Review* (1995) p. 3.
- <sup>12</sup> Conference Board, "Contingent Employment," *HR Executive Review* (1995) p. 7.
- <sup>13</sup> Morris and Vekker, "An Alternative Look at Temporary Workers, Their Choices, and the Growth in Temporary Employment," *Journal of Labor Research* (Spring 2001) p.380.
- <sup>14</sup> Timothy J. Bartl, [America Wants Flexible Work](#), Labor Policy Association (1998) p.40.
- <sup>15</sup> Lyons, [Long-Term Temps: A Rare Breed](#), Employment Policy Foundation (July 12,1999) p.27
- <sup>16</sup> PricewaterhouseCoopers International Student Survey of 2510 graduating students in 11 countries citing predictable ability to balance work and personal life/ability to pursue goals outside work as their most important goal (1999). <http://www.pricewaterhousecoopers.com> (Global Initiatives)
- <sup>17</sup> The Segal Company, [Segal Special Report: The Aging of Aquarius: The Baby Boom Generation Matures](#) (February, 2001) p.2.
- <sup>18</sup> Bartl, [America Wants Flexible Work](#), Labor Policy Association (1998) p.48
- <sup>19</sup> Kundu, "Temporary Worker – No Longer Growing," [Employment Trends](#) (February 2, 2000) (some respondents listed more than one of the options).
- <sup>20</sup> Bartl, [America Wants Flexible Work](#), Labor Policy Association (1998) p.44.
- <sup>21</sup> "Temporary Employment Data May Provide Leading Indicator of Future Business Activity," *Daily Rep. Exec.* No. 68, A-29, BNA (April 9, 2001). (Cites BLS data.)
- <sup>22</sup> Id.
- <sup>23</sup> Id. (citing a statement by Richard Wahlquist, executive vice president of the American Staffing Association).
- <sup>24</sup> Id. ,The authors note, at pages 1 – 18, that the decline may be due to the strong economy where traditional jobs are more plentiful.
- <sup>25</sup> Horne, Williamson and Herman, [The Contingent Workforce: Business and Legal Strategies](#), Law Journal Press (2000) p. 1-10. The 1995 BLS survey was the first supplemental questionnaire to the Current Population Survey (CPS) on contingent workers and workers with alternative work arrange-

ments. "This survey offered the first 'comprehensive and unified' measure on contingent workers and workers with alternative work arrangements in the U.S. workforce." (Polivka, 1996) See also *Defining the Flexible Workforce and the use of the term "contingent workers,"* supra.

<sup>26</sup> Houseman, "Flexible Staffing Arrangements," (August 1999) Ch. 4. (Published as part of the Department of Labor services, *Futurework, Trends and Challenges for Work in the 21st Century.*) <http://www.dol.gov/dolasp/public>. The categories noted by one commentator include: temporary workers hired directly by the service recipient (2.6% of total employment); self-employed workers who are not independent contractors such as restaurant owners and shop owners (5.1%); and "regular" workers who work part-time (14.3%). It is important to note that self-employed workers are fundamentally different in need and circumstance than other flexible workers and are not dealt with in this paper.

<sup>27</sup> Id. In its recently released report on contingent workers, *Contingent Workers: Incomes and Benefits Lag Behind the Rest of the Workforce*, the General Accounting Office (GAO) provided information on a range of workers who could be considered contingent under different definitions. The GAO also developed data on direct-hire temps and combined the categories of on-call workers and day laborers. The GAO did not include data on "leased employees" due to the general lack of understanding of the term and scarcity of data on such workers. See p. 44-45 of the June 2000 GAO report.

<sup>28</sup> Copeland, Fronstin, Ostuw and Yakaboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) p. 11.

<sup>29</sup> Copeland, Fronstin, Ostuw and Yakaboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) p. 12.

<sup>30</sup> Lyons, *Long-Term Temps: A Rare Breed*, Employment Policy Foundation, (July 12, 1999) p. 4. <http://www.epf.org/backg>.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Twenty-eight percent of temporary workers aged 65 or older have worked as temps for over twenty four months compared to sixteen percent of 35-44 year olds.

<sup>39</sup> Department of Labor, [Futurework, Trends and Challenges for Work in the 21st Century](http://www.dol.gov/dolasp/public). <http://www.dol.gov/dolasp/public>.

<sup>40</sup> Horne, Williamson and Herman, [The Contingent Workforce: Business and Legal Strategies](#), Law Journal Press, 1-14 (2000) citing Hudson, "No Shortage of Nonstandard Jobs" Economic Policy Institute (Dec. 1999) Tables 5 and 6. <http://www.epinet.org/briefingpapers/hudson/htm>.

<sup>41</sup> Id.

<sup>42</sup> Hipple, "Contingent Work: Results from the Second Survey," *Monthly Labor Rev.* 22 (Nov. 1998) Table 10; United States Bureau of Labor Statistics, "Technical Note to Contingent and Alternative Employment Arrangements," *Labor Force Statistics from the Current Population Survey* (Feb. 1999) Table 9. <http://www.bls.gov.news.release.contemp.tn.htm>.

<sup>43</sup> Copeland, Fronstin, Ostuw and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) Table 12. Figures do not add in all cases due to rounding.

<sup>44</sup> [Contingent Workers: Incomes and Benefits Lag Behind the Rest of the Workforce](#), GAO/HEHS-00-76 (June 2000) p. 20-23.

<sup>45</sup> Horne, Williamson and Herman, [The Contingent Workforce: Business and Legal Strategies](#), Law Journal Press, (2000) p. 1-16.

<sup>46</sup> Employee Benefits Research Institute, *EBRI Issue Brief No. 207* (March 1999). This table compares health insurance coverage of traditional workers with contingent workers and other workers with alternative work arrangements. Estimate 1, 2 and 3 refer to the alternative definition of contingent workers used by the Bureau of Labor Statistics in its surveys on workers. The narrowest definition used by the BLS (Estimate 1) refers only to wage and salary workers who have worked for their current employer for no more than one year from the time of the survey. Estimate 2 adds to the foregoing group self employed persons and independent contractors who do not expect to continue their work arrangement for more than one year and temporary agency employees who do not expect to continue their current assignment for more than one year. Estimate 3 refers to all wage and salary workers regardless of their presurvey tenure, who answered "No" when asked, "Provided the economy does not change and your job performance is adequate, can you continue to work for your current employer as long as you wish?" These findings are underscored by similar findings of coverage collected through a supplement to the February 2001 Current Population Survey conducted by the Bureau of Labor Statistics available at <http://stats.bls.gov/news.release/conemp.tn.htm>.

<sup>47</sup> Employee Benefits Research Institute, *EBRI Issue Brief No. 207* (March 1999) This table compares health insurance coverage by age group and category of worker as provided by employers and alternative sources. Estimate 3 has the same definition as is provided for the table in Appendix A. These findings are underscored by similar findings of coverage collected through a supplement to the February 2001 Current Population Survey conducted by the Bureau of Labor Statistics available at <http://stats.bls.gov/news.release/conemp.tn.htm>.

<sup>48</sup> According to an industry association of temporary employment agencies, such work is short term, intermittent or transitional with the worker often not staying long enough to meet the insurance policy's terms for eligibility. See "Contingent Workers: Incomes and Benefits Lag Behind Those of the Rest of the Workforce," GAO/HEHS-00-76 (June 2000) p.22.

<sup>49</sup> Many employers' health care plans require a co-pay, which may weigh in a worker's decision to accept or decline coverage.

<sup>50</sup> Copeland, Fronstin, Ostuw and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) p. 19.

<sup>51</sup> Copeland, Fronstin, Ostuw and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) Table 12.

<sup>52</sup> Copeland, Fronstin, Ostuw and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) Table 13.

<sup>53</sup> Id.

<sup>54</sup> Citing EBRI's statistics in [Report of the Working Group on the Benefit Implications of the Growth of a Contingent Workforce](#), U.S. Department of Labor Advisory Council on Employee Welfare and Pension Benefit Plans (November 10, 1999) p. 7, Table 1. As with health care benefits, independent contractors and other self-employed workers are their own employers and, accordingly, are not covered by the retirement plans of the companies for whom they perform services, but often provide benefits for themselves. Again, these self-employed workers account for more than one-third of flexible workers. Indeed, this segment of the flexible workforce has among the highest levels of retirement plan coverage. In 1997, 39.0 percent of self-employed workers had a Keogh plan or an IRA. Copeland, Fronstin, Ostuw, and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) p. 26, Table 17. There was a 2.5 percent increase in this covered percentage from 1995. As might be expected, many more independent contractors and other self-employed workers than traditional workers have these types of retirement plans—42 percent of independent contractors and 46 percent of other self-employed workers, compared with 16 percent of traditional workers. These numbers reflect the availability of different types of retirement plans to different types of workers (i.e., traditional workers who participate in an employer-sponsored plan generally do not contribute to an IRA).

<sup>55</sup> Copeland, Fronstin, Ostuw, and Yakoboski, "Contingent Workers and Workers in Alternative Work Arrangements," *EBRI Issue Brief No. 207* (March 1999) p. 22.

<sup>56</sup> The likelihood of receiving health and retirement benefits from the temporary help worker's client employer increases with job tenure. For temporary workers with tenure exceeding 24 months, 13 percent receive pension benefits and 64 percent receive health care benefits. Lyons, [Long-Term Temps: A Rare Breed](http://www.epf.org/backg), Employment Policy Foundation (July 12, 1999) p. 5. <http://www.epf.org/backg>.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> These twenty factors include whether the employee (1) must comply with the employer's instructions about the work; (2) receives training from or at the direction of the employer; (3) provides services that are integrated into the business; (4) provides services that must be rendered personally; (5) hires, supervises, and pays assistants for the employer; (6) has a continuing working relationship with the employer; (7) must follow set hours of work; (8) works full time for an employer; (9) works on the employer's premises; (10) must work in a sequence set by the employer; (11) must submit regular reports to the employer; (12) receives payments of regular amounts at set intervals; (13) receives payments for business and/or traveling expenses; (14) relies on the employer to furnish tools and materials; (15) lacks a major investment in facilities used to perform the service; (16) cannot make a profit or suffer a loss from the services; (17) works for one employer at a time; (18) does not offer services to the general public; (19) can be fired at any time by the employer; (20) may quit work at any time without incurring liability.

<sup>60</sup> See also [Bronk v. Mountain States Telephone & Telegraph](#), 140 F.3d 1335 (10<sup>th</sup> Cir. 1998) (reversing district court holding that leased workers who meet minimum age and service requirements cannot be excluded from pension plan); [Clark v. DuPont](#), 105 F.3d 646 (4<sup>th</sup> Cir. 1997) (unpublished opinion) ("ERISA simply does not require an employer to provide benefits to every individual in that company's employment."); [Abraham v. Exxon Corp.](#), 85 F.3d 1126 (5<sup>th</sup> Cir. 1996) (nondiscrimination rules do "not permit a court to rewrite the plan to include additional employees).

<sup>61</sup> See [Roth v. American Hospital Supply](#), 965 F.2d 862 (10<sup>th</sup> Cir. 1992); [Boren v. Southwestern Bell](#), 933 F.2d 891 (10<sup>th</sup> Cir. 1991).

<sup>62</sup> See [Smart v. Gillette Long-Term Disability Plan](#), 70 F.3d 173 (1<sup>st</sup> Cir. 1995).

<sup>63</sup> Even though an individual may be required to be counted as an "employee" for purposes of the Internal Revenue Code minimum coverage nondiscrimination tests, the individual will not necessarily be entitled to benefits under the plan. In [West v. Clark Murphy, Jr. Self Employed Pension Plan](#), 99 F.3d 166 (4<sup>th</sup> Cir. 1996), the court found that "employee status under ERISA is determined not by the tax code but by the common law of agency."

<sup>64</sup> See Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814 (1<sup>st</sup> Cir. 1991) (using joint employer theory in ADEA and Title VII case).

<sup>65</sup> M.B. Sturgis, Inc., 331 N.L.R.B. No. 173 (Aug. 25, 2000).

<sup>66</sup> "Report of the Working Group on the Benefit Implications of the Growth of a Contingent Workforce," U.S. Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans (November 10, 1999) p. 15.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Study Of The Overall State Of The Federal Tax System And Recommendations For Simplification, Joint Committee on Taxation (April 2001).



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