CASUAL WORKERS AND EMPLOYEE BENEFITS: STAYING AHEAD OF THE CURVE

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I. INTRODUCTION

The shape of the American work force has been changing rapidly over the past few decades and these changes have an impact that reaches far beyond the seemingly uncomplicated employer-employee relationship. Labor laws in the United States were enacted based on the once valid assumption that when a person was hired, he would be a full-time, permanent employee. Yet these laws largely relate to when employers may and may not fire employees, and not to the benefits that employers must provide, such as unemployment insurance and Social Security.

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1. Clyde Summers writes that the traditional employer-employee relationship typically had three main characteristics:

First, it was a personal relationship between a dominant master or employer and a servient worker. Second, it was full-time, that is for the full normal work week. Third, it was generally assumed to continue for a substantial period or indefinitely, so long as the worker was needed and wanted to work.

Clyde Summers, Contingent Employment in the United States, 18 COMP. LAB. L.J. 503, 503 (1997). Although many employees did not sign formal contracts, "there has been a shared expectation among both employers and employees that the job-holder would have uninterrupted employment unless there was some reason to terminate the relationship." Mark Berger, The Contingent Employee Benefits Problem, 32 IND. L. REV. 301, 308 (1999).


Despite the lack of legally required benefits packages, most employers provide paid vacation days, sick leave, pension plans, and employer-sponsored health insurance to their full-time, permanent employees. And during the last half of the twentieth century, employees have become increasingly reliant on the workplace to provide these benefits. As worker dependence on benefits packages has grown, so has the proportion of compensation that they account for. At the same time that this proportion has risen, salaries have increased. Not surprisingly, the cost of providing these benefits has also grown, leading employers to look for ways to avoid the added costs.

Eliminating many of their full-time, permanent positions and replacing them with contingent workers is but one of the methods utilized by employers to cut some of these costs. The result of this change in employment structure has been to shift the burden of benefit compensation

5. In 2004, eighty-nine percent of private sector employees were eligible for paid holidays (such as Christmas and New Year’s Day) and ninety percent were eligible for paid vacations. U.S. DEPT. OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES (2004), available at http://www.bls.gov/ncs/ebs/sp/ebsm2002.pdf. While fewer employers provide medical care and retirement income benefits, eighty-four percent and sixty-eight percent of employees are offered coverage, respectively. Id. Compare this with the fewer than forty percent of part-time employees receiving paid time off, and only twenty percent being offered any type of health care benefit. Id.
7. While these packages only accounted for three percent of total compensation in 1929, by 1991 this number had grown to more than twenty-eight percent. See BUREAU OF LABOR AND STATISTICS, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION, available at http://data.bls.gov/PDQ/servlet/SurveyOutputServlet (showing that benefits compensation as a percentage of total compensation has remained stable over the past twelve years, accounting for approximately twenty-eight percent of total compensation across civilian jobs).

But see Berger, supra note 1, at 314, citing UNITED STATES CHAMBER OF COMMERCE, 1997 EMPLOYEE BENEFITS REPORT. The benefits included in employee compensation plans only began to include paid vacations in the 1920s and 1930s, which also accounts for the increase in the percentage of total compensation that benefits packages account for. See, e.g., ROBERT VANGIEZEN AND ALBERT E. SCHWENK, BUREAU OF LABOR STATISTICS, COMPENSATION FROM BEFORE WORLD WAR I THROUGH THE GREAT DEPRESSION (Fall 2001), available at http://www.bls.gov/opub/cwc/cm20030124ar03p1.htm (last visited Apr. 29, 2005).
8. Donald M. Fisk reports that “[i]n 1900, per capita income (in 1999 dollars) was $4,200; it was about $33,700 in 1999.” AMERICAN LABOR IN THE 20TH CENTURY, BUREAU OF LABOR STATISTICS (Fall 2001), at http://www.bls.gov/opub/cwc/cm20030124ar02p1.htm (last visited Apr. 29, 2005).
costs onto the contingent workforce. The term "contingent workers" has been construed to encompass a number of different employment arrangements. The three main categories that comprise the contingent workforce are part-time employees, temporary workers, and independent contractors. As of 1999, contingent workers accounted for nearly thirty percent of the total workforce in the United States.

According to Clyde Summers, part-time employment is "the most prevalent form of contingent employment in the United States." Part-time workers earn significantly less money per hour than their full-time counterparts, and generally do not qualify for any employee benefits packages. Temporary workers include those people who "are retained through outside staffing agencies instead of being made a part of the employer's permanent work force." Staffing agencies generally charge an hourly rate to the employer, which includes the worker's per hour wages (from which requisite taxes are deducted) as well as additional charges that cover administrative costs and commissions. Independent contractors, or freelancers, are hired directly by the employer to perform a specific task. Unlike full-time employees, however, independent contractors are responsible for providing their own benefits and paying the withholding taxes that would generally be taken care of by the employer.

In this Comment, I will focus on one group of contingent workers, whom I term "casual workers," and the impact that recent developments in common law has had on their position in the workplace.

II. LEGAL PROTECTIONS FOR CASUAL WORKERS

Employers are not required to provide casual workers with an employee benefits package that full-time, permanent employees receive. This means that most casual workers do not receive paid vacations, holidays, or sick leave, and employer's pension and health insurance plans

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10. The most significant drain on contingent workers is the cost of health insurance. Employer-sponsored plans are generally less expensive for one or both of two reasons. First, employers often offset the costs by making contributions to workers' health insurance. Second, an employer contracting for a large group of employees can negotiate for a better rate because of the number of policies involved. WORKING TODAY, THE ISSUES, at http://www.workingtoday.org/advocacy/issues.php (last visited Apr. 25, 2005).
11. GAO REPORT, supra note 9, at 14 tbl.1.
12. Summers, supra note 1, at 506.
15. I am limiting my discussion to skilled temporary employees who are hired and paid directly by the employer corporation. For the purposes of this Comment, I will consider casual workers who would, if given the opportunity, take a full-time, permanent position with the firm that employs them.
do not usually include them. Casual workers are, however, protected by worker’s compensation laws, minimum wage laws, and health and safety laws. These laws only serve as a safeguard against sub-minimum standards; they are not a significant source of help to people who more often than not are struggling to make ends meet. Similarly, although anti-discrimination laws technically cover casual workers, the “temporary” nature of the employment prevents any meaningful protection.

Professor Summers points out that for Family and Medical Leave Act (FMLA) benefits to kick in, for example, “temporary employees must work more than twelve months for the same employer.” Another area in which casual workers are almost always left to fend for themselves is with pension benefits. The Employee Retirement Income Security Act (ERISA) requires a five-year vesting period, and mandates that benefits are nontransportable. This requirement excludes virtually all casual workers from pension programs.

A. Vizcaino v. Microsoft: A Milestone Case

In 1996, Donna Vizcaino, representing a class of former workers, successfully sued Microsoft Corporation under ERISA for retroactive benefits under Microsoft’s saving and stock purchase plans. Ms. Vizcaino was one of many people hired by Microsoft as an independent

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16. See Belous, supra note 13.
17. Worker’s Compensation laws vary from state to state. For example, New York State’s Worker’s Compensation law covers “[w]orkers in all employments conducted for profit,” but does not include “[p]eople engaged in a teaching or non-manual capacity in or for a religious, charitable or educational institution.” NEW YORK STATE WORKER’S COMPENSATION BOARD, WHO IS AND IS NOT COVERED BY THE LAW?, at http://www.wcb.state.ny.us/content/main/onthejob/wc03004.htm (last visited Apr. 29, 2005).
25. Id. at 558.
26. Technically, these workers had been considered independent contractors by Microsoft Corporation. Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1008 (9th Cir. 1997) (en banc).
27. Id. at 1006.
contractor\textsuperscript{28} to perform certain services for it. These “independent contractors” worked alongside and on teams with Microsoft’s regular employees for a period of more than two years.\textsuperscript{29} They worked the same hours and under the same supervisors as the regular employees.\textsuperscript{30} The only real difference between these workers and the regular employees was the way in which Microsoft paid them. Instead of going through the payroll department, they submitted invoices for their hours to and were paid through the accounts payable department.\textsuperscript{31} This was an accounting technique used by Microsoft to classify Ms. Vizcaino and others in a similar position as independent contractors rather than employees. In addition to disallowing the workers from participating in employee benefits plans, Microsoft did not withhold Federal Insurance Contribution Act (FICA) taxes, nor did it pay the employer’s share of FICA taxes.\textsuperscript{32}

This tax reclassification made Microsoft realize that it had to change its system, at least for tax purposes. One of the ways that it accomplished this was by outsourcing some of its work to staffing agencies.\textsuperscript{33} This tax reclassification led Microsoft to take advantage of a loophole that effectively enabled it to avoid some of the costs of providing employee benefits—it decided to outsource its work to staffing agencies.\textsuperscript{34} Essentially, Microsoft offered some of its employees the option of continuing to work for them, but “as temporary employees under the auspices of a temporary employment agency.”\textsuperscript{35} Ms. Vizcaino was offered such a position, which she decided not to take. At that point she and seven other similarly situated workers filed the lawsuit against Microsoft, asserting “that they were employees of Microsoft and should have had the opportunity of participating in the SPP [(Savings Plus Plan)] and ESPP [(Employee Stock Purchase Plan)] because those plans were available to all employees.”\textsuperscript{36}

\begin{itemize}
  \item \textsuperscript{28} As independent contractors, Vizcaino and others contracted around any employee benefits that Microsoft’s full-time employees received.
  \item \textsuperscript{29} \textit{Id.} at 1008.
  \item \textsuperscript{30} \textit{Id.}
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} \textit{Id.}
  \item \textsuperscript{33} \textit{Id.} at 1009.
  \item \textsuperscript{34} Microsoft offered a number of its independent contractors full-time positions at the company, but this was not the case with many of the workers. \textit{Id.} at 1009.
  \item \textsuperscript{35} Forster, \textit{supra} note 24, at 561.
  \item \textsuperscript{36} Vizcaino, 120 F.3d at 1009. The ERISA statute provided the federal cause of action for Vizcaino to sue. It states that “[a] civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B)(1999). ERISA specifically defines what qualifies as an employee benefit welfare plan as follows:
\end{itemize}
Although Microsoft conceded that Vizcaino was a common law employee, that is, a person who would be classified as an employee at common law, it is worth noting the factors that are typically used to ascertain whether or not a worker is, in fact, a common law employee. The IRS looks for certain criteria to make this determination. The general guidelines say that:

Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

Whether someone is a common law employee turns out to be a major factor impacting the availability of benefits. This is because many employer-sponsored pension and welfare benefits programs base eligibility for participation on an employee's common law status.

The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services ....

37. Vizcaino, 120 F.3d at 1009.
38. 26 C.F.R. § 31.3401(c)-1(b) (2004).
39. In this case, Microsoft's eligibility requirements stated that "[e]ach employee who is 18 years of age or older and who has been employed for six months shall be eligible to participate in this Plan." Vizcaino v. Microsoft, 97 F.3d 1187, 1192 (9th Cir. 1996)
Despite the fact that participation in Microsoft's benefits programs was predicated on being an employee for more than six months, Microsoft argued that because Vizcaino and others specifically waived any rights to take advantage of these benefits, they were barred from participation. The Ninth Circuit, sitting en banc, ruled that employers and employees are not permitted to contract around employee benefits. In other words, a common law employee is entitled to, and cannot sign away his rights to, employer-sponsored benefits programs.

B. Responses to the Vizcaino Decision

The Ninth Circuit's decision in Vizcaino v. Microsoft generated widespread and varied reactions: misclassified employees brought a flurry of other class action lawsuits for back pay and benefits; numerous law journals have published articles critiquing the court's legal analysis and articulating ways the court got it wrong; and many unions and other

[hereinafter Vizcaino II]. Microsoft further defined employee as "'any common-law employee who receives remuneration for personal services rendered to the employer and who is on the United States payroll of the employer.'" Id. (court-added emphasis omitted).

40. Id. at 1191.

41. Id. at 1194–95. The Ninth Circuit examined the issue of whether the plaintiffs had been lawfully excluded from participating in the SPP and the ESPP by interpreting the provisions of the plans in a reasonable manner. They concluded that although both the plaintiffs and defendant Microsoft had reasonable interpretations of the provisions, adopting Microsoft's interpretation:

would impute to Microsoft an unlawful purpose: to pay some common-law employees without making the requisite payroll deductions and contributions, the very tax violation that subsequently engendered this litigation . . . . [And "n] interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]"

Id. at 1195 (citation omitted).

42. This should not be construed to mean that workers are required to participate in these programs. For instance, many workers choose not to take advantage of their employers' health insurance programs because they have alternative means of coverage, either through a spouse or a trade organization. However, once an employer provides a certain set of benefits programs for certain categories of employees, it cannot exclude individual employees who fall into those categories from participating in the programs. See generally Susan N. Houseman, Flexible Staffing Arrangements: A Report on Temporary Help, On-Call, Direct-Hire Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States (Aug. 1999) (unpublished manuscript, on file with the W.E. Upjohn Institute for Employment Research).


44. See Berger, supra note 1 at 324 (arguing that the Ninth Circuit's decision would only lead employers to the conclusion that "benefit plan language must be carefully written if the employer seeks to exclude contingent employees"); see also Forster, supra note 24 at
lobbying organizations have put forth policy suggestions for how to better regulate contingent employment in this country.\textsuperscript{45}

1. Class Actions: Suits for Back Pay and Benefits

The lawsuit against Microsoft was not the first class action lawsuit for benefits, but it is the first that received national attention.\textsuperscript{46} The law firm of Bendich, Stobaugh and Strong, P.C., located in Seattle, has made employment class action suits the bread and butter of its business.\textsuperscript{47} In fact, its first case dates back to 1978 when it represented 5,000 Seattle workers, mostly janitors, alleging that they had been misclassified as temporary employees. The case settled in 1980 for $12,000,000.\textsuperscript{48}

What many people might find surprising is that municipal workers bring many class action lawsuits. "Substitute" and "part-time" employees of the Seattle Public Library, seeking paid leave, health insurance, and other employee benefits, brought one such suit, Hughes v. City of Seattle.\textsuperscript{49} This case was "[s]ettled in 1992 for compensation and benefits valued at approximately $2 million and changes in employment practices."\textsuperscript{50}

Another class action lawsuit involving municipal workers that followed on the heels of Vizcaino is Logan v. King County.\textsuperscript{51} In that case, long-term "temporary" employees sought retroactive benefits that they had been denied for nearly a decade, including career service protection, health insurance, vacation, and other leave benefits. In 1997, King County agreed.

\textsuperscript{565} (arguing that Vizcaino's holding was too narrow, and has not "resulted in employers being any less concerned about the prospect of liability in the event of a lawsuit brought by contingent workers").


\textsuperscript{47.} Bendich, Stobaugh and Strong, P.C. represented Vizcaino in her seven-year battle against Microsoft.


\textsuperscript{49.} No. 90-2-23160-7 (King County Super. Ct. 1992). Technically, these workers are alleging that they were misclassified, but are actually municipal workers.

\textsuperscript{50.} See Significant Employment Class Actions by Bendich, Stobaugh and Strong, P.C., at http://www.bs-s.com/prev.htm (last visited Apr. 29, 2005).

\textsuperscript{51.} No. 93-2-20233-4 SEA (King County Superior Court 1997).
to settle the suit for $24,000,000, and the settlement affected approximately 2,500 employees.\textsuperscript{52} Apparently, county officials were aware that using temporary employees could cause the county legal problems, but “[s]ince the early 1980s, King County has used hundreds of temporary workers despite repeated warnings from personnel departments.”\textsuperscript{53} “Ruben Nieto, acting director of the Office of Human Resources Management, warned heads of the county’s largest departments that there was ‘substantial risk’ in continuing to use temporary workers” in a December 6, 1995, memorandum.\textsuperscript{54} Numerous other cases have been brought against King County and cities within the county; apparently Mr. Nieto’s warnings were not heeded.\textsuperscript{55}

Although King County does not have a good record regarding treatment of many of its workers, steps have been taken in the past by officials and council members to improve working conditions. Voters passed a charter amendment in 1988 that would have required temporary workers to be treated as career employees, but the council never passed an ordinance that would have enacted this charter change.\textsuperscript{56} Yet, despite the best efforts of a few advocates, proposed ordinances to tighten the temporary hiring rules never garnered enough support from other council members to emerge from committee.\textsuperscript{57}

Los Angeles County also engages in similar practices, using a method that has been referred to as “permatemping.”\textsuperscript{58} Ironically, these cases have

\begin{itemize}
\item \textsuperscript{52} Susan Gilmore, Some 2,500 Temps To Get $24 Million: King County Settles Class-Action Lawsuit, \textit{Seattle Times}, Oct. 18, 1997, at A1.
\item \textsuperscript{53} Lynne K. Varner & Susan Gilmore, \textit{King County Owes Temps $24 Million: Settlement of Class-Action Suit to Affect up to 2,000 Workers}, \textit{Seattle Times}, Oct. 17, 1997, at A1.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} See Jordan v. City of Bellevue, No. 98-2-21515 SEA (King County Superior Court 2000) (leading to a settlement for $750,000 and changes in employment practices); Clark v. King County, No. 95-2-29890-7 SEA (King County Superior Court 2000) (leading to an $18,600,000 settlement, including compensation for denial of vacation, sick leave and health insurance, and retroactive enrollment in the State’s PERS pension plan because common law employees were mislabeled as “independent contractors,” “contract workers,” and “agency” employees); Mader v. State of Washington, et al., No. 98-2-30850-8 SEA (King County Superior Court 2002) (leading to a $12,000,000 settlement on behalf of part-time community college instructors who had been denied certain retirement benefits).
\item \textsuperscript{56} Varner & Gilmore, supra note 53, at A1.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} According to The Boston Globe:

\begin{quote}
Permatemp is a 1990s expression, a byproduct of the new economy. It refers to people who work the same hours and have the same jobs as full-time employees but are classified as part-timers, even though they have been with the company for years. Others are leased out by contract firms.

Most are ineligible for benefits, such as medical, dental, retirement, paid vacation, and stock options. That’s why some employers rely on them:
\end{quote}
been brought on behalf of attorneys, paralegals, and support staff that work in the Office of Los Angeles County Counsel ("LACC"), the office that handles all civil matters for the county. One suit, Shiell v. Los Angeles County, alleges that the County’s two-tier employment scheme denies the plaintiffs equal protection of the law and violates numerous provisions of the Los Angeles County Charter and California law.59 Los Angeles County, as a means of cutting costs, set up a shell corporation, Auxiliary Legal Services ("ALS"), that paid attorneys and support staff significantly less money than other LACC employees who did identical work.60 Another suit against the county alleges that most of LACC’s female attorneys were assigned to the lower-paying ALS jobs, while most of the higher-paying, higher-benefit LACC jobs were given to males.61 The ALS employees “are paid up to $40,000 less per year than county attorneys.”62

Worker misclassification has not only occurred in the high tech and government sectors. This problem is also at issue in education. In 1999, members of the Harvard Union of Clerical & Technical Workers reached an agreement with Harvard University that would give back pay and benefits to several hundred employees who were misclassified as casual workers.63 Unlike the cases against Microsoft, King County, and Los Angeles, however, Harvard University showed a great deal of willingness to fix the problem. According to Adrienne Landau, the president of the Union, “the university recognized that this was an important issue, . . . and it knew this agreement was the right thing to do.”64

Many employers who are in the habit of misclassifying workers could take a lesson from Harvard.65 Anne Taylor, general counsel for Harvard University, expressed her pride in the agreement reached by the Union and the University. She said, “There certainly has been activity in the legal world surrounding this issue, but [Harvard] is one of the first employers to say, ‘We’re going to belly up to the bar and address it.’”66 Unfortunately,
as evidenced by the numerous class action suits that continue to be brought, Harvard is the exception, not the rule.

2. Federal Legislation

The problem of "who is an employee" is a worldwide issue. England and Germany, for example, require by statute that part-time employees be given pro-rata fringe benefits.\footnote{According to the Department of Trade and Industry, to comply with the law in the United Kingdom, "Part-time workers should receive the same hourly rate as comparable full-time workers." The Law and Best Practice: A Detailed Guide for Employers and Part-Timers, at http://www.dti.gov.uk/er/pt-detail.htm (last visited Apr. 29, 2005). This includes paying part-time workers pro rata amounts of any bonuses paid to a company's workers. See id.} Recently, there have been a number of bills proposed in Congress that would ameliorate, and possibly preempt, many of the problems faced by contingent workers.\footnote{Under German law, The Improvement of Employment Opportunities Act, part-time workers "are entitled to remuneration commensurate with their working hours, to leave, to pay for public holidays, to continued remuneration when they are unavoidably prevented from working, and to the continued payment of remuneration as generally provided for . . . . Also, part-timers may not normally be excluded from discretionary fringe benefits that have the nature of remuneration (e.g. bonuses)." European Foundation for the Improvement of Living and Working Conditions, Part-Time Work, at http://www.eurofound.eu.int/emire/GERMANY/PARTTIMEWORK-DE.html (last visited Apr. 29, 2005).} The spate of recent class action lawsuits is the likely reason for the increased interest on the part of federal lawmakers. In 2000, Senators Edward M. Kennedy and Robert G. Torricelli requested a report on the income and benefits of contingent workers from the United States General Accounting Office.\footnote{See, e.g., Employee Benefits Eligibility Fairness Act of 2000, S. 2946, 106th Cong. (2000); Small Business Health Insurance Affordability Act of 2003, H.R. 450, 108th Cong. (2003); Day Laborer Fairness and Protection Act, H.R. 2870, 108th Cong. (2003).} The report found several disparities between contingent workers and full-time workers. For example, many contingent workers are more likely than

\footnote{In 1999, there was almost no data on the independent workforce. It was difficult to determine if this sector was growing or whether working independently affected this group's ability to access affordable benefits. . . . In the first analysis of its kind, the study found that over one-third of the American workforce work in non-standard arrangements (over thirty million workers). Latest Campaigns, at http://workingtoday.org/advocacy/campaigns.php (last visited Apr. 29, 2005).}
full-time workers to have low incomes,\textsuperscript{70} less likely than other workers to have benefits\textsuperscript{71} and health insurance,\textsuperscript{72} and, perhaps most importantly, "[a]re [l]ess [l]ikely to [b]e [c]overed by [k]ey [l]aws [d]esigned to [p]rotect [w]orkers."\textsuperscript{73}

The most troubling aspect of the GAO Report, and the issue that some lawmakers have been trying to correct, is that employees are often misclassified on purpose.\textsuperscript{74} One factor that could account for some of these misclassifications is the complex and subjective nature of the tests used to determine whether a worker is an employee or an independent contractor.\textsuperscript{75}

However, perhaps the most pervasive reason that employers misclassify workers is the economic incentives:

\begin{quote}
[E]mployers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes); providing workers' compensation insurance; paying minimum and overtime wages; or including independent contractors in employee benefit plans. For 1984, the last year for which IRS made a comprehensive estimate of the extent of the problem, the agency estimated that 15 percent of employers misclassified 3.4 million workers as independent contractors.\textsuperscript{76}
\end{quote}

The GAO Report made several suggestions for expanding benefits coverage and worker protections, including proposals that would build on the current employer-employee relationship\textsuperscript{77} as well as some that sought

\textsuperscript{70} GAO REPORT, supra note 9, at 18.
\textsuperscript{71} \textit{Id.} at 19.
\textsuperscript{72} \textit{Id.} at 20.
\textsuperscript{73} \textit{Id.} at 27.
\textsuperscript{74} The GAO Report notes as an example that employers "consider some workers independent contractors when, in fact, they are more appropriately considered employees." \textit{Id.} at 33.
\textsuperscript{75} "The National Labor Relations Act, the Civil Rights Act, the Fair Labor Standards Act, and ERISA use different definitions of an employee and various tests, or criteria, to determine whether workers are independent contractors or employees." \textit{Id.} For example, the Fair Labor Standards Act uses the "economic realities test," which asks whether, as a matter of economic reality, workers depend upon someone else's business for the opportunity to render service or are in business for themselves. \textit{See} Thomas v. City of Hudson, 3 Wage & Hour Cas. (BNA) 513, 517 (N.D.N.Y. 1996). On the other hand, the term "employee" as used in ERISA incorporates traditional agency law criteria for distinguishing the employment relationship from that of independent contractor. \textit{See} Daughtrey v. Honeywell, Inc., 3 F.3d 1488 (11th Cir. 1993).
\textsuperscript{76} GAO REPORT, supra note 9, at 33.
\textsuperscript{77} One such proposal "would require employers to provide equal hourly wages and benefits for equal work regardless of employment status." \textit{Id.} at 37.
new approaches outside the traditional relationship.  

Senators Kennedy, Torricelli, and Harkin sponsored the Employee Benefits Eligibility Fairness Act of 2000 shortly after receiving the GAO Report. One of the first changes they proposed to ERISA was that the determination of years of service and hours of service include:

all service for the employer as an employee under the common law, irrespective of whether the worker is paid through a staffing firm, temporary help firm, payroll agency, employment agency is paid directly by the employer under an arrangement purporting to characterize an employee under the common law as other than an employee, or is paid from an account not designated as a payroll account.

The bill also responded to the key issue in the Microsoft case—waivers of participation. Section four of the proposed bill would have rendered ineffective any waiver of participation in pension or welfare plans if related in any way to the miscategorization of an employee. Another important change that Senators Kennedy, Torricelli, and Harkin proposed required objective eligibility criteria in plan instruments. Senate Bill

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78. For example, one proposal seeks to “create a new safety net for these workers by providing access to the individual insurance market through intermediaries such as professional associations, unions, nonprofits, and employers.” Id. at 40.
80. These are both factors that determine eligibility for participation in ERISA programs. See 29 U.S.C. § 1052(a)(3).
81. S. 2946 § 3(a).
82. Id. at § 4.
83. The proposed amendment to 29 U.S.C. § 1102 would have added:

(c)(1) The written instrument pursuant to which an employee benefit plan is maintained shall set forth eligibility criteria which—
(A) include and exclude employees on a uniform basis;
(B) are based on reasonable job classifications; and
(C) are based on objective criteria stated in the instrument itself for the inclusion or exclusion . . .

(2) No plan instrument may permit an employer or plan sponsor to exclude an employee under the common law from participation irrespective of the placement of such employee in any category of workers (such as temporary employees, leased employees, agency employees, staffing firm employees, contractors, or any similar category) if the employee—
(A) is an employee of the employer under the common law,
(B) performs the same work (or substantially the same work) for the employer as other employees who generally are not excluded from participation in the plan, and
(C) meets a minimum service period or minimum age which is required under the terms of the plan.
2946 would have gone a long way toward correcting the problems faced by many contingent employees, and would have obviated the need for the continuous stream of class action litigation. Unfortunately, this bill never made it out of committee, either in the Senate or in the House of Representatives.  

More recently, Representative Luis V. Gutierrez introduced House Bill 2870, the Day Laborer Fairness and Protection Act. This bill does not address many of the problems that Senate Bill 2946 did; instead it focuses on a small sector of the contingent workforce—day laborers. The stated purpose of this bill is “to ensure that individuals working as day laborers, or temporary workers, are afforded full protection of and access to employment and labor laws that ensure workplace dignity and to reduce unfair competitive advantage for firms that abuse day laborers.” Some of the protections proposed by this bill include required breaks, transportation to and from the point of hire, and health and safety regulations. While House Bill 2870 goes a long way to “help ensure that [day laborers] who work hard and pay taxes have the same employment protections as people in other jobs,” it only addresses a small part of the problem. Despite the fact that this bill is much more limited in scope that Senate Bill 2946, it is highly unlikely that it will ever be argued in the full House, and even more unlikely that it will get passed.

III. REAL WORLD CONSEQUENCES OF DECISIONS LIKE VIZCAINO V. MICROSOFT FOR CASUAL WORKERS

The purpose of the Ninth Circuit’s ruling in Vizcaino was to prevent misclassified workers from being denied pension and welfare benefits if they were in fact common law employees. The result was that Microsoft employees who had been misclassified and were, except for the misclassification, eligible to participate in the pension plans were now

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Id. at § 5.


86. Id. at § 3.

87. Id. at §§ 6, 7.

enrolled in those plans.\textsuperscript{89} One of the key requirements for participation in Microsoft's pension and welfare benefit programs was employment for a minimum of six months.\textsuperscript{90} However, the requirements for participation in employer sponsored benefit programs tend to vary from company to company.\textsuperscript{91} One unintended result of the \textit{Vizcaino} decision is that employers seem to be hedging their bets. Now, instead of taking the chance that their employees will want to participate in these programs, employers are simply firing their casual workers before they become eligible to partake in them.

When companies "seasonally fire" casual workers, they generally do not hire new people to take their place. Rather, they wait anywhere from a few days to a few weeks and then rehire the same people. One of the reasons employers engage in this practice is that the casual workers are typically skilled workers—graphic designers and computer programmers, for instance.\textsuperscript{92} In a tight job market where the contingent workforce is growing, skilled workers in casual employment are not likely to complain about the semi-annual firing and rehiring. Rather, they are concerned about being rehired again, and are grateful just to have a job.\textsuperscript{93}

Even large, liberal, presumably pro-labor corporations like The New York Times are engaged in these practices because they simply don't have

\begin{itemize}
\item \textsuperscript{89} \textit{Vizcaino II}, 97 F.3d at 1192.
\item \textsuperscript{90} \textit{Id}.
\item \textsuperscript{91} Private sector participation requirements tend to range from start date to a full year of employment before eligibility kicks in. Telephone Interview with David Schrager, Senior Claims Specialist, Zurich N.A. (Mar. 20, 2004). In fact, the eligibility requirements at any one company can be constantly in flux, depending on what changes in benefits plans the plan administrators are offering at any given time. \textit{Id}. One sector in which eligibility for benefits begins almost immediately is educational employers—public boards of education and universities, for example, provide eligibility after thirty to forty-five days. The New York City Board of Education provides benefits for anyone who has been working for thirty consecutive days—and in the case of part-time employees, it provides pro-rated benefits. Interview with Susan Brustein, Assistant Principle of Science and Technology, Townsend Harris High School (Mar. 28, 2004). At Hofstra University, faculty members are eligible for participation in pension and health benefits programs immediately upon commencing work. Telephone Interview with Bernard J. Firestone, Dean of the College of Liberal Arts and Sciences, Hofstra University (Mar. 24, 2004).
\item \textsuperscript{92} Skilled workers require time-intensive training because they are generally performing the same tasks as full-time employees, and therefore they must go through the same training as their full-time counterparts. It is often less expensive and more efficient to seasonally fire and rehire the same workers and make do without them for a few weeks in order to avoid the hassle of searching for qualified candidates and then training them.
\item \textsuperscript{93} Despite the unwillingness of many casual workers to "rock the boat," paying for one's own health insurance is an almost insurmountable task. According to \textit{Working Today}, a New York-based group that studies the workforce of the future, unless one earns more than $100,000 per year, one cannot afford health insurance plans in New York. \textit{Working Today}, LATEST CAMPAIGNS, available at http://workingtoday.org/advocacy/campaigns/php.
the budget to hire the requisite number of full-time employees. Alison Black, who began working at the New York Times in January 2003, was originally hired as a part-time casual worker. However, it quickly became apparent that her services were required on a more regular, full-time basis. Once trained, Alison was asked to work five or six days a week, but was not offered a full-time position. Additionally, she was informed by her fellow (casual) coworkers that at the six-month mark of employment she would have to take a mandatory, unpaid "vacation" before returning to work.

This furlough amounts to a loophole that companies use to avoid classifying workers as common law employees. Since jobs like Alison's require so much training, which is very costly, the New York Times prefers to "fire" people for a brief period of time, and then rehire them as new employees. Of course, the re-hired workers do not need to be re-trained, which saves both time and money.

One of the reasons that this type of employment relationship persists is that there is a vast supply of prospective employees who are willing to work under the aforementioned conditions—largely because jobs are scarce. Workers know this, and are therefore unwilling to "rock the boat" and demand full-time employment and the benefits they are rightfully owed. Many employees are also unaware of their rights pursuant to the Vizcaino decision, and those who do know are afraid that once they request benefits as common law employees they will be fired permanently.

More troubling than the manipulation of Vizcaino's loophole is the utter disregard for the Ninth Circuit's holding that employers often display. For example, if a casual worker is supposed to go on a furlough at the six-month mark, but the company is under-staffed at that time, the worker will

94. According to Alison, a casual worker at the New York Times, more than half of the employees in the New York Times News Services department are casual workers. Telephone Interview with Alison Black (Jan. 22, 2004). This employee wished to remain anonymous, and her name has been changed to reflect that.

95. Alison was hired with the expectation of working three or four days a week. Because her employment was on a part-time basis, there was no expectation of welfare benefits. She was also issued a temporary employee identification card, for access to the New York Times building, which was set to expire after six months' time. Telephone Interview with Alison Black (Mar. 12, 2003).

96. Id. Alison spent about three weeks learning the various software packages that she needed to use for her job, which required the time of previously trained employees to teach her. This was necessarily a drain on the resources of an already overextended department. Id.

97. Telephone Interview with Alison Black (Apr. 25, 2003).

98. Id.

99. Id.

100. Telephone Interview with Alison Black (Jul. 22, 2003).
often be told that their furlough will take place later.\textsuperscript{101} When Alison’s department was in a labor crunch a few summers ago, her employer chose to put off her furlough until the fall.\textsuperscript{102} For employees like Alison, these forced vacations are an unwelcome pitfall of being categorized as casual workers. Although companies may vary their seasonal firing depending on how long it takes for employees to become eligible for welfare benefits plan participation, the problem remains. The consequences of the \textit{Vizcaino} decision are thus bittersweet. While it sent a message to employers that they could not continue the farce of misclassifying workers for indefinite periods of time as a means of excluding them from participating in employee benefits plans, it also led to “creative solutions” on the part of employers as a way to skirt the issue. Casual workers are still, unfortunately, not adequately protected regarding welfare benefits in the workplace.

IV. CONCLUSION

The casual workforce faces myriad challenges. They are not sufficiently protected by current labor laws, and although court rulings have helped those who bring suit, the rest of the casual workforce is faced with worse conditions as corporations try to sneak through increasingly smaller loopholes. As the American workforce becomes more and more dependent on employee benefits packages, the issue of casual worker protections will continue to gain prominence and importance.

Senators Kennedy and Harkin and others need to be pushed to continue the fight, because it seems that, with the exception of Harvard University, class action lawsuits and legislation are the only ways to get results. Organizations like Working Today serve an important role in helping change legislation so that it better protects contingent workers.\textsuperscript{103}

\begin{flushright}
101. After six month’s employment with the New York Times, Alison was given no indication that she had to leave. Instead, in October, more than nine months after she began her employment, she was told to take two weeks of unpaid leave. Telephone Interview with Alison Black (Oct. 12, 2003). However, her employee identification badge did expire after six months. \textit{She was simply instructed to get a new one}. \textit{Id.}

102. Alison’s boss most likely felt that the appearance of compliance with the six-month rule was important, because if the personnel department looked at her employment record, they would see that she had taken a two-week unpaid leave and think that everything was legal. Another concern of Alison’s was that since she was “being forced to take a farcical vacation, [she would] have trouble paying bills because there [wouldn’t] be any money coming in for those two weeks.” Telephone Interview with Alison Black (Oct. 12, 2003), supra note 101.

103. Working Today states its mission as follows:

\begin{quote}
Independent Workers often pay a high price for working in non-standard arrangements, making it increasingly more difficult to survive in the
\end{quote}
For example, current government policies assume that employers will be providing insurance, and rates are usually set according to the number of employees in a company in order to spread the risks. Working Today has proposed several policy changes that would possibly help an even larger group of workers than the legislation that Senators Kennedy, Torricelli, and Harkin proposed in 2000:

Groups attempting to address this problem by pooling together independent workers do not fit easily into any one category since current insurance rates were determined assuming the employer model. For example, even though the Freelancers Union has over 4,000 members, our rates do not reflect the size of our group. One way to drive down costs is to update the regulations so that they reflect the change in the structure of work.

In addition to revising existing insurance regulation to reflect the changes in the workforce, Working Today also recommends establishing refundable tax credits for health insurance payments for people, regardless of how they work.

Of course, the ideal solution would encompass both concepts—it would protect workers who freelance and do not necessarily work continually for the same employer, and it would also make accommodations for those who fit the description of common law employees. But it is unlikely that such a solution will come in the near future without a significant increase in activism.

The first steps toward solving these problems have already been taken by plaintiffs like Ms. Vizcaino, and legislators such as Senator Kennedy. Organizations like Working Today not only serve as lobbyists, but also go

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104. Id.

105. Id. Working Today is also focusing on several other issues that face freelance workers. These include: unemployment insurance—many independent workers have no access to unemployment insurance; anti-discrimination protection—because under the Civil Rights Act of 1964, employees are able to seek redress for workplace discrimination, and independent workers are frequently not classified as employees and are thus not protected from discrimination; self-employment taxes—in New York City, independent workers are required to pay onerous self-employment taxes in addition to income taxes. Id.
a long way toward increasing public awareness of the challenges that a continually growing number of workers face.

Until more substantive solutions are put into place, workers like Alison are faced with the unsavory choice of bringing suit against their employers with the probability that they will be fired and replaced by someone else, or of remaining silent and hoping that at some point in the future the budget will allow them to be hired as full-time, permanent employees.\footnote{The New York Times posted Alison's job as a full-time position approximately a year ago, for which she applied. Nearly two and a half years after she began working at the New York Times, Alison was hired as a full-time permanent employee with full benefits, subject to a six-month probation period. Finally, after almost three years' employment with the same company, Alison has job security. Telephone Interview with Alison Black (Dec. 20, 2004).} For most workers, both of these choices are untenable. Perhaps the most frequent criticism of our legal regimes in general, and the common law in particular, is that it lurches forward only too rarely to play catch-up with an ever-changing and more complex reality. In the area of employee benefits, the time has come for the law to move forward decisively and reflect the needs of our current reality.