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Frances Gregston

MEWA's: cover anyone's 2nd of arrangements -
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Is this a way for someone to do this + have employer \$

Plans are employment based + employer always accountable
IRS + DOL are interested in coverage, if it means it's
more difficult w/ accountability if it works

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FINAL REPORT

UNITED STATES DEPARTMENT OF LABOR

ADVISORY COUNCIL ON EMPLOYEE
WELFARE AND PENSION BENEFIT PLANS

REPORT OF THE WORKING GROUP ON THE
BENEFIT IMPLICATIONS OF THE GROWTH OF A
CONTINGENT WORKFORCE

NOVEMBER 10, 1999

The Working Group Report, submitted to the ERISA Advisory Council on November 10, 1999, was approved by the full body and subsequently forwarded to the Secretary of Labor. The Advisory Committee on Employee Welfare and Pension Plans, as it is formally known, was established by Section 512(a)(1) of the Employee Retirement Income Security Act of 1974 to advise the Secretary with respect to carrying out his/her duties under ERISA.

WORKING GROUP ON THE BENEFIT IMPLICATIONS OF THE GROWTH OF A CONTINGENT WORKFORCE

Whether called contingent, flexible, alternative or nonstandard, the portion of the American workforce engaged in nonpermanent or less than full-time employment constitutes approximately 30% of the entire workforce and is growing. Because the workers in this portion of the workforce have substantially less access to traditional employment-based health and retirement benefits, and evidence substantially less proclivity to participate in such benefit plans where available, serious social policy implications are presented.

And, whether or not the growth of this contingent workforce reflects the preferences of a new generation of "free agents by choice," or the economic product of global competition unencumbered by effective collective bargaining, its social consequences require serious policy consideration.

I. THE WORKING GROUP'S PURPOSE AND SCOPE

The subject matter of this Working Group--the benefit implications of the growth of a contingent workforce--flows logically from the findings of Working Groups of the Advisory Council on Employee Welfare and Pension Benefit Plans in both 1997 and 1998 which identified and measured the decline of the traditional system of employer-provided pension benefits in the United States.

In 1997 the Working Group on Defined Contribution vs. Defined Benefit Plans identified a virtual flight by employers from defined benefit to defined contribution plans, and a resulting undermining of the traditional annuity form of benefit payment that characterized the defined benefit system for the lump sum form of benefit characterizing defined contribution plans. Particularly troubling to the Working Group was the domination of 401(k) plans in this defined contribution plan growth because 401(k) plans were, by their nature, particularly vulnerable to participant dissipation of assets for purposes other than retirement.¹

Because of serious reservations about the growth of 401(k) plans, and their susceptibility to asset dissipation prior to retirement, the 1997 Working Group on Defined Contribution vs. Defined Benefit Plans, recommended that a working group be established by the 1998 Advisory Council to inquire into the

¹Report of the Working Group on the Merits of Defined Contribution vs. Defined Benefit Plans (1997).

dangers of asset dissipation, popularly known as "leakage," of defined contribution plan assets.

Upon that recommendation the 1998 Advisory Council established a Working Group on Retirement Plan Leakage. That Working Group's report identified and measured empirical evidence of the opportunities, and utilization of those opportunities, for the leakage of 401(k) plan assets prior to retirement, and urged strong action to limit those opportunities if 401(k) plans were to successfully supplant traditional defined benefit plans as the primary form of employer-provided retirement security in the United States.²

Following on those two prior Working Group reports, it was appropriate that in 1999 the Advisory Council established a Working Group on the Benefit Implications of the Growth of the Contingent Workforce. Taken together, the findings of the two prior Working Groups established that the defined benefit pension system, historically available to those in permanent full-time employment, is being supplanted by a 401(k) system bearing an inherent risk of asset dissipation prior to retirement. If, at the same time that the retirement security system for the traditional workforce is being exposed to these new risks, the U.S. economy is experiencing a growth in the nontraditional workforce that has historically had very limited access to employer-provided benefits, the potential for crisis in health and retirement benefits has been magnified.

Accordingly, at its February 1999 meeting the Advisory Council on Employee Welfare and Pension Benefits established the Working Group on the Benefit Implications of the Growth of a Contingent Workforce, which now presents its report.

²Report of the Working Group on Retirement Plan Leakage: "Are We Cashing Out Our Future?" (1998).

II. PROCEEDINGS OF THE WORKING GROUP

The Working Group held five hearings at which fifteen witnesses presented testimony.

At the Working Group's first hearing the authors of the Bureau of Labor Statistics' (BLS) 1995 and 1997 studies of contingent workers and alternative work arrangements, Mr. Stephen Hipple and Ms. Sharon Cohany, appeared and described in detail their methodologies and findings. Because their studies had attempted to measure the characteristics and size of the workforces engaged in contingent and alternative work arrangements, but did not specifically address the availability of employer-provided fringe benefits for these cohorts, Dr. Paul Yakoboski, Senior Research Fellow of the Employee Benefits Research Institute (EBRI), also appeared at the Working Group's first hearing.

Dr. Yakoboski co-authored a March 1999 EBRI study that took the same data utilized by Mr. Hipple and Ms. Cohany, and further analyzed it to determine the extent to which employer-provided health and retirement benefits were available to those employed in alternative work arrangements, i.e., temporary help agency workers, on-call workers, contract company workers, independent contractors and regular part-time workers.

At the Working Group's second hearing testimony was received from Dr. Edith Rasell who co-authored a 1997 study, and 1999 follow-up study, sponsored jointly by the Economic Policy Institute (EPI) and the Women's Research and Education Institute, which analyzed the 1995 and 1997 BLS surveys with specific reference to the availability of employer-provided benefits.

At the second hearing the Working Group also received testimony from Mr. Larry Engelstein, Associate General Counsel of the AFL-CIO, who described the limited ability under current labor laws for contingent workers to secure access to employer-provided fringe benefits through the traditional system of collective bargaining.

At its third hearing the Working Group received testimony from representatives of the U.S. Department of the Treasury and the U.S. Department of Labor concerning the statutory framework governing the obligations of employers providing fringe benefits to do so on a non-discriminating basis and in conformity with the terms and provisions of all plan documents. Ms. Deborah Walker and Mr. William Bortz of the Treasury Department described in detail the substantial costs which can be avoided by employers seeking to avoid their statutory obligations, and the ongoing IRS enforcement program to identify and pursue cases of employee misclassification.

Mr. Marc Machiz, Associate Solicitor of the U.S. Department of Labor (DOL), described for the Working Group the obligations imposed by the Employee Retirement Income Security Act of 1974 (ERISA) with respect to contingent workers. Using both the recently filed DOL suit against Time Warner, Inc., and the ongoing private action in Vizcaino vs. Microsoft as examples, Mr. Machiz emphasized that through precise and artful draftsmanship of plan documents employers can in most cases lawfully exclude contingent workers from benefit plan coverage.

At its fourth hearing the Working Group received testimony from four witnesses representing the employer perspective on the contingent workforce. Mr. Edward Lenz, Senior Vice President Public Affairs and General Counsel of the National Association of Temporary and Staffing Services (NATSS), and Mr. Marc Freedman, Special Counsel of the National Technical Services Association (NTSA), both provided testimony on the size and growth of the temporary help agency portion of the contingent workforce, and emphasized its growth in the technical and professional fields. Likewise, Mr. Carl Camden, Executive Vice President Field Operations of Kelly Services Inc., discussed the growth of the industry as a whole and his company's growth experience, and emphasized his view that the traditional system of employment-based fringe benefits was entirely inadequate for the delivery of benefits to the growing contingent workforce, and that the inability to provide benefits to this workforce was the greatest impediment to the growth of the flexible workforce required to meet the challenges of global competition.

Mr. Milan Yager, Executive Vice President of the National Association of Professional Employer Organizations (NAPEO), testified concerning the truly explosive growth--30% per year for the last five years--of professional employer organizations. These organizations, virtually nonexistent 10 years ago, act as intermediaries between employers and their workforces to provide complete payrolling and human resources services. Employees, while retaining a co-employer relationship with the entity to which they provide their services, can be hired, fired and paid by the intermediary professional employer organization. Accordingly, while these employment relationships are not included within the contingent workforce, from the employees' standpoint they have all the hallmarks of the disconnect between employer and employee that characterize the other cohorts of the contingent workforce.

The fifth and final hearing of the Working Group received testimony from two researchers, Dr. Susan Houseman of the W.E. Upjohn Institute for Employment Research and Dr. Paul Osterman of the Sloan School at the Massachusetts Institute of Technology, and attorney David Stobaugh of Seattle, Washington, who represents the plaintiffs in Vizcaino vs. Microsoft, as well as plaintiffs in a variety of other litigation seeking to secure fringe benefits for workers excluded from coverage by their employers.

Dr. Houseman discussed with the Working Group the findings contained in her 1997 report entitled Temporary, Part-Time, and Contract Employment in the United States, as well as recent follow-up research she has conducted on the subject for the U.S. Department of Labor. Dr. Houseman's study analyzed the same cohorts of the contingent workforce analyzed in the BLS survey of alternative work arrangements. However, Dr. Houseman's study was based upon employer interviews, while the BLS data was harvested from employee interviews.

Given the different universes from which their data was drawn, the similarity in findings of the Houseman and BLS studies as to the size of the various cohorts of the contingent workforce is remarkable. Indeed, the outcomes of the EBRI (Dr. Yakoboski), EPI (Dr. Rasell) and Upjohn Institute (Dr. Houseman) studies of the health and retirement benefit coverage of the various cohorts is all quite similar and, accordingly, is presented in Tables 1, 2 and 3 of this Report as bases for evaluating the benefit implications of the contingent workforce.

Dr. Osterman of MIT discussed his recent book Securing Prosperity: How the American Labor Market Has Changed and What To Do About It, and specifically addressed the policy judgements to be made when balancing the health and retirement security interests of the U.S. workforce against the competitive needs of U.S. industry for a flexible workforce.

Mr. Stobaugh reviewed in some detail the various factual settings in which his litigation on behalf of employees labeled as contingent workers--generally agency temporaries, contract company workers or independent contractors--has arisen. He described the legal theories he has successfully pursued to secure benefit coverage for these employees as true common law employees of the employer to whom they provide their services, not the employer who may merely be acting as conduit agent for the payment for those services. Mr. Stobaugh strongly urged that statutory penalties be imposed in addition to the compensatory damages currently available to act as a deterrent to further growth of the unlawful utilization of contingent workers to avoid payment of fringe benefits.

TABLE 1
CONTINGENT WORKERS AS PERCENT OF TOTAL WORKFORCE

	TEMP. HELP AGENCY	DIRECT HIRE TEMP.	ON-CALL WORKERS	CONTRACT COMPANY WORKERS	INDEPENDENT CONTRACTORS	OTHER SELF- EMPLOY	REGULAR PART- TIME WORKERS	TOTAL
BLS ³	1.0	---	1.6	.6	6.7	---	15.4	25.3
EPI ⁴	1.0	---	1.5	1.3	6.4	4.8	13.6	28.6
Upjohn ⁵	<u>1.0</u>	<u>2.6</u>	<u>1.6</u>	<u>.6</u>	<u>6.7</u>	<u>5.1</u>	<u>13.6</u>	<u>31.2</u>
Average	1.0	2.6	1.6	.8	6.6	5.0	14.2	31.8

³Bureau of Labor Statistics, 1998. "Workers in Alternative Employment Arrangements: A Second Look," Washington, D.C., U.S. Department of Labor.

⁴Economic Policy Institute and Women's Research and Education Institute, 1997. "Nonstandard Work, Substandard Jobs, Flexible Work Arrangements in the U.S.," Washington, D.C.; and supplemental testimony before the Working Group by Dr. Edith Rasell, Economic Policy Institute, May 5, 1999.

⁵W. E. Upjohn Institute for Employment Research, 1997. "Temporary, Part-Time and Contract Employment in the United States: A Report on the W.E. Upjohn Institute's Employer Survey on Flexible Staffing Arrangements," Kalamazoo, Michigan; and supplemental testimony by Dr. Susan Houseman before the Working Group, September 8, 1999.

TABLE 2

PERCENT OF WORKERS WITH PENSION BENEFITS THROUGH THEIR EMPLOYERS

	TEMP. HELP AGENCY	ON-CALL WORKERS	CONTRACT COMPANY WORKERS	REGULAR PART-TIME WORKERS	REGULAR FULL-TIME WORKERS
EBRI ⁶	4.6	28.4	39.9	16.2	56.8
EPI ⁷	5.6	39.6	46.3	17.0	63.3
Upjohn ⁸	<u>4.3</u>	<u>22.2</u>	<u>39.2</u>	<u>20.4</u>	<u>67.1</u>
Average	4.8	30.1	41.8	17.9	62.4

⁶Employee Benefits Research Association, 1999. "Contingent Workers and Workers in Alternative Work Arrangements", Washington, D.C.

⁷Economic Policy Institute and Women's Research and Education Institute, 1997. "Nonstandard Work, Substandard Jobs, Flexible Work Arrangements in the U.S.," Washington, D.C.; and supplemental testimony before the Working Group by Dr. Edith Rasell, Economic Policy Institute, May 5, 1999.

⁸W. E. Upjohn Institute for Employment Research, 1997. "Temporary, Part-Time and Contract Employment in the United States: A Report on the W.E. Upjohn Institute's Employer Survey on Flexible Staffing Arrangements," Kalamazoo, Michigan; and supplemental testimony by Dr. Susan Houseman before the Working Group, September 8, 1999.

TABLE 3
PERCENT OF WORKERS WITH HEALTH BENEFITS THROUGH THEIR EMPLOYERS

	TEMP. HELP AGENCY	ON-CALL WORKERS	CONTRACT COMPANY WORKERS	REGULAR PART-TIME WORKERS	REGULAR FULL-TIME WORKERS
EBRI ⁹	8.5	33.2	57.9	15.7	66.5
EPI ¹⁰	6.3	43.1	55.7	18.0	69.4
Upjohn ¹¹	<u>7.3</u>	<u>20.0</u>	<u>51.3</u>	<u>17.7</u>	<u>83.8</u>
Average	7.4	32.1	55.0	17.1	73.2

⁹Employee Benefits Research Association, 1999. "Contingent Workers and Workers in Alternative Work Arrangements", Washington, D.C.

¹⁰Economic Policy Institute and Women's Research and Education Institute, 1997. "Nonstandard Work, Substandard Jobs, Flexible Work Arrangements in the U.S.," Washington, D.C.; and supplemental testimony before the Working Group by Dr. Edith Rasell, Economic Policy Institute, May 5, 1999.

¹¹W. E. Upjohn Institute for Employment Research, 1997. "Temporary, Part-Time and Contract Employment in the United States: A Report on the W.E. Upjohn Institute's Employer Survey on Flexible Staffing Arrangements," Kalamazoo, Michigan; and supplemental testimony by Dr. Susan Houseman before the Working Group, September 8, 1999.

III. DISCUSSION

For purposes of this report, the Working Group adopts as its definition of contingent work, work that is nonpermanent or less than full time. The rationale for adoption of this definition is articulated well in the Introduction to the March 1999 EBRI study, Contingent Workers and Workers in Alternative Work Arrangements:

"The changing employment environment in the United States can be characterized by the increased use of flexible work arrangements. The term contingent employment is often used to describe flexible work arrangements or alternatives to traditional full-time work arrangements through which individuals are hired by, and work for, a single employer. Contingent work, defined broadly, covers flexible employment practices such as temporary work, employee leasing, self-employment, contracting, and home-based work, as well as part-time work. Contingency work implies changes in three traditional notions of employment:

- Time--something different from an eight-hour, five-day work week.
- Permanency--something other than a permanent relationship between an employer and worker.
- Social contract--something different from the traditional reciprocal rights, protections, and obligations between the worker and the employer (Christensen and Murphree, 1988)."

Table 1 presents the findings of three of the studies whose authors presented testimony before the Working Group: the Bureau of Labor Statistics (Ms. Sharon Cohany), the Economic Policy Institute (Dr. Edith Rasell) and the Upjohn Institute for Employment Research (Dr. Susan Houseman). The estimates of the size of the contingent workforce in these three studies range from 25.3 to 31.2. When simple arithmetic averages of each component group are added together, the three studies produce a combined total average of 31.8%. Accordingly, it is fair to say that the contingent workforce represents approximately 30% of the overall U.S. workforce. In absolute numbers approximately 38 million of the 126.7 million workers in the U.S. workforce in 1997 were employed in contingent jobs.

Tables 2 and 3 present the findings of the three studies reviewed by the Working Group that analyzed the availability of health and retirement benefits to the primary cohorts of the contingent workforce, relative to the regular full-time workforce. The percentages in each table represent the percentage of workers in each cohort who actually receive pension or health benefits from their employers.

Independent contractors are not included in these tables because they are, by definition, self-employed and do not qualify to participate in benefit plans of the employers to whom they provide their services.

With respect to pension benefits, Table 2 presents the findings of the EBRI, EPI and Upjohn Institute studies, and averages of the three. On average, 62.4% of regular full-time employees participate in employer-provided pension plans. Compared to regular full-time employees, only two-thirds as many employees of contract companies (41.8%), one-half as many on-call workers (30.1%), one-third as many regular part-time employees, and one-twelfth as many temporary help agency employees (4.8%) participate in employer-provided pension plans.

The story is much the same for employer-provided health benefits. As shown in Table 3, an average of 73.2% of regular full-time employees participate in employer-provided health benefit plans. Comparatively, only three-fourths as many contract company workers (55%), two-fifths as many on-call workers (32.1%), one-fourth as many part-time workers (17.1%), and one-tenth as many temporary help agency workers (7.4%) participate in employer-provided health benefit plans.

Several explanations were offered for these low levels of employer-provided pension and health benefits in the contingent workforce. First of all, representatives of the temporary help agency industry described the difficulty in designing pension and health benefit plans for workers with relatively brief periods of attachment to any particular agency, and argued that an alternative must be found to the traditional employment-based system for delivering health and pension benefits. Without providing specific details, Mr. Carl Camden of Kelly Services suggested that the provision of benefits needs to be separated from the place of employment. He pointed out that even among the 30% of Kelly Services' workforce that are long-term temporaries, the participation rate in Kelly's benefit plans is only 10%. Likewise, Mr. Marc Freedman of the National Technical Services Association, without specifics, expressed the opinion that the traditional linkage between benefits and employment has become an inefficient delivery system and that we should address solutions that focus on providing greater individual access to benefits outside of the employment relationship.

Another explanation for the low level of benefit participation by contingent workers was the cost and type of benefits offered. While no testimony or evidence was produced on the question, it is likely that the type of pension plans offered to contingent workers are not traditional noncontributory defined benefit plans, but rather the increasingly prevalent 401(k) plans that require voluntary employee contributions. And Mr. Lenz of the National Temporary and Staffing Services Association testified that among temporary agencies with annual revenues exceeding \$50 million, the health benefit plans offered, on

average, require the employee to pay 60% of the premium. So, undoubtedly, the low levels of participation are a function of the relatively costly nature of the benefit plans available to the contingent workforce.

A further explanation offered for the low level of benefit plan participation was the availability of benefits through a spouse or other family member. While this explanation is supported by the research, it is more troubling than comforting. To the extent that employers of the contingent workforce are avoiding the costs of fringe benefits because they are available through relatives of their employees who work for employers that do provide benefits, the viability of the employment-based system of benefits is placed under further stress. In effect benefit-provider employers are subsidizing non-providers, and workers are induced to arbitrage the system.

In addition to providing the Working Group with insight into the reasons for the low participation of contingent workers in employment-based benefits, the representatives of the temporary help agency industry also documented the rapid growth in contingent employment in recent years, and the expectation that this growth will accelerate.

The BLS study of workers in alternative work arrangements confirmed that between 1995 and 1997 three of the cohorts of the contingent workforce remained relatively static as percentages of the overall workforce: independent contractors, on-call workers and part-time workers. On the other hand, the remaining two cohorts grew substantially: the temporary help agency cohort grew by 10%, and contract company workers grew by 24%. These numbers were confirmed by the other research studies reviewed by the Working Group.

The growth in these two segments was not viewed with alarm because they comprise the two smallest cohorts of the contingent workforce. Hidden in those numbers, however, may well be the beginnings of truly explosive growth in that portion of the contingent workforce that has little, if any, chance of attaining health and retirement benefits through the traditional system.

While the EBRI, EPI and Upjohn Institute studies all confirmed that employees of temporary help agencies constituted about 1% of the 1997 workforce, or 1,267,000 workers, Mr. Lenz of the NATSS testified that in 1990 the average daily employment for temporary help firms was 1.1 million, as of 1998 it was 2.6 million, and he estimated that it is currently about 3 million--a threefold increase in nine years. This growth rate is consistent with the 15% per year growth of Kelly Services over the last five years reported by Mr. Camden.

Why didn't the BLS survey capture the size and rate of growth of this cohort? Dr. Rasell of EPI provided one answer. In her testimony she pointed out that while the BLS 1995 and 1997

surveys used a definition of temporary help agency workers not previously used, there has for many years been another BLS survey conducted monthly, the Current Population Survey (CPS), which identifies workers in the "help supply services industry." While she did not explain the differences in the definitions, she testified that in 1982 only .5% of workers identified themselves as working in the help services industry, but as of 1998 2.2%, or 2.5 million workers so identified themselves in the CPS. This number is more consistent with both the size and growth rates identified by Mr. Lenz and Mr. Camden.

A further explanation of the discrepancy may lie in the way BLS asked its questions. Mr. Freedman of the NTSA pointed out that while his member companies provide temporary services, they tend to be of a longer term nature than the typical temporary help agency worker and, therefore, may well have been captured under the contract company category in the BLS Survey. Mr. Freedman explained that if that is indeed what took place it would explain the rapid growth in the contract company cohort between 1995 and 1997, reflecting what he characterized as the rapid growth in his industry.

For purposes of the Working Group the discrepancies in estimates of the size of the temporary agency and contract company workforces are relatively immaterial. What is material is that by every estimate these cohorts are growing and growing rapidly.

Indeed, the testimony of all the industry witnesses compels no other conclusion than that the workers employed through their agencies represent the vanguard of the emerging workforce of the American economy. As described by Messrs. Lenz, Freedman and Camden temporary help agencies now provide workers in virtually every occupation, with the greatest growth coming in the technical and professional fields. And their testimony as to the rapid growth expected in this field is consistent with the Upjohn Institute survey in which two-thirds of the responding employers predicted that organizations in their industry would increase their use of flexible staffing arrangements in the coming five years.

Most importantly, whether this vanguard consists of "free agents" by their own choice--Mr. Camden's term--or "freelancers" by their employer's choice (as described by Mr. Stobaugh, Microsoft identified their long-term temporary employees as "freelancers"), this is a vanguard that will have only the most minimal access to health and retirement benefits in our traditional employment-based system of delivery.

IV. FINDINGS

1. The term "contingent workforce" utilized by the Bureau of Labor Statistics does not adequately describe the workforce at risk in the traditional U.S. employment-based system of health and retirement benefits.
2. The workforce at risk in the traditional employment-based system of health and retirement benefits includes the substantial and growing portion of the workforce engaged in nonpermanent or less than full-time employment.
3. The percentage of the workforce engaged in nonpermanent or less than full-time employment is approximately 30% and is growing.
4. A nonpermanent or less than full-time workforce can permit employers to respond to global competitive pressures and may also respond to employee preferences for flexibility.
5. The inaccessibility of health and retirement benefits to the nonpermanent or less than full-time workforce is a substantial barrier to the development of a flexible workforce.
6. Continued growth of this nonpermanent or less than full-time workforce without benefits coverage will increase the subsidy by employers that do provide benefits to employers that do not provide benefits, and further burden all taxpayers with the obligation to subsidize the health and retirement benefits of this workforce.
7. In the absence of a collectively bargained obligation, the provision of employment-based health and retirement benefits is entirely a matter of voluntary employer choice.
8. The current laws regulating collective bargaining were not designed to, nor do they adequately, provide access to collective bargaining to the nonpermanent or less than full-time workforce.

V. RECOMMENDATIONS

Having identified the size and growth of the contingent workforce, its limited access to traditional employment-based fringe benefits, and its limited ability to secure such benefits through collective bargaining, the Working Group makes the following recommendations:

1. The Department of Labor and the Internal Revenue Service should continue to vigorously enforce existing laws to prevent the denial of fringe benefits to statutory employees misclassified as contingent workers.
2. Existing labor and antitrust laws that prevent access by contingent workers to multiemployer plans of the type that have traditionally served employers and contingent workers in the construction and garment industries should be modified:
 - a) Independent contractors should be permitted to organize and bargain collectively on a single or multiemployer basis.
 - b) The "community of interest" standards developed administratively by the National Labor Relations Board to define appropriate units of workers for collective bargaining should be modified to permit temporary and contract company employees to organize and bargain with their employers.
 - c) The provisions of labor law recognizing the temporary and intermittent nature of work in the construction and garment industries, that permit employers and employees in those industries to enter into pre-hire agreements setting the terms and conditions for employment, should be extended to independent contractors, temporary agency employees and contract company workers.
3. While the decoupling of benefits from employment urged by representatives of the temporary help industry may most simply be accommodated by a system of universal health and retirement benefits, intermediate solutions should be explored:
 - a) The multiemployer plan model, which facilitates the availability of health and retirement benefits for small employers with temporary and intermittent workforces, should be expanded to the contingent workforce. In addition to the construction and garment industries, successful examples of such plans are found in state and local governments and rural electrical cooperatives.

- b) While problems of cost and adverse selection will likely limit their effectiveness, purchasing coalitions permitting contingent workers to obtain health and retirement benefits at group rates, should be facilitated.
4. The Department of Labor should review current statutory impediments to group purchasing of health benefits along the multiemployer model. Specifically, the Department of Labor, pursuant to Section 3(40) of ERISA, should seek to expand the ability to extend health benefits to contingent workers through Multiple Employer Welfare Arrangements (MEWAs) with, however, strong safeguards to assure the adequate funding of such arrangements.
 5. The Internal Revenue Code Section 403(b) retirement plan model should be reviewed as a prototype for utilization as a vehicle to permit employers of contingent workers to contribute to retirement accounts of those workers.
 6. To eliminate a possible disincentive to the provision of health and retirement benefits to contingent workers, the Department of Labor and the Department of the Treasury should review whether removing the provision of employee benefits as one of the factors in the current 20-factor test for determining employee status would enhance the ability of contingent workers to secure health and retirement benefits, without unacceptable offsetting losses either to the critical health and retirement systems funded through employment taxes, or other fundamental worker protections.
 7. The Department of the Treasury should review the Voluntary Employees' Beneficiary Association (VEBA) rules of Section 501(c)(9) of the Internal Revenue Code, and consider allowing the inclusion of a greater percentage of non-employee contingent workers.
 8. The Internal Revenue Service should amplify its instructions and conduct public information and education activities for taxpayers concerning the deductibility of individual health insurance costs.

VI. SUMMARIES OF TESTIMONY

Meeting of April 6, 1999

Testimony of Mr. Steven Hipple
Bureau of Labor Statistics,
U.S. Department of Labor

Steven Hipple, economist, Division of Labor Force Statistics, Bureau of Labor Statistics (BLS) discussed the Current Population Survey (CPS). It is a sample survey of 50,000 households (100,000 people) conducted each month since the late 1940's. Interviews are 60% by phone and 40% in person. It is the primary source of demographic data on the US labor force over age 15. The best known statistic from this survey is the national unemployment rate. It is now 4.2 %, the lowest since January of 1970.

BLS also uses the CPS questionnaire to conduct periodic surveys including the Contingent and Alternative Work Arrangements Survey. It has been conducted three times -- in February of 1995, 1997 and 1999. Results of the 1999 survey should be available in the fall of 1999.

BLS has not done a contingent work survey of employers. All of its three surveys were through the Current Population Survey, which asks questions of individuals.

Contingent work is not a particularly well or narrowly defined term. It often has referred to temporary work or "just-in-time" work in addition to other types of non-full time work.

BLS defines contingent work as any job in which an individual does not have an explicit or implicit contract for ongoing employment. It covers anyone holding a job that, for an economic-related reason, is structured to be short-term, or temporary. BLS publishes three different definitions of contingent work:

- Estimate 1 is the narrowest and includes wage and salary workers who expect their jobs will last for one year or less and have held their jobs for one year or less.
- Estimate 2 is broader. BLS adds in the self-employed and independent contractors who meet the same criteria as Estimate 1.
- The broadest (Estimate 3) has no restrictions on current and restricted tenure. It basically includes anyone who thinks his or her job is temporary or not expected to continue.

Results of the 1997 survey showed that the number of contingent workers ranged from 2.4 million under Estimate 1 to 5.6 million under Estimate 3. The portion of total employment that was in a contingent job (referred to as the contingency rate) ranged from 1.9% to 4.4%. These were slight declines from numbers in the 1995 survey. The time periods covered by the 1995 and 1997 surveys involved strong labor market conditions with low unemployment and strong job growth.

These surveys indicate that younger workers have a higher probability of holding a contingent job than older workers. For workers under age 25, the contingency rate was high -- over 9% -- compared to the overall rate for all workers, which was 4.4%. A large portion of under-25 workers was enrolled in school and probably wanted the increased flexibility of a temporary job.

Women had a higher probability of holding a contingent job than men. Industries with above-average contingency rates included construction and services. Namely, 30 percent of college-level instructors, for example, held jobs expected to last a limited period of time and they reflect the increased use of non-tenured faculty who typically work on short-term contracts.

Half of contingent workers said that they wanted permanent jobs. For younger contingent workers a third said they were satisfied with their temporary jobs. Older contingent workers are more likely to prefer a permanent job than younger contingent workers; 70% of workers over age 25 wanted a permanent job.

Contingent workers earned only 80% of what their non-contingent counterparts earned. Contingent workers were also less likely to have employer-provided health insurance. However, 2/3 were covered by some form of health insurance -- usually from a spouse or another family member.

Only 16% of contingent workers were included in an employer-provided pension plan versus 50% of all non-contingent workers.

Meeting of April 6, 1999

Testimony of Ms. Sharon R. Cohany,
Bureau of Labor Statistics,
U.S. Department of Labor

Sharon Cohany, economist, Office of Unemployment and Unemployment Statistics, Bureau of Labor Statistics said that BLS has identified four selected alternative work arrangements:

- independent contractors,
- on-call workers,
- workers employed by temporary help firms, and
- workers employed by contract company firms.

The 1995 and 1997 surveys indicate that these four arrangements accounted for 10% of all workers. The largest arrangement was independent contractors, independent consultants and free-lance workers. Independent contractors tend to be middle-aged men, with college degrees, in managerial or skilled blue-collar fields. Temporary agency workers were more likely to be younger -- women in clerical occupations and men in machine operator jobs.

Most independent contractors preferred their arrangements to traditional jobs, while only 1/3 of temporary agency workers preferred their situations to more traditional arrangements. Only 1.9% of on-call workers are represented by a union.

Contract company workers earn more than traditional workers, while on-call workers and temporary help agency workers earned less than the average.

29% of temporary help agency workers had been in their current assignment for a year or more, which shows that temporary help agencies can be intermediaries for relatively long-term employment relationships.

News releases with these data (as well as articles in the Monthly Labor Review) can be found on the BLS web site.

Meeting of April 6, 1999

Testimony of Dr. Paul Yakoboski, Senior Research Fellow, Employee Benefit Research Institute

Dr. Paul Yakoboski said that BLS determined that 5% of the total US-employed population was contingent in February of 1995 compared to 4.5% as of February 1997.

Only 66% of contingent workers had health insurance coverage in 1997 compared with 82% of non-contingent workers. 54% of non-contingent workers had employment-based health insurance compared with 21% of contingent workers. Even counting health insurance coverage from another source such as a spouse, a greater proportion of contingent workers are uninsured.

Only 16% of contingent workers participated in a retirement plan in 1997 compared with 50% of non-contingent workers.

Contingent work arrangements can offer advantages to both employer and employee. Employers can benefit from scheduling flexibility, the potential for incremental growth and management of labor costs. Employees can benefit through scheduling flexibility, supplemental income and personal development. However, contingent workers typically earn less and are less likely to receive health care and retirement benefits.

Meeting of May 5, 1999

Testimony of Dr. Edith Rasell,
Economist,
Economic Policy Institute

Fundamentally, Dr. Rasell urges that rather than the concept "contingent workforce," the best and most applicable, indeed broadest, and most accurate description is the "nonstandard workforce."

The "nonstandard workforce" is a workforce where (1) there is no employer (independent contractor, self-employed); (2) the firm that employs the worker differs from the one for whom the person works (temps, contract workers); (3) there is extreme temporal instability (temps, on-call workers, day laborers) or (4) where the worker works part time. In these jobs, average pay is lower and retirement and health coverage benefits are less common compared with the standard workforce. Unfortunately, the Bureau of Labor Statistics' definition of "contingent" work (a job of limited duration) differs from the way this word is commonly used and this has confused the debate. Dr. Rasell suggests avoiding this confusion and using the term "nonstandard workforce" to define alternative forms of employment and that the definition "nonstandard workforce" should include part-time and self-employed people in addition to those employees which the Bureau of Labor Statistics includes in its definition of alternative work arrangements.

The choice of definition determines the size of nonstandard workforce and the scope of the problem of low wages and lack of health insurance and retirement benefits for the nonstandard workforce.

The main public policy problem with the nonstandard workforce is the low levels of pay and the relative non-existence of retirement and health benefits compared to regular full-time employees. The Economic Policy Institute estimates that approximately 30% of all workers are in the nonstandard workforce.

Retirement coverage in any form and at any level for the nonstandard workforce is overall approximately 12%, versus

retirement coverage for the standard full-time workforce of approximately 66%.

Between 1982 and 1995, temporary agency workers as a share of total employment grew from 0.5% of the workforce to 2.0% of the workforce, an increase of approximately 300%.

Three principal points:

1. About 30% of workers are in the nonstandard workforce.
2. Nonstandard workers, on average, are paid less per hour than women with similar demographic characteristics (including education) in regular, full-time jobs.
3. While about two-thirds of standard workers receive health insurance and a pension from their own employer, just 12 of nonstandard workers do.

Meeting of May 5, 1999

**Testimony of Mr. Larry Engelstein,
Associate General Counsel,
AFL-CIO**

The National Labor Relations Act enacted in 1935 was based on that era's industrial model and is ill-suited to the current low wage "contingent" work force economy.

Today's economy is service-sector dominated.

Employer's who retain the reality of economic controls may easily manipulate the indicia of legal "employment" to avoid employment law requirements.

Labor brokers (subcontractors) usually are low capital, labor intensive operations. Hence labor brokers lack the capacity to significantly raise wages and benefits and even provide any benefits for their workers without losing customers and suffering economic failure. In many instances, the real employer retains control of the premises where the work by labor broker employees is performed.

Service contracts, for example janitorial contracts for office and large residential buildings, are usually terminable at short notice and without cause, these facts reinforce the pressure on labor brokers to control labor costs which are often 90% of their total costs, and hence determinative of their ability to compete.

The NLRB has ruled since the 1960's that the real employer may cancel service contracts with subcontractors because of union

organizational threats or actual union representations. In case of union representations or threat, the real employer may thereafter substitute a new subcontractor which is under no obligation to hire the former contractor's workers. Although the new contractor, in hiring, cannot in theory discriminate against employees of the former service contractor, this obligation can easily be avoided.

Any collective bargaining agreement between the union representing the employees of the old service contractor need not be recognized by a new service contractor. There is an obligation on the part of the new service contractor to bargain in good faith with the represented workers if the operations are substantially continuous and the personnel are substantially the same. However, the "obligation to bargain" is not the obligation to recognize an agreement or indeed to reach any agreement, particularly when the new contractor is sophisticated or is in fact advised on labor avoidance by the real employer.

The real employer is in control (economic reality of the funds available for bargaining) but is legally insulated and protected from the economic pressures essential to real bargaining under the anti-secondary provisions of the Taft-Hartley Act (NLRA amendments of 1947). Hence real bargaining is often hindered. Indeed, proscribed secondary pressures are attempted, the NLRB is mandated to seek immediate injunctive relief in federal court, and private damage actions are available. These remedies, which are not otherwise available, apply only when labor organizations apply or attempt to apply such secondary pressures.

Thus, the real employer who possesses the power to make collective bargaining a reality rather than fiction is insulated from the need to engage in collective bargaining.

The joint employer doctrine is recognized by the NLRB, however adjudication and enforcement are slow, uncertain and ineffectual. For example, in the trucking industry, the NLRB disregards real employer's roles under federal regulations that determine the details of trucking operations and are imposed by the real employer upon subcontractors. Thus the NLRA ignores the reality of the employment relationship.

The NLRB appears inclined to find joint employment relationships where only non-supervisory employees are provided by the labor contractor. But the NLRB has ruled that even where a joint employer relationship is found, employees of a contractor may not be included in the same bargaining unit with employees of the client employer even where these employees share an overwhelming community of interest unless both employers consent to be the common unit; which rarely occurs.

Independent Contractors

The 1947 amendments (Taft-Hartley) to the NLRA define "independent contractors" out of NLRA protection as not being "employees." Hence independent contractors attempting to organize are subject to concerted action and joint activity prohibitions under Federal and State anti-trust laws which in fact prevent joint independent contractors from bargaining with real employers.

This labor law/labor economics briefing is background for understanding the "why" of the inadequacy or non-existence of health and retirement coverages for the contingent work force.

Meeting of June 8, 1999

Testimony of Marc Machiz,
Associate Solicitor of Labor,
Plans Benefit Security Division,
and Robin Parry
U.S. Department of the Treasury

Mr. Machiz provided written comments covering the general framework of Title I of ERISA. Many of these issues of vesting, eligibility, etc. parallel the Tax Code provisions of Title II of ERISA. The Title I provisions are, in general, more flexible than those of the Tax Code. For example, there are no ratio tests for coverage in Title I. Thus, for example, a valid employment contract which denied an employee coverage in a plan would not be prohibited by Title I.

Mr. Machiz stated that the Department's current focus on this issue is the fiduciary conduct implications of the decision to cover or not to cover certain segments of the workforce. The fundamental issue is that employer promises to provide benefits must be published and kept. The DOL supports the publication part of this process through the various reporting and disclosure duties that Title I enforces on the plan sponsor - Summary Plan Description, Summary Annual Report, statements of vested benefits, etc.

The enforcement part of the process is aided through DOL audits of the plan's operation, to propose settlements out of Court and the right of the DOL to participate in litigation on behalf of plan participants.

Within the field of *contingent workers*, the DOL deals with the same common-law definition of the employer/employee relationship as the Treasury Department. The DOL maintains the position that only the plan document can control who has access to benefits. Though the DOL does not yet have a formal position on waivers, it appears that any effort to get an employee to

waive coverage would not be valid if the plan document did not authorize such waiver.

Meeting of June 8, 1999

Testimony of Ms. Deborah Walker,
Deputy to the Tax Benefits Tax Counsel,
and
William Bortz
Office of Assistant Secretary for Tax Policy,
U.S. Department of the Treasury

Ms. Walker and Mr. Bortz appeared before us to provide an understanding of the basic tax structure within which employee plans must operate and how this structure influences the offering or denying benefit coverage to contingent workers.

Mr. Bortz spoke first and outlined how the tax incentive structure encourages profitable employers to establish benefit plans. That these plans must operate within the context of specific procedures regarding nondiscrimination, vesting, coverage, entry age, etc. These rules are more specific and detailed for retirement plans, than they are for welfare plans.

The impact of these rules on contingent workers are:

- The eligibility rules allow employers to exclude employees who do not work more than a minimum number of hours - 1,000 for a retirement plan or a minimum period of service - 12 months for a retirement plan.
- The vesting rules mean that persons who work fewer than 1,000 per year may never earn a nonforfeitable interest in any benefits that they may accrue.
- The coverage rules allow a plan sponsor to exclude from participation a portion of their workforce that might otherwise be eligible.
- The tax-qualified rules only apply to common-law employees and provide no protection for bona fide independent contractors.

There is a specific provision covering *leased employees* but again, this only comes into play for an individual who has been performing service on a substantially full-time basis for 12 months.

Ms. Walker expanded the discussion to cover other plans - welfare, stock, nonqualified deferred compensation agreements, etc. Employee stock purchase plans must be offered to substantially all common law employees. Some welfare plans such

as self-insured medical and group-term life insurance have nondiscrimination rules. But the same issues arise, they are aimed at common-law employees who work roughly half time and on a recurring basis for the same employer.

Ms. Walker also discussed the hurdles that Congress faces in attempting to develop a better definition of employee for income tax reporting and benefits. The common-law tests are the basis for the working definition. These have been interpreted over the years and Congress granted some flexibility and protection to employer's in interpreting these rules in 1978 and 1996 tax acts. The importance of this program and the difficulty in determining the employee status was affirmed by the IRS's recent Classification Settlement program. Ms. Walker was not optimistic that there would be a legislative solution to this matter in the near future.

The conclusion to this testimony was that the Treasury Department has the objective to protect real employees, whatever that may mean. To provide access to employee benefits for these people. They have an ongoing concern about employee choice. These major reclassification cases present a serious concern to them.

Meeting of July 13, 1999

Testimony of Mr. Edward A. Lenz, Senior Vice President, Public Affairs and General Counsel,

National Association of Temporary and Staffing Services (NATSS)

Mr. Lenz agreed with the testimony of prior witnesses that the definition of contingency is a difficult and inherently subjective one. Mr. Lenz limited his remarks to that portion of the contingent workforce employed through temporary help agencies or staffing firms.

Mr. Lenz testified that the average daily number of workers employed through these arrangements has increased from 1 million in 1990 to approximately 3 million today. He pointed out that since the turnover rate is roughly 450% annually for these workers, approximately 15 million persons annually are employed as temporaries. The average job tenure for each job is 9.6 weeks.

Mr. Lenz stressed that this high turnover is a fundamental reason for the low level of benefits coverage of these workers.

He offered statistical data with respect to the availability of health coverage based upon a survey of his membership. The vast majority of all temporary workers are employed by firms with annual revenues exceeding \$50 million. In turn, 75% of firms in that size category offer health benefits in which the employer, on average, contributes 40% of the premium costs, with the

employee paying 60%. Finally, of the resulting 56% (i.e., $75\% \times 75\% = 56.25\%$) of temporary workers offered coverage on this basis, only 15% choose to purchase the coverage.

With respect to pension coverage, Mr. Lenz advised that 60% of large firms offered 401(k) plans but only 6.5% of eligible workers participated, although 14% of those in small firms did so.

Mr. Lenz described three distinct groups within the temporary help industry that his association has identified: traditional, transitional and career temporaries. "Traditional" temporaries are defined as those who seek the flexibility of temporary work such as students, teachers, retirees and parents of young children. They make up 20% of the temporary workforce, are disproportionately young, are not focussed on saving for retirement and are often covered by health insurance of a parent or spouse. "Transitional" temporaries are those utilizing temporary work as a bridge to permanent employment. They may be looking for a first job, reentering the workforce after an absence or layoff, transitioning from welfare or simply looking for a better job. Over 72% of temporary employees go on to permanent jobs within one year. They are often covered by a spouse's health plan and do not opt for available pension benefits. They comprise 50% of the temporary workforce. "Career" temporaries comprise 25% of the temporary workforce. They tend to be better educated and higher paid and are more likely to have benefits. Of those working more than 12 months as temporary employees, 60% have health insurance from some source and 28% were eligible for pension coverage, although no participation figures were offered. These workers prefer the flexibility of temporary work.

In conclusion Mr. Lenz offered three proposals for increasing benefit coverage for temporary workers:

- 1) Increase portability of benefits by encouraging pooling arrangements to allow trade associations or other groups to provide continuous health coverage to temporaries employed by participating firms.
- 2) Accelerating the timetable for full deductibility of health insurance premiums and eliminating the linkage between deductibility and employment status.
- 3) Increasing the annual limits on IRA contributions.

Meeting of July 13, 1999

Testimony of Marc D. Freedman,
Special Counsel,
National Technical Services Association (NTSA)

The member firms of NTSA fall mostly within the contract company definition of the Bureau of Labor Statistics (BLS) because the workers are employed by companies under contract, are assigned to one customer at a time and perform work at the customer's worksite. The assignments tend to last longer than temporary help agency assignments and, given the nature of the work and high level of skills involved, the workers are better paid and have greater access to benefits. The workers supplied work in design, drafting, engineering, project management, computer programming, staff augmentation and technical publication services.

Mr. Freedman criticized the BLS definition of contingent worker as one which is not well suited for capturing the technical contract and temporary workforce because it focuses on whether the worker believes he has a job for a fixed duration. Most technical contract and temporary workers do have jobs of fixed durations.

Mr. Freedman expressed agreement with the testimony of Mr. Lenz of the NATSS, and specifically agreed that the traditional concept of employment-based benefits is not suitable for the emerging flexible workforce. He suggested that the higher wages commanded by workers employed by his constituent members--an average of \$52,000 annually--would permit them to purchase benefits individually if there was greater access available.

Mr. Freedman cautioned that if benefits for contract and temporary workers were mandated, then client firms of his members might not continue to use temporary staffing firms in such great numbers, and salaries might be reduced to offset the costs of benefits. In addition, the economy and labor market would suffer by not being able to take better advantage of the services provided by contract companies such as greater career development opportunities and career choices for workers and efficient labor intermediaries for their clients and the economy.

Mr. Freedman stated that the segment of the market represented by his members falls within the contract worker portion of the BLS survey, and is the fastest growing segment of the industry.

Meeting of July 13, 1999

Testimony of Mr. Carl A. Camden,
Executive Vice President, Field Operations,
Kelly Services, Inc.

Mr. Camden expressed the belief that the provision of employee benefits to the contingent workforce represents the most significant barrier to the ability of the economy and workforce to grow and remain globally competitive, and that dealing with this issue is one of the most important issues that the Department of Labor can be addressing.

Mr. Camden advised that 70% of the average 750,000 workers that work for Kelly Services do so for less than two months--a significant challenge to benefits design. Furthermore, while 80% of Kelly's revenues are derived from the 30% of their employees who are of long tenure sufficient to participate in available benefit plans (i.e., 1,000 to 1,500 hours per year on a nearly continuous basis), only 10% elect to do so. These statistics define the challenge.

Mr. Camden stated that we should acknowledge that certain segments of the temporary workforce will choose not to participate in benefit plans because they are young and feel immortal, have benefits available elsewhere, or are structurally difficult to deal with because of short-duration employment, but nevertheless move on to address how to make benefits available to that segment of this workforce that want and need benefit coverage but find it difficult to do so at their income levels.

Mr. Camden advised that Kelly Services has grown at the rate of 15% per year for the last five years and has tripled in size since 1990. He anticipates continued change in the nature of the workforce that will require a change in the fundamental nature of benefits delivery.

Mr. Camden went on to describe a segment of Kelly's workforce, 30% to 40%, which he characterized as free agents by choice, who will not accept permanent employment if offered. He shared the concern that if benefits continue to be employment based that the cross subsidies by employers who do provide benefits to employers who don't will continue to increase. He referred to this as the ability of workers to arbitrage benefits, and referred to the historical model that produced our system of employment-based fringe benefits as dysfunctional for a significant part of the workforce as the new economy is taking hold.

Mr. Camden advised that Kelly operates in 20 countries around the world and that all of them are grappling with this same problem. He urged that the Working Group examine the experience in these other countries before reaching any conclusions.

In response to a question from the Working Group, Mr. Camden advised that there has been tremendous growth in the temporary staffing business in the last five years and that this represents only a small part of the free agent workforce that is creating this challenge for benefits provisions. Consultants, independent contractors and thousands of professionals working for traditional companies, but with no expectation of permanent employment, are all part of the emerging free agent workforce that should be of concern for benefits policy.

Meeting of July 13, 1999

**Testimony of Mr. Milan Yager
Executive Vice President,**

**National Association of Professional Employer Organizations
(NAPEO)**

It is estimated that between 2 and 3 million workers are employed pursuant to coemployment relationships between the employer to whom they provide services and the professional employer organization (PEO) that pays them and provides all relevant human resource services, including fringe benefits where available.

Mr. Yager emphasized that employees employed pursuant to these relationships--an industry which has grown more than 30% each of the last five years--are not a part of the contingent workforce as defined. This is because the workers are not employed for a limited duration, but rather are regular full-time employees whose salary and benefits are provided by a third party to the employment relationship--a coemployer PEO. The PEO does not provide workers to employers but merely provides human resource services to the employers' existing workforces.

Mr. Yager cited results of a survey of his member firms showing that prior to establishing the PEO relationship only 4% of client firms offered 401(k) savings plans. After establishing the relationship 90% of the covered workers had access to 401(k)s, although rates of actual participation were not cited. Likewise, over 98% of NAPEO members offer health care, although the rates of copay and participation were not cited.

Mr. Yager stressed that the average number of employees per client firm of NAPEO members was only 16, and that the establishment of the PEO relationship can enhance, not diminish access to employee benefits.

In response to a question from the Working Group, Mr. Yager cited research by Bankers Trust that projects that the PEO industry can expect to continue to grow at the rate of 30% for the next 5 to 10 years.

Meeting of September 8, 1999

Testimony of Dr. Susan N. Houseman
W.E. Upjohn Institute for Employment Research

There is widespread perception that the number of workers in nonstandard employment arrangements is large and growing. This has raised concern for several reasons: (1) often workers in these arrangements don't receive much in the way of benefits, (2) there is concern that firms sometimes use workers in these arrangements to circumvent ERISA and other laws governing benefits and labor standards, and (3) there's concern that the laws were written primarily with the full-time employee in mind, and therefore do not adequately protect or cover workers in other types of arrangements.

Dr. Houseman discussed a couple of issues that have caused confusion. One issue is the term "contingent." Another is the contention by some (including some of our previous witnesses) citing Bureau of Labor Statistics (BLS), that the contingent workforce phenomenon is small and therefore does not merit much policy attention. On the first issue, Dr. Houseman scrupulously avoids the word contingent. She prefers other terms like nonstandard work arrangements, flexible staffing arrangements or alternative work arrangements. With respect to the BLS, there are some problems with the data. The BLS surveys defined contingent workers as those whose jobs were expected to end in a relatively short period of time. Several examples were cited where workers were not counted as contingent workers by the BLS because of this definition--on-call workers, temporary help agency workers, and many independent contractors--which is a very large category. In most of these instances these workers are certainly contingent from the employer's perspective. In Dr. Houseman's view, the Bureau of Labor Statistics on contingent work, and their definition, isn't particularly relevant for our work group. Rather, a broad set of employment arrangements beyond regular full-time employees are appropriate. The reason is two-fold: (1) these workers outside of regular full-time employment arrangements are much less likely to receive benefits; and (2) because the law governing benefit regulations are written primarily with the full-time employee in mind.

Dr. Houseman referred to several tables and discussed the percentage of workers in flexible staffing arrangements and trends. Table 1, Distribution of Employment by Work Arrangement (1997), indicates that workers in flexible staffing arrangements or alternative work arrangements (agency temporaries, on-call or day laborers, independent contractors, contract company workers and other direct-hire temporaries) accounted for 12.5% of the total workforce. Other self-employed account for another 5.1%. It was noted that agency temporaries only show up as being one percent of the workforce in the CPS household survey, but they are about double that in the establishment survey. You may question the accuracy of the other figures, but it was observed

that they are the only numbers we have. We know very little about trends in employment in these arrangements. However, via the current establishment survey, we do have trend figures on temporary help agency workers. Employment of these agency temporaries has increased from about half a percent of general employment in 1982 to about 2.3 percent a year or so ago. We also have data on all self-employed workers and on all part-time workers. Neither has increased much in recent years. There isn't any hard data on the other categories, but several surveys have asked businesses if they have increased their use of these various types of employment arrangements in the last five or 10 years and do they expect to increase them in the future. The responses suggest that these types of arrangements have been growing.

Dr. Houseman's research clearly indicates that with respect to whether an employee receives benefits doesn't have to do with the workers themselves, as some may think, but rather with the type of employment arrangement. For example, workers who are not full-time regular employees account for about 31% of the workforce, but they also account for about half of those with no health insurance and about half of those with no retirement plans. Another misconception is that workers in these other arrangements may be concentrated in companies that don't offer benefits to anyone. Not true. The data shows that of companies that hire direct-hire temporaries, almost 94% offered benefits to their regular full-time employees. Less than 10% of these companies offered benefits to their direct-hire temporaries. It's important from a policy standpoint to understand that it is very difficult for a company to discriminate among different sets of full-time employees with respect to benefits, but they are using these alternative employment arrangements to determine benefit eligibility. In her survey, when companies were asked whether they are using these other employment arrangements to save on benefit costs, very few said they are. But, when asked do you actually save on wage and benefits costs even though it's not an important motivation for using these workers, the answer was definitely yes.

Meeting of September 8, 1999

Testimony of Dr. Paul Osterman
Sloan School at the Massachusetts Institute of Technology

Dr. Osterman took a different approach, and stepped back from the issue of contingent workers and benefits to give his view of the fundamental changes that are going on in the labor market, how contingent work fits into that, and what the broader policy implications might be. He conducted a survey about contingent work in 1992 that was repeated in 1997 on a random sample of American establishments in the private sector with 50 or more employees. Two kinds of contingent work were covered—

temporary help firms and on-call contingent workers. Fifty percent of the firms surveyed used temps, and 13% use on-call workers. When used, temps represented 5.7% of the payroll, and totaled 2.7%. Contingent on-call represented 13.5%, and totaled 2.4%. What's really striking is that temporary help agencies are new labor market institutions and perform functions that had never been performed. They are job-matchers. In fact, about 23% of temporary help agency workers are eventually hired as full-time employees and about 44% of on-call workers were eventually hired. The main advantages cited by employers for using contingent workers were peak load and flexibility. Savings in benefits as a reason was relatively low. The disadvantages of using these workers are they're not committed to the employer, they don't care whether they're using good product or not and their job skills are often inadequate.

Professor Osterman focused on what's fundamentally different about the labor market today. The rules have changed. In his view we are in a transition period from the old long-term stable employment system that lasted from about the end of World War II until about 1982. Some new labor market institutions are being created, and it is unclear what the new rules are going to be. He believes it is important not to be overwhelmed and roped into the notion that markets, whether we talking about competitiveness, efficiency or globalization, dictate the outcome.

How does the old labor market compare with the current one? The old one has blown apart. Instead of the firm as family, you have reengineering. Instead of emphasis on pay equity, you've got pay for performance. You clearly don't have career jobs any more as was the case with the old system. This is where contingent work fits in, and the growth of nonstandard workers is a symptom of the changing nature of careers and work.

There are two policy-setting implications as a result of this new labor market. One is how to deal with mobility or turnover. The other is the growing imbalance of power between employers and employees. In a world of high turnover it creates problems with respect to unemployment insurance, where there's a minimum number of hours for eligibility, and benefits. In Professor Osterman's view, policies need to be rethought not in the context of contingent or nonstandard work, but to deal with higher rates of turnover and mobility which, if put into place would benefit contingent workers as well as others. With respect to the balance of power issue, power in the labor market has shifted way from employees in favor of employers. This trend is less relevant to contingent work, and has more to do with the need for labor law reform in order to provide workers with a voice.

The fundamental lesson Professor Osterman wants to leave with our work group is that he would think about the problem of nonstandard work in the context of the broader changes in the

labor market. It may lead us in some directions that we would not have otherwise gone.

Meeting of September 8, 1999

Testimony of David F. Stobaugh, Esq.
Bendich, Stobaugh & Strong

An employee by another name is still an employee. Mr. Stobaugh's entire practice has consisted of representing people who are called something they're not, contingent workers. He believes that a lot of people are mislabeled because employers want to deny them benefits and be relieved of certain laws. This is true both in the private and public sectors. ERISA has been seriously undermined because of this practice of employers pretending that their employees are not their employees. According to Stobaugh, we are heading in the direction of "virtual companies" where the companies only hire the owner and outsources all of the other functions. It makes one wonder whether mandating benefits for contingent workers may be necessary.

Mr. Stobaugh's experience in this area is based on cases, and he has litigated almost every type of nonstandard worker, temporary employees who are not temporary, on-call workers who are not on-call, etc. Several cases that they have tried were reviewed to illustrate his point. One example was a case against the Seattle Public Library, and their scheme was to count only authorized hours. So, nineteen hours was authorized and the benefits threshold was twenty. Another example was a case brought against King County, where their scheme was to call everybody temporary. You were temporary unless you had a position in the budget. They had long-term temporaries, i.e. people who had been there 10-15 years. A more recent case is the one against Microsoft. They hired some people as free-lancers. At Microsoft free-lancer meant that you had a different colored badge and you filled out invoices to get paid, but otherwise you're exactly the same as any full-time regular employee. In their particular division they made up 40% of the workforce. What really galled his clients is that they weren't really part of the team and didn't get the employee recognition they thought they deserved. They raised the issue with management to be reclassified so that they could get benefits. Management was not responsive. There is a whole industry out there trying to transfer employees from the payroll of the real employer to that of the agency. Microsoft was also "payrolling" employees.

Other examples of cases where Mr. Stobaugh represented contingent workers were reviewed. The common thread through all of these from his vantage point is that employers were systematically and intentionally setting up employment arrangements, and mislabeling employees to avoid paying benefits

to these workers. The additional examples: (1) LA County-payrolled many lawyers, who did the same job as regular full-time lawyers, by setting up their own payroll service agency; (2) Arco-payrolled some shift workers that did exactly the same work as other employees, and took them out of the benefits plan. Arco used several payroll service agencies. And even where these payroll service agencies had their own 401(k) plan, there were minimum service requirements that the employees could never meet to participate because Arco kept switching them to another agency before they met the minimum service requirement.

The proliferation of PEO's was addressed. He does not believe that PEO's really do anything, and that it's just a scheme to shift employees from the "real" employer and again allowing the real employer to avoid paying benefits. There are a number of other motivations why employers do these misclassification schemes. It allows them to avoid other legal responsibilities because a whole host of laws depend on the employment relationship. It allows them to hide the true size of their workforce. The ideal company would have no jobs because jobs are just costs.

In response to a question about suggestions, Mr. Stobaugh said his suggestion would only address perma-temps (people who are given an improper label, but really work very long periods of time), and not "real contingent workers" (i.e. short-termers). With respect to perma-temps, he thinks that both the Treasury and DOL could make clear in regulations that you can't take somebody out of a plan by calling them something that they're not. You could also have a similar approach with legislation. It was also noted that there are absolutely no penalty now for doing what these employers are doing, no consequences. There is no remedy. It would be helpful to just get the plans enforced, and not let employers exclude people by pretending that they are something that they are not.

VII. EXHIBITS AND WRITTEN MATERIALS RECEIVED

1999 Index

Advisory Council on Employee Benefit and Pension Plans

(Actual Transcripts/Executive Summaries for the Council's full meetings and working group sessions are available - at a cost - through the Department of Labor's contracted court reporting service, which is Executive Court Reporters at 301-565-0064/301-589-4280FAX.)

For the Advisory Council's 1999 Term:

April 6, 1999: Working Group Studying Benefit Implications of a Contingent Workforce

Chair: Michael Fanning

Vice Chair: Patrick McTeague

- 1) Agenda
- 2) Official Transcript
- 3) Executive Summary of Transcript
- 4) "Contingent Workers and Workers in Alternative Work Arrangements" by Craig Copeland, Paul Fronstin, Pamela Ostuw and Paul Yakoboski, Employee Benefit Research Institute, March 1999.
- 5) "Contingent Work: Results From the Second Survey" by Steven Hipple, Bureau of Labor Statistics, U.S. Department of Labor, November 1998.
- 6) "Workers in Alternative Employment Arrangements: A Second Look" by Sharon R. Cohany, Bureau of Labor Statistics, U.S. DOL, November 1998.
- 7) "Temporary Workers as Members of the Contingent Labor Force, a Congressional Research Service of the Library of Congress, prepared by Linda Levine, Specialist in Labor Economics, Domestic Social Policy Division, dated February 16, 1999.

May 5, 1999: Working Group Studying Benefit Implications of a Contingent Workforce

- 1) Agenda
- 2) Official Transcript
- 3) Executive Summary of Transcript
- 4) The Nonstandard Work Arrangements and Pension Coverage: Confusion Over Definition and Trends" presentation paper by Edith Rasell, Economic Policy Institute, at the meeting, as well as Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S. by Arne L. Kalleberg, Edith Rasell, Naomi Cassirer, Barbara F. Reskin, Ken Hudson, David Webster, Eileen Appelbaum, Robert M. Spalter-Roth from the Economic Policy Institute Women's Research and Education

Institute, 1997.

- 5) Section V. Contingent Workers, excerpted from the Dunlop Commission Report of 1994, prepared for the U.S. Department of Labor.
- 6) "Independent Contractors: A Briefing Paper" presented by Larry Engelstein, Associate General Counsel, AFL-CIO. Also distributed Part-Time Work: Full-time Bills: The Problems of Part-Time Employment" at the meeting.
- 7) Synopsis of Testimonies made at the April 6, 1999 working group session, prepared by Judith Calder.

June 8, 1999: Working Group Studying Benefit Implications of a Contingent Workforce

- 1) Agenda
- 2) Official Transcript
- 3) Executive Summary of Transcript
- 4) Several May 14, 1999 news articles including: "Microsoft Loses Ruling Over Temporary Workers" by Ralph T. King, Jr., Wall Street Journal; "Temps Win Case for Microsoft Benefits" by Timothy Burns, Washington Times; Excerpt from daily items on the business page of the Washington Post regarding the issue; "Temporary Microsoft Workers Win Stock Ruling" by Tina Kelley, New York Times; "The Growth of Part-time Employment Has Already Peaked," a letter to the editor by Max Lyons, economist, Employment Policy Foundation, which appeared in the Washington Times, May 15, 1999.
- 5) Written Testimony of Marc Machiz, Associate Solicitor of Labor, Plans Benefits Security Division, plus various court documents related to the Department's case, Herman v. Time Warner Inc. et al 98 Civ. 7589.

July 13, 1999: Working Group Studying Benefit Implications of a Contingent Workforce

- 1) Agenda
- 2) Official Transcript
- 3) Executive Summary of Transcript
- 4) "Nonstandard Work is Preferred by Most 'Contingent' Workers" by Max R. Lyons, issued by the Economic Policy Institute.
- 5) "Contingent Workforce: Bills Seek Parity for Full-Time Temporaries to Prevent Firms From Denying Benefits" by Colleen T. Congel, BNA Pension & Benefits, June 28, 1999; "Union Asks Temporary Employment Agencies for Recognition of Microsoft Bargaining Unit" by Nan Netherton, May 17, 1999.
- 6) "America Wants Flexible Work" by Timothy J. Bartl, a public policy publication of the Labor Policy Association, 1998.
- 7) "Who's an Independent Contractor? Who's an Employer" by Myra H. Barron, Esq., a partner in Weinberg & Jacobs, LLP, Rockville, Md. from the Labor Lawyer, Vol. 14, N. 3,

Winter/Spring/1999.

- 8) Summary of June 8 testimony of Deborah Walker and Bill Bortz, Department of the Treasury, and of Marc Machiz, Associate Solicitor of Labor.
- 9) Written Statement by Edward A. Lenz, Senior Vice President, Public Affairs and General Counsel, National Association of Temporary and Staffing Services (NATSS). Plus "Long-Term Temps: A Rare Breed" by Max Lyons for the Employment Policy Foundation, July 8, 1999.
- 10) Written Statement of Marc D. Freedman, Special Counsel of the National Technical Services Association (NTSA).
- 11) "FreeAgents by Choice" by Carl A. Camden, Executive Vice President, Field Operations, Kelly Services, Inc. for the New Democrat, March/April 1998 issue entitled "Why America Needs a New Labor". Plus a promotional handout on Kelly Services.
- 12) Written Statement of Milan Yager, Executive Vice President of the National Association of Professional Employer Organizations (NAPEO).
- 13) "What a PEO Can Do For You" by Bruce E. Katz from the Journal of Accountancy, July 1999.

September 8, 1999: Working Group Studying Benefit Implications of a Contingent Workforce

- 1) Agenda
- 2) Official Transcript
- 3) Executive Summary of Transcript
- 4) Written Testimony before the Working Group by Susan N. Houseman, Senior Economist, W.E. Upjohn Institute for Employment Research, September 8 1999. Plus a Draft of "Flexible Staffing Arrangements, a Report on Temporary Help, On-Call, Direct Hire Temporary, Leased, Contract Company and Independent Contractor Employment in the United States, prepared by the Department of Labor in June 1999 and copies of her slides for a July 21 presentation at DOL.
- 5) Written Testimony from Dr. Paul Osterman, Sloan School, Massachusetts Institute of Technology, September 8, 1999. (Receipt Pending)
- 6) Written Testimony from David F. Stobaugh, Bendich, Stobaugh & Strong, P.C. on September 8, 1999.
- 7) "Revolt of the Worker Bees: 'Permatemps' sue employers over benefits, stock options" by Patricia Barnes, American Bar Association Journal, September, 1999.
- 8) Summary of testimony of Edward A. Lenz, Marc Freedman, Milan P. Yager and Carl Camden, who all appeared at the July meeting of the Working Group.
- 9) Memorandum Decision (98 Civ. 7589) in Herman v. Time Warner, Inc., September 3, 1999.
- 10) "Understanding the Microsoft Decision: Advice for Employers With Leased Employees, by John R. Quesnel, for the Employee Benefit Plan Review, August 1999.

- 11) "Staffing Positively Impacts Economy, Industry Officials Tell DOL" by Bruce Steinberg, July 23, 1999 issue of Staffing Industry Report.

October 5, 1999: Working Group Studying Benefit Implications
of a Contingent Workforce

- 1) Agenda
- 2) Official Transcript
- 3) Executive Summary of Transcript
- 4) A copy of the Temporary, Part-Time and Contract Employment in the United States: A Report on the W.E. Upjohn Institute's Employer Survey on Flexible Staffing Policies, prepared by Susan Houseman under a contract to the Department of Labor.

VIII. MEMBERS OF THE WORKING GROUP

MICHAEL R. FANNING

Chair of the Working Group

Central Pension Fund of the International Union of Operating Engineers and Participating Employers

PATRICK N. MCTEAGUE

Vice Chair of the Working Group

McTeague, Higbee, MacAdam, Case, Watson and Cohen

ROSE MARY ABELSON

Northrop Grumman Corporation

KENNETH J. BLACKWELL

Secretary, State of Ohio

EDDIE C. BROWN

Brown Capital Management

JUDITH ANN CALDER

Abacus Financial Group, Inc.

THOMAS J. MACKELL, JR.

Vice Chair of the Advisory Council

MFS Institutional Advisors, Inc.

JUDITH F. MAZO

The Segal Company

REBECCA J. MILLER

McGladrey & Pullen, L.L.P.

MICHAEL J. STAPLEY

DeSeret Mutual Benefit Association

BARBARA ANN UBERTI

Chair of the Advisory Council

Wilmington Trust Company

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