Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee

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American workers in the 1990s are finding that the employment landscape has changed dramatically. Expectations that competence and hard work lead to job security have eroded as a result of widespread labor force contractions, often involving financially healthy companies eager to improve their profit margins.1 The process has been given such labels as downsizing, right-sizing, re-engineering, and corporate restructuring, and has had an impact on every segment of the workforce.2 Managers and executives, in particular, now find

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1. See Stephen E. Frank, American Express Plans Lay-offs of 3,300, WALL ST. J., Jan. 28, 1997, at A2 (reporting the fourth stage of American Express layoffs since 1991, despite "solid" fourth-quarter earnings and a 23% return on equity); John J. Keller, AT&T Will Eliminate 40,000 Jobs and Take a Charge of $4 Billion, WALL ST. J., Jan. 3, 1996, at A3 ("AT&T Corp., charting one of the largest single cutbacks in U.S. corporate history, said it would take a $4 billion charge to eliminate 40,000 jobs over the next three years. . . . In the first nine months of 1995, AT&T earned $2.82 billion. . . . In 1994, full-year profit was $4.7 billion . . . ."); Matt Murray, Thanks, Goodbye: Amid Record Profits, Companies Continue To Lay Off Employees, WALL ST. J., May 4, 1995, at A1 ("Corporate profits rose 11% in 1994, after a 13% rise in 1993 . . . . Meanwhile corporate America cut 166,069 jobs in 1994 . . . . Among the profitable companies now in the midst of layoffs: Procter & Gamble Co., American Home Products Corp., Sara Lee Corp. and Banc One Corp."); Louis S. Richman, Preemptive Strikes, FORTUNE, Oct. 18, 1993, at 10, 10 ("Anheuser-Busch is laying off 1,200 of its salaried employees, Eastman Kodak 10,000, and US West . . . . 9,000."); John R. Wilke, Digital Posts Earnings of $113.2 Million for 4th Period, Its First Profit in 2 Years, WALL ST. J., July 29, 1993, at B6 ("Digital has cut 19,600 jobs, or about one-fifth of its work force in the past year . . . . IBM . . . will cut 50,000 jobs this year and another 35,000 in 1994, or 28% of its work force.").

2. See Al Ehbrar, Price of Progress: 'Re-Engineering' Gives Firms New Efficiency, Workers the Pink Slip, WALL ST. J., Mar. 16, 1993, at A1; George Russell, Rebuilding to Survive, TIME, Feb. 16, 1987, at 44, 44 (discussing the phenomenon known as "downsizing, rationalizing, streamlining, and perhaps most commonly, restructuring"—an effort to "produce streamlined, combative concerns that can withstand the frenetic, competitive pace of the late '80s."). For a discussion of downsizing and right-sizing in the manufacturing sector and in service-oriented professions, see Louis S. Richman, When Will the Layoffs End?, FORTUNE, Sept. 20, 1993, at 54 (examining downsizing or "decriuting" in manufacturing, service companies, military contractors, airlines, and health care and drug industry companies); and Andrew E. Serwer, Layoffs Tail off—but Only for Some, FORTUNE, Mar. 20, 1995, at 14 (discussing layoffs in pharmaceutical, financial services, computer, and transportation industries). Not even the government is immune from the need to downsize. See Tom Herman, U.S. May Explore Private Tax Collection, WALL ST. J., Nov. 22, 1995, at A2 ("[T]he IRS needs to reduce its work force, now about 114,000, by about 8,000 . . . .").
that they are just as likely as blue collar factory workers to be the targets of massive staff reductions. Women and members of minority groups have also been victims of this process, especially because of their relatively recent entrance into higher-level positions in corporate governance.

Job losses, of course, are not a new phenomenon. It has always been true that if a company could not survive in the marketplace, its employees would face the risk of termination. In the 1970s and 1980s, for example, many manufacturing enterprises encountered severe economic problems. Production plants of all sorts closed during this period, leaving their workers unemployed. But business closings are an inherent feature of a free market economy, and the risk of job loss due to business failure has been well understood. Similarly, many have accepted that employees whose work is of a more intermittent nature may lose their jobs because of a company's temporary production cutbacks. Employees in a wide variety of industries have experienced temporary layoffs resulting from periods when there were short-term business slowdowns. However, unemployment compensation insurance

3. See BENNET HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 38 (1988); A Lot More Than You Would Think, ECONOMIST, Feb. 2, 1991, at 66, 66 ("The recession is cutting a swathe through America's managerial and professional elite—accountants, lawyers, engineers, bankers, advertising men, property agents, and, especially, middle managers."); Michael J. Mandel, This Time, the Downturn Is Dressed in Pinstripes, BUS. WK., Oct. 1, 1990, at 130, 130 ("Since August, 1989, the number of unemployed workers has jumped by 485,000, and 65% of them are managers, professionals, and the clerical workers who work for them."); see also Srully Blotnick, "Me?," FORBES, Dec. 2, 1985, at 268 (discussing the firing of middle managers); John Harwood, Economic Insecurity Is Widespread, Poll Finds, but It's Unclear Which Party Can Capitalize on It, WALL ST. J., May 16, 1996, at A16 (noting that public concerns about employment would likely have a role in the election campaign).

4. See Mike Causey, Downsizing Vs. Diversity, WASH. POST, Apr. 17, 1996, at D2 ("Many if not most feds laid off—starting this election year—will be young women, many of them black women. Women tend to have less seniority than men, and few women have earned veterans preference protection."); Louis Meixler, Budget Crunch: Leaders Fight Lest UN Financial Crisis Put the Squeeze on Female Workers, CH. TRIB., Apr. 14, 1996, at 10 (reporting that by the end of 1997, the United Nations intends to cut 800 of its 10,000 headquarters jobs, and that "women would suffer disproportionately from layoffs by seniority because many were recruited recently"); David Segal, In Medicine's Reshaped World, the Ax Hits Women Hardest, WASH. POST, Apr. 21, 1996, at H4 ("Hospitals have begun laying off thousands of workers nationwide... and the brunt of those job losses will be felt by women...").

5. One source described the phenomenon as a process of de-industrialization that produced job eliminations. See HARRISON & BLUESTONE, supra note 3, at 35-36; see also Gene Koretz, In This Recession, the Rust Belt Looks Pretty Shiny, BUS. WK., Apr. 29, 1991, at 22, 22 (discussing the "multiple plant closings, soaring unemployment, and dark prophecies of the deindustrialization of America, particularly in the heartland"); Bill Richards, Pocket of Poverty: Minnesota Iron Range Is Hurt and Despairing as More Plants Close, WALL ST. J., Nov. 26, 1984, at 1 (detailing the reasons for and impact of plant closings in the iron ore range of Minnesota); Alexander L. Taylor III, Showdown at General Motors, TIME, Sept. 24, 1984, at 52 (discussing the impact of 1970s plant closings and the potential impact of 1980s shutdowns).

6. See James C. Cooper & Kathleen Madigan, Even the Fed Is Getting Nervous About This Recovery, BUS. WK., Aug. 19, 1991, at 21 (discussing the economic impact of typical, temporary layoffs in the auto, textile, and apparel industries); Gabriella Stern, GM's Main Cadillac Plant to Cut Output in January as Sales Are Expected To Slow, WALL ST. J., Nov. 28, 1994, at A6 ("General Motors Corp. said it would slow production...").
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has been available to cover at least some of the lost income in such cases, and hopefully the employee on layoff will later be recalled and the employee terminated because of a plant closure will subsequently find alternative employment. But whether or not their stories end happily, employees cannot reasonably expect to remain at work when there is nothing to produce or when the plant itself has shut down.

While it is still true that employees may find themselves out of work as a result of temporary production slowdowns or plant closings, reductions in employment today often occur in quite different settings. Employers in the 1980s and 1990s have embarked on a relentless quest to improve corporate earnings—or as their spokesmen often describe it, remain competitive—by cutting expenses of all sorts, including, if not especially, the costs associated with hiring and retaining employees. In some cases, technological innovation is the main explanation offered for such staff reductions; here machines simply replace people. In other settings, the employer concludes that the workforce is larger than necessary to perform the tasks required of it and thus institutes a plan for restructuring.


8. See Laura Landro, RCA Employees in Upheaval over Plan for GE To Buy Firm, Fear for Their Jobs, WALL ST. J., Dec. 20, 1985, at 6 ("To remain competitive . . . RCA would have had to invest enormous sums in its businesses and undergo even further restructuring."); The Pain of Downsizing, BUS. WK., May 9, 1994, at 60, 61 (detailing the impact of the decision by Nynex Corp. "to slash its operating budget by up to 40% to remain competitive," in large part through "downsizing that would eliminate 15,000 to 25,000 people from the payroll"); Amy Stevens, Fewer Partners, More Mergers Enriched Top Law Firms Last Year, Survey Shows, WALL ST. J., June 29, 1995, at B1 (reporting that layoffs and other cost-cutting measures have improved average profits per partner); see also STANLEY NOLLEN & HELEN AXEL, MANAGING CONTINGENT WORKERS 20-21 (1996) (noting that although companies downsized to reduce management and overhead costs, they now find themselves relying heavily on contingent employees "not only to take on short-term or temporary assignments, but also to replace talent lost in downsizing"); Tom Larson & Paul M. Ong, A Critique of the Contingent Labor Thesis, 29 J. ECON. ISSUES 1201, 1210 n.2 (citing other researchers who argue that firms "responded to greater competitive pressures . . . by reducing the number of core workers employed in internal labor markets and increasing the number of contingent workers").


10. In the communications industry, layers of bureaucracy have been cut for this reason. See John J. Keller, AT&T's Cuts Are Just the First Shot in Telecom Wars, WALL ST. J., Jan. 4, 1996, at A2 (reporting AT&T's plan to cut more than 40,000 jobs, noting that the seven regional Baby Bell companies have slashed payrolls by more than 130,000 jobs combined since 1984, and quoting an analyst who asserted that these companies "have plenty of room to cut people, but they have to go
to personnel cutbacks in order to avoid any duplication of functions within the new entity.\textsuperscript{11} Corporate spinoffs have produced the same result, even though there are no duplicate functions to be eliminated.\textsuperscript{12} In all of these situations, the employees affected by the terminations join a growing list of individuals displaced as a result of a new business environment in which the firm's current financial viability is no longer a guarantee of job security.\textsuperscript{13}

This process of shedding personnel has been an expensive one. Typically, the employer offers some form of severance package to workers who are permanently let go, often including monetary compensation along with assistance in securing new employment.\textsuperscript{14} In addition, even those who remain...

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\textsuperscript{11} See Barbara Rudolph, \textit{Forced To Make a Fresh Beginning: Layoffs Pose the Challenge of a Lifetime}, \textit{Time}, Feb. 16, 1987, at 46, 46 ("More companies than ever before are relying on early-retirement schemes and generous severance packages to entice voluntary resignations as a means of meeting slimming goals.").

\textsuperscript{12} See Fred R. Bleakley, \textit{A Bastion of Paternalism Fights Against Change}, \textit{Wall St. J.}, Jan. 16, 1997, at B1 (citing as examples Eastman Chemical Co., Corning Inc., and Hewlett-Packard Co.); David E. Sanger & Steve Lohr, \textit{Hugh McColl's Masterwork}, \textit{Bus. Wk.}, Apr. 27, 1992, at 94, 95 (noting that when NCNB Corp. acquired C&S/Sovran Corp., the resulting consolidation of operations eliminated 9,000 jobs); Ralph T. King Jr., \textit{After a Long Lead-In, BankAmerica Closes Merger with Security Pacific}, \textit{Wall St. J.}, Apr. 23, 1992, at B4 (reporting that the $4.2 billion merger of BankAmerica Corp. with Security Pacific Corp. may result in more than 16,000 layoffs); John Meehan, \textit{If Mergers Were Simple, Banking's Trouble Might Be Over}, \textit{Bus. Wk.}, Apr. 22, 1991, at 77, 79 (observing that the merger of Citizens and Southern Corporation and Sovran Financial Corporation reduced their combined workforce by 1,200 jobs, or 4%, due to "the elimination of duplicated services").


\textsuperscript{14} In contrast, a few employers have given a higher priority to job security in reaching corporate decisions. See Fred R. Bleakley, \textit{A Bastion of Paternalism Fights Against Change}, \textit{Wall St. J.}, Jan. 16, 1997, at B1 (citing as examples Eastman Chemical Co., Corning Inc., and Hewlett-Packard Co.); David E. Sanger & Steve Lohr, \textit{A Search for Answers to Avoid the Layoffs}, \textit{N.Y. Times}, Mar. 9, 1996, at A1 (providing as examples employee-owned corporations such as United Airlines).
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with the firm inevitably experience some effect of the layoffs,\textsuperscript{15} and that potential loss of morale may translate into a loss of maximum productive efficiency.\textsuperscript{16} This message has not been lost on the business community. To the contrary, prospective employers have come to recognize that there is a cost associated with hiring a traditional employee who has an expectation of continued employment.\textsuperscript{17} Therefore, when additional personnel are necessary due to a loss of critical staff or because of increased production, businesses may become reluctant to meet their labor needs by adding more employees to their regular workforce.

As a way of responding to these concerns, an increasing number of businesses have chosen to address the need for more personnel by making use of alternative work arrangements in lieu of hiring new employees. One option employers may utilize is to obtain the services of workers through temporary or leasing agencies.\textsuperscript{18} In this arrangement, the worker is the employee of the agency and is merely on a temporary assignment to the lessee.\textsuperscript{19} The firm


\textsuperscript{16.} See Julie Amparano Lopez & Joann S. Lublin, \textit{Bosses Seek Ways to Hold on to Workers as Recovery Encourages Job Hopping}, WALL ST. J., Jan. 5, 1993, at B1 (reporting that companies such as Honeywell, Inc., Pacific Teleis Group, Kraft General Foods Inc., and General Cinema Corp. have launched seminars or “Coping with Change” sessions for layoff survivors); Joann S. Lublin, \textit{Don't Stop Cutting Staff, Study Suggests}, WALL ST. J., Sept. 27, 1994, at B1 (observing that companies offer layoff survivors “additional job training, career counseling, expanded participation in profit-sharing plans and bonuses or salary increases”); Joann S. Lublin, \textit{Walking Wounded: Survivors of Layoffs Battle Angst, Anger, Hurting Productivity}, WALL ST. J., Dec. 6, 1993, at A1 (“Workers who pull through endless waves of job cuts can feel so distrustful, overworked and insecure that the businesses fail to achieve their projected gains in productivity and profitability.”).

\textsuperscript{17.} The Department of Labor maintains an employment cost index that focuses on wages and benefits, but the index does not consider the additional costs, both direct and indirect, that result from a layoff. See Jacob M. Schlesinger, \textit{Employment Cost Index Increases 0.6%}, WALL ST. J., Oct. 30, 1996, at A2.

\textsuperscript{18.} See Clare Ansberry, \textit{Firms Use Contract Labor and Temps To Cut Costs and Increase Flexibility}, WALL ST. J., Mar. 11, 1993, at A1 (providing statistics on temporary/contingent employment and discussing the benefits of hiring temporary workers); \textit{The Temp Boom Is Here To Stay}, BUS. Wk., May 8, 1995, at 28, 28 (discussing the use of temporary workers to meet strong market demands in “telecommunications, computers, heavy manufacturing, and banking”). For a review of contingent workers in fields where temporary workers are non-traditional, see Jerry Flint, \textit{A Different Kind of Temp}, FORBES, Feb. 28, 1994, at 54, 54 (“Butler International ... leases out engineers, computer programmers and managers to large companies . . . AT&T, for example, contracts with Butler for workers to install complex phone network systems; Boeing uses Butler's temps for its new 777 airliner. On an annualized basis Butler’s temps typically earn $50,000 or more.”). For a summary of the management costs saved by the use of alternative employment arrangements, including streamlined recruiting, administration, and human resources expenses, and the diminished risk of employment-related litigation, see NOLLEN & AXEL, supra note 8, at 62, 69.

\textsuperscript{19.} In a case involving General Motors (GM), for example, an employee leasing firm was held liable for federal taxes that neither the leasing firm nor GM had withheld, even though GM had supervisory control over the leased workers. See General Motors Corp. v. United States, 1990 WL 259676 (E.D. Mich. Dec. 20, 1990). However, in other circumstances the exercise of control may lead
may also enter into a contract directly with an individual to provide services for a limited period of time, which may or may not be defined. This procedure results in the formation of a true employment relationship, but one in which there is no expectation of long-term continuity. In either case, the company has withheld the traditional tacit commitment that the duration of the job is indefinite, and replaced it with a clear understanding that no obligations are assumed by the company to the worker other than payment of the agreed-upon rate for services rendered until those services are no longer desired. In current parlance, the employment relationship has become contingent.

There is, of course, a sense in which all employment is contingent. No one can ever guarantee that a private company will remain profitable and thereby continue to need its workforce. Nor can anyone be certain that government employment will remain secure, especially given the current interest in privatizing governmental functions. However, the new breed of contingent employees is distinguished by the fact that the core assumption behind their status in the workplace is that their assignment will be temporary.


20. Cf. Ellen Graham, Flexible Formulas: Companies Are Rewriting the Rules to Give Workers More Say in When, Where and How Much They Work, WALL ST. J., June 4, 1990, at R34 (noting that certain companies are expanding their “use of in-house temporary pools of former employees” and providing as an example Travelers Co., which “maintains a job bank for its own retirees and hires them on a temporary basis).


22. See David Hage et al., Reversing the Tide: Washington Turns To Privatization to Help Reduce the Budget Deficit, U.S. NEWS & WORLD REP., Apr. 3, 1995, at 42 (discussing the need to privatize everything from electricity to student loans in order to reduce the deficit); David R. Henderson, The Case for Small Government, FORTUNE, June 26, 1995, at 39 (analyzing the potential positive economic impact of the privatization of government functions); Tom Herman, U.S. May Explore Private Tax Collection, WALL ST. J., Nov. 22, 1995, at A2 (noting that the IRS has been allocated $13 million to start a program to use law firms and private collection agencies to collect unpaid taxes, which will result in the elimination of about 8,000 IRS jobs); Bernard Wysocki Jr., No End in Sight: The List of Privatization Targets Keeps on Growing, WALL ST. J., Oct. 2, 1995, at R29 (discussing traditional governmental functions currently privatized, including prisons and schools, and briefly reviewing several core government functions for which privatization efforts are underway, such as Social Security, the Postal Service, and federally controlled power companies (including the Tennessee Valley Authority)).
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job continuity and security, this does not necessarily mean that contingent workers should be deprived of legal protections available to traditional employees. Normally, employees expect protections such as those afforded by statutes barring discrimination, imposing minimum wage and overtime requirements, and obligating employers to contribute to social security. Surely, contingent employees have a legitimate claim to the very same rights since they are employees, and therefore part of the class covered by the relevant legislation. Existing case law supports this conclusion, although the nature of the contingent employment relationship may create some confusion in identifying the actual employer.


26. See Tremelling v. Ogio Int'l Inc., 919 F. Supp. 392 (D. Utah 1996) (discussing the application of anti-discrimination legislation to an employee of a temporary service agency); Brock v. Wilmowsky, 639 F. Supp. 1166 (S.D.N.Y. 1986) (holding that temporary employees are entitled to overtime compensation under the Fair Labor Standards Act); Amarnare v. Merrill Lynch, 611 F. Supp. 344 (S.D.N.Y. 1984), aff'd, 770 F.2d 157 (2d Cir. 1985) (classifying a temporary help customer as a co-employer for the purpose of a suit brought by a temporary employee under Title VII of the Civil Rights Act of 1964); see also Edward A. Lenz, Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements 8 (3d ed. 1997) (arguing that individuals supplied by staffing firms are "clearly" protected under laws in "areas such as civil rights, workers' compensation, labor relations, [and] employee benefits," although it may be unclear "[w]hether the staffing firm, its customer, or both owe a duty to the worker in a given case"); Edward A. Lenz, Co-Employment—A Review of Customer Liability Issues in the Staffing Services, 1993 Daily Lab. Rep. (BNA) 154 d24 (Aug. 12, 1993) (suggesting that users of temporary workers employed through a temporary employment agency should assume that their obligations under the Americans with Disabilities Act are no different than their obligations of non-discrimination under Title VII of the Civil Rights Act, as discussed in Amarnare). But see Mangum v. A-1 Painting Contractors, 477 F.2d 593, 1973 WL 21482 (4th Cir. May 16, 1973) (unpublished table decision) (finding that an employer was not obligated to contribute on behalf of temporary employees to union pension and health and welfare trust funds); Kellam v. Snelling Personnel Serv., 866 F. Supp. 812 (D. Del. 1994) (holding that employees of Snelling Personnel Services could not bring charges of sexual harassment against the temporary employment agency under Title VII of the 1964 Civil Rights Act); Conference on the Growing Contingent Work Force: Flexibility at the Price of Fairness?: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 103d Cong. 21-22 (1994) (statement of Anthony Carevale, Chairman, National Commission on Employment Policy) ("The tendency has been in the court cases to look on an employee as someone who is controlled by the employer. . . . The difficulty arises . . . if I am temporary or part-time, and increasingly if I am highly skilled . . . [I]f I am a pharmacist who works in a pharmaceutical company [or a technician in a small manufacturing plant], I can arguably be an independent contractor . . . . [T]he judges have concluded in many cases [that], because [such workers] are autonomous, because [they] have all this skill, . . . [they] are not subject to protection under these various laws [governing the workplace].").

27. See Greenlees v. Eidenmuller Enters., Inc., 32 F.3d 197, 198-99 (5th Cir. 1994) (holding that an "employment agency" with fewer than fifteen employees may not be sued as an "employer"); Honey v. United Parcel Serv., 879 F. Supp. 615 (S.D. Miss. 1995) (noting that, under Mississippi law, a temporary worker is a borrowed servant and the temporary employer is immune from tort liability for on-the-job injury under either the dual employment or borrowed servant doctrines); Lenz, supra note 26, at 8 ("Co-employment" is the term often used to refer to the relationship between staffing firms and their customers and to the legal issues that arise out of that relationship. Although co-employment historically has not posed significant problems for users of staffing services, it remains a subject of
Nevertheless, in at least one area, the judiciary has treated the status of contingent workers as grounds for eliminating legal rights enjoyed by employees. Against a legal background in which most employees have been regarded as at-will and therefore subject to discharge by the employer without the need to show cause,28 many state courts in recent years have recognized a cause of action that allows an employee to challenge an unjust termination on any of the following grounds: the discharge violates public policy, is inconsistent with implied contract rights created by the parties, or breaches the implied covenant of good faith and fair dealing implicit in employment contracts.29 The result of the public policy theory is protection for workers against such employer actions as attempting to coerce employees into performing illegal acts30 or retaliating against them for informing authorities of the employer's criminal misdeeds.31 The contract-based theories, although less widely accepted,32 protect employee expectations created in the formation of the employment relationship and obligate the employer to act fairly in dealing with her employees. Nevertheless, contingent employees have found that analogous rights are not available to them when their employer chooses to terminate their relationship.33 Reasons that would support a legal challenge to the dismissal of a traditional employee have been held not to constitute grounds for challenging the refusal to continue a limited-term contractual

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29. Jurisdictions vary significantly in their approach to unjust termination lawsuits; not every state has adopted all three theories of liability, nor do the states treat each of the categories in the same fashion. See 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.13–.63 (3d ed. 1992); see also infra Part II. Unjust terminations are often referred to by the terms wrongful discharge and unjust dismissal, and all three will be used interchangeably in this Article.


32. Missouri, for example, has rejected the implied contract theory as a basis for challenging a discharge. See Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988) (en banc). One source has estimated that "[a] little more than one-fifth of the states" have adopted the implied covenant of good faith and fair dealing theory. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 537 (1994).

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employment relationship.\textsuperscript{34} Thus, courts have added the legal disadvantage of being unable to challenge an otherwise unlawful termination to the economic uncertainties inherent in the status of contingent employment.

It is the thesis of this Article that the legal doctrines developed to protect employees against unjust terminations represent sound public policy, and that judicial rulings denying contingent employees the right to challenge unjust dismissals constitute a misapplication of the law, as well as misguided employment relations policy. In so arguing, this Article will consider the nature and status of contingent employment and review the doctrine of unjust dismissal. Decisions that have refused to apply unjust dismissal principles to contingent employees will then be addressed, including consideration of their supporting rationales. Finally, this Article will argue that existing legal principles, properly applied, warrant extending unjust dismissal protection to contingent workers. Primary reliance will be placed upon the analogy of recent Supreme Court decisions extending employee First Amendment protection to independent contractors,\textsuperscript{35} legal precedents applying employee protection laws to those whose economic realities are equivalent to the circumstances of traditional workers,\textsuperscript{36} and statutory provisions that ignore technical distinctions between categories of workers in regulating workers’ compensation benefits.\textsuperscript{37}

I. CHARACTERISTICS OF CONTINGENT EMPLOYMENT

Since the nature of contingent employment is not well understood, some explanation of the forms that such arrangements can take is necessary in order to appreciate the unique legal problems contingent employment systems can

\textsuperscript{34} In \textit{Smith v. American Greetings Corp.}, 804 S.W.2d 683 (Ark. 1991), the Arkansas Supreme Court identified the traditional view of at-will employment, stating that an “employee may be discharged for good cause, no cause, or even a morally wrong cause.” \textit{Id.} at 684. But the court also recognized that an exception existed for terminations that violate public policy in its holding “that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. This is a limited exception to the employment-at-will doctrine.” \textit{Id.} (quoting \textit{Sterling Drug, Inc. v. Oxford}, 743 S.W.2d 380, 385 (Ark. 1988)). See generally infra notes 107-115 and accompanying text (discussing the public policy exception to the at-will doctrine). The more limited character of contingent employee rights is illustrated by \textit{Curran v. Children’s Serv. Ctr., Inc.}, 578 A.2d 8 (Pa. Super. Ct. 1990), in which the court held that while a permanent employee has a right of review of unsatisfactory performance, a temporary employee has no reasonable belief that she can only be discharged for cause. See \textit{id.} at 35-36; see also \textit{LENZ}, supra note 26, at 38 (suggesting that temporary employees cannot sue for wrongful discharge).


\textsuperscript{37} Individuals are treated as statutory employees and thus covered even if they would not qualify as employees under traditional common-law principles. See 4 \textsc{Arthur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law} § 49.00-.22 (1997).
generate. This section will also look at the pre-World War II patterns out of which contemporary contingent employment systems have emerged and the growing use of such systems in recent years, as well as the alternative forms of contingent employment now in use. Finally, the advantages and disadvantages of contingent employment over the traditional employer-employee relationship will be addressed.

Although references to contingent employment and contingent employees are appearing with increasing frequency in both the legal and human resources arenas, the phrase itself is misleading. It suggests that contingent employees who do not have any inherent promise of job security are distinct from other employees who do. In reality, all employment is contingent in some fashion. Any employee can expect termination for misconduct on the job, or if the employer goes out of business, or if the individual's skills are no longer adequate to perform the tasks required of her. Contingent employees would also suffer loss of employment for these reasons, but they are distinguished by the understanding that they have no indefinite employer commitment, even if the factors usually leading to termination do not exist.

In recent years, employers have increasingly relied on contingent employment arrangements to perform both peripheral and core firm tasks. Nevertheless, no consensus has emerged in defining the categories of employees properly subsumed under the contingent employment label. Recognizing the problem, the Bureau of Labor Statistics attempted to construct a definition when it undertook its first special survey on contingent employment. The Bureau opted to focus on "those individuals who did not perceive themselves as having an explicit or implicit contract for ongoing employment." As the Bureau recognized, this could include "almost any work arrangement that might be considered to differ from the commonly perceived norm of a full-time wage and salary job," including self-employment, part-time work, and employee leasing systems.

Using this general framework, the Bureau conducted surveys of contingent

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38. Offers of permanent employment and hirings for an indefinite term have normally been treated by courts as instances of at-will employment that allow for termination at the employer's discretion. See, e.g., Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936); Melnick v. State Farm Mut. Auto. Ins. Co., 749 P.2d 1105 (N.M. 1988); Murphy v. American Home Prods. Co., 448 N.E.2d 86 (N.Y. 1983); Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587 (Wis. 1967). Nevertheless, when such offers are received, it is understandable that they lead to an expectation that the employee can anticipate job continuity since that is what is implied by the notion of a permanent or indefinite job. That is true even though the expectation may not be legally enforceable.

39. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONTINGENT AND ALTERNATIVE EMP. ARRANGEMENTS, REP. 900, at 1 (1995). Expanding upon the lack of continuity factor, other authors have defined contingent employees as individuals who "have little or no attachment to the company at which they work. Whether they work, when they work, and how much they work depends on the company's need for them. They have neither an explicit nor implicit contract for continuing employment." NOLLEN & AXEL, supra note 8, at 5.

40. BUREAU OF LABOR STATISTICS, supra note 39, at 1.
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employment in the American economy and produced estimates of its scope based upon narrow, intermediate, and broad interpretations of the study’s contingent employment criteria. At the upper end, the Bureau concluded that the total contingent employment in the United States was as high as six million persons,\(^{41}\) or 4.9\% of the American workforce.\(^{42}\) Many analysts, however, were surprised by the estimates contained in the Bureau of Labor Statistics report, believing that the actual figures were higher.\(^{43}\) Dr. Richard S. Belous, who has written extensively on contingent employment issues, concluded that as much as thirty percent of the American labor force is contingent,\(^{44}\) while other experts in the field have estimated the figure to be between twenty and twenty-five percent.\(^{45}\) But even if the exact numbers are not known, there is little doubt that contingent employment relationships are being used with increasing frequency, and the rate is likely to grow. This conclusion is supported by a 1995 Conference Board study which revealed that thirty-five percent of surveyed employers believed that their workforces would soon be comprised of at least ten percent contingent employees, as compared to a 1990 study in which only twelve percent of the surveyed employers expected that level of contingent employment utilization by their firms.\(^{46}\)

The growth of contingent employment relationships mirrors employment patterns which predominated in the American economy prior to World War I. As described by Professor Paul Weiler, employees were recruited by the employing firm on an as-needed basis. Then,

[If the work load in the factory slackened, the redundant employees were let go with no expectation of a future preference in rehiring based upon their previous service; neither was there any regular practice of preferring incumbent workers for promotion into whatever more skilled and attractive jobs happened to open up. . . . Indeed, if workers became less productive because of disability or age, they would

\(^{41}\) See id.

\(^{42}\) See id. at 2 tbl.A.


\(^{44}\) See Richard S. Belous, The Rise of the Contingent Work Force: The Key Challenges and Opportunities, 52 WASH. & LEE L. REV. 863, 867-68 (1995) (estimating that contingent employees represent between 25\% and 30\% of the American workforce and have been growing at a rate 40\% to 75\% faster than the overall workforce). A study published by the Economic Policy Institute came up with a comparable figure, concluding that “29.4\% of all jobs were in nonstandard work arrangements” in 1995. ECONOMIC POL‘Y INST., supra note 21, at 1.

\(^{45}\) See NOLLEN & AXEL, supra note 8, at 9. The authors’ estimate attempts to account for the fact that at least some part-time workers are permanent core employees and therefore should not be classified as contingent, while existing figures for temporary employment may not adequately account for direct hires as opposed to those who receive their assignments through temporary help agencies. See id. at 10-11.

simply be replaced by younger, more able-bodied workers, who were better able to meet the rigors of factory life.\textsuperscript{47} To a large extent, however, contingent employment in this form was largely associated with lower-level positions.\textsuperscript{48}

As the American economy continued to grow, relationships between employers and employees began to change, a process characterized by strengthening ties between the two which, in turn, fostered greater employee expectations of job security. For one thing, employers were increasingly interested in workforce stability so that their investment in training would not be wasted because workers saw themselves as transient.\textsuperscript{49} The rise of unions during the 1930s, the passage of New Deal pro-labor legislation, and the extraordinary period of American prosperity following the conclusion of World War II all added support to the trend.\textsuperscript{50} These factors allowed unions to press for guarantees of job security through collective bargaining, protected by labor laws which barred anti-union retaliation and by a vibrant economy which placed a premium on securing and retaining skilled workers. Finally, Congress has passed a vast array of anti-discrimination statutes establishing explicit protection against terminations based upon legislatively prohibited reasons.\textsuperscript{51} This evolutionary process had an impact on public perceptions and has led to a tacit understanding between the employer and employee communities that the normal employee's job is continuous and will not be terminated arbitrarily.\textsuperscript{52}

Since the 1970s, however, the American economy has undergone a significant transformation characterized by heightened competitiveness, with

\begin{itemize}
\item \textsuperscript{47} PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 144-45 (1990).
\item \textsuperscript{48} See Mary E. O'Connell, On the Fringe: Rethinking the Link Between Wages and Benefits, 67 TUL. L. REV. 1421, 1471-76 (1993); Roy, supra note 21.
\item \textsuperscript{49} See Matthew W. Finkin, The Bureaucratization of Work: Employer Policies and Contract Law, 1986 WIS. L. REV. 733, 740-43 (1986). One study described the post-World War II corporate employment structure as relying upon internal labor markets which were characterized by internal promotion opportunities and a strategy of employment security. While this system fit well with the general pattern of firm expansion experienced during this period, it is not suited to the kind of corporate contractions recent years have witnessed. Arguably, this change in orientation has contributed to the rise of contingent employee utilization. See HARRISON & BLUESTONE, supra note 3, at 43-45.
\item \textsuperscript{50} See O'Connell, supra note 48, at 1474-75; Roy, supra note 21.
\item \textsuperscript{52} See WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 30 (1993); WEILER, supra note 47, at 64, 68. Paul Osterman explains this as a feature of the "salary model" in which, following a probationary period, individuals: can expect lifetime employment with the firm. Unlike the industrial model, in which it is explicitly understood that the firm will adjust the size of the labor force in response to product conditions or technological change, the implicit promise in the salary system is that layoffs will not occur or that the firm will be strenuous in its effort to prevent them. PAUL OSTERMAN, EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION AND PUBLIC POLICY 66 (1988).
\end{itemize}
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profound effects on the employer-employee relationship. One of the primary contributors to this development has been the increasing globalization of markets, a process which has vastly increased firm competition. In their quest for higher returns, investors, including money managers for mutual funds and retirement plans, have increased pressure on corporate executives and boards to improve efficiency and have held corporate officers accountable for unsatisfactory performance. As a result, employers have been less willing to assume the burdens of the employment relationship, at least where they can be avoided without damaging the productive mission of the firm.

There is no doubt that the competitive pressures of the marketplace are real, and employers have found that alternative employment arrangements contribute to a more efficient firm structure in response to those pressures. Edward A. Lenz, a senior vice president of the National Association of Temporary and Staffing Services, has identified a number of ways in which this is accomplished. These include securing flexibility to respond to fluctuating market conditions and the avoidance of overstaffing. Another commentator has observed that "[i]ncreased uncertainty in product markets has encouraged the shifting of risks and costs downward from larger and stronger U.S. firms to the smaller subcontractors who depend on them."

Alternative employment arrangements represent a way in which such subcontractors can reduce labor-related costs, although large employers have not been hesitant to employ the very same techniques. Ultimately, more and more businesses are finding that it is cheaper to avoid using traditional full-time, continuous employees where possible, thereby increasing the supply of contingent employment positions, and perhaps the number of available job opportunities as well. On the other hand, while it is true that changes in the

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53. See Eileen Appelbaum, Structural Change and the Growth of Part-Time and Temporary Employment, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 1, 5-8 (Virginia du Rivage ed., 1992). This process has been exacerbated by slower productivity growth since the oil embargo of 1973. See id. at 7.

54. Institutional holdings of stocks have grown from 16% of the market in 1965 to 46% of the market in 1990, bringing with it greater pressure on American companies to improve competitiveness. See Michael Useem, Corporate Restructuring and the Restructured World of Senior Management, in BROKEN LADDERS: MANAGERIAL CAREERS IN THE NEW ECONOMY 23, 26 (Paul Osterman ed., 1996). Oddly enough, the "owners" of mutual fund and retirement program shares which have been generating pressures on under-performing employers are largely employees, many of whom have also been adversely affected by corporate downsizings. See Floyd Norris, On Wall Street: For Richer, for Poorer?, N.Y. TIMES, Mar. 9, 1996, at A13.

55. In contrast, a few examples exist of employers giving a higher priority to job security in reaching corporate decisions. See supra note 13.

56. See Edward A. Lenz, Flexible Employment: Positive Work Strategies for the 21st Century, 17 J. LAB. RES. 555, 557 (1996); see also Françoise J. carré, Temporary Employment in the Eighties, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 45, 62 (noting that surveyed employers utilized contingent workers to deal with workload fluctuations such as special projects and seasonal needs).

57. Appelbaum, supra note 53, at 11.
character of the workforce have produced an increasing number of potential workers who are not necessarily interested in traditional full-time positions, the argument that the growth in contingent employment has been driven by worker supply rather than employer demand has not been demonstrated.58

There are a number of alternative work arrangements employers may utilize that can provide maximum flexibility and minimum exposure when compared to the traditional employment relationship. For example, employees can be obtained from temporary employment agencies which typically provide workers for limited periods, pay them directly, and bill the client for the service. Manpower, Inc., the largest private U.S. employer, has been performing this function since 1948.59 However, although temporary help agencies have been a feature of the employment environment for some time, they are no longer exclusively associated with office and clerical help. To the contrary, such firms are now available to provide employers with contract workers in a wide variety of disciplines, including the professions.60 The rapid growth of the temporary help industry is indicative of the increasing importance of this form of employment.61

58. See Carré, supra note 56, at 71-72. This conclusion is supported by the results of the Bureau of Labor Statistics survey, which indicated that more than half of those with contingent jobs would prefer full time work. See BUREAU OF LABOR STATISTICS, supra note 39, at tbl.11.

59. One author reported a total of 560,000 Manpower employees. See JEREMY RIFKIN, THE END OF WORK 190 (1995); see also RICHARD S. BELOUS, THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE 29-30 (1989) (discussing the history and development of Manpower, Inc.). Employers have been accustomed to using such services to fill in during employee vacations and illnesses, or to handle seasonal or other special workloads. Temporary help companies typically hire and train employees and provide them in response to customer requests. See LENZ, supra note 26, at 10.


61. Between 1982 and 1990, temporary-help employment grew ten times faster than employment in general, accounting for two of three new private sector jobs in 1992. See RIFKIN, supra note 59, at 191; see also Carré, supra note 56, at 47-49 (observing that temporary help industry employment grew 104% from 1978 to 1985, eight times the rate for nonagricultural employment); "Contingent" Workforce Expands Rapidly, supra note 43 (reporting on Conference Board economist Audrey Freedman's conclusion that contingent employees are becoming an increasingly large part of the labor market, numbering 29.6 million workers); Robert E. Parker, Why Temporary Workers Have Become a Permanent Fixture, BUS. & SOC'Y REV., Sept. 22, 1994, at 36 (tracing the growth of contingent employment to the decline in the number of core workers employed by major corporations as a result of the rise of both domestic and international competition since the 1970s). Manpower recently signed an agreement with Drake Beam Morin Inc., the nation's largest outplacement firm, to channel restructured employees into temporary help positions if they cannot be placed in permanent jobs. See Outplacement Firm To Send Workers to Temp Jobs, KAN. CITY STAR, May 28, 1996, at D21. The next
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In other settings, employers may lease workers from a third-party supplier. In a sense, leasing arrangements are similar to the securing of services through temporary help agencies. However, employee leasing as a distinct employment arrangement is often typified by the transfer of control of the workforce to the supplier. The leasing entity hires, directs, and controls the workforce on behalf of its client. Temporary help agencies, in contrast, simply provide workers, with the client assuming the responsibility for their direction and control.62

Employers may also seek to convert their workforce into contract employees, a status that can apply to executives, managers, or rank-and-file workers. Changing to a contract workforce can be achieved by simply informing the employee, preferably in writing, that she is being kept on for a limited duration with a specified rate of pay. As a result, the employee’s status is changed, although she may find herself continuing to work in the same location performing the same tasks. However, she will also probably find herself without the benefits typically provided to traditional employees.63 In some settings, such as the academic world, contract employees are also increasingly serving on a part-time basis. As a result, two or more part-time positions may be needed in order to generate an income level approaching that of a full-time employee.64

Converting to a contingent employment environment can offer employers substantially increased flexibility in the handling of their workforce. If, for example, the firm’s production pattern is characterized by periods of high and low volume, the employer can maintain a limited core of permanent employees, and supplement them with additional contingent employees hired on an as-

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63. See Belous, supra note 44, at 873; Phaedra Brotherton, Staff to Suit: Temporary Employees, 1995 HR MAG., Dec. 1995, at 50, 51, 54 (reporting that where corporate downsizing was taken too far, many companies found themselves “hiring back some of their former employees as independent contractors and temporaries,” and noting “the savings associated with providing few, if any, benefits” to such contingent workers). If the benefit plan does not clearly exclude contract workers, however, it may be possible to compel their inclusion if they are, in fact, “employees” under common law, statutory, or administrative definitions. See Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1009-10, 1013 (9th Cir. 1997) (en banc) (holding that the workers were not disqualified simply due to the use of the independent contractor label in their employment agreements, but remanding their benefit claims to the district court and the plan administrator for ultimate resolution).
64. One pair of commentators describes such college-level instructors as an “academic proletariat of part-time and adjunct faculty.” STANLEY ARONOWITZ & WILLIAM DIFAZIO, THE JOBLESS FUTURE 54 (1994); see also Parker, supra note 61, at 36 (reporting that at some community colleges, as many as half of the faculty are employed on a part-time, temporary basis).
needed basis.\textsuperscript{65} The protected full-time employees, therefore, do not suffer any loss of morale as their employer sheds "excess" contingent workers, while at the same time the company is able to avoid the unfavorable publicity that might otherwise be directed toward its personnel cutbacks.\textsuperscript{66} In effect, the contingent workers serve "as a buffer against job loss for regular employees."\textsuperscript{67}

Decreased labor costs are another important advantage derived from the use of contingent employees. One reason for the lower costs is the fact that employers generally compensate contingent employees at a lower wage rate,\textsuperscript{68} but other labor cost reductions also exist. For example, even though an employer may not feel free to eliminate fringe benefits for her permanent workforce, the evidence indicates that contingent workers often lack such benefits as health care coverage and pension plans.\textsuperscript{69} Additional cost reductions can be achieved by shifting training expenses to the employee or to the provider of the leased or temporary help.\textsuperscript{70}

Contingent employment arrangements can also be extremely useful in creating a more docile and controllable workforce. If employees have been secured from leasing or temporary help agencies, the supplier can simply be asked to provide alternative staff if problems arise. Contract workers hired directly by the employer can be dropped through the simple expedient of not renewing the contract when its term expires. Even if the workers are not actually released, the highly transient and insecure status of contingent employment deters protest. As a result, the employer is likely to face a significantly reduced risk of unionization.\textsuperscript{71}

\textsuperscript{65} A Conference Board survey reported that 81% of the companies questioned identified labor force flexibility as the major objective in using contingent workers. See \textit{Global Companies Hiring More Temps}, supra note 46; see also Parker, supra note 61, at 36 (citing the need for labor force flexibility as the explanation for increasing employer reliance on both internal and external contingent workers).

\textsuperscript{66} Motorola has been cited as an example of this phenomenon, but it may also be typical of high-tech firms generally. See Parker, supra note 61, at 38.

\textsuperscript{67} \textcite{NOLLEN & AXEL, supra note 8, at 38.}

\textsuperscript{68} See \textcite{Belous, supra note 44, at 873-75; Hiatt & Rhinehart, supra note 21.}

\textsuperscript{69} See \textcite{HARRISON & BLUESTONE, supra note 3, at 46; "Contingent" Work Force Expands Rapidly, supra note 43; Contingent Workers Unfairly Deprived of Benefits, Job Security, Senate Panel Told, 1993 Daily Lab. Rep. (BNA) No. 114 d11 (June 16, 1993) (reporting on the job restructuring undertaken by the Bank of America, which resulted in the conversion of 48% of its staff to hourly or temporary positions without the opportunity to receive benefits); GAO Finds Greater Use of Contingent Workers, Warns of Strain on Income Protection System, 1991 Daily Lab. Rep. (BNA) No. 59, at A-7 (Mar. 27, 1991) (reporting the concerns of Representative Tom Lantos that the rise of contingent employment practices creates the risk of shifting the costs of income protection and benefits from employers to workers and taxpayers).}


\textsuperscript{71} See H. Lane Dennard, Jr., \textit{Governmental Impediments to the Employment of Contingent Workers}, 17 \textit{J. LAB. RES.} 595, 597 (1996); \textcite{NLRB Ponders Test for Independent Contractors, 153 Lab. Rel. Rep. (BNA) 461 (Dec. 9, 1996). Union advocates have expressed this concern in support of their efforts to convince the National Labor Relations Board to change the test governing unit determinations for temporary workers, as well as the way it approaches employer efforts to recast employees as...
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It is also true, however, that for many employees contingent employment relationships present an opportunity for entrance into the workforce which might not otherwise be available. In particular, those in need of flexible work arrangements which might be part-time or of limited duration can be expected to benefit from the increasing availability of contingent employment opportunities. Included are individuals in between jobs, students seeking supplemental income, or parents with child care responsibilities. Another category is represented by senior citizens remaining in or reentering the workforce who would prefer something other than the traditional full-time, permanent job. Recent efforts by Manpower to provide work assignments to low income individuals moving off the welfare rolls in response to federal welfare reform legislation may represent a new horizon for the contingent employment market. Additionally, workers and employers who prefer to evaluate each other before making any significant commitment can take advantage of contingent employment staffing firms to recruit, train and place individuals in temporary assignments which can lead to permanent jobs.

Nevertheless, from the perspective of the individual worker, the contingent employment environment is not necessarily desirable. To the contrary, many individuals have found themselves involuntarily forced into contingent employment arrangements, a fact substantiated by the conclusions of the Bureau of Labor Statistics survey indicating that more than half of those identifying themselves as having contingent employment arrangements would prefer traditional full-time jobs. For individuals in this category, the insecurity and generally lower level of overall contingent employment compensation represent serious personal problems.

Clearly, there are both advantages and disadvantages to the increasing reliance by employers on a contingent workforce. Depending upon the particular individuals and firms involved, the result can be a productive meeting of mutual needs or it can turn into a coercive and socially problematic arrangement. However, there is a further difficulty in judging contingent employment relationships which stems from the problems the legal system has independent contractors. See Temporary Workers Sap Union Strength, NLRB Told, 153 Lab. Rel. Rep. (BNA) 466 (Dec. 9, 1996). "The use of contingent workers is...very often aimed at undercutting established unions and the establishment of unions, because contingent workers are so fearful of jobs and so easy to lay off...It is an anti-union as well as a cost cutting tactic." Roy, supra note 21 (quoting Markley Roberts, economist, AFL-CIO). Corporate managers have attempted to cut the costs associated with labor "by pursuing what is referred to in business circles as 'union avoidance,'" and a key prong to this strategy is outsourcing. HARRISON & BLUESTONE, supra note 3, at 48.

72. See Johnson & Coyie, supra note 60, at 378-79.


75. See BUREAU OF LABOR STATISTICS, supra note 39, at tbl.11.
had in determining how to apply existing labor and employment laws to this growing group of non-traditional workers. If such laws can be easily circumvented by simply restructuring the workforce, it is only natural that employers will be encouraged to make use of contingent employees in lieu of permanent staff, thereby artificially increasing the rate of contingent employee utilization. Unfortunately, the judicial response to this development has not been particularly satisfactory, especially in adjusting newly-developed common-law theories of unjust dismissal to such restructured employment patterns.

II. THE AT-WILL DOCTRINE AND UNJUST DISMISSAL THEORY

While traditional employees may be characterized as those who are employed with an expectation of continuity, the law has afforded that expectation virtually no protection until quite recently. To the contrary, employees who did not have explicit contractual promises of a fixed duration of employment were treated by the law as having been hired at will. The employer was free to discharge the employee for good reason, bad reason, or no reason at all. The expectation of continuous employment, in short, was no more than a hope. However, it is not clear that this result was dictated by history and legal precedent, nor does such an approach to the employment relationship necessarily suit contemporary needs. The emergence of unjust dismissal theory can be seen as a response to these concerns.

English law, during the era of Blackstone, did not incorporate the at-will doctrine in defining the relationship between employers and employees. Relying upon the needs of an agricultural society, the law obligated the parties
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to maintain their relationship for a period of one year in the absence of an
agreement fixing an alternative term. In Blackstone's words:

If the hiring be general without any particular time limited, the law construes it to
be a hiring for a year; upon a principle of natural equity, that the servant shall
serve, and the master shall maintain him, throughout all the revolutions of the
respective seasons; as well as when there is work to be done, as when there is not

Over time this standard was also found suitable for non-agricultural employ-
ment in a society moving toward industrialization and experiencing labor
shortages and personnel turnover. As the doctrine evolved, however,
customs and practices in particular trades were found sufficient to rebut the
presumption of an employment term of one year in favor of lesser terms.
Nevertheless, the law continued to presume the existence of an employment
contract with a specific duration rather than an indefinite, terminable at-will
arrangement.

Despite this historical background, American law eventually came to reject
the definite-term presumption which English law applied to the relationship
between employers and employees, in favor of the at-will doctrine. Responsi-
bility, or blame, for the departure from English precedent is normally credited
to the treatise-writer H. G. Wood. Although case law at the time did not fully
support his assertions, and some decisions were actually contrary to his claims,
Wood nevertheless wrote:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a
hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is
upon him to establish it by proof. A hiring at so much a day, week, month or year,
no time being specified, is an indefinite hiring, and no presumption attaches that it
was for a day even, but only at the rate fixed for whatever time the party may
serve.

But while many commentators have focused on Wood's role in the development

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80. 1 WILLIAM BLACKSTONE, COMMENTARIES *425. See generally Feinman, supra note 28, at 119-
22 (discussing the English courts' "approach to the termination of master-servant relationships");
Cornelius J. Peck, Penetrating Doctrinal Camouflage: Understanding the Development of the Law of
Wrongful Discharge, 66 WASH. L. REV. 719, 721 (1991) (noting that "English common law was not
the source of the employment-at-will doctrine").
81. See Feinman, supra note 28, at 120.
82. See PAUL I. WEINER ET AL., WRONGFUL DISCHARGE CLAIMS: A PREVENTIVE APPROACH 5-6
(1986); Feinman, supra note 28, at 120-21; Clyde W. Summers, The Contract of Employment and the
Rights of Individual Employees: Fair Representation and Employment at Will, 52 FORDHAM L. REV.
83. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). The cases
upon which Wood relied are analyzed in Note, Implied Contract Rights to Job Security, 26 STAN. L.
REV. 335, 341 n.54 (1974). Commentators have described Wood's statement of the at-will employment
rule as an “unsupported assertion,” Summers, supra note 82, at 1083, and criticized him for relying on
cases that were “far off the mark” and for “scholarly disingenuity,” Feinman, supra note 28, at 126.
of the at-will employment rule, the economic conditions of the time were no
doubt more significant in the doctrine’s emergence. The late nineteenth century
American economy was characterized by a laissez-faire spirit suited to
employment relationships that did not restrict the freedom of workers to move
on to new employment or the freedom of employers to hire and fire without
judicial oversight.84

Although the at-will employment rule did not gain immediate acceptance
following the publication of Wood’s treatise,85 it later spread rapidly.86
Indeed, even the United States Supreme Court appeared to endorse Wood’s
statement describing the presumption of at-will employment when it struck
down state and federal legislation designed to limit the power of employers to
discharge their employees.87 In Adair v. United States, the Supreme Court
observed that “the right of the employee to quit the service of the employer,
for whatever reason, is the same as the right of the employer, for whatever
reason, to dispense with the services of such employee.”88 The fact that
employees generally “are not financially able to be as independent in making
contracts for the sale of their labor as are employers in making contracts of
purchase thereof”89 did not warrant a different result.

Doctrinally, the early development of the employment at-will rule also
 gained support from the “formalistic approach to contract interpretation”90
which prevailed at the time. Courts embracing this approach required definite
and express terms in the parties’ agreement manifesting their consent to an
employment relationship of a specific rather than an indefinite
term.91 As the
doctrine evolved over time, the burden placed on employees to establish the
existence of such an agreement, other than with a written employment contract,
became virtually insurmountable, and the at-will presumption effectively
became a rule-like principle.92

84. See Feinman, supra note 28, at 131-35; Finkin, supra note 49, at 737-40; Peck, supra note 80,
at 722.
85. See Summers, supra note 82, at 1083-84 (citing Adams v. Fitzpatrick, 26 N.E. 143 (N.Y.
1891); and 2 THEOPHILUS PARSONS, LAW
OF CONTRACTS 34-35 (Samuel Williston ed., 8th ed. Boston,
Little, Brown, & Co. 1893)).
86. See 1 PERRITT, JR., supra note 29, § 1.4, at 13; Peck, supra note 80, at 720.
88. Adair, 208 U.S. at 174-75.
89. Coppage, 236 U.S. at 17.
90. HEIN, ET AL., supra note 82, at 30.
91. See Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate
92. “The courts, applying terminability at will, erected such a rigid presumption in favor of Wood’s
rule that often evidence of the parties’ intentions was ignored. Even in cases where the parties had
contracted for permanent employment, courts maintained the contradictory right of an employer to
terminate the employment contract.” ROTHSTEIN ET AL., supra note 32, at 10-11; see also Clarke v.
Atlantic Stevedoring Co., 163 F. 423, 425 (E.D.N.Y. 1908) (“A contract of hiring, indefinite with
respect to the term for which the contract shall run, in the absence of allegations that the term of the
contract is fixed by statute or custom, is at most a contract terminable at will.”).
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During the period in which Wood's theories were gaining acceptance, courts assumed that a legal presumption of at-will status was justified because of their belief that the bonds between employers and employees were relatively impermanent and unstable. Their belief accorded with the actual character of such relationships at the time, at least with respect to non-management and non-supervisory personnel. However, even if this view of the labor market was accurate with respect to the late nineteenth and early twentieth century American economy, the years following the Depression of the 1930s and World War II have markedly changed the assumptions underlying the employment relationship. As Professor Paul Weiler has observed:

The standard expectation in the real world of work is that the employee will keep his job unless he does something wrong—in the sense of some specific misconduct or a general pattern of poor performance—and as a consequence forfeits the position. Indeed, a further feature of the social mores at work is that even if an employee does something wrong—for example, if he takes a day off without a legitimate reason—it will not cost him his job immediately; he will be dismissed only if the bad act is part of a broader pattern of unsuitable behavior which has not been corrected by the employer with less severe disciplinary measures.

Such an approach to job security is clearly inconsistent with the legal reality of the employment at-will rule.

Contract principles of mutuality were often used to support the at-will rule. The Supreme Court relied on this concept in Adair when it referred to the equivalent rights of employers to terminate employees and employees to leave

93. See WEILER, supra note 47, at 144-45 (describing the pre-World War II drive system in which employees were recruited from a "nomadic population of available workers," with no expectations of preference for promotions or even for rehire following a layoff); Finkin, supra note 49, at 737-39 (commenting on the high turnover rates in the textiles, meat-packing, and railroad industries); O'Connell, supra note 48, at 1473-75 (noting the greater stability of supervisory and management jobs).

94. One scholar has observed that what "characterizes the period from the Great Depression to the Vietnam War is a social compromise between industrial workers and big business in which each side recognized certain needs and prerogatives of the other." Alan Dawley, Workers, Capital and the State in the Twentieth Century, in PERSPECTIVES ON AMERICAN LABOR HISTORY 152, 166-67 (J. Carroll Moody & Alice Kessler-Harris eds., 1989). As a result, "a generation of children grew up beyond the clutches of the terrible insecurity their parents and grandparents had always known." Id. at 173.

95. WEILER, supra note 47, at 52.

96. Even union employees who normally have labor contract protection against termination without cause can find themselves converted to at-will workers if the employer, after bargaining, assigns the work to contractors. Jonathan P. Hiatt, the General Counsel of the Service Employees International Union, has called for priority hiring of such displaced workers by the new contractor as a way of giving "employers the flexibility they seek in contracting for services while providing the affected work force with the job security needed to access national workplace rights and protections." Jonathan P. Hiatt, Policy Issues Concerning the Contingent Work Force, 52 WASH. & LEE L. REV. 739, 748 (1995). In Professor Weiler's view, "as modern employment has evolved from a casual to a career relationship between worker and firm, the traditional at-will legal concept has become morally untenable." WEILER, supra note 47, at 68. With exceptions for areas lacking expectations of tenure, such as athletics, Professor Weiler supports the notion of employment tenure with the firm as opposed to job tenure over a particular position. See id. at 68-69.
the service of their employers. If employees could enforce contracts of employment for an indefinite duration, they would have the right to end the employment relationship by quitting, but the employer would be burdened by a commitment which would require cause to end. However, as critics have pointed out, there is no reason to assume that obligations between employers and employees should or must be mutual, nor do principles of contract law require mutuality of obligations as opposed to the simple exchange of consideration.

A separate argument often made was that consideration apart from performing work in return for wages was required before a promise of more than at-will status could be enforced. Absent an additional commitment from the employee, the employer’s promise to retain the employee indefinitely was not supported by a return promise, and therefore the contract was invalid for lack of consideration. But once again, critics recognized the misapplication of contract principles. Courts should not be concerned with the adequacy of consideration, and consequently there is no reason why the performance of one’s job could not support both the payment of wages and a promise of more than at-will status.

In addition to questioning the doctrinal basis for the at-will rule, commentators have also observed that the doctrine should be modified in light of changing circumstances. Employment security has become increasingly important to individual workers, not only because of the economic dependence of the employee on her job, but also because of the close association between employment and an individual’s sense of worth. Moreover, post-Depression and World War II changes in public attitudes toward job security caused the at-will rule to appear out of line with the generally accepted understanding of the individual employee’s legal right to resist discharge. At the legislative level, this resulted in the enactment of statutes designed to protect against terminations for specific discriminatory reasons or for whistleblowing. However, courts also began to be responsive to these criticisms, although not

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99. See Blades, supra note 98, at 1419-20; Summers, supra note 82, at 1098.
100. See Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir. 1964).
101. See Summers, supra note 82, at 1099.
102. See Weiler, supra note 47, at 63-67; Blades, supra note 98, at 1413-14.
103. See supra note 94 and accompanying text.
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to the extent of abolishing the at-will presumption. Rather, in a series of judicial rulings, state courts throughout the country developed exceptions to the at-will rule premised on tort and contract theories. This process occurred independently of legislative efforts to protect employees against discharge based upon specific discriminatory reasons.\(^{106}\)

*Petermann v. International Brotherhood of Teamsters*\(^{107}\) is an early and frequently cited example of the tort-based judicial limitation on the employment at-will rule. In this case, the court held that despite the existence of the at-will presumption, terminating an employee because of his refusal to commit perjury in violation of the state’s criminal law is itself a violation of public policy. In such a case, the employer’s right to discharge an employee without judicial supervision required modification in order to prevent state policy from being seriously impaired. In more recent years, many jurisdictions have adopted the public policy theory set forth in *Petermann* and now allow terminated employees to file a wrongful discharge suit against their employers on the grounds that the termination was motivated by the employees’ refusal to commit a criminal act.\(^{108}\) However, in applying the principle that employers may not terminate their employees for reasons that violate public policy, courts increasingly have chosen not to restrict themselves to the public policy reflected in the prohibition against requiring employees to commit criminal offenses. Many jurisdictions now also protect employees who have been terminated for reporting criminal violations committed by the employer\(^{109}\) or a third party.\(^{110}\) Courts have also considered public policy to be violated when an employee is terminated for performing public duties such as serving

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on a jury,\textsuperscript{111} testifying in a legal proceeding,\textsuperscript{112} and exercising public rights such as filing a workers compensation claim.\textsuperscript{113} In Washington state, public policy has recently been deemed to extend far enough to include an armored truck driver who had been fired for leaving his truck to help an individual who was being chased by a man with a knife.\textsuperscript{114} Today there is much variety in how states view the scope of the public policy challenge to employee terminations, with jurisdictions differing on what constitutes a sufficiently clear public policy to warrant protection against discharge as well as on what sources may be relied upon in identifying the public policy allegedly violated.\textsuperscript{115}

Contemporary decisions have also moderated the high burden of establishing a contractual employment relationship on an other than at-will basis. Some courts have found implied contractual commitments by employers not to discharge without cause in the circumstances surrounding the employment relationship, relying on such factors as longevity of service\textsuperscript{6} and promises contained in employee handbooks and manuals.\textsuperscript{7} Other judicial decisions have recognized an implied covenant of good faith and fair dealing in all

\begin{footnotes}
\item[114] See Gardner v. Loomis Armored Inc., 913 P.2d 377 (Wash. 1996) (en banc). Based upon specific language contained in ERISA, the Supreme Court has held that statutory protection is available for participants in an ERISA benefit plan who are discharged for the purpose of interfering with their right to attain benefits under the plan. See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry., 117 S. Ct. 1513 (1997). The Court rejected the argument that this principle was limited to benefit rights capable of vesting. See id. at 1514.
\item[115] See, e.g., Buethe v. Britt Airlines, Inc., 787 F.2d 1194 (7th Cir. 1986) (finding a public policy tort in a dismissal for exercising an explicit statutory right); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (en banc) (limiting public policy to constitutional and statutory sources); Bushko v. Miller Brewing Co., 396 N.W.2d 167 (Wis. 1986) (finding a public policy tort where an employee was terminated for refusing to violate an explicit statutory prohibition). For general discussion of the extent to which jurisdictions differ on what constitutes public policy for purposes of a wrongful discharge suit, see 1 PERRITT, supra note 29, §§ 1.13-.63; ROTHSTEIN ET AL., supra note 32, §§ 9.9-.14; and HOWARD A. SPECTER & MATTHEW W. FINKIN, 1 INDIVIDUAL EMPLOYMENT LAW AND LITIGATION §§ 10.33-.41 (1989).
\end{footnotes}
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employment contracts, thereby providing contractually-based protection against
abusive terminations to employees who would not otherwise be able to establish
an implied contract claim.118 The implied contract and implied covenant of
good faith and fair dealing theories are distinct in that the former obligates the
employer to demonstrate sufficient cause for a dismissal, while the latter only
requires that the employer act in good faith.119 Nevertheless, both serve as
substantive limitations on the right of employers to unilaterally terminate the
employment relationship.

The development of the public policy, implied contract, and implied
covenant of good faith and fair dealing exceptions to the at-will rule has
transformed discharge law, making it far different today than it was a
generation ago. Now, in addition to being statutorily protected against
terminations that violate anti-discrimination statutes120 and specific whistle-
blower protection laws,121 employees in most jurisdictions also have a
common-law cause of action to challenge their discharge even if the legislative
protections against termination are inapplicable.122 There have also been calls
for the development of general statutory protection against unfair termina-
tions,123 as well as for the drafting of model legislation by the National
Conference of Commissioners on Uniform State Laws.124 Thus far, Montana
may be the only state that has a general statute addressing wrongful discharg-

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118. See Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Merrill v. Crothall–American,
Inc., 606 A.2d 96 (Del. 1992); Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977);
Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). However, other courts have rejected this
theory. See, e.g., Jeffer v. Bishop Clarkson Mem’l Hosp., 387 N.W.2d 692 (Neb. 1986); Murphy v.

Court of Massachusetts established that good faith and good cause are different standards, and violation
of one does not necessarily entail the violation of the other. See also Wade v. American Fam. Mut.
Ins. Co., 343 N.W.2d 367 (N.D. 1984) (noting that the implied covenant of good faith and fair dealing
bars conduct involving bad faith injury to contract rights).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994); Americans with

121. See, e.g., Civil Service Reform Act of 1978, Pub. L. No. 95-454, sec. 101(a), §§ 2301(b)(9),
2302(b)(8), 92 Stat. 1112, 1114, 1116 (codified at 5 U.S.C. §§ 2301(b)(9), 2302(b)(8) (1994));
Conscientious Employee Protection Act, N.J. STAT. ANN. §§ 34:19-1 to -8 (West 1988 & Supp. 1997);

122. Although not fitting the pattern of barring discriminatory discharges or those which reflect
retaliation for the reporting of misdeeds, the Supreme Court has confirmed the applicability of ERISA
to protect employees who are discharged for the purpose of interfering with their right to attain benefits
under a covered pension or welfare benefit plan. See Inter-Modal Rail Employees Ass’n v. Atchison,

123. See Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute,

124. See MODEL EMPLOYMENT TERMINATION ACT (1991); Kenneth A. Sprang, Beware the
Theodore J. St. Antoine, Employment-At-Will—Is the Model Act the Answer?, 23 STETSON L. REV. 179
(1993).
es, but the possibility that other states may enact unjust dismissal legisla-

tion exists.

It must be conceded that providing protection against unjust terminations
creates costs. A 1988 study by the Rand Corporation, for example, revealed
that average jury awards in California wrongful termination cases had reached
$436,626; in cases where punitive damages were awarded, the average figure
was $646,855. While damage awards at this level may not seriously affect
large corporations, the impact upon smaller employers could be more
significant. Furthermore, if jury awards in employment cases are increasing,
as some evidence has suggested, the cost factor could become a problem
even for those who at present believe that the unjust dismissal doctrine is not
a financial threat. However, whether this concern is justified remains
speculative, and appellate courts have shown the ability to exercise a
restraining influence on jury awards in appropriate cases.

Litigation costs must also be considered, even in cases that result in a
defense victory. The Rand study found that the average fee in litigated cases
was $80,073, with a median of $65,000. Presumably, legal costs could be
lowered by settling the case prior to trial, but employers may be concerned that
signaling a willingness to settle may only serve to increase the number of
terminated employees who file suit. However, viewed in perspective, the Rand
Corporation researchers concluded that “[d]espite all the sound and fury over
wrongful termination litigation, the aggregate legal costs are really not very
large.”

Finally, evaluating the expense of unjust termination litigation requires
consideration of indirect costs. These can include such responses as not
firing workers even when justified, limiting employment expansion entirely,
focusing firm hiring on candidate groups presenting the lowest risk of exposure
to litigation, and even altering the focus of the company to avoid risky ventures
which might require the hiring of excess employees who could later file suit

legislation aimed at limiting the scope of its public policy exception to the at-will rule. See Employment
Protection Act, ch. 140, § 3, 1996 Ariz. Legis. Serv. 685-86 (West) (codified at ARIZ. REV. STAT.
ANN. § 23-1501 (West 1997)).

126. See JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF

13, 1996).

128. See, e.g., Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) (reducing a
$5,000,000 district court sexual harassment award, which had already been reduced from a $50,000,000
verdict, to $350,000); Karcher v. Emerson Elec. Co., 94 F.3d 502 (8th Cir. 1996) (reversing a punitive
damage award).

129. See DERTOUZOS ET AL., supra note 126, at 38.

130. Id. at 47.

131. This subject was explored in a 1992 Rand Corporation study. See JAMES N. DERTOUZOS &
LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY (1992).
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if terminated. While it may be argued that these reactions are unnecessary because unjust dismissal doctrine does not bar warranted terminations, employers may fear that juries will develop a pro-employee bias and find liability even in the face of facts justifying termination. However, the extent to which employers utilize unnecessary measures to protect against litigation is speculative. Moreover, some of the indirect costs of modifications to the at-will rule may well constitute benefits, such as forcing the exercise of greater care in the selection and termination of employees.

In addition to voicing concerns about the impact of wrongful dismissal litigation upon employers, commentators have also questioned the ability of such litigation to secure adequate relief for the total population of unjustly terminated employees. One concern is that contract-based wrongful discharge theories benefit high-salary personnel more than they do average workers, since damages are based upon the wage rate of the terminated employee. In addition, although wrongful discharge cases may result in significant awards, the existence of a limited number of very high verdicts distorts the figure. Finally, when reductions of jury awards by trial and appellate court judges are calculated, along with attorney contingency fees, actual recovery for successful plaintiffs is far more modest than might be assumed. Concededly, the result is a somewhat unpredictable system in which many are either deterred from seeking relief or secure very modest awards, while only a few are successful in winning the litigation lottery.

Although the system is far from perfect, the fact remains that unjust dismissal doctrine provides at least some protection to employees who face wrongful termination. In specific cases, an employer might be deterred from threatening an employee with discharge unless she agrees to engage in illegal conduct, or she might be forced to compensate an illegally discharged worker who refused to comply. Beyond these benefits, the system arguably serves the additional purposes of inducing employers to upgrade their personnel selection

132. See id. at 38.
133. See WEILER, supra note 47, at 80.
134. See DERTOUZOS & CAROLY, supra note 131, at 38-39.
135. See WEILER, supra note 47, at 81-83. Professor Weiler also observed that: the capacity of the employees to discern and complain about the employers' violations of their rights is in turn dependent on their widely varying intellectual, financial, and organizational resources. That is why successful wrongful dismissal claims, for example, are far more likely to be filed by managerial or professional employees than by the less skilled, less well paid workers whose plight usually precipitates the original call for such protective laws. Id. at 28. It is true that the tort-based public policy theory offers the possibility of punitive damages for all dismissed employees, and therefore does not contain an inherent bias in favor of more highly compensated employees. However, the trend is toward barring such awards in cases based upon the implied contract and covenant of good faith and fair dealing doctrines. See Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).
and retention processes, as well as tempering the exercise of firm discretion which may be subject to abuse by frontline supervisors and managers. To employers, however, these consequences are likely to be viewed as unwarranted costs to be avoided if at all possible. It is logical, therefore, to expect employers to take protective steps designed to limit their exposure to unjust dismissal lawsuits challenging the exercise of their authority to terminate employees.

Recent employer responses have included an effort to restructure the employment relationship in a way which would entirely circumvent the impact of the unjust dismissal doctrine, thereby returning employers to the regime of unreviewable termination decisions associated with the at-will employment rule. It was not necessarily predictable, however, that the judiciary would go along with this effort. Nevertheless, in decision after decision, courts throughout the country have placed contingent employees in a special category, one of whose characteristics is that employers are free to dispense with their services without fear of legal consequence. In so ruling, however, the courts have moved toward undoing much of the employment law reform which emerged in the 1970s and 1980s. They have given employers a device enabling them to avoid many of the responsibilities of the employment relationship, and employers have increasingly taken advantage of this opportunity.

III. CONTINGENT EMPLOYEES AND UNJUST DISMISSAL DOCTRINE

In light of the rapid growth of the contingent employment sector of the American labor market, it was inevitable that questions would arise concerning the applicability of unjust dismissal principles to these non-traditional work arrangements. How should the public policy and contract-based restrictions on the right to terminate a continuous employee apply to temporary help, leased workers, and employees converted to independent contractor or contract worker status? To the extent that such workers share characteristics of traditional employees, such as performing the core work of the employer or being equally dependent on their earnings from the work arrangement for their economic well-being, equivalent protection against wrongful termination would appear necessary. But is it appropriate to restrict the employer’s right to discharge workers who lack reasonable expectations of job continuity? What consequences are likely to ensue if contingent employees are treated differently for unjust dismissal purposes? Although the underlying issues present difficult policy choices, courts which have confronted the problem have hastily concluded that unjust dismissal theories do not apply to workers employed on a contingent basis.

Driveaway & Truckaway Service, Inc. v. Aaron Driveaway & Truckaway
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Co.\textsuperscript{137} illustrates the approach courts have taken when efforts have been made by those in non-continuous work arrangements to rely upon unjust dismissal principles. In this case, a company engaged in the business of transporting vehicles throughout the United States retained agents in various locations for the purpose of conducting business on its behalf. After the plaintiff’s agency relationship was terminated, a lawsuit was filed alleging that the termination breached an oral agreement that the relationship would remain in effect as long as there was no violation by the agent of any lawful company procedure or other obligation. The agent claimed that the relationship had been terminated without justification due to his refusal to participate in various illegal schemes. The agent sought relief in the form of both compensatory and punitive damages.\textsuperscript{138}

The plaintiff’s compensatory damage claim represented a traditional application of contract principles. If an agreement existed between the agent and the principal which the latter breached, the standard remedy would require making the plaintiff whole for losses incurred. However, the plaintiff’s punitive damage claim was based upon the tort theory that the defendant’s reason for terminating the relationship was in violation of public policy. The defendant sought to dismiss this claim, and the court agreed that it could not be pursued. From the court’s perspective, the punitive damage count reflected the plaintiff’s effort to fit the action within the wrongful discharge theory, but the court concluded that this doctrine applied only to employees.\textsuperscript{139} On the grounds that the separate corporate identities of the principal and agent, and the manner in which the agency structured its business, did not support the argument, the court rejected the plaintiff’s claim that wrongful discharge principles should apply because the tie between a principal and an agent was “completely analogous” to the employer-employee relationship.\textsuperscript{140}

Separately, the court addressed the question of whether the tort doctrine covering retaliatory discharges in employee termination cases should also be held applicable to the principal-agent relationship which characterized the parties in Driveaway. It took the position, however, that courts should not expand the scope of the retaliatory discharge tort,\textsuperscript{141} and that the doctrine has only the limited objective of providing a remedy in situations where employees with little or no bargaining power are faced with threats of discharge in

\textsuperscript{138} See id. at 549.
\textsuperscript{140} See Driveaway, 781 F. Supp. at 551.
\textsuperscript{141} See id.
violation of the state's strong public policy interests. Given the court's judgment that the parties did not stand on an unequal footing and its belief that the breach of contract remedy was sufficient to deter public policy violations, the court concluded that there was no need to apply the retaliatory discharge doctrine to the principal-agent relationship that existed. While the punitive damage claim might very well provide further protection for state public policy goals, the court did not believe that punitive damages would further the "proper balance" among the relevant competing interests.

In similar fashion, an Illinois state court in *New Horizons Electronics v. Clarion Corp.* concluded that a retaliation claim did not apply to independent contractor relationships. In this case, a corporation acting as sales representative brought suit, claiming that its contract was terminated because it refused to pay bribes and kickbacks to an employee of the defendant. In support of its claim, the plaintiff argued that the retaliatory discharge theory was designed to deter violations of public policy, and that this rationale applied to independent contractors as it did to employees. However, the court concluded that the rationale supporting the retaliatory discharge theory, based on the unequal relationship between employers and employees as well as the need to maintain a proper overall balance between competing public and private interests, did not justify extending the doctrine to independent contractors.

Independent contractors have experienced comparable results in other jurisdictions. In Indiana, for example, it has been held that the prohibition against discharging an employee based upon her exercise of a right granted by statute does not apply to an individual in an independent contractor relationship. In largely conclusory fashion, the Indiana decision confined unjust dismissal litigation to those in formal employment relationships, as have court rulings in California, Idaho, Minnesota, and Wisconsin. After

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142. See id. at 552 (citing Kelsay v. Motorola, 384 N.E.2d 353 (Ill. 1978)).
143. See id.
144. See id. at 553.
145. See id. (citing Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981)). The Eighth Circuit Court of Appeals concluded that the courts in Arkansas would reach a similar result in rejecting the public policy claim of a terminated insurance agent. See McNeill & McNeill v. Security Benefit Life Ins., 28 F.3d 891 (8th Cir. 1994).
147. See id. at 285.
148. See id.
150. See Abrahamson v. NME Hosps., Inc., 241 Cal. Rptr. 396 (Ct. App. 1987). Here, the plaintiff-physician's contract to operate a hospital's laboratory and pathology department allowed either party to terminate the agreement without cause after giving 90 days notice. See id. at 396. The plaintiff claimed that the hospital terminated the contract after giving notice without cause for reasons that violated public policy and breached the covenant of good faith and fair dealing. See id. at 397. The court rejected this claim because it concluded that it would add onto a contract that allowed for
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these rulings there may be room for a plaintiff to argue that what is labeled an independent contractor relationship in fact masks employee status.\(^1\) Failing that, relief will be denied.

The Missouri Supreme Court took the approach of denying plaintiffs the right to pursue wrongful discharge actions if they are not in a formal employer-employee relationship with the defendants a step further in *Luethans v. Washington University.*\(^1\)\(^\text{5}\) Instead of simply hiring Luethans as a licensed veterinarian, which would have made him an at-will employee, Washington University retained his services through a series of one-year contracts over the course of a six-year period. At-will employment status would have meant that Leuthans’ employer could fire him as long as the reason for discharge did not violate any statutory anti-discrimination requirement and was not contrary to termination the condition that the termination must be free of any suggestion of violation of public policy. See id. at 399. Citing *Abrahamson,* a federal district court in Maryland concluded that a physician’s independent contractor status barred application of the wrongful discharge theory to the termination of his contract. See *Cogan v. Harford Mem’l Hosp.*, 843 F. Supp. 1013, 1022 (D. Md. 1994).

151. See *Ostrander v. Farm Bureau Mut. Ins.*, 851 P.2d 946 (Idaho 1993). Here, the court concluded that various civil rights statutes did not protect independent contractors, and thus the plaintiff had no public policy claim available. The court specifically added that the Idaho statutes for civil remedies did not apply to independent contractors. See id. at 949. The court also rejected application of the implied covenant of good faith and fair dealing to independent contractors. See id.

152. See *Werner v. New Balance Athletic Shoe, Inc.*, 824 F. Supp. 890 (D. Minn. 1993). Since Minnesota’s whistleblower statute only provided a cause of action for employees, excluding independent contractors from the definition of employee, the plaintiff’s cause of action failed: The court concluded that no common-law right of action for whistleblowing existed and refused to create a special theory applicable only to independent contractors. See id. at 892-93 (citing *Pickerski v. Home Owners Sav. Bank*, 956 F.2d 1484, 1493 (8th Cir. 1992)).

153. See *Ziehlsdorf v. American Family Ins. Group*, 461 N.W.2d 448, 1990 WL 149183 (Wis. Ct. App. July 18, 1990) (unpublished opinion). Here, the plaintiff conceded that the tort of wrongful discharge was limited to those in an employment relationship, but argued that he fit within that category despite the formal characterization of his status in his career agent’s agreement as an independent contractor. See id. at *3.

154. See id. Misclassification problems can prove costly, as in a recent ruling by a panel of the Ninth Circuit Court of Appeals. The court held that Microsoft improperly treated so-called “freelance” workers as independent contractors, and therefore wrongfully deprived them of benefits. See *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996); Charles McCoy, *Temp Win Full-Time Benefits at Microsoft in Business Setback,* WALL ST. J., Oct. 14, 1996, at B5. In an en banc ruling, the Ninth Circuit upheld the panel’s rejection of Microsoft’s arguments for denying benefits to the freelancers, remanding questions concerning their eligibility for the company’s stock purchase plan to the district court and the determination of their qualification for a deferred salary plan to the plan administrator. See *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1015 (9th Cir. 1997) (en banc). The confusion in this area is illustrated by conflicting rulings in the Fourth and Fifth Circuits denying benefits to contingent workers. See *Clark v. E.I. DuPont de Nemours & Co.*, 105 F.3d 646, 1997 WL 6958 (4th Cir. 1997) (unpublished table decision); *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996); see also *Ann Davis, Employee Benefits at DuPont Don’t Extend to Temp Workers, WALL ST. J.*, Jan. 16, 1997, at B4 (reporting on the Fourth Circuit Court of Appeals ruling denying employee benefits to leased workers under DuPont’s benefits plan). In order to clarify the distinction between employees and independent contractors, the Internal Revenue Service issued a revised training manual for its staff. See *INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, EMPLOYEE OR INDEPENDENT CONTRACTOR?* (1996). However, further changes may be necessary as a result of new legislation. See *Worker Classification Guidelines Released, 152 Lab. Rel. Rep. (BNA) 539* (Aug. 26, 1996).

155. 894 S.W.2d 169 (Mo. 1995).
state public policy. As a contractual employee, in contrast, Luethans could not be discharged during the term of the agreement without cause. Instead of terminating Luethans, Washington University therefore chose the alternative of not renewing his contract when it expired. Luethans asserted that the action of his employer was based upon reasons that violated public policy. The court responded that Leuthans’ contract status precluded application of the wrongful discharge theory since that doctrine is limited to those in an at-will employer-employee relationships. Luethans’ contractual protection against discharge without cause, albeit for a limited period, cost him the right to challenge the reason behind the employer’s termination of the relationship.

Although the court denied Luethans’ wrongful discharge claim, it did not address the alternative theory that his employer engaged in a wrongful refusal to renew their contractual employment relationship. However, when a subsequent Missouri Court of Appeals case, Adcock v. Newtec, Inc., presented such an issue, the court granted summary judgment in favor of the employer. The court concluded that the plaintiff’s allegations did not constitute grounds for relief, leaving unresolved the issue of whether other facts could support a claim of wrongful failure to renew a contract. Such a cause of action could provide contract employees with protection against contract nonrenewal comparable to the role of wrongful discharge doctrine for traditional employees. However, unless the cause of action is recognized and developed, contract workers will remain unprotected. At present there is no clear sign that courts are prepared to take such a step.

Some courts have viewed the status of union employees under collective bargaining agreements as similar to contingent workers status and consequently have held that the former lack protection against wrongful discharge under state common-law theories. According to one Pennsylvania court, for example, the purpose of the wrongful discharge action is to provide a remedy to those with no other recourse to challenge their terminations. Since a union member may normally pursue a grievance under the labor contract, no further remedy


157. See Luethans, 894 S.W.2d at 172.

158. According to the court, “whether there . . . may exist liability for a ‘wrongful’ failure to renew a contract or what types of damages may be recovered for a breach of contract in a ‘whistleblower’ situation are questions that remain open.” Id.

159. 939 S.W.2d 426 (Mo. Ct. App. 1996).

160. The plaintiff had claimed that he was terminated because he “(1) refused to authorize salary termination payments, based on false invoices, for a discharged employee; and (2) reported the false invoicing activity to other Newtec personnel.” Adcock, 939 S.W.2d at 428.

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is required.\textsuperscript{162} The Court of Appeals for the Eighth Circuit determined that Missouri would reach the same conclusion.\textsuperscript{163} Additionally, three Illinois appellate courts have held that union members may not file suit under a wrongful discharge theory, arguing that union members under collective bargaining agreements with just cause termination requirements have a remedy to protect themselves, and, further, that allowing an independent tort suit would serve to undermine collective bargaining grievance procedures.\textsuperscript{164}

In a very fundamental sense, however, the effort to analogize union workers with contingent employees is unpersuasive. Unlike those in contingent employment relationships, union workers reasonably expect continuity in their employment status even if their collective bargaining agreement expires or their union status ceases for some other reason. They are traditional employees in every sense. Therefore, to the extent that the denial of unjust dismissal protection to contingent employees is based upon their non-traditional status and the lack of any permanency in their employment relationship, clearly union employees do not deserve the same treatment.

Similarly, the argument that union workers have alternative remedies to challenge a termination does not justify depriving them of the right to pursue wrongful discharge theories available to other employees. While it is true that union members typically have protection against unjust dismissal under their collective bargaining agreements, the relief they are likely to receive does not equate to the recovery available in a tort action. If an arbitrator overturns a termination under a labor contract, the employee can anticipate reinstatement, but back pay for lost work time is the only monetary award the employee will receive, and in many circumstances arbitrators will limit the award to less than the total wages lost.\textsuperscript{165} Such a remedy falls far short of the potential recovery available in a tort suit with a punitive damage claim. In most circumstances it is unlikely to offer a serious deterrent to an employer prepared to pressure an employee to engage in illegal activity.

Recognizing the disparity in remedies, the Illinois Supreme Court held in \textit{Midgett v. Sackett-Chicago, Inc.}\textsuperscript{166} that union members protected by labor contracts do have the right to file suit challenging a termination in violation of

\textsuperscript{162} See \textit{Phillips}, 503 A.2d at 37.
\textsuperscript{163} See \textit{Egan}, 23 F.3d at 1446 (citing \textit{Luethans v. Washington Univ.}, 838 S.W.2d 117, 120 (Mo. Ct. App. 1992)).
\textsuperscript{166} 473 N.E.2d 1280 (Ill. 1984) (citing \textit{Kelsay v. Motorola Inc.}, 384 N.E.2d 353 (Ill. 1978)).
public policy, concluding that without the possibility of punitive damages in a tort suit, employers would be inadequately deterred from discharging employees in violation of public policy. The court also believed that it would be unreasonable to allow punitive damages for the unjust termination of a non-union employee, while limiting union workers to reinstatement and back pay. Finally, the court concluded that allowing a tort remedy would not undermine federal policy favoring labor arbitration, especially in light of the fact that the United States Supreme Court has not found that policy undermined in other situations where union employees with collective bargaining agreements bring claims against employers that are based on violations of statutory rights. The Kansas Supreme Court used a comparable approach in holding that employees under collective bargaining agreements could pursue public policy tort claims. The court reasoned that the public interests encompassed in public policy tort claims are not the focus of a labor contract arbitration proceeding, and that the collective bargaining process could not be taken as a waiver of the rights embodied in tort law.

While some courts have evaluated the applicability of unjust dismissal theory to unionized employees by looking at the intended scope of the theory, preemption analysis has also been employed. Using a preemption approach, courts have had to decide whether the existence of an alternative remedy to contest a termination was intended to provide the exclusive means for securing relief. The Hawaii Supreme Court employed this method of analysis and concluded that the remedies against termination under the Railway Labor Act, which governs labor relations in the railroad and airline industries, did not preempt application of the state's unjust dismissal doctrine. The court reasoned that where the issues involved in the unjust dismissal lawsuit do not rely upon interpreting the terms of the collective bargaining agreement, federal law does not bar the employee from pursuing an independent state cause of action.

167. See id. at 1284.
169. See Coleman v. Safeway Stores, Inc., 752 P.2d 645 (Kan. 1988). In so ruling, the court reversed prior decisions, including one that was only three months old, Armstrong v. Goldblatt Tool Co., 747 P.2d 119 (Kan. 1987).
170. See Coleman, 752 P.2d at 651-52.
172. This same analysis was used by the United States Supreme Court in rejecting a claim that the National Labor Relations Act preempted a state lawsuit filed by a union worker who was fired for pursuing a workers' compensation claim. See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); see also Cook v. Hussman Corp., 832 S.W.2d 342 (Mo. 1992) (en banc) (holding that a state
issues in both a state unjust dismissal action and a labor contract arbitration, that should not leave a union employee in a situation where she may not choose to pursue the punitive damages available in a state court tort proceeding. Res judicata and collateral estoppel principles could be applied to handle this problem without depriving the employee of her choice of remedies.\textsuperscript{173}

Court decisions thus far have uniformly barred contingent employees from pursuing unjust dismissal claims that are available to traditional workers under applicable state law, with some rulings even extending that result to union employees under collective bargaining agreements. Whether labeled as independent contractors, agents, contract workers, leased staff, or temporary help, contingent employees in these categories have been deprived of the opportunity to challenge discharges that would be considered in violation of public policy and therefore actionable by traditional employees. Contract-based theories would be of no assistance in protecting against terminations because one of the inherent characteristics of contingent employment is the shared understanding between the employer and employee that their relationship is not intended to be a continuous one. Courts have reached these results by simply decreeing that the unjust dismissal theory is only applicable to traditional employees, or by relying on the existence of other potential remedies, regardless of their adequacy, to challenge a termination.

IV. LEGAL PRINCIPLES FOR PROTECTING NONTRADITIONAL EMPLOYEES

Clearly, there have been vast changes in the American labor market in recent years. Contingent workers now constitute both an increasing number and an increasing variety of employees in the workforce. At the same time, the balance of conflicting interests that led courts in the 1970s and 1980s to create remedies for unjustly discharged workers remains the same today, and is just as applicable to employees who have been forced into the contingent category. However, the emergence of an arbitrary method of avoiding the application of unjust dismissal principles is bound to prove inviting to employers willing to terminate employees despite public policy restraints. Unless the courts are more careful, much of the progress in employment law doctrine achieved over the past twenty years may well unravel.

There is nothing intrinsic in the status of a contingent employee that

claim that a discharge was in retaliation for the exercise of workers' compensation rights is not preempted by the Labor Management Relations Act); Lepore v. National Tool & Mfg. Co., 540 A.2d 1296 (N.J. Super. Ct. App. Div. 1988), aff'd, 557 A.2d 1371 (N.J. 1989) (holding that a state law retaliatory discharge claim by a union employee is not preempted by either the Labor Management Relations Act or the Occupational Safety and Health Act).

173. See, e.g., Elia v. Industrial Personnel Corp., 466 N.E.2d 1054 (Ill. App. Ct. 1984) (holding that a lawsuit is barred only where the retaliatory discharge issue has been raised in the grievance procedure); Bertling v. Roadway Express, Inc., 459 N.E.2d 265 (Ill. App. Ct. 1984) (finding a retaliatory discharge lawsuit is barred where the labor contract grievance made the same accusation).
warrants depriving her of the protections developed to safeguard traditional employees. Certainly, the public policy concerns are the same. The state has just as much interest in insuring that a contingent worker is not threatened with discharge or nonrenewal of an agency or contract relationship for reasons that violate public policy as it has in preventing such conduct with respect to traditional employees. The insecure status that typically characterizes contingent employment, moreover, would seem to call for even greater protection in such cases.

However, if state courts are still reluctant to recognize these facts, the recent Supreme Court rulings applying public employee First Amendment rights to independent contractors doing business with the government provide ample evidence that employee rights are not to be arbitrarily confined so as to exclude other comparable relationships. Similar examples are also provided by various state laws that have rejected limiting the application of employment regulations only to those formally classified as employees. Finally, the Supreme Court’s interpretation of the National Labor Relations Act in *NLRB v. Hearst Publications, Inc.*174 is a further illustration of the ability of courts to adapt labor laws to the realities of how companies arrange for work to be performed. Indeed, the principles recognized in all of these settings justify applying the unjust dismissal doctrine to those in contingent employment relationships.

A. The Analogy of Public Contractor First Amendment Rights

During the 1995-96 term, the United States Supreme Court considered challenges filed by two independent contractors who claimed that their business relationships with government entities were terminated in violation of their First Amendment rights.175 In both cases, the contractors relied upon Supreme Court precedents which established that public employees do not lose First Amendment protection when they accept public employment.176 Despite the argument that the nature of an independent contractor relationship is distinct from that of employer-employee status and that First Amendment protection is inappropriate for those who contract with the government, the Court held that the constitutional rights of free political expression and association were equally applicable.177 Both rulings stand in marked contrast to the uniform pattern of state decisions which have refused to accord contingent employees,

174. 322 U.S. 111 (1944). *Hearst Publications* used an economic facts test to determine the applicability of the National Labor Relations Act to what was claimed to be an independent contractor relationship.
176. See *O’Hare Truck Serv.*, 116 S. Ct. at 2356-57; *Umbehr*, 116 S. Ct. at 2346-47.
177. See *O’Hare Truck Serv.*, 116 S. Ct. at 2359-60; *Umbehr*, 116 S. Ct. at 2349-50.
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including independent contractors, unjust dismissal rights available to traditional workers.

The Court had held previously that public employees could not be subjected to government retaliation simply because they expressed opinions on matters of public concern[178] on the grounds that such action would amount to an unconstitutional condition on public employment.[179] However, recognizing that the government has a special interest in promoting the efficiency of public services that is distinct from any interest it may have in regulating free expression by citizens in general, the Court in each case required a balancing of the employee’s interest in free expression against the interest of the state functioning as an employer,[180] in order to judge the legitimacy of the adverse action taken against the employee. And in a separate series of rulings, the Supreme Court affirmed public employee rights of free political association, holding that political affiliation and political activities may not be used as the basis for such employment decisions as hiring, firing, promotion, and transfer unless political involvement is a reasonably appropriate requirement for the position.[181]

The Court addressed the scope of independent contractor free expression rights in Board of County Commissioners v. Umbehr.[182] Umbehr had secured a contract from the county to be the exclusive hauler of trash for cities located within the county’s jurisdiction. By its terms, the agreement was subject to termination by the parties, but the contract had been automatically renewed each year for a total of six years. However, Umbehr was an outspoken critic of the Board of County Commissioners, at one point even running, albeit unsuccessfully, for election to the Board. Eventually, the Board voted to terminate Umbehr’s contract.

In a companion case, O’Hare Truck Service Co. v. City of Northlake,[183] the Court considered a complaint filed by an independent contractor who was pressured to make political contributions. The O’Hare Truck Service Company had performed towing services for the City of Northlake for a period of over twenty years. It had been on the City’s list of approved towing companies and


179. See Rankin, 483 U.S. at 383-84 (citing Perry v. Sindermann, 408 U.S. 593 (1972)); see also Connick, 461 U.S. at 142-43 (citing Perry); Mt. Healthy, 429 U.S. at 283-84 (citing Perry).

180. See Rankin, 483 U.S. at 384 (quoting Pickering v. Board of Educ. 391 U.S. 563, 568 (1968)); see also Connick, 461 U.S. at 142-43 (citing Pickering); Mt. Healthy, 429 U.S. at 283-84 (quoting Pickering, 391 U.S. at 568).


was assigned work on a rotation basis. However, when Northlake's mayor sought a contribution in connection with his re-election campaign, O'Hare's owner refused and instead supported the mayor's opponent. The City of Northlake responded by removing O'Hare from the list of towing companies.

In opposing the decision to grant First Amendment protection to public employees, Justice Scalia maintained that the existence of a long tradition of political patronage was sufficient to establish the constitutionality of restrictions upon the First Amendment rights of public employees. He reiterated this position in *Umbehr* and *O'Hare Truck Service*, insisting that it is inappropriate to interfere with patronage practices "which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years." But even accepting the existing doctrine governing public employment, Justice Scalia argued that the relevant principles should not be expanded beyond public employees to include those in independent contractor relationships with the government. Generalizing upon the characteristics of public employees and independent contractors, Justice Scalia observed that public employees usually are not wealthy, so "the termination or denial of a public job is the termination or denial of a livelihood." Independent contractors, in contrast, are often corporations who are not entirely dependent on government contracts. Public employment, therefore, is the appropriate place to draw the line limiting the application of First Amendment rights. Justice Scalia found further support for this conclusion in the greater volume of litigation he predicted if First Amendment rights were extended to independent contractors, because they are more likely to have the resources to pursue litigation and the amounts at issue are more likely to make litigation worthwhile.

The views of Justice Scalia, joined by Justice Thomas, did not persuade a majority of the Supreme Court. Seven Justices agreed that independent contractors are not excluded from First Amendment protection covering free expression and freedom of political association. As with public employment, the Court recognized that independent contractor relationships represent a "valuable financial benefit" that can be used to coerce otherwise protected freedoms. The Court's majority in both cases did not believe that any differences that may exist between independent contractor and employer-

186. Id. at 2366 (Scalia, J., dissenting).
187. See id. at 2367-68 (Scalia, J., dissenting).
188. All seven Justices in the majority agreed with Justice Kennedy in *O'Hare Truck Service* and Justice O'Connor in *Umbehr* that independent contractors were not excluded from First Amendment protection. However, Chief Justice Rehnquist declined to join in that portion of Justice O'Connor's opinion which discussed the role of history and tradition in legitimizing patronage contracting practices.
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employee relationships warranted excluding independent contractors from constitutional coverage.

To be sure, independent contractors generally perform their functions under less direct supervision than public employees. The Court disputed, however, that the lack of day-to-day control justified giving public entities the right to be free of First Amendment restraints in terminating contractor relationships. Nor was the Court persuaded by the argument that contractors are sufficiently independent from government support and would not be subject to coercion as much as public employees. Such an approach would require courts to analyze the role of government in various job markets as both employer and contractor, a task the majority believed courts are not well-suited to perform. Finally, the Court did not agree that recognizing the First Amendment rights of independent contractors would lead to excessive litigation. That was not a result of the public employee decisions, nor did it occur following a Tenth Circuit Court of Appeals ruling that applied the First Amendment to independent contractor patronage cases. In the end, the Court concluded that “[i]ndependent contractors, as well as public employees, are entitled to protest wrongful government interference with their rights of speech and association,” and thus they need not fear contract termination in retaliation for engaging in conduct protected by the First Amendment.

As Justice Kennedy recognized in O'Hare Truck Service, the distinction between employee and independent contractor status has a long legal tradition. That alone, however, is not sufficient to support differential treatment. The distinction is, after all, a creature of state common law, and allowing it to become determinative “would leave First Amendment rights unduly dependent on whether state law labels the government service provider’s contract as a contract of employment or a contract for services.” These are “formal distinctions, which can be manipulated largely at the will of the government agencies.” Creating a First Amendment bright line between independent contractors and employees would allow the government to “avoid constitutional liability simply by attaching different labels

190. See id. at 2348-50.
191. See id. at 2350.
192. See id. at 2349.
193. See id. at 2350; see also O'Hare Truck Serv., 116 S. Ct. at 2360 (same).
194. See O'Hare Truck Serv., 116 S. Ct. at 2360 (citing Abercrombie v. Catoosa, 896 F.2d 1228 (10th Cir. 1990)).
195. Id.
196. See id. at 2359 (“[T]he distinction between employees and independent contractors has deep roots in our legal tradition.”).
197. Umbrich, 116 S. Ct. at 2349.
198. Id. (citing Logue v. United States, 412 U.S. 521, 532 (1973); and Lefkowitz v. Turley, 414 U.S. 70, 83 (1973)).
to particular jobs." The protections available for the rights of free expression and political association of public employees are therefore not lost if the employer-employee relationship is restructured as a contingent arrangement.

B. Statutory Employment Status Under Workers' Compensation

The Supreme Court’s method of analysis in refusing to deprive independent contractors of First Amendment rights available to traditional government employees has parallels at the state level. Where policy dictates that protection is required, it has not always been found necessary to limit arbitrarily state law employment rights as a result of the specific label which is applied to the worker delivering the service. Perhaps the best example of this approach is the creation of the special category of “statutory employee” in state workers’ compensation systems.

The basic premise behind workers’ compensation is that employees injured in the course of their employment should be eligible for some financial benefits from their employer, regardless of fault. State workers’ compensation laws provide for a limited but predictable recovery, and in the process eliminate common-law defenses employers otherwise might raise in any lawsuit filed by an injured worker. Workers’ compensation systems were designed and implemented as a form of social insurance for those in employer-employee relationships. Independent contractors and their employees have therefore been excluded from coverage.

The bright line distinction between employer-employee and independent contractor status for workers’ compensation purposes offers employers a method of escaping potential liability. Through the simple process of contracting-out required tasks to individuals or companies, employers can avoid the employer-employee designation which is a jurisdictional prerequisite to

199. O'Hare Truck Serv., 116 S. Ct. at 2359.
200. LARSON & LARSON, supra note 37, § 1.10, state that:
[The basic operating principle [of the typical workers' compensation act] is that an employee is automatically entitled to certain benefits whenever he suffers a 'personal injury by accident arising out of and in the course of employment' or an occupational disease . . . negligence and fault are largely immaterial . . . benefits to the employee include cash wage benefits . . . and hospital, medical and rehabilitation expenses.

Id.; see also MO. ANN. STAT. § 287.120.1 (West 1993) (“Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee . . . .”).

201. Workers’ compensation damages are limited to injuries “which either actually or presumptively produce disability and thereby presumably affect earning power.” LARSON & LARSON, supra note 37, § 2.40; see also id. § 4.50 (discussing the abrogation of the defenses of contributory negligence, comparative fault, and assumption of risk). The Missouri workers’ compensation law, like that of other states, provides for the amount of recovery. See, e.g., MO. ANN. STAT. §§ 287.160-.190, .200, .220, .240, .250, .450-.470 (West 1993 & Supp. 1997).

202. See, e.g., Knowlton v. Airport Transp. Co., 454 N.W.2d 278 (Neb. 1990); see also LARSON & LARSON, supra note 37, § 1.10 (noting that “coverage is limited to persons having the status of employee, as distinguished from independent contractor”).
workers' compensation liability. Recognizing the potential loop-hole created by
the exclusion of independent contractors from workers' compensation coverage,
states have responded by enacting legislation extending coverage to employers
who hire contractors to perform the employer's regular work. As a result, if
an injury occurs to the contractor or one of the contractor's employees, and the
contractor is not able to provide the necessary compensation or is uninsured,
liability will extend back to the employer. Such laws create what has come to
be known as statutory or constructive employment, a status that serves to
"prevent evasion of the compensation coverage by the subcontracting of the
employer's normal work."\(^{203}\) as well as to "protect employees of irresponsible
and uninsured subcontractors by imposing ultimate liability on the presumably
responsible principal contractor."\(^{204}\)

Legislation creating the statutory employment category comes in a variety
of forms. Under Colorado law, for example,

\[\text{any person, company, or corporation operating or engaged in or conducting any}
\text{business by leasing or contracting out any part or all of the work thereof to any}
\text{lessee, sublessee, contractor, or subcontractor, irrespective of the number of}
\text{employees engaged in such work, shall be construed to be an employer . . .}\] \(^{205}\)

In somewhat more succinct form, Georgia provides that a "principal,
intermediate, or subcontractor shall be liable for compensation to any employee
injured while in the employ of any of his subcontractors engaged upon the
subject matter of the contract to the same extent as the immediate employ-
er."\(^{206}\) However, the common objective of all statutory employment provi-
sions is to cover "all situations in which work is accomplished which this
employer, or employers in a similar business would ordinarily do through
employees."\(^{207}\) As a result, where the statutory employment doctrine is
applicable, courts are not required to determine whether the 'employer'
exercised control over the injured claimant in order to provide workers’
compensation coverage, since even independent contractor arrangements cannot
escape liability in such cases.\(^{208}\)

Missouri's workers' compensation legislation, which follows the prevailing
statutory employment pattern, has been amplified by state court decisions to
provide a more detailed structure for identifying covered statutory employees.
The relevant statute provides:

\[^{203}\] LARSON & LARSON, supra note 37, § 49.00.
\[^{204}\] Id. § 49.14. Note that statutes sometimes cover an individual who is both the owner and
employee of the subcontracting company when the company fails to carry workers' compensation
insurance for him. See e.g., Pinter Constr. Co. v. Frisby, 678 P.2d 305, 309 (Utah 1984).
\[^{207}\] LARSON & LARSON, supra note 37, § 49.16(a).
\[^{208}\] See West v. Posten Constr. Co., 804 S.W.2d 743, 746 (Mo. 1991).
Any person who has work done under contract on or about his premises which is
an operation of the usual business which he there carries on shall be deemed an
employer and shall be liable under this chapter to such contractor, his subcontrac-
tors, and their employees, when injured or killed on or about the premises of the
employer while doing work which is in the usual course of his business.209

As the Missouri Supreme Court has recognized, the legislation requires proof
establishing that: "(1) the work is performed pursuant to a contract; (2) the
injury occurs on or about the premises of the alleged statutory employer; and
(3) the [tasks performed were] in the usual course of business of the alleged
statutory employer."210 Application of the statutory employer doctrine,
moreover, has been broadened by defining the employer's usual business as
activities:

(1) that are routinely done (2) on a regular and frequent schedule (3) contemplated
in the agreement between the independent contractor and the statutory employer to
be repeated over a relatively short span of time (4) the performance of which would
require the statutory employer to hire permanent employees [to perform the task]
absent the agreement.211

If these criteria are met, workers' compensation liability cannot be avoided
even if the claim is made that the parties are in a formal independent contractor
relationship. Through statutory means, the fact that the relationship between the
employer and service provider is contingent in character has been made legally
irrelevant.

C. The Economic Realities Test

Precedent for a broadened view of the coverage of worker protection
legislation can also be found in the Supreme Court's initial interpretation of the
National Labor Relations Act's definition of an employee. As originally passed,
the Act's scope was limited to employers and employees as defined by the

209. MO. ANN. STAT. § 287.040.1 (West 1993). The Missouri Supreme Court has identified the
purpose of the legislation as preventing the circumvention of workers' compensation through the hiring
of independent contractors to perform the employer's normal work. See Walton v. United States Steel
Corp., 362 S.W.2d 617 (Mo. 1962).

employment criteria are applicable to "contracts which are 'express or implied, oral or written . . . .'" McGaure v. Tenneco, Inc., 756 S.W.2d 532, 535 (Mo. 1988) (en banc) (quoting MO. REV. STAT.
§ 287.020.1 (1986)). The premises of the employer are broadly defined to be "any place where, in the
usual operation of his business, it is necessary for those whom he has employed to do the work to be
jurisdictions have equally broad definitions of this element. See, e.g., Dougherty v. Conduit & Found.
separating customary work from tasks that are only incidental or isolated. See Salle v. Alton Brick Co.,
508 S.W.2d 243, 248 (Mo. Ct. App. 1974); Woodard v. Westvaco Corp., 433 S.E.2d 890, 894-95

211. Bass, 911 S.W.2d at 621.
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legislation. However, there was no specific exclusion for independent contractors. In NLRB v. Hearst Publications, Inc., the National Labor Relations Board ordered the company to bargain with a union representing newsboys who sold Hearst newspapers, but the company appealed on the grounds that they were not covered employees. Instead, relying upon common-law standards, the company claimed that the newsboys were independent contractors with whom there was no duty to bargain.

The Court undertook an extensive review of the working environment of the newsboys, including consideration of company-imposed restrictions on their method of operation. Arguably, the Court could have concluded that the newsboys were, in fact, in an employer-employee relationship with the company, and therefore covered under the Act. Instead, the Court reasoned that the task of defining covered employees for purposes of the National Labor Relations Act required consideration of the “history, terms and purposes of the legislation.” In the Court’s judgment, “Congress had in mind a wider field than the narrow technical legal relation of ‘master and servant,’ as the common law had worked this out in all its variations.” In enacting the legislation, “Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective. It rather sought to find a broad solution, one that would bring industrial peace . . . .”

This analysis had a direct bearing on the newsboys seeking NLRA coverage in Hearst Publications since they were “subject, as a matter of economic fact, to the evils the statute was designed to eradicate.”

The result of the Hearst Publications decision was a rejection of the traditional common-law independent contractor distinction as a basis for separating workers covered by the Act from those who were not. Instead, the economic facts of the case would be controlling. As stated by the Court:

[The broad language of the Act’s definitions, which in terms reject conventional limitations on such conceptions as “employee,” “employer,” and “labor dispute,” leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by

213. 322 U.S. 111 (1944).
214. See id. at 120.
215. See id. at 115-19.
216. Even after the Act was amended to specifically exclude independent contractors, the Board has found newspaper sellers to be employees where the facts indicated that an independent contractor relationship had not been formed. See Philadelphia Newspapers, Inc., 238 NLRB 835 (1978).
218. Id.
219. Id. at 125.
220. Id. at 127.
previously established legal classifications.221

Because of the broad policies of the National Labor Relations Act, newsboys who might have been in a formal independent contractor relationship with the Hearst Corporation, but whose economic environment was similar to that of the company’s traditional employees, would receive the very same protection for their union activities.

It is true, of course, that Congress subsequently rejected the Court’s interpretation of covered employees under the Act. Congress specifically excluded independent contractors from the definition of “employee” under the Taft-Hartley Act of 1947.222 Nevertheless, the “economic facts” analysis used by the Supreme Court demonstrated an alternative to applying strict common-law standards in cases where the nature of the relevant legal principle calls for a broader view. In particular, if the worker seeking protection, regardless of her formal status, is sufficiently similar to employees clearly covered by the legislation, the economic facts of her employment environment should produce similar treatment.223 The courts have used this approach when determining federal jurisdiction under the Fair Labor Standards Act,224 although a broader definition of “employee,” which supports the more encompassing application of the term, exists under the statute.225

The advantage of the economic realities approach is that it focuses attention upon characteristics of the worker seeking coverage that are relevant to determining whether coverage is appropriate. Instead of simply relying on the common-law right-of-control principle, the economic realities test applies a totality-of-the-circumstances approach. This test allows the court to consider factors demonstrating that the so-called independent contractor raising a labor

221. Id. at 129 (citations omitted).
223. See Dau-Schmidt, supra note 77, at 884-85; Hiatt & Jackson, supra note 77, at 177.
225. The Supreme Court made the following observation in commenting on the Fair Labor Standards Act:

The definition of “employee” in the FLSA evidently derives from the child labor statutes, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” This latter definition . . . stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles.

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (citations omitted). The National Labor Relations Act is similar to ERISA in not defining the term “employee,” the relevant language provides only that the “term ‘employee’ shall include any employee.” 29 U.S.C. § 152(3) (1994). Wrongful discharge actions, however, are not statutorily based and therefore there is no obligation to limit the definition on the assumption that the legislature intended to apply traditional common-law principles.
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relations claim is functionally indistinguishable from a traditional employee. The Dunlop Commission implicitly adopted this rationale in recommending that the economic realities test be applied "across the board in employment and labor law," and in explaining its view of how the test would distinguish the two categories, it stated the following:

Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients—that is, if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like. Workers who are economically dependent on the entity for whom they perform services generally should be treated as employees. Factors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an independent contractor.

Current applications of the economic realities test have been properly criticized as emphasizing the right-of-control factor instead of the economic dependence of the worker. As a result, many decisions applying this test have nevertheless excluded workers from coverage, much like those reached under the common-law standard. In response to this problem, some critics suggest that the effort at making any distinction between independent contractors and traditional employees should be eliminated entirely, at least for purposes of applying anti-discrimination laws; however, it is unlikely that either legislatures or the courts will embrace such a dramatic change in the controlling legal principles. In contrast, however, careful application of the

226. See Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (per curiam); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Armbruster v. Quinn, 711 F.2d 1532, 1539-42 (6th Cir. 1983).


228. DUNLOP COMMISSION REPORT, supra note 76, at 38-39.


230. This statement is particularly true if the court applies what has come to be known as the "hybrid test"—a standard that emphasizes the employer's right to control the work performed in assessing factors relevant to the economic realities standard. See id. at 250-52, 254-56. Even courts have acknowledged that there may be little difference between the alternative standards as they have been applied. See, e.g., Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993).

231. See, e.g., Maltby & Yamada, supra note 229, at 265-74.

232. Courts seem more preoccupied with cutting back the scope of affirmative action than with expanding the reach of governmental anti-discrimination efforts. See Hopwood v. Texas, 84 F.3d 720 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996) (invalidating the University of Texas Law School's affirmative action program for admissions). Similarly, legislative attention appears to be focused on barring race-based affirmative-action programs, as reflected in California Proposition 209. See Edward Felsenthal & G. Pascal Zachary, Supreme Court Refuses Case on Preferences: Affirmative Action Foes Given a Boost to Push for Bans in More States, WALL ST. J., Nov. 4, 1997, at A24 (reporting on the expected consequences of the Court's decision not to review a lower court ruling allowing the implementation of Proposition 209).
economic realities standard represents a more modest reform that is well-suited to identifying workers who fit within the policy umbrella of the wrongful discharge theory.

V. RECONSIDERING CONTINGENT EMPLOYEE UNJUST DISMISSAL RIGHTS

Unjust dismissal law, as developed by the states, reflects a balance between important public and private interests. From the employer's perspective, the right to terminate employees, with or without cause, or even for socially disapproved reasons, is a valuable prerogative. If employers are free from state oversight of discharge decisions, they can act with maximum efficiency and minimum cost. Employers will not feel obligated to develop a cumbersome bureaucracy to administer employee terminations, nor will they have to fear baseless lawsuits challenging dismissals filed simply for their nuisance value. It is true that prior to the development of state causes of action for wrongful termination, the right to dismiss had already been significantly restricted by a variety of anti-discrimination statutes barring discharges based upon such reasons as race, sex, age, and disability. However, employers understandably prefer employees to remain terminable at-will in all other respects.

Rather than limiting exceptions to the at-will rule to specific anti-discrimination statutes, states have recognized the need to accommodate interests that call for additional regulation of employee termination decisions. Thus, the need to protect state public policies has led to the development of the tort of wrongful discharge as a way of preventing employers from using their economic power over employees to coerce illegal activities. In addition, many states have concluded that the employer's right to terminate at will must succumb to the private interest of the employee when employer actions have created an implied contract right to employment or are inconsistent with the principle of good faith and fair dealing. These restrictions reflect the belief that, in at least some circumstances, the state has a public interest in enforcing contractually-based rights arising out of a private employment relationship. Moreover, both the tort and contract-based limitations on the at-will employment rule have been established despite the fact that they impose regulatory costs on employers.

In light of the fact that the American workplace is being transformed as a result of the increasing number of non-traditional contingent employees performing traditional employee tasks, the question of whether protection

233. See, e.g., STEVEN C. KAHN ET AL., LEGAL GUIDE TO HUMAN RESOURCES § 9.07 (1994) (recommending that "[s]teps should be taken at each phase of the employment process to document and substantiate the reasons for termination").

234. See supra notes 107-115 and accompanying text.
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against unjust dismissal will be available to such workers has become increasingly important. To simply assert that the unjust dismissal doctrine was created to protect employees, and therefore should not be applicable to contingent work arrangements, is an inadequate explanation for restricting an important form of state protection for workers. Unjust dismissal doctrine may have originated in the context of traditional employer-employee relationships, but that does not mean that its logic is inapplicable elsewhere. Rather, it is necessary to evaluate the nature of the work relationship and the impact of providing protection in order to determine whether application of unjust dismissal principles is required. Such an assessment requires a finely-tuned analysis of the specific contingent employment pattern and can produce vastly different results from those achieved by attempting to pigeonhole the work relationship into either the traditional or contingent employment category.

Independent contractors as a group, for example, have been denied protection against unjust terminations by courts that view the doctrine as applicable exclusively to traditional employer-employee relationships. But if the balance of interests is the same, there is no reason for courts to deny protection against unjust dismissal simply because a different label is applied to the relationship. This lesson is easily discernable from the Supreme Court’s rulings in *Board of County Commissioners v. Umbehr* and *O’Hare Truck Service, Inc. v. Northlake*, which provide protection for the exercise of First Amendment rights by individuals who contracted to perform services for government agencies and were victims of government retaliation when they resisted official pressure to conform. However, the fact that the Supreme Court found the constitutional interests of the independent contractors of equal weight to the constitutional interests of public employees who had already been afforded protection against dismissals in retaliation for the exercise of First Amendment rights does not necessarily mean that the same result is appropriate when the interests at issue are those reflected in state legislative and regulatory public policies. In fact, the difference in settings may call for a more refined analysis in determining how much protection against unjust terminations contingent employees should receive.

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235. See *supra* notes 137-160 and accompanying text.
239. A recent California appellate court ruling rejected the argument that *Umbehr* and *O’Hare Truck Service* require that a race discrimination claim that would be cognizable under state wrongful discharge theory for employees must also be cognizable for independent contractors. See *Sistare-Meyer v. YMCA*, 67 Cal. Rptr. 2d 840, 845 (Ct. App. 1997). However, the decision was carefully focused on the state constitutional ban against discrimination as measured against the competing public policy encompassed in the long-standing distinction between independent contractors and employees. *Id.* The ruling does not preclude a more finely-tuned analysis that could result in applying wrongful discharge
The strongest case for allowing the termination of contingent employment relationships without additional government supervision arises in circumstances involving inter-business contracting for specific projects. For example, an employer may secure the services of an independent contractor for construction work at the employer's location by hiring a construction company to perform the necessary tasks, or if it is a smaller project, by directly hiring individuals with the required skills. In either case, the relationship is for a discrete project, with each side recognizing that completion of the project entails termination of the relationship. In such settings there is less to be gained from supervising employer decisions to terminate the relationship before project completion beyond the contract rights to which the parties have agreed. Where the project is a limited one, the contractor is less likely to be tied to the relationship, and therefore, there is a reduced risk that she will be pressured into conduct inconsistent with state public policy interests. Consequently, the costs associated with providing additional legal supervision for each decision to dismiss an independent contractor take on a greater significance, leaving the balance point tipping in favor of retaining a regulatory-free environment for contractor terminations. Once the contract has been completed, the parties' relationship ends and they are left to contract remedies if either side is dissatisfied with the other's performance.

In contrast, independent contractor relationships may also be used to provide continuing services to an employer in areas that involve the core function or service the employer provides. For example, the employer may contract with individuals or an employment agency to secure the services of skilled personnel to run her equipment, or she may seek professionals in any number of disciplines to provide services to clients. Often workers in such an arrangement are traditional employees in all but name. Nonetheless, they are likely to find themselves without the salary and benefits available to those who are awarded the prized "employee" classification, and without state law protection against terminations which offend legislative or regulatory policies of the jurisdiction. A careful assessment of the conflicting interests demonstrates the inappropriateness of this result.

Initially, the state public policy interests reflected in legislative and protection to independent contractors in at least some circumstances.


241. See supra notes 63, 68-70 and accompanying text.
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regulatory enactments are equally violated whether an independent contractor or employee is terminated for reporting employer improprieties or for refusing to engage in illegal activities. Additionally, independent contractors in such an environment can be just as tied to the company for whom they perform services as traditional employees, and therefore, equally in need of state public policy protection. Employers, in response, are likely to argue that the cost of regulating independent contractor termination decisions is too high. This very argument, however, was outweighed in cases involving traditional employees. Instead, the fact that continuing independent contractor relationships are functionally equivalent to traditional employment leads to the conclusion that the same protection against dismissal is appropriate for each.

The approach suggested partly represents the application of the analysis used by the Supreme Court in both *Umbehr* and *O'Hare Truck Service*, as it calls for disregarding the formal distinctions between independent contractor and employer-employee relationships. However, the Supreme Court's conclusion that employees and independent contractors should be treated alike for First Amendment purposes is a broader approach than is warranted when the interests involved are encompassed in state legislative and regulatory policies. These interests do not involve the same central rights of expression bound up in the First Amendment, and it is therefore appropriate to evaluate the character of the independent contractor relationship more precisely rather than including it as a whole within the scope of unjust dismissal regulation. As in *NLRB v. Hearst Publications, Inc.*, the economic realities of the relationship between the employer and the service provider should govern the applicability of wrongful discharge protection to the specific contingent employment pattern at issue.

The difficulty of the problem is illustrated in situations where employers subcontract tasks to be performed elsewhere by outsiders, in lieu of contracting for outsiders to perform employer functions in-house. Arrangements of this sort encompass a variety of business objectives. One possibility is that the firm is fundamentally changing the way it operates by allocating to others tasks it had previously performed itself. For example, a company that both manufactured and serviced equipment might conclude that it could operate more efficiently if it restricted its in-house activity to manufacturing alone and used contractors to meet servicing requirements. If the contract involves an arms-length

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243. In the automobile industry, for example, warranty service is performed by independent dealers rather than by the automobile manufacturer; both are in a contractual relationship with each other with respect to this activity. In contrast, other product manufacturers may perform warranty service directly, but then may reach a size and scope where they conclude that the system used in the automobile industry is preferable. At that point, they could seek relationships with independent contractors to perform the warranty service. The use of outsourcing in the auto industry has also served to prevent unionizing, as "[g]iven that the United Auto Workers have been able to organize only a portion of the independent
business arrangement between the firm and other contracting entities, it is appropriate that the existing legal remedies remain applicable to address potential problems.

In contrast, a firm’s practice of “subcontracting” may not fundamentally change the way the firm operates, or it may involve a “subcontractor” relationship which is functionally equivalent to employment. In effect, the company may be doing no more than sending employees home to perform the same tasks previously performed under direct employer supervision at the plant or the office. Some production tasks, including many in the apparel industry, can be assigned to employees who work at home, as can numerous high-tech functions that require only skilled personnel with computers and modems. Rather than being arms-length business transactions, such arrangements seem more like simple adjustments in the locus of work. The fact that employers cannot directly supervise the daily activities of home workers is inherent in the very character of home work and should not be the basis for concluding that an employer-employee relationship does not exist. In settings of this sort, the balance of interests applicable to employees at the plant or office cannot be distinguished from the balance applicable to those whose work stations have been moved. Using the principles developed by the Supreme Court in *Hearst Publications*, where the economic realities are the same, governing doctrine should also be the same.

Individuals hired pursuant to written contracts of employment have an even stronger claim to the same protection under state unjust dismissal law that is available to at-will employees. This is especially true where the arrangement is continually renewable and where the duration of each contract is for a relatively limited term. It is true that employees in this category have some contractual protection against termination which arises out of the employment suppliers of parts, the major auto producers constantly search for these cheaper, nonunion sources of parts.” HARRISON & BLUESTONE, supra note 3, at 48.

244. The U.S. Department of Labor rescinded its total ban on homework in the production of gloves and mittens, handkerchiefs, buttons and buckles, “nonhazardous” jewelry, and embroideries, replacing it with a certification system for homeworkers in those industries. The regulation implementing this policy change was upheld against legal challenge. See International Ladies’ Garment Workers’ Union v. Dole, 729 F. Supp. 877 (D.D.C. 1989). It has been suggested that “[f]or a number of industries in both manufacturing and services, this presumably small change in regulation produced windfall profits.” HARRISON & BLUESTONE, supra note 3, at 104.


246. See Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1384 (3d Cir. 1985) (“That the home researchers could generally choose the times during which they would work and were subject to little direct supervision inheres in the very nature of home work. Yet, courts have held consistently that the fact that one works at home is not dispositive of the issue of ‘employee’ status under the FLSA.”) (citing Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961)).
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counterpart itself. However, the available protection is far more limited than what the unjust dismissal doctrine affords. In reality, the employment contract, when structured in such a fashion, is simply a device to defeat legal principles available to regulate the termination decision. This result is accomplished through the formal mechanism of refusing to renew the service provider’s contract in lieu of terminating her midterm. The employer then argues that there has been no dismissal; therefore, the wrongful termination doctrine is inapplicable. In reality, however, where the contract is of limited duration and a pattern of renewal exists, the balance of interests supports the argument that the employer should be called upon to recognize that nonrenewal of the contract is equivalent to the termination of a traditional employee, and the decision therefore should not be based upon reasons that violate legislative and regulatory state public policies.

An application of this analysis can be seen in the current controversy surrounding the use of “gag rules” in standard form contracts physicians have been required to sign in order to receive Health Maintenance Organization (HMO) patients. It has been alleged that HMOs have sought to bar doctors by contract from informing patients of medical treatments not ordinarily covered by the HMO. If a physician violated the ban and either was dismissed prior to the expiration of her contract, or alternatively, if the HMO decided not to renew the doctor’s contract at the end of its term, the contract status of the physician would undoubtedly be relied upon by the HMO to avoid any potential unjust termination liability, even if the basis of the termination violated existing public policy. Because the delivery of medical services is the core function of the HMO, and physician-HMO contracts are renewable, wrongful termination remedies available to traditional employees should also apply to these health care delivery arrangements. The fact that the Department of Health and Human Services has informed HMOs that gag rules are banned for Medicare patients only reinforces the need for protection for physicians who choose


248. The most significant distinction is the fact that unjust dismissal doctrine offers the possibility of tort damages in lieu of more limited contract remedies. The plaintiff in Driveaway & Truckway Service v. Aaron Driveaway & Truckway Co., 781 F. Supp. 548 (N.D. Ill. 1991), for example, was permitted to proceed with his suit claiming breach of an oral contract, but his claim for punitive damages under a public policy tort theory was dismissed because of the lack of an employer-employee relationship. See supra notes 107-115 and accompanying text. If only a short period remains before the contract terminates, or if it is simply not renewed, contract damages are likely to be inadequate.

249. Allegations of the use of "gag" rules by managed care companies have led to industry moves to eliminate the use of this device. See Ron Winslow, Managed Care Acts To Mollify Clients, Doctors, WALL ST. J., Dec. 17, 1996, at B1. Congress is also considering legislation that would bar the use of such rules in HMO-physician contracts. See Spencer Rich, Managed Care, Once an Elixir, Goes Under Legislative Knife, WASH. POST, Sept. 25, 1996, at A1.

to comply with federal policy rather than inconsistent HMO directives.

In contrast, where employers use employment contracts to secure the services of workers for defined periods, and do not avoid state discharge regulation by using renewable contract employees as a substitute for a permanent workforce, the balance of interests is different. In such a case, the failure to renew a contract where there is no pattern of renewal has none of the attributes of a termination. Therefore, in this type of environment, the employer should not be forced to provide any more justification for her decision not to contract than she would under other circumstances.

When a refined analysis of employer and public interests is undertaken, it is clear that unionized employees who work under the umbrella of a collective bargaining agreement should not be deprived of state law protection against unjust dismissals. The existence of a labor contract governing the terms and conditions of employment for unionized workers does not alter the fact that they are traditional employees with well-founded expectations of continuous service. They are employed to perform the core functions of the firm, as is the case for traditional non-union workers, and depend economically on their employment, which is identical to that of at-will employees. The typical labor contract’s protection against termination without just cause during the term of the agreement hardly substitutes for state law protection against discharge in violation of state legislative and regulatory policies. Moreover, the threat of arbitral reinstatement with or without full backpay may not be sufficient to deter employers from violating state public policy interests. Finally, the preemption doctrine should not be used as a basis for withdrawing employee rights from unionized workers, since wrongful discharge claims can be analyzed without reference to the parties' labor contract.

Contingent employment relationships come in a wide variety of forms. As a result, it is not possible to detail how every variation should be treated for purposes of unjust dismissal doctrine. Nevertheless, some generalized standards

9, 1996, at B7.
251. Most collective bargaining agreements contain provisions that require the existence of just cause to support the discharge of a covered employee. However, arbitrators have implied such a requirement even where the contract contains no explicit language creating a just cause standard. See, e.g., Cameron Iron Works, Inc., 25 Lab. Arb. Rep. (BNA) 295, 301 (Boles 1955); ELKOURI & ELKOURI, supra note 165, at 652-53 (citing Worthington Corp., 24 Lab. Arb. Rep. (BNA) 1, 6-7 (Boles 1955)).
252. There are no prescribed standards regulating the duration of a collective bargaining agreement, but contracts for a term longer than three years will not bar a competing union from petitioning for an election. See General Cable Corp., 139 NLRB Dec. (CCH) 1123 (1962).
253. See supra text accompanying note 165.
254. In Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), the Supreme Court held that a union employee’s state lawsuit claiming discharge in retaliation for the filing of a workmen’s compensation claim was not preempted by the Labor Management Relations Act. The Court noted that resolving the claim would not require the interpretation of the collective bargaining agreement; therefore, the fact that the labor contract protected against discharges without just cause was insufficient to preclude resort to the state law remedy. See id. at 407-10.
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can be identified. As a baseline, employers should be liable if their actions relate to individuals who perform work on the employer’s premises when such work is part of the normal course of the employer’s business. If an employee is repeatedly engaged in such activities, an employer’s decision to replace her with a contingent worker performing the same tasks in the same manner should be subject to state regulation of termination or nonrenewal decisions to the same extent as discharges of traditional employees. In cases of this sort, the firm’s decision to perform required tasks through contingent employment arrangements is, at its core, no more than an effort to escape potential liability. If state interests are sufficiently substantial—as they are with respect to terminations that violate public policies of the jurisdiction—then the technical reclassification of the relationship between the firm and its workers is not an adequate basis on which to alter existing legal consequences. The statutory employer doctrine in workers’ compensation law demonstrates that such a concept is workable.255

If the employer wishes to make a more substantial change in arrangements for having tasks performed, she is free to do so as long as it is not a substitute to evade state regulation. For example, if a special project requires additional personnel, there is nothing to prevent the employer from hiring temporary workers for that specific task. The employer can then insure freedom from state regulation by effecting the hiring through an employment contract. The employee will receive implicit protection against termination during the contract’s term, but the employer will be free of state supervision once that term has expired. Continually renewed employment contracts, however, are significantly different. In line with the Supreme Court’s analysis in Hearst Publications, the contract worker who is renewed repeatedly is, for all practical purposes, an employee and therefore should be provided with whatever state protection is available to terminated employees.

Off-premise work, in contrast, can be more complicated to evaluate. Such task-performance arrangements have a greater likelihood of being arms-length business transactions for which the principles applicable to employment termination decisions are not relevant. While a bright-line test would certainly make decisionmaking simpler in these types of cases, it is unlikely that a fixed standard can be developed. In actuality, a bright-line test is currently in use, and the consequence has been that nontraditional employees have been excluded arbitrarily from state law protection. As a result, despite the uncertainty costs involved, a more discrete and finely tuned analysis of the work-performance arrangement is required in order to determine whether or not state law protection against termination is appropriate.

Borrowing from the analysis of the Supreme Court in Umbehrr and O’Hare

255. See supra Section IV.B.
Truck Service, the formal contingent status of the relationship between the firm
and its workers should be disregarded. Simply shifting the designation of the
workforce from the category of employees to contingent staff does not, in
itself, alter the balance of interests. Rather, it is necessary to consider on an
individualized basis whether the staffing arrangement is akin to the traditional
employer-employee relationship in its fundamental character and how the
various parties interrelate with each other. If the employer’s staff is retained
to perform repetitive services that are a core feature of the business, and if the
work is regular and continuous in character, the similarity to the traditional
employment relationship is too great to warrant altering state protection. This
is true whether the staff is selected individually or is furnished by leasing or
temporary-help firms. The individual performing the service in either case will
have an equivalent interest in retaining the continuity of the relationship. This
interest is in need of protection when employers seek to take advantage of such
a relationship by acting in conflict with state public policy.

Is the price of such an analysis too high? In one sense, the legal system has
already answered this question in the negative. Unjust dismissal doctrines
already exist to regulate traditional employee discharges that violate state public
policy, and no state has legislatively reversed this result. The suggested
analysis would simply prevent employers from circumventing the established
legal structure by altering the employment status of workers in order to avoid
any risk of wrongful-termination lawsuits. And while there is concededly a cost
involved in subjecting termination decisions to state review, the portion of that
cost attributable to unjust dismissal doctrine, as opposed to anti-discrimination
legislation, is an undoubtedly limited one. Finally, the issue of cost cannot
be evaluated independently of the benefits achieved through legal oversight of
unjust terminations. Those benefits have led courts to create an avenue for
legal redress for those wrongfully discharged. Further, there have been no new
developments which would alter the conclusion that the costs do not outweigh
the opposing need to insure that state public policy interests are not undercut.

VI. CONCLUSION

For much of the 1970s and 1980s, the dominant issue in the field of
employment law was the controversy surrounding the at-will employment rule.

256. The EEOC has reported a significant volume of both sexual harassment and disability
discrimination complaints. See Nancy Montwieler, EEOC: Drop in Charges, Inventory Attributed to
that sexual harassment cases constituted 10.4% of the Commission’s 87,500 filed charges for the year,
down from 13% the previous year, and that disability discrimination cases represented 22.6% of the
total). Statistics of a comparable nature on unjust dismissal claims are not available since there is no
federal agency to which such complaints must be directed. Nevertheless, reported cases appear to be
heavily weighted in favor of discrimination issues and not just unjust dismissal claims.
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Numerous articles debated the wisdom of retaining an environment in which termination decisions were free from legal oversight or incorporating limitations on the right to discharge employees for any reason deemed sufficient by the employer. The result of the debate has been an unmistakable change in the legal controls available to challenge termination decisions. Both tort and contract theories now exist in many jurisdictions as a response to employer excesses. Courts have concluded that the employer’s interest in freedom from state oversight is outweighed by the need to insure that employers who retaliate against workers who refuse to engage in illegal activities or who report them to the authorities do not undermine important public policy interests.

In the 1990s, a new issue has emerged as a focus of controversy in the employment law arena. However, rather than involving a change in existing legal doctrine, the current debate centers on the consequences of changes in the basic relationship between the employer and those who perform services for her. In order to avoid a variety of costs imposed on the hiring of employees, an increasing number of employers have made use of alternative arrangements to have both core and peripheral functions performed. The individuals performing these functions work in a variety of non-traditional contingent arrangements, and often the laws applicable to employees in general are not broad enough to cover them. Recent case law has produced just such a result when efforts have been made to utilize unjust dismissal principles after the termination or non-renewal of a contingent worker.

The explanation courts often give for refusing to incorporate contingent workers into the unjust dismissal doctrine is the arbitrary restriction of the principle to traditional employer-employee relationships. But courts have also asserted that extending the right to challenge a termination outside of its existing limits would alter the balance between competing public and private interests. What may really be happening, however, is that the courts have become less interested in providing opportunities for workers to challenge their discharge. They are faced with a large number of such suits and may be

258. See supra notes 137-160.
259. See supra notes 149-153 and accompanying text.
261. The Dunlop Commission noted the spiraling rate of employment litigation and recommended increased use of alternative dispute resolution techniques. See DUNLOP COMMISSION REPORT, supra note 76, at 25-34. At hearings before the Commission, business representatives described the United States as experiencing a “litigation crisis.” See ADR Is Discussed at Dunlop Panel Hearing, 147 Lab. Rel. Rep. (BNA) 161 (Oct. 10, 1994).
frustrated by the way in which they are clogging court calendars. If so, their actions represent mistaken public policy.

While there may be a substantial volume of litigation challenging employee termination decisions, there is no evidence that unjust dismissal cases are a major part of the total. Even the complete elimination of unjust dismissal cases might have only a marginal impact on the number of employment-related cases on court dockets, since discrimination lawsuits would remain.262 The appropriateness of the unjust dismissal doctrine, therefore, must be judged on the merits, not on its contribution to the workload of the courts. On this basis, the doctrine is clearly warranted since it prevents the narrow private interests of the employer from undercutting important public policy interests of the state.

The fact that states have developed unjust dismissal principles to deal with terminations which violate the public policy interests of the jurisdiction indicates that the balancing of competing interests in this area has already been accomplished. In that case, as this Article argues, there is no justification for the outright denial of comparable protection for those who do not fit into the traditional employer-employee pattern. When the circumstances of specific contingent employment relationships are analyzed, there are many cases in which the interest of the employer in making regulation-free termination and non-renewal decisions is no different than for traditional employees, while the interest of the state in preventing the violation of its public policy is just as strong. In these settings equivalent protection is appropriate.

There are sufficient legal principles available to support applying unjust dismissal theories to new contingent employee arrangements. The Supreme Court in Umbehr and O'Hare Truck Service held that where free expression and association rights are concerned, even the distinction between independent contractor and traditional employee status is insufficient to justify restricting First Amendment protections otherwise available to government employees. And although reversed by statute, the Hearst Publications holding that the category of "employees" covered under the NLRA should be determined by analyzing the economic realities of the relationship, rather than by the common law distinction between independent contractors and traditional employer-employee status, demonstrates that formal labels need not be controlling in determining the scope of worker protection. Finally, there is precedent under workers' compensation systems for defining "statutory employers" to include those who are not in employer-employee relationships with service providers.

This does not mean that every contingent employee should be able to obtain tort damages based upon the claim of a public policy violation. To the

262. Indicative of the high level of employment discrimination complaints is the substantial level of EEOC case filings, particularly in the area of sexual harassment and disability discrimination. See supra note 256.
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contrary, there is more than enough room to distinguish between discrete contracts for services and contingent work arrangements that are functionally indistinguishable from traditional employer-employee relationships. This may not be as simple a test to administer as a bright line rule, but bright line rules create the risk of producing arbitrary results. The exclusion of contingent employees from unjust dismissal doctrine has only served to contribute to the increasing use of contingent work arrangements. However, the unjust dismissal doctrine is too important to be subject to such easy subversion. It is time for the courts to recognize the implications of their decisions and take appropriate steps to bring contingent employees back into the mainstream of workers protected against improper employer retaliation.