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A stylized world map in a light blue color, centered on the Atlantic Ocean, set against a dark blue background with a faint, repeating text pattern.

**Meeting the challenge
of precarious work:
A workers' agenda**

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Meeting the challenge
of precarious work:
A workers' agenda

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Contents

5

Foreword

Dan Cunniah

9

*ILO standards and precarious work:
Strengths, weaknesses and potential*

Luc Demaret

23

Establishing rights in the disposable jobs regime

Peter Rossman

41

*Implications for union work of the trend
towards precarization of work*

Jenny Holdcroft

59

*Trade union responses to precarious work
in seven European countries*

Maarten Keune

79

Negotiating parity for precarious workers

Susan Hayter and Minawa Ebisui

97

*Strengthening the collective bargaining rights of precarious workers
under US labour and employment law*

Owen Herrnsstadt

117

*Precarious work and the exercise of freedom of association
and collective bargaining: Current ILO jurisprudence*

Beatriz Vacotto

133

*Precarious work and access to collective bargaining:
What are the legal obstacles?*

Camilo Rubiano

153

Precarious work: An international problem

Enrique Marín

Strengthening the collective bargaining rights of precarious workers under US labour and employment law

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While few protections exist for private sector workers in the United States, one group of workers, those falling into the category of *precarious* workers, are especially vulnerable. Over 40 million individuals in the United States, constituting roughly one-third of the workforce, could be considered to be precarious workers.¹ Precarious workers are distinct from standard, full-time or “regular” workers because they are often part-time, temporary, seasonal, leased, on-call, or independent contractors – and often not covered by many existing worker protection laws.²

As precarious workers, these individuals are often paid significantly lower than standard, full-time workers and may have little or no benefits. Moreover, precarious workers have no job security. While job security is limited for most private sector workers in the United States, workers that have formed labour unions and obtained collective bargaining agreements with their employers, may have some job security in the form of *just cause* dismissal requirements, under their collective bargaining agreement. Union workers also have the right to bargain over better wages and benefits and, as a result, generally enjoy higher wage rates and better benefits than other workers – particularly precarious workers – as a result of collective bargaining. While basic rights to form a union and engage in collective bargaining are weak in the United States, these rights are often not available to precarious workers.

The sheer size of the precarious workforce and their lack of rights under existing worker protection laws have profound implications for both union and non-union standard, full-time workers in the United States. Both groups of workers face considerable pressure on their wages and benefits when competing with the growing number of lower-paid precarious workers. These pressures also place union workers in a disadvantaged position by giving employers additional leverage in the collective bargaining process.

This paper focuses on proposals that would strengthen the rights of precarious workers in the United States by incorporating some aspects of international labour standards that, among other things, would require coverage of many precarious workers by US employment and labour laws. In order to understand the basis for these proposals, the first section of the paper describes the nature of precarious workers in the United States. The second section describes the limited coverage of precarious workers by US employment and labour law to precarious workers. It specifically focuses on the reasons that, the National Labor Relations Act, which governs workers’ rights to form a union and engage in collective bargaining, is often not available to precarious workers. The last section of this paper describes the advantages

1. “Employment Arrangements”, GAO-06-656, 7/2006, p. 3 (hereinafter referred to as “Employment Arrangements”).

2. See “Contingent Workers”, GAO/HEHS-00-76, 6/2000, p. 11 (hereinafter referred to as “Contingent Workers”), in the United States, precarious workers are most frequently referred to as “contingent workers”.

and disadvantages of various proposals that would extend the protections provided by US employment and labour laws to precarious workers. It includes a discussion of how international labour standards, as defined by the International Labour Organization (ILO), could be utilized to assist precarious workers.

Precarious workers in the United States

Precarious workers in the United States are generally referred to as *contingent* workers. The largest group of the contingent workforce in the country is part-time workers who are defined as those individuals “who regularly work less than 35 hours per week for a particular employer and are wage and salary workers” and comprise about 43 per cent of the contingent workforce (Employment Arrangements, pp. 6, 12). The second largest category of precarious workers is that of independent contractors which are reported to comprise about 25 per cent of the precarious workforce in the United States, but this number may be somewhat lower since regular employees are often classified as independent contractors – leaving these workers without the protection of many US labour and employment laws (*ibid.*, p. 12). The misclassification of employees as independent contractors has been a focus of both federal and state governments for many years. Independent contractors are generally considered to be “[i]ndividuals who obtain customers on their own to provide a product or service (and who may have other employees working for them), such as maids, realtors, child care providers, and management consultants” (*ibid.*, p. 6).

Other categories of precarious workers include: contract company workers who “work for companies that provide services to other firms under contract”; agency temporary workers “who work for temporary employment agencies and are assigned by the agencies to work for other companies”; on-call workers “who are called to work only on an as needed basis”; direct hire temporary workers “hired directly by companies to work for a specified period of time”; day labourers “who get work by waiting at a place where employers pick-up people to work for the day”; and on-call self-employed workers “self-employed workers who are not independent contractors” (*ibid.*, pp. 6 and 12).

Employment-at-will: The foundation of employment and labour rights law in the United States

The cornerstone of employment law in the United States rests on the legal concept of *employment-at-will* (see Feinman, 1976).³ Under this concept, as introduced in the late 1800s, employees were presumed to be *at-will* if there was no contract or specified duration of employment and could be terminated for good cause, bad cause, or no cause at all. In essence, the at-will concept meant (and still means) that for most private sector workers, there is no job security. When it was adopted, it meant that workers could also be terminated for forming a union or engaging in collective bargaining. At the time, workers also did not have rights to minimum wages or work in a place that was free from discrimination.

Since its adoption, a number of exceptions to the basic rule of employment-at-will have been created, though its basic underlying premise that most workers have no job security remains. These exceptions have been established both by statute and through the judicial process, though judicially-created exceptions apply only to geographic regions within their jurisdictions. The most common judicial exceptions can be categorized as either based on public policy or as implied contracts.⁴

Statutory exceptions are contained in federal laws such as the National Labor Relations Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Worker Adjustment Retraining Notification Act, the Occupational, Safety and Health Act and state laws such as those governing workers compensation, unemployment insurance, and others.⁵

Judicially created exceptions to the employment-at-will rule

1. Public policy exception

The public policy exception to the employment-at-will rule has been applied by state courts in situations where employers terminate employees for reasons that threaten public policy.⁶ For example, the public policy exception has been applied where an employer terminated an employee because he refused to perjure himself.⁷ Other public policy exceptions have been found for employees who were fired for refusing to engage in an illegal price-fixing

3. See also *Adair v. United States*, 208 U.S. 161 (1908). [In *Adair*, a federal statute which made it a crime to fire an employee solely due to his membership in a labour organization, was deemed unconstitutional.

4. The third exception, the implied covenant of good faith and fair dealing, may not be as relevant for precarious workers and is not discussed in this paper.

5. Many of these federal statutes are listed elsewhere in this paper.

6. See *Monge v. Beebe Rubber Company*, 316 A.2d 549 (N.H. 1974).

7. See *Petermann v. International Brotherhood*, etc. 344 P.2d 25 (Cal. 1959).

scheme,⁸ and for filing a claim under the state workers compensation statute (the state workers compensation statute did not have an explicit provision prohibiting retaliatory discharge for filing such a claim).⁹

Not all jurisdictions have adopted the public policy exception. Where it has been adopted, the concept of public policy often remains ill-defined. Courts that have adopted a public policy exception appear to constrain public policy to matters where there is either a clearly defined public policy established under state or federal law.

2. Implied contract exceptions

Some state jurisdictions have found exceptions to the employment-at-will rule for employees that are covered by a theory of implied contract.¹⁰ This is also commonly known as the *employment manual exception*. These courts have found that employment manuals combined with employer assurances regarding job security can create an employer obligation concerning termination.¹¹ For example, an implied contract may exist if individuals considering an offer of employment are told that they will have job security and that they can only be dismissed for just cause and are given an employment manual that reflects this promise. In such a situation, if the employer dismisses an employee for anything less than just cause, the employee would have a basis for legal action stemming from the breach of an implied contract that he or she could be dismissed only for a just cause. This implied contract is distinguished from an explicit contract because the employment manual and oral assurances are not negotiated and are unilaterally given to the employee by the employer.¹²

3. Applicability to precarious workers

The applicability of the employment-at-will exceptions is quite limited – particularly with respect to precarious workers. First, both types of exceptions have been recognized in only a handful of jurisdictions. Second, even when they have been recognized, they have been very narrowly interpreted. For example, with respect to the public exceptions, courts are very reticent to usurp the role of the legislature in defining public policy through the enactment of statutes.¹³ With respect to implied contracts, courts are very hesitant

8. See *Tameny v. Atlantic Richfield Company*, 610 P.2d 1330 (Cal. 1980).

9. See *Frampton v. Central Indiana Gas Company*, 297 N.E.2d 245 (Ind. 1973).

10. See *Toussaint v. Blue Cross and Blue Shield*, 292 N.W.2d 880 (Mich. 1980).

11. *Ibid.*

12. Courts have concluded that “consideration” (an element of contract law) has been met in these cases because the employee continues to work for the employer based on the employer’s assurances of dismissal for just cause only.

13. See *Gantt v. Sentry Insurance*, 824 P.2d 680 (Cal. 1992).

to create employer obligations based on employment manuals that reflect the employer's policies. Third, exceptions created from employment manuals can be remedied easily by inserting a disclaimer clearly stating that employees remain at-will and nothing in the language of this manual should be interpreted as constituting an implied contract or other obligation on the employer regarding job security.¹⁴ Since many precarious workers are hired with the clear understanding that their employment is temporary, such a disclaimer may not even be needed. Finally, considerable financial resources are needed to file legal claims based on these exceptions. Filing a claim is even more impractical for precarious workers who are likely to have fewer resources to begin with.

Statutory exceptions to the employment-at-will rule: Creating enforceable worker protections

There are several statutory exceptions to the employment-at-will rule. These exceptions, created under federal law, further limit the employment-at-will rule by creating employee rights and employer obligations with respect to the workplace. For example, workers cannot be fired for trying to form a union and they cannot be fired for discriminatory reasons. Each of the statutes listed below, represent some exception to the at-will rule by furnishing employees with certain rights in the workplace:¹⁵

- National Labor Relations Act – reflects rights for most private sector workers to form a union and engage in collective bargaining.¹⁶
- Fair Labor Standards Act – establishes employee rights to minimum wage, overtime pay, and regulates child labour.¹⁷
- Occupational Safety and Health Act – creates duties on employers to provide a safe and healthy workplace.¹⁸
- Title VII of the Civil Rights Act of 1964 – protects employees from discrimination based on race, color, religion, sex, or national origin.¹⁹
- Worker Adjustment and Retraining Notification Act – requires employers to provide covered workers with sixty days advance notice prior to a certified mass layoff or plant closing.²⁰

14. See *Novosel v. Sears, Roebuck & Co.*, 495 F.Supp. 344 (1980).

15. This list is not exhaustive and does not include state statutes.

16. 29 U.S.C. §151 et seq.

17. 29 U.S.C. §§201–216, 217–219.

18. 29 U.S.C. §§553 651–678.

19. 42 U.S.C. §§2000e-2000e-17.

20. 29 U.S.C. §§2101–2109.

Applicability of statutory exceptions to precarious workers

Who is an employee?

Although international labour standards apply broadly to many forms of precarious workers, the same cannot be said for US labour and employment laws (Vacotto, 2011). Several challenges exist for precarious workers who seek to assert the rights provided under each of these statutes. First, precarious workers must be covered by the law. Most statutes cover only *employees*. Two tests are often applied to determine if individuals are employees covered by these laws. These include the right to control test and the economic realities test.²¹

1. *The right to control test*

The right to control test relies on determining “whether the business has a right to direct and control how the worker does the task for which the worker is hired”.²² The 11 factors considered in applying the test include:

- (a) Instructions the business gives the worker.
- (b) Training the business gives the worker.
- (c) The extent to which the worker has unreimbursed business expenses.
- (d) The extent of the worker’s investment.
- (e) The extent to which the worker makes services available to the relevant market.
- (f) How the business pays the worker.
- (g) The extent to which the worker can realize a profit or loss.
- (h) Written contracts describing the relationship the parties intended to create.
- (i) Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.
- (j) The permanency of the relationship.
- (k) The extent to which services performed by the worker are a key aspect of the regular business of the company.

21. Some laws provide other definitions of who is covered and many limit protections to employees who work a specified minimum number of hours or do not apply to small employers.

22. Employers’ Supplemental Tax Guide (Supplement to Publication 15 [Circular E], Employers Tax Guide), Publication 15-A, Department of Treasury, Internal Revenue Service, 2011, pp. 6–7.

2. *Economic realities test*

The other major test indicating whether or not an individual is an employee is the economic realities test. In general, the test examines whether an employee is economically dependent on the employer and consists of six factors:²³

- (a) The degree of control exercised by the alleged employer.
- (b) The extent of the relative investments of the worker and alleged employer.
- (c) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.
- (d) The skill and initiative required in performing the job.
- (e) The permanency of the relationship.
- (f) The integral nature of the service rendered.

Collective bargaining and precarious workers

Since the focus of this paper is on collective bargaining, any analysis of collective bargaining and precarious workers must begin with the National Labor Relations Act (the "NLRA" or the "Act"). Enacted in 1935, the NLRA provides most private sector workers with the right to form a union and engage in collective bargaining. The Act was created to encourage the practice and procedure of collective bargaining and to protect workers' exercise of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²⁴ While the Act may cover, under some circumstances, seasonable, short-term, or leased workers, coverage is not automatic and can be difficult to establish.

Before discussing the Act's limitations with respect to precarious workers, it is important to explain that any kind of worker, precarious or standard, full time, can find it very tough to assert their rights provided under the Act. So that even if all of the difficulties that face precarious workers are resolved, they would still be confronted with the same challenges that all workers face when seeking to form their own union and engage in collective bargaining. The challenges that all workers face under the Act are reflected by the following scenario, which could occur during a union organizing campaign:

A union begins an organizing drive. The in-house organizing committee is fired and unfair labour practices are filed with the Board. If a petition has been filed, the election is either blocked or held in the wake of the discharges.

23. *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981).

24. 29 U.S.C. §151.

If the election is held, it is not hard to imagine the effects on employees the illegal conduct may have. In areas where skilled jobs are hard to come by, threats of discharge and closings are taken very seriously. If the election is not held, it will take a long time for the unfair labour practice to be fully litigated. When the charges are finally resolved, the union has to start its organizing drive all over again. Either way, the employer has the upper hand.

Even if the union wins an election and unfair labour practices are not at issue, the employer can bargain to impasse and unilaterally implement its last offer. If the workers cannot live with the unilaterally implemented contract, they can strike and watch permanent replacements march through their picket lines. After the election bar is lifted, their permanent replacements can vote to decertify the union. (Herrnstadt, 1988, pp. 188–189)

One study of union elections under the NLRA offers further insight into the Act's weaknesses (Bronfenbrenner, 2009). It found that for the years studied:

- 34 per cent of employers fire workers;
- 63 per cent of employers interrogate workers about their support for the union in mandatory one-on-one meetings with their supervisors;
- 54 per cent of employers threaten workers in such meetings;
- 57 per cent of employers threaten to close the worksite;
- 47 per cent of employers threaten to cut wages and benefits;
- 52 per cent of newly formed unions had no collective bargaining agreement one year after an election; and,
- 37 per cent of newly formed unions still had no labour agreement two years after an election.

The study also concluded that employers tend to appeal most labour administrative law judge decisions, regarding the representation matter. In some egregious cases, the appeal can delay a final decision regarding the election by three to five years (*ibid.*).

In addition to the challenges all workers face in asserting their rights under the Act, as described above, the challenges that precarious workers face is seemingly endless. Adopting proposals to remove each hurdle may be futile, since another hurdle immediately appears. These obstacles start with determining whether an individual is even covered by the Act. The Act applies to the 11-part right to control test which is narrower than the economic realities test and explicitly excludes independent contractors.²⁵

25. 29 U.S.C. §152(3); Individuals are misclassified as independent contractors by some employers to evade coverage of the Act. See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090 (9th Cir. 2008). Proposals to curtail misclassification of workers are discussed later in this paper.

Another hurdle concerns the definition of employer. Some employers create subsidiaries and other legal entities as a way to employ leased workers. Although these workers perform the same work as standard workers perform, they technically work for a different employer – the leasing company. (In some cases, the new entity may merely provide the employees for the original company.) This makes it difficult to organize the workforce because many of the workers have different employers – even though they perform the same work and are working side-by-side. Application of rules concerning employers under these circumstances is complicated and subject to challenge. Proposals include broadening the definition of employer, when a company creates a subsidiary with the intention of evading the law. Other proposals could make it easier to treat separate companies (that have no relation to one another), such as the employee leasing company and the original employer, as joint employers under the Act.²⁶

If a precarious worker qualifies as an employee under the Act and there is no question that they work for the same covered employer, they still must form an appropriate bargaining unit in order for a union election to be conducted under the NLRA.²⁷ The bargaining unit serves as the basis for the union if it is certified by the National Labour Relations Board. (The “NLRB” administers the NLRA.) In most cases, the key to determining whether a unit is appropriate depends on whether employees share a community of interest with one another. Among other things the NLRB reviews “many considerations...into a finding of community of interest”.²⁸ These factors include the degree of functional integration, common supervision, the nature of the employees’ skills and functions, the interchangeability in contact among employees, commonality of work sites, fringe benefits provided, and the history of collective bargaining.²⁹

While precarious workers have substantively similar interests to regular employees, their different characteristics may make it relatively easy to separate them from a bargaining unit of regular employees. For example, if they do not closely work with regular employees, do not share supervision, skills, levels of pay or benefits, and have different bargaining history, they may be vulnerable to arguments that would keep them in a separate bargaining unit from regular employees. Of course, if they also have different characteristics between themselves, it may be difficult to demonstrate that they constitute a stand-alone unit.

Relaxing the community of interest standard or establishing a presumption that precarious workers are included in a unit with regular employees

26. The NLRB applies a number of factors to this situation.

27. See 29 U.S.C. §159.

28. “An Outline of Law and Procedure in Representation Cases”, NLRB, 8/2008, pp. 129–131.

29. *Ibid.*

could create serious problems. Including precarious workers in a unit of regular workers is one method employers utilize to inflate a bargaining unit with employees that are opposed to the union effort. One solution might be for the NLRB to adopt a presumption that precarious workers within a company can form an appropriate bargaining unit among themselves.

Even if an appropriate bargaining unit can be established for precarious workers, it still must receive official recognition from the NLRB in order to serve as the exclusive bargaining representative for the unit's employees. This official recognition is referred to as *certification* and is usually preceded by an NLRB election. The pursuit of certification means that supporters of the union must be able to withstand the possibility of an anti-union campaign and other time-consuming delays before the election is held. Anti-union campaigns are an enormous impediment to organizing standard and precarious workers (Bronfenbrenner, 2009).

Once a bargaining unit is certified, the union gains the right to negotiate collectively on behalf of the unit. Although the union now has the right to represent the workers in bargaining, employers are only required to negotiate with the union in *good faith*. There is *no* obligation that the parties reach a collective bargaining agreement. The short-term or temporary nature of many precarious workers is likely to undermine the ability to complete a bargaining process that often lasts several months or even years. The prolonged process could easily destroy the newly certified unit – since the precarious employees who started the certification or the negotiating process may not be employed through the entire process.

In addition, in order to use their full economic leverage, precarious workers must be able to assert their legally protected right to strike should bargaining reach an impasse. It is doubtful if many short-term workers would be interested in striking, giving their tenuous relationship to the employer. Even if they did go on strike, since many precarious workers have lower skills, an employer could easily find replacements.

Moreover, while it is unlawful for an employer to terminate an employee for exercising their right to strike, the NLRA has been interpreted as permitting an employer to use permanent replacements for striking workers.³⁰ This means that even though employees have not been terminated, they may find that their jobs are no longer available to them because they have been filled by permanent replacements if they choose to return to work after the strike. In such cases, they must wait until an opening occurs if they want to continue in their current jobs. Since many employers have downsized, it could be many years before a former striker is recalled, if ever. Recall rights for regular workers under these circumstances are unsatisfactory (to say the least), for short-term employees, they are especially meaningless.

30. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S.333 (1938).

Even if a collective bargaining agreement can be reached, the contract itself must be enforced. When a contract is not enforced, employees can file a grievance, if a grievance procedure is included in the agreement. The grievance procedure, however, involves several steps and is often time consuming. The final stage involves binding arbitration, which can also be quite time consuming. Given the short-term nature of many precarious jobs, this too may present a meaningless resolution.

In order for collective bargaining rights to become available for precarious workers, rights must be dramatically strengthened for *all* workers. Instead of strengthening these rights, labour law advocates are on the defensive as collective bargaining rights for public sector workers and the NLRB itself is under attack.³¹ Sadly, in light of the anti-union climate in the United States, it is doubtful if efforts to strengthen collective bargaining rights so that they are consistent with international labour standards for precarious workers – let alone for regular workers – can be achieved in the near future. There are, however, some signs of hope: the attacks on collective bargaining rights have led to a mobilization of groups who believe in collective bargaining (see, for example, Gardner, 2011). Some people believe that a backlash may occur which would pave the way for the enactment of stronger collective bargaining rights for all workers in the future (*ibid.*).

Other protections for precarious workers

As discussed above, collective bargaining rights under the NLRA are limited for all workers in the United States and, consequently, strengthening these rights for precarious workers under the current legal framework will be difficult and complicated. Nevertheless, there may be other ways to strengthen worker protections for precarious workers. These include:

- curtailing the misclassification of employees and extending coverage of employees under federal statutes;
- adopting new methods to determine minimum wages;
- providing a degree of job security;
- establishing voluntary agreements between multinational corporations (MNCs) and unions to provide precarious workers with rights based on international labour standards; and
- considering the adoption of European notions of social dialogue.

31. See, e.g., “Wisconsin Governor Officially Cuts Collective Bargaining”, NBC News and News Services, 11 March 2011; “Congress v. the NLRB”, WSJ online, 4 May 2011; “Bill Curbing, NLRB Powers Nears Action by House of Representatives”, BNA Daily Labour Report, 26 July 2011.

Misclassification of employees as independent contractors

Misclassification of employees is common in the United States. Government reports estimate that up to 30 per cent of companies misclassify employees with employers, illegally passing off 3.4 million regular workers as contractors (Greenhouse, 2010).³² While some workers are unintentionally misclassified, many employers purposefully misclassify workers in order to avoid coverage and compliance with many of the labour and employment laws which often apply only to employees – and not independent contractors.

One solution for discouraging the misclassification of employees is to abandon the use of different tests for determining who is an employee and adopting one, broad, uniform standard in their place. The Commission on the Future of Worker–Management Relations made such a recommendation arguing that such a definition should be based on the economic realities of the employment relationship – conferring independent contractor status “only on those for whom it is appropriate – entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth.”³³ The Commission went on to explain that misclassification costs both federal and state governments large amounts of tax revenues – including social security, unemployment insurance and personal income tax – noting that the law should not provide this type of incentive for employers to misclassify workers.³⁴

Many states have investigated the issue of misclassification of employees as independent contractors, enacting legislation to address the matter (see Ruckelshaus, 2008). Advocates for precarious workers propose the following principles when drafting legislation regarding misclassification (*ibid.*):

1. Provide for right of action for the aggrieved worker(s) and the worker’s representative, including unions or community groups.
2. Provide for strong anti-retaliation protections for workers who complain.
3. Provide for monetary damages per worker misclassified in an amount likely to deter future violations.
4. Provide for debarment remedies if the violating employers are state public contractors.

ILO standards provide ample support for enforcing laws prohibiting the misclassification of employees. The Labour Inspection Convention, 1947 (No. 81), provides that “[t]he system of labour inspection in industrial

32. See Employment Arrangements, *supra* at note 1; Contingent Workers, *supra* at note 2.

33. Fact Finding Report, Commission on the Future of Worker–Management Relations, May 1994.

34. *Ibid.*

workplaces shall apply to all work places”, regardless of the characteristics of the workers that occupy them. Moreover, labour inspection must be enforced specifically in reference to “provisions relating to hours, wages, safety, health and welfare ... in so far as such provisions are enforceable by labour inspectors”. The International Labour Conference recently addressed these and other issues, marking its commitment to achieving the principles outlined in Convention No. 81, among other things (ILO, 2011).

Providing job security

Since most private sector employees are at-will employees who can be fired for almost any reason or for no reason at all, job security remains a critical issue for all workers throughout the United States. There are a number of possibilities for addressing this issue that have been proposed or debated over the years. The public policy and implied contract exceptions to employment-at-will could be codified into federal or state law in order to improve job security for all workers. Several years ago, a Model Employment Termination Act (META) was proposed.³⁵ In general, META would have prohibited an employer from terminating an employee without good cause. The Model Act, however, would not have applied to short-term or temporary employees and left many other areas unaddressed. No state has adopted META, although Montana has enacted a Wrongful Discharge from Employment Law that has some similarities.³⁶

Providing for decent wages

Most precarious workers generally are required to receive a minimum wage under the Fair Labor Standards Act, the federal law establishing minimum wage, overtime and other wage protections, and state minimum wage laws which often require wage payments that exceed the federal minimum.³⁷ Under federal law, minimum wage for most workers is set at \$7.25 an hour,³⁸ but Washington State, with the most protective minimum wage law, requires payment of \$8.67 per hour.³⁹ In addition, some *communities* have adopted what is known as livable wage standards. Since minimum wage is still far below the poverty level, livable wages are aimed at ensuring wages that can

35. National Conference of Commissioners on Uniform State Laws (August 1991).

36. See Montana Statutes, Wrongful Discharge from Employment, 39-2-9012915.

37. See Wage and Hour Division, U.S. Department of Labor, Minimum Wage Laws in the States – 1 January, 2011, <http://www.dol.gov/whd/minwage/america.htm>.

38. Fair Labor Standards Act, supra at note 17.

39. Ibid.

provide workers with a decent standard of living. For example, the city of Chicago passed an ordinance requiring some very large retailers to pay at least \$10 an hour (Bellandi, 2006).

An even higher “minimum wage” might be achieved by adopting a *prevailing wage* for workers in industries dominated by precarious workers. The concept of prevailing wages is borrowed from public contract law, which requires that certain employers who receive public contracts for construction, services, and other activities pay employees working on the contract a prevailing wage that satisfies specific requirements.⁴⁰ These prevailing wages are considerably higher than minimum wages and are, in general, based on the wages paid for certain occupations in specific geographic areas. A system of prevailing wages could be established for workers regardless of the nature of their employment. The drawback of this approach is that precarious workers in general are already low paid workers – so that a prevailing wage determination may remain low.

Voluntary agreements

Global framework agreements (GFAs) represent another mechanism for strengthening the rights of precarious workers by utilizing international labour standards. Global framework agreements are negotiated between multinational corporations (MNCs), their works councils, international labour federations, and individual unions. In order to assist precarious workers, GFAs must contain these four elements (Herrnstadt, 2007):

- **Broad coverage:** GFAs must cover the entire corporate enterprise and related entities. If a GFA covers only MNCs direct employees of a corporation, than leased employees, part-time and short-term employees working alongside the regular direct employees will not be covered. This omission will raise doubts about the MNC’s commitment to the GFA and will create two classes of workers.
- **ILO Conventions and accompanying jurisprudence:** GFAs must include labour standards explicitly referenced by the Conventions of the International Labour Organization and accompanying jurisprudence. The agreements must commit signatory companies to exceeding national laws that fall short of the international labour standards contained in the GFA. One model agreement, the Model for the International Metalworkers’ Federation (IMF), requires MNCs to pay decent wages and benefits that are sufficient to meet the basic needs of workers and their families and

40. See the Davis-Bacon Act, 40 U.S.C. §§276a to 276a-5, Service Contract Act of 1965, 41 U.S.C. §§351–358, and the Walsh-Healey Public Contracts Act, 41 U.S.C. §§35–45.

provide some discretionary income, make certain that hours of workers are not excessive and that working conditions are decent.⁴¹

- **Effective implementation:** GFAs must be effectively implemented through proper education and communication. Agreements must be distributed to all related enterprises and individuals connected to the company – including regular and precarious workers, management, contractors, and suppliers. The agreements must be distributed along with an explanation written in easily understood language. Concepts like the freedom of association and collective bargaining are not easy to understand, so this education component is critical for all levels of the MNC and its enterprises.
- **Monitoring and enforcement:** in addition, GFAs must be monitored and enforced in a transparent manner. External independent monitoring of the MNC and its suppliers, at all levels, must take place on a regular basis. Conflicts that arise under the GFA must be subject to a dispute resolution mechanism such as binding arbitration. It will do little good if no one knows if an MNC is complying with the GFA, and if it can violate the agreement without a satisfactory recourse.

GFAs could lead to stronger rights for some precarious workers. However, they are voluntary and cannot provide the same level of protection for regular or precarious workers as legally enforceable protections established by federal (or state) laws. Moreover, past experience with GFAs has not been particularly promising. Over fifty GFAs have been negotiated but none fully address the four elements outlined above. Many have limited coverage and inadequate reference to labour standards (Herrnstadt, 2007). Even fewer have proper implementation provisions and enforcement mechanisms. Nevertheless, the dialogue from which the GFA emerges could serve the interests of all workers – and provide a forum for raising worker protection issues faced by precarious workers.

Importing social dialogue from Europe to the United States

Works council frameworks, such as those existing in Europe, could be established in the United States to provide a mechanism for representation of precarious workers. However, the political climate, lack of social dialogue and anti-union conduct in the United States are likely to undermine efforts to import the works council concept. Even more troubling is the fact that many European-based MNCs abandon the concept of social dialogue when they establish facilities outside Europe (Compa, 2010).

41. IMF Model Framework Agreement; see www.IMFMetal.org.

Furthermore, there is a risk that works councils could be used for anti-union purposes in the United States. It is conceivable that US management could use works councils to recruit non-union employee representatives to undermine collective bargaining efforts with unions. US labour history is replete with examples of how companies have used so-called labour management cooperation programmes and other innovative management mechanisms in this way (Herrnstadt, 1998).

Extension mechanisms of collective bargaining agreements

Extending collective bargaining agreements beyond their normal coverage raises some interesting issues. Such an extension mechanism could make relevant negotiated wage rates applicable for all workers in the same industry. The advantage of such a concept would be that all workers would receive the benefits of the union's collective bargaining agreement, regardless of whether they are included in an appropriate bargaining unit represented by the union. This would, of course, raise significant questions regarding enforceability of the contract since the collective bargaining agreement would not actually cover these workers. While a whole new statutory framework could be envisioned for establishing an enforcement regime, given the current political climate in the United States, the legislative success of such an endeavor is highly doubtful. Moreover, this sort of extension mechanism presents political and legal questions for a union, including questions regarding its obligation to the unrepresented workers who are not union members and who do not pay any fees for representation. In addition, an extension mechanism could also provide a disincentive for precarious workers to seek their own union representation, since they are receiving collective bargaining benefits for free.

Adopt core international labour standards in international trade and investment agreements

International labour standards are not only social issues – they are also economic issues. Indeed, many corporations that shift production to other countries do so to take advantage of lower labour costs that exist when core labour standards are neither recognized nor enforced. This is why many labour advocates argue that specific references to ILO Conventions and acceptable conditions of work must be included in international trade and investment agreements. By including these standards in these agreements, precarious workers and their advocates would have a valuable tool to promote their interests, including fundamental human rights to form a union, engage in collective bargaining and earn acceptable wages and have reasonable hours of

work. If these rights were included in trade and investment agreements and effective enforcement mechanisms were available that would permit violations to be processed under meaningful dispute resolution mechanisms, precarious workers would have another tool to assist them.

Conclusion

Collective bargaining rights in the United States are weak and must be improved for all workers. Sadly, efforts at meaningful labour law reform, which would address many of these weaknesses, have yet to be successful. Given these circumstances, it is difficult to articulate realistic proposals for improvement in collective bargaining laws aimed narrowly at precarious workers.

Strengthening other worker protections for precarious workers could help to advance their rights in the future. Efforts to provide a broad and uniform definition of employee and curtail the misclassification of individuals as non-employees are two obvious proposals. Other proposals address activities to ensure that all employees receive decent wages, some form of job security, and encourage voluntary agreements that are centered on international labour standards. Still other proposals call for entirely new labour relations systems built on European concepts of social dialogue and the adoption of enforceable labour standards in international trade and investment agreements. Lastly, consideration is given to adopting internationally recognized labour standards in trade and investment agreements.

The key to any of these proposals rests firmly, however, on the ability to change a North American corporate culture that can be hostile to workers' rights to form a union and to engage in collective bargaining. It is critical that legislative initiatives, both large and small, be vigorously pursued to adopt laws and regulations that will guide employers toward accepting these fundamental human rights, based on ILO Conventions and accompanying jurisprudence. In this vein, concerted global campaigns to stop the exploitation of precarious workers, like those that are being led by many labour federations, must be aggressively pursued so that the public, policy makers and especially the corporate community learn about the critical importance of freedom of association and collective bargaining for all workers. Until a fundamental understanding can be established worldwide on the importance of freedom of association and collective bargaining, great challenges remain for advocates who aim to improve the collective bargaining rights and other employment protections for the most vulnerable workers, those who find themselves in precarious positions.

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