

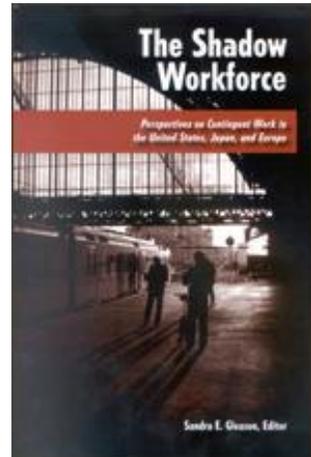
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## Public Policy and Contingent Workers

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# 6

## Public Policy and Contingent Workers

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The growth of contingent employment from 1970 to the present has been met with a resounding silence about possible federal and state-level public policy responses. This lack of response is not surprising since systematic public policy responses to changes in the labor force are difficult to enact in the United States due to the absence of a true national labor policy. There exists instead a fragmented system: federal legislation is implemented by the states, but the rules are interpreted by the courts. Policy responses therefore are limited by both U.S. federalism and the autonomy of the states. (For one example see the detailed discussion of the constitutional issues surrounding the Social Security Act of 1935 in Haber and Murray [1966]). This cumbersome system often fails to keep pace with the needs of workers as labor market conditions change. Current public policies governing contingent employment have arisen from the haphazard application of existing policies rather than the development of new policies designed to address the specific circumstances of contingent workers.

The policy difficulties inherent in the system stem from the single-minded aim of policymakers when the existing labor market policies were being developed: to provide protections for the benefit of regular full-time workers. This focus was a historical accident because the workforce was primarily full time and male when the key U.S. labor policies such as unemployment insurance and the minimum wage were enacted in the 1930s. Policies that have an impact on nonstandard and contingent workers do so only because contingent workers are caught in the penumbræ of policies developed for full-time workers, not because policies have been developed specifically for the benefit of contingent workers.

Eligibility requirements are the key to understanding the impact of labor market policies on contingent workers. These requirements establish the rules by which an individual qualifies for benefits. By specifying eligibility criteria, policymakers determine whom they want covered by the policy. Often the unintended consequence of these eligibility requirements is to limit access to social insurance by minorities and women, who are disproportionately represented in the contingent workforce (as discussed in Chapter 2).

There are essentially three ways in which a contingent worker may be deemed ineligible for coverage. Most commonly, the contingent worker fails to meet the work-based requirements for eligibility. These requirements stipulate rules governing the hours worked, amount earned, or the distribution of earnings during the year. Those with full-time jobs and those who earn more qualify for benefits, while those with part-time jobs or limited hours of work are deemed ineligible. A second factor determining ineligibility is employment in an industry or with a firm that is exempted from the legislation. There are numerous examples of farm workers and employees of small firms that are not covered by labor legislation. Finally, there are the gray areas of labor legislation where the courts have not yet decided whether the laws apply to certain types of workers. These gray areas have emerged in issues concerning the Occupational Safety and Health Act (OSHA) discussed on p. 192 and employer-provided benefits such as pensions and stock options, as in *Vizcaino v. Microsoft Corporation* (May 12, 1999).

When evaluating the impact of labor market policies, analysts use four criteria: 1) economic efficiency, 2) equity, 3) security, and 4) liberty. (For a complete discussion of these criteria, see Stone [1988]). Economic efficiency is determined by evaluating the relationship between the increased coverage and its marginal cost. In this sense we can consider a policy efficient if the most people are covered for the least cost. Equity means treating people in similar situations in the same way. Security is defined as providing benefits to those most at risk. However, economic efficiency and security often will be at odds with one another. For example, providing health insurance to the most ill may improve security, but the extra cost is likely to be disproportionately high. Finally, liberty examines when a policy intervention is justified: when should a government impress a collective outcome on an individual? This is generally interpreted to mean that government should intervene during

those times when an individual's actions adversely affect other people. One example is when an individual does not take into consideration the effects of auto emissions on others. In this case there is an opportunity for government action to correct this outcome.

For each of the public policies discussed in this chapter, eligibility rules are used as a starting point to examine the efficiency and equity of the program. Eligibility rules determine whether contingent or nonstandard workers are likely to be eligible and therefore covered (equity), and whether coverage can be expanded to include contingent workers with only modest increases in cost (efficiency). The likelihood that nonstandard workers will need the program (security) and the rationale for altering the eligibility criteria and coverage of these public policies (liberty) also are examined.

The discussion is focused on those policies that affect individual workers directly: employer-provided benefits of health insurance and pensions, unemployment insurance, family and medical leave, minimum wages, and occupational safety and health. Clearly this is not an exhaustive list of public policies affecting workers; however, these policies are representative of those that are likely to directly impact contingent and nonstandard employment relationships.

## **EMPLOYER-PROVIDED BENEFITS**

Employer-provided benefits have recently been the subject of considerable litigation and debate in the courts and state and federal legislatures. The Ninth Circuit Court of Appeals found in the widely publicized case *Vizcaino v. Microsoft* that temporary employees were in fact "common law" employees of the Microsoft Corporation. Consequently, the court found that Microsoft had wrongly denied benefits worth millions of dollars to employees because they had been misclassified as independent contractors or freelancers.

Legal challenges to the classification of contingent workers have a long history. Part of the challenge of properly classifying employees results from the ambiguity of the tax status of these workers. The Internal Revenue Service (IRS) has filed a number of lawsuits in an effort to determine who is responsible for an employee's payroll taxes. (For a

discussion of the legal relationship between temporary help employers and workers, see Parker [1994]; Gonos [1997]; duRivage, Carré, and Tilley [1998]). The court also has made considerable headway in determining who is an “employee” and under what criteria the employer is responsible for enforcing a number of federal statutes. Carnevale, Jennings, and Eisenmann (1998) have outlined many of the requirements necessary to be considered an employee (as opposed to a contractor or temporary worker). As discussed in Chapter 5, there are a number of multifactor legal tests for distinguishing between an employee and an independent contractor. One of the most important factors has been determining “the extent of the employer’s control and supervision over the worker, including directions on scheduling and performance of work” (p. 288).

### **Health Insurance**

Legislative changes extending employer-provided benefits to employees have been considerably more modest than legal rulings. Most changes have been concerned with maintaining worker access to health insurance benefits. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) allows employees (under certain circumstances<sup>1</sup>) to continue their employers’ group health care plan by paying for the policy themselves. COBRA provides insurance at group rates rather than individual health insurance rates for up to 18 months after coverage would have otherwise ended. More recently, the Health Insurance Portability and Accountability Act (HIPAA) of 1996 protects workers when they seek to buy, keep, or switch their health insurance, even when workers have serious preexisting medical conditions.

From the perspective of contingent workers, these workplace policies have two highly problematic eligibility criteria. To be eligible, your employer must have insurance that covers 20 or more employees. Also, the worker must have been laid off or had her working hours reduced. A worker fired for gross misconduct is ineligible. One of the most serious limitations of the policy is that it provides no subsidy for those who cannot afford the coverage. HIPAA protects only those who can demonstrate health insurance coverage for 18 months without a significant interruption, where significant interruption is defined as an interruption that exceeds 63 days.

However, these policies are of little help to contingent workers since very few have health insurance coverage provided by their employer. We can see in Table 6.1 that most contingent workers and most nonstandard workers do not receive health insurance from their employers.

The low rates of employer-provided health insurance among nearly all types of nonstandard employment demonstrates the narrow cast of HIPAA. Few workers are helped by a policy providing health insurance portability if they do not have health insurance initially. Looking at the insurance rates overall, a better picture emerges: workers in nonstandard employment are approximately 12.6 percent less likely to have health insurance coverage than regular full-time workers (75.6 percent and 88.2 percent, respectively). It is also likely that some of those with insurance will fail to meet the continuous coverage requirements of HIPAA that ensure portability. The biggest differences are among part-time and full-time workers. For example, only 18.5 percent of regular part-time workers receive health insurance from their employers, while 69.0 percent of regular full-time workers receive employer-provided health insurance.<sup>2</sup>

While Table 6.1 indicates that the majority of workers in nonstandard employment do not receive health insurance benefits from their employers, the majority of nonstandard workers do have some insurance, most likely through a family member or the government. While the lack of coverage is not dire for nonstandard workers, spousal coverage is costly since employers typically pay only their employees' portion of the premium. This means greater out-of-pocket expenditures for health coverage for workers in nonstandard employment relative to regular full-time jobs.

## **Pensions**

Much like health insurance, pension coverage for nonstandard workers is very limited. Table 6.2 shows that workers in full-time employment are about 3.5 times more likely to receive a pension from their employer than are workers in nonstandard jobs (52.8 percent and 16.0 percent, respectively). The biggest differences in pension coverage are based on hours of work. Part-time workers are considerably less likely to have pension coverage. This finding is consistent with some literature

**Table 6.1 Percentage of Workers with Health Insurance Coverage, by Work Arrangement and Sex, 2001**

	All		Women		Men	
	Any coverage	Through own employer	Any coverage	Through own employer	Any coverage	Through own employer
All	84.8	54.3	86.0	50.7	83.8	57.4
All nonstandard arrangements	75.6	13.7	77.7	14.8	73.0	12.4
Full-time						
Temporary help agency	46.9	12.8	49.9	11.0	43.0	15.2
On-call/day laborer	69.1	49.0	76.4	39.8	66.3	52.5
Self-employed	82.2	n/a	80.1	n/a	83.0	n/a
Independent contractor, WS <sup>a</sup>	66.8	23.2	65.4	17.6	67.5	25.8
Independent contractor, SE <sup>b</sup>	73.2	n/a	75.2	n/a	72.5	n/a
Contract company	84.7	58.2	88.8	54.9	83.3	59.4
Regular full-time	88.2	69.0	89.6	66.8	87.0	70.8
Part-time						
Temporary help agency	58.3	0.6	70.0	0.9	36.9	0.0
On-call/day laborer	67.0	11.0	69.9	10.6	60.8	12.0
Self-employed	85.6	n/a	88.0	n/a	78.5	n/a
Independent contractor, WS <sup>a</sup>	72.8	10.1	77.8	4.7	64.5	19.0
Independent contractor, SE <sup>b</sup>	75.1	n/a	81.5	n/a	61.4	n/a
Contract company	81.0	14.9	80.5	12.7	82.0	19.0
Regular part-time	76.6	18.5	78.5	19.4	72.0	15.9

<sup>a</sup> Wage and salary.

<sup>b</sup> Self-employed.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, The Current Population Survey (CPS) Supplements, Contingent and Alternative Employment Arrangements, February 2001; analysis by author.

**Table 6.2 Percentage of Workers with Pension Coverage, by Work Arrangement and Sex, 2001**

	All		Women		Men	
	Any coverage	Through own employer	Any coverage	Through own employer	Any coverage	Through own employer
All	60.4	52.8	59.3	52.4	61.5	53.3
All nonstandard arrangements	38.5	16.0	37.7	20.1	39.6	11.1
Full-time						
Temporary help agency	24.1	11.3	24.9	10.2	23.0	12.7
On-call/day laborer	51.9	47.7	48.2	40.4	53.3	50.4
Self-employed	51.7	n/a	38.8	n/a	57.0	n/a
Independent contractor, WS <sup>a</sup>	37.2	17.8	36.7	15.8	37.5	18.7
Independent contractor, SE <sup>b</sup>	44.5	n/a	44.4	n/a	44.5	n/a
Contract company	64.7	56.1	68.7	64.0	63.3	53.2
Regular full-time	68.3	66.2	68.9	66.5	67.9	66.0
Part-time						
Temporary help agency	7.7	2.2	11.5	3.3	0.0	0.0
On-call/day laborer	30.9	17.3	33.6	18.7	25.5	14.4
Self-employed	43.9	n/a	42.7	n/a	47.2	n/a
Independent contractor, WS <sup>a</sup>	32.7	8.8	28.0	4.3	40.1	15.9
Independent contractor, SE <sup>b</sup>	41.5	n/a	44.9	n/a	34.0	n/a
Contract company	27.5	14.5	28.3	17.1	26.1	9.6
Regular part-time	32.0	25.2	36.1	28.0	21.4	17.1

<sup>a</sup> Wage and salary.

<sup>b</sup> Self-employed.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, The Current Population Survey (CPS) Supplements, Contingent and Alternative Employment Arrangements, February 2001; analysis by author.

that shows that firms use nonstandard work arrangements to offset the high benefits costs of regular full-time employees (Abraham 1988).

### **Policy Evaluation**

While these findings for health insurance and pension coverage are not surprising given the design of the public policies, there is little evidence that public policy is moving to remedy the lack of coverage for workers in nonstandard employment. Temporary employment agencies have been sensitive to the criticism that workers are unable to receive health insurance; many of these agencies have begun to make it available to their workers. Despite the increased availability, few workers take advantage of the insurance, most likely due to the high costs relative to their earnings.

The health care and pension systems demonstrate the difficulty public policy has in adequately addressing incomplete markets, that is, those markets where there are only limited products available at a wide range of prices. From an economic efficiency standpoint (as defined above), it is unlikely that the market is efficient; many uninsured workers with health statuses similar to workers with insurance do not get health insurance as a result of where they work. Thus, many workers who have relatively low insurance costs go without insurance. From a social standpoint health insurance markets are very flawed. Many workers who initially have low-cost insurance go without medical care. Some of them get treatment too late, raising overall medical costs and potentially decreasing their health outcomes. Since employers who do not provide insurance bear only a fraction of the cost of uninsured workers, there is little economic incentive to provide insurance. From an equity standpoint these markets are very inequitable: workers in ostensibly the same work situation receive different compensation.

Perhaps the most important aspect of this policy is security. The analysis in Table 6.3 from the matched February/March 2001 Current Population Surveys indicates that workers in nonstandard employment are much more likely to report “fair” to “poor” health. Involuntary part-time workers (part-time workers who would prefer full-time work) are 4.5 times as likely to report diminished health status as regular full-time workers. This may be due to a variety of factors, not the least of which is employee self-selection: fewer healthy workers may choose

**Table 6.3 Percentage of Workers Reporting Health Status as “Fair” or “Poor,” 2001**

Employment type	Fair to Poor
Regular full-time	2.2
Contract worker	6.3
Independent contractor	6.5
On-call	7.5
Temporary help	10.3
Involuntary part-time	10.0

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, The Current Population Survey (CPS) Supplements, Contingent and Alternative Employment Arrangements, February 2001 and March Annual Demographic file 2001; analysis by author of matched February/March CPS data.

these forms of employment based on employment flexibility. However, this reduced health status does point to the need for health insurance coverage.

The rationale for government intervention is very strong in this case. Socially, the benefits of insuring this large group of workers are likely to be quite high, and the market has been unable to achieve these improvements on its own. However, it is unlikely that we will see government mandate that businesses cover these workers. Their lower health statuses imply that they would be increasingly costly to insure. Under these circumstances government intervention is warranted and necessary.

## **SOCIAL INSURANCE: UNEMPLOYMENT INSURANCE**

The provision of employer-provided health insurance or pensions fails to provide systematic coverage since only workers whose employers provide benefits and who earn enough to afford the benefits actually receive the coverage. In contrast, social insurance is provided for all people who meet certain eligibility requirements. These requirements often have a differential impact on workers in nonstandard employment arrangements. The most important form of social insurance that directly affects employees is unemployment insurance (UI).

## **Overview of Unemployment Insurance**

The UI system in the United States began with the Social Security Act of 1935, which provides the primary line of defense against earnings losses when workers become unemployed. For those eligible for unemployment insurance benefits, the typical state program provides 26 weeks of benefits at approximately 50 percent of the worker's normal wage. Although federal and state statutes have been revised periodically to increase the level of benefits, the basic system created by the act has remained the same. The most significant change is that the program now covers nearly all employees; therefore, nearly all employees or their employers pay unemployment insurance taxes. However, coverage does not mean eligibility. Unfortunately, this first line of defense is so porous that it leaves many full- and part-time workers uninsured.

The overall picture of unemployment insurance is one of a declining share of the full-time workers who lose their jobs receiving UI benefits (Blank and Card 1991; Vroman 1991; Wenger 2001). In this situation, workers may have to choose some form of contingent work as an earnings substitute for UI benefits. While this may be a good strategy in a robust economy, during periods of economic malaise even these nonstandard jobs will be hard to find. During the current recession, the temporary employment sector lost more than 900,000 jobs. Under these conditions temporary employment is not likely to provide income security to those who have lost jobs in other sectors.

The situation for workers in nonstandard arrangements is even bleaker. Eligibility requirements for hours of work and earnings are particularly onerous for contingent workers. Clearly, both these criteria are related: as hours decrease we see a commensurate reduction in earnings. Due to the sporadic nature of contingent work, hours and earnings are unpredictable, making eligibility difficult to establish.

### **Determining Eligibility for UI**

From the perspective of nonstandard workers, unemployment insurance has five major problems related to the determination of eligibility for UI. First, the system is biased toward regular full-time work. Workers with low wages and those with fewer than full-time hours may have difficulty qualifying for benefits.

Second, the system is confusing. A wide array of initial and continuing eligibility requirements create uncertainty about eligibility. Complex payment and benefit duration formulae confuse workers about the potential value of benefits. Limited labor market experience only compounds the confusion since contingent workers do not have stable employment relationships that allow them to share information about eligibility and benefit amounts.

Third, waiting periods prior to eligibility have a disproportionate negative impact on low-wage workers, especially those with limited resources. Many states have waiting periods for eligibility of one to two weeks. Families with limited resources may find a two-week waiting period financially unmanageable, choosing instead to return to contingent employment if they can find a job in that sector.

Fourth, the most difficult eligibility rules for a nonstandard worker to satisfy may be the rules that deny benefits if the worker refuses to accept a job offer. Part of the ongoing eligibility requirements in UI are the job search requirements. To collect unemployment benefits the unemployed must continue to search for work. In most states a worker who turns down any job offer is no longer eligible to receive benefits. Federal law does provide some worker protections by prohibiting states from denying benefits under the following conditions:

- 1) if the job vacancy was the result of a labor dispute;
- 2) if the wages, hours, or other conditions of the work offered fail to meet prevailing standards;
- 3) if joining a company union or being required *not* to join a bona fide union is a condition of employment.

Thirty-one states and the District of Columbia stipulate that the worker must be available for any type of work to maintain eligibility. Ten states require the worker to accept “suitable work,” although this has a broad definition and changes as the duration of unemployment increases. Finally, nine states require the worker to accept work in his usual occupation or in jobs for which he is reasonably matched due to prior training or experience. The penalties for turning down a job offer vary from a reduction in benefits to benefits being postponed for the duration of the unemployment (U.S. Department of Labor 1996).

However, the nonstandard labor market is so volatile that part-time job offers for work in nonstandard jobs may be a regular facet of this

type of employment. For workers who seek to leave contingent employment and use their unemployment insurance benefits to subsidize their search for a full-time job, requiring contingent workers to accept any position may amount to placing them in a UI eligibility trap from which escape to better employment is difficult. Thus, this type of eligibility requirement may be particularly difficult for a contingent worker to satisfy. Turning down a job offer in hopes of landing a better job may result in ineligibility.

Finally, a number of states explicitly exclude from eligibility workers who search for part-time work exclusively. These workers are considered “not available” for full-time work and consequently are not eligible to receive benefits (Wenger, McHugh, and Segal 2002). In essence these workers’ unavailability is evidenced by their substantial restrictions on the conditions of their employment. Consequently, for nonstandard employees, especially part-time workers, eligibility requirements may all but eliminate them from collecting UI benefits in some states.

Empirical evidence suggests that the eligibility restrictions take a much higher toll on contingent and nonstandard employees. Table 6.4

**Table 6.4 Percentage of Workers Satisfying Monetary Eligibility Requirements for Unemployment Insurance, 2001**

Type of employment	Status: Ineligible
Temporary help	15.9
Contract	6.8
On-call/day laborer	20.7
Independent contractor, WS <sup>a</sup>	63.1
Involuntary part-time	25.7
Voluntary part-time	30.0
Contingent worker type 1	26.3
Contingent worker type 2	30.5
Contingent worker type 3	11.6
Regular full-time	6.1

NOTE: Self-employed and independent contractors not paid by wage or salary are omitted since these workers are not covered by the UI system.

<sup>a</sup> Paid by wage or salary so covered by UI.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, The Current Population Survey (CPS) Supplements, Contingent and Alternative Employment Arrangements, February 2001 and March Annual Demographic file 2001; analysis by author of matched February/March CPS data.

**Table 6.5 Maximum Weekly Benefits, Lowest and Highest Paying States, 2000 (\$)**

Alabama	190	Massachusetts	477
Mississippi	190	Washington	441
Arizona	205	Pennsylvania	430
South Dakota	224	New Jersey	429
California	230	New York	405

SOURCE: U.S. Department of Labor (2001).

compares the monetary eligibility of contingent, nonstandard, and regular full-time workers.<sup>3</sup> Regular full-time workers are more likely than any other group to satisfy the earnings requirements for unemployment insurance. The workers least likely to be eligible are the independent contractors who are paid a wage or salary.

Previous earnings determine both who is eligible and the amount of benefits the unemployed receive. Those workers who have lower earnings and fewer hours of work receive smaller benefit amounts, and are likely to receive benefits for a shorter period of time. These differences in benefit calculations are not trivial; the maximum weekly benefit in different states varies by hundreds of dollars. Table 6.5 compares the maximum weekly benefits for the five highest and lowest paying states in the United States.

The difference in maximum weekly benefits between Massachusetts and Alabama is striking. From a policy perspective we can see both sides of the UI debate reflected in these two states. Lower-threshold earnings requirements increase the likelihood of being eligible but often result in low benefit levels. Conversely, higher benefit allowances usually require higher earnings and/or hours. These higher threshold levels may exclude low-wage workers from benefits.

One initially surprising empirical finding is that contingent and nonstandard workers receive higher benefit levels than their regular full-time counterparts. Considering only those who received UI benefits in 1994, nonstandard workers received on average \$2,781 (N = 417) while regular full-time workers only received \$2,349 (N = 2435). This is likely due to self-selection: only those contingent workers who expect higher benefit payments are likely to apply. Typically these are workers with higher incomes and steadier employment such as contract workers who are independent contractors in the least volatile employ-

ment arrangements and paid a wage or salary (see also Kunda, Barley, and Evans [2002]).

Consequently, it appears that there are two groups of contingent employees who view UI options quite differently: those who are reasonably certain of a high benefit amount are likely to choose to apply for UI. However, given the confusing array of eligibility rules and complex benefit formulae, we can speculate that a second group—probably the majority of contingent workers—find it easier to seek other contingent work rather than apply for benefits. Employees in this second group find that reentering the contingent labor market is a way of avoiding the waiting periods, uncertain benefit amounts, administrative hassles, and the potential social stigma arising from being an unemployed worker.

### **Policy Evaluation**

The nature of UI usage is changing. The new labor market actors, contingent and nonstandard workers, are not using UI in the same way that regular full-time workers use the system. Yet despite the reduction in use and inapplicability to new work forms, systematic change is unlikely. States compete among themselves to create favorable business conditions to attract employers. They are unlikely to yield to pressure from labor groups to systematically extend benefits to contingent workers that will increase the cost of labor for employers. When jobs are relatively plentiful, this lack of concern for the public policy reform may not be problematic. Rather than suffer from the social stigma that may occur from UI use, workers will remain productively employed in the labor force, even if in less than full-time positions. However, as the economic climate shifts toward recession, job availability diminishes and contingent employment becomes less of an option. The opportunity to use contingent work as a substitute for UI will be reduced for many of these workers. We therefore would expect UI rolls to increase because they will be more willing to tolerate the waiting period requirements, administrative hassles, and social stigma.

From a policy perspective, unemployment insurance includes many complicated components to analyze. Economic efficiency, as measured by the cost of adding workers in nonstandard arrangements to unemployment insurance, is not likely to be very costly. Wenger (2000) shows that the effects of unemployment insurance on the likelihood of workers

becoming unemployed are about the same for regular full-time workers and workers in nonstandard arrangements. It would appear that the cost per person of extending unemployment insurance benefits to workers in nonstandard arrangements is similar to the current per person costs of regular full-time employees.

Unemployment insurance suffers from considerable inequities. Particularly vexing is the inequity across states. Identical workers employed in different states will likely receive different benefit amounts, may have different eligibility outcomes, and may have different weeks of eligibility. This inequity is especially problematic to address since each state makes its own policy within loose federal guidelines. Creating a national policy from such a system would be nearly impossible since states control almost all of the important aspects of eligibility and benefits.

There can be little doubt that workers in nonstandard employment arrangements need UI. They are more likely to become unemployed and less likely to be eligible for benefits. The least stable of these arrangements, such as temporary employment, has both intermittent employment and low wages. This means that UI eligibility will be more difficult to attain due to low wages, but spells of unemployment are more likely due to sporadic employment. Overall, the current UI system is relatively inefficient, highly inequitable, and fails to provide security for a class of workers with considerable need. The justifications for government intervention are myriad. Government clearly has a role in easing the destructive forces that the market rains on the unemployed. Additionally, from a broader economic perspective, UI has a stabilizing effect on the economy as a whole (Chimerine, Black, and Coffey 1999). However, the real shortcoming of the current unemployment insurance program is its lack of modernization to adapt it to the new labor market realities in the United States.

## **SOCIAL INSURANCE: FAMILY AND MEDICAL LEAVE ACT (FMLA)**

One of the most recent additions to the U.S. social insurance system is the Family and Medical Leave Act (FMLA), enacted in 1993. The act

was established to “allow employees to balance their work and family lives by taking reasonable unpaid leave for certain family and medical reasons.” The act also seeks to promote the “economic security of families” and “national interests in preserving family integrity.” The FMLA accomplishes this by providing eligible employees with up to 12 weeks of *unpaid*, job-protected leave each year. Additionally, the act requires employers to continue to provide health benefits during the leave.

Unfortunately, for workers in nonstandard employment the FMLA provides at best a marginal benefit to those contingent workers who already have the option to sporadically leave the labor force for periods of time and receive no pay.<sup>4</sup> While the job protections and especially the preservation of health insurance may be of some benefit for contingent workers and those in nonstandard arrangements, eligibility rules and low levels of employer-provided insurance provide nearly nonexistent benefits.

### **Factors That Determine Contingent Workers’ Use of FMLA**

The FMLA eligibility requirements are much less complex than those for the UI system. However, they are far more likely to classify contingent and nonstandard workers as ineligible. There are three main criteria for FMLA eligibility: the employer must have more than 50 employees, and the employee must have worked for the employer for 12 months or more and worked a minimum of 1,250 hours in the previous 12 months (approximately 31 weeks of work at 40 hours per week). These criteria eliminate the majority of contingent workers from eligibility. Part-time workers (those who work year round fewer than 24 hours per week) or workers who move from job site to job site or who have multiple contracts are unlikely to satisfy the eligibility criteria.

The ability to use the FMLA leave option is determined by the work schedules of contingent workers. Not all workers in nonstandard employment have flexible schedules. For example, part-time workers may have little control over their work schedules. Contract workers may only be able to take time away from work between contracts. The self-employed must schedule time off during the ebb of customer demand. Consequently, for workers like these, the FMLA policies could provide flexibility while affording them some job security. However, contingent workers typically cannot afford the cost of taking the time off even if

they would benefit from the protections prescribed in the FMLA. Only long-term contractors and “perma-temps” are likely to benefit from the act. The primary benefit to these two groups is the continued availability of employer-provided health insurance during a leave of absence. However, because contingent workers are unlikely to receive employer-provided health insurance, this benefit will cover few workers, as shown previously in Table 6.1.

Thus, the FMLA is unlikely to be an important policy for contingent workers since very few will be able to satisfy the eligibility criteria. However, the FMLA has created an increased dependence on workers in nonstandard jobs since contingent workers are likely to be hired to replace regular full-time employees when they use the provisions of the act. As of 2000, 98.2 percent of all firms reported assigning work to other employees, while 41.3 percent reported hiring outside temporary-replacement workers. The use of temporary workers declined from 1995 to 2000, but their role in making FMLA successful remains important.

### **Policy Evaluation**

The FMLA does not perform well in terms of our four policy criteria of economic efficiency, equity, security, and liberty. It is clear that the policy was essentially formulated for workers in standard jobs where leaves of absence normally would require an employee to quit a job. Therefore, from an equity perspective, the FMLA program treats inequitably workers in nonstandard jobs who are excluded from this leave option. From the business perspective it would appear that there is little additional cost if all employees are allowed to take leave, regardless of how many hours of service a worker had rendered in the previous 12 months. However, it may be harder for employers to manage the loss of a full-time employee than a half-time employee.

Evaluating the FMLA on the criteria of security poses an interesting problem. Many nonstandard arrangements offer little flexibility. Consequently, workers in part-time and contract jobs may have a considerable need for the policy. In many cases, workers in these arrangements are more likely to meet the hours requirements for eligibility. For the other types of work arrangements such as temporary help agency workers, independent contractors, and the self-employed, these work forms may offer enough flexibility to be able to accommodate an unpaid leave.

After more than 12 years of experience with the FMLA, we have not managed to expand coverage, nor have we found a way to provide paid leave for those who need to take care of children or sick relatives. With an aging U.S. population the demand for this leave option is likely to increase. However, without a mechanism for paying for leave, much of that demand will go unsatisfied. Consequently, the federal government is likely to experience increased pressure to intervene.

Many of the U.S. labor market policies started by providing modest coverage, and over time that coverage has been expanded. This was true for UI, the minimum wage, and disability insurance. It remains to be seen whether the FMLA follows this path as well.

## MINIMUM WAGES

In contrast to the public policies discussed above, federal minimum wage legislation instituted with the Fair Labor Standards Act (FLSA) in 1938 provides nearly universal coverage. The FLSA establishes standards for minimum wages, overtime pay, and child labor. States may choose to set minimum wages above the federal level. As of January 2003, 11 states had minimum wage laws that exceeded the federal minimum wage.<sup>5</sup>

While the FLSA provides nearly universal coverage, there are two notable exceptions: the self-employed and independent contractors. As a consequence, nearly one-third of all workers in nonstandard employment arrangements are not covered by minimum wage laws. For those who are likely to be covered, such as workers at temporary help firms, on-call workers, wage and salary independent contractors, and part-time workers, they are more likely to earn low wages.<sup>6</sup> Table 6.6 shows mean wages by work arrangement and gender. Average hourly wages are lowest for workers in part-time jobs and those who work for temporary help agencies. Regression analysis that controls for human capital characteristics also shows that regression-adjusted wages are lower for part-time and temporary workers relative to full-time workers.

The low levels of the minimum wage, the decline of its real purchasing power, and tight labor markets throughout most of the 1990s have eroded the efficacy of the minimum wage.<sup>7</sup> Analysis of the Feb-

**Table 6.6 Average Hourly Wages (1999) and Percent Change in Wage Since 1997, by Work Arrangement and Sex**

	All		Women		Men	
	1999 Wage (\$)	% Change	1999 Wage (\$)	% Change	1999 Wage (\$)	% Change
Regular part-time	11.86	12.2	11.81	11.4	12.00	14.7
Temporary help agency	10.84	-2.9	10.00	-1.9	12.01	-2.0
On-call/day laborer	13.19	8.0	12.89	12.8	13.47	4.0
Self-employed	17.68	2.8	14.21	8.3	19.57	0.5
Independent contractor, WS <sup>a</sup>	17.42	15.6	15.76	22.5	19.10	10.0
Independent contractor, SE <sup>b</sup>	19.60	-0.8	17.66	-3.6	20.50	0.4
Contract company	19.09	13.7	16.86	15.4	20.15	13.7
Regular full-time	15.83	3.7	13.78	0.7	17.43	5.8
All	15.56	4.3	13.51	2.9	17.37	5.6

<sup>a</sup> Wage and salary.

<sup>b</sup> Self-employed.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, The Current Population Survey (CPS) Supplements, Contingent and Alternative Employment Arrangements, February 1997 and 1999; analysis by author.

ruary Current Population Survey Contingent Work Supplement from 1999 indicates that, overall, approximately 10 percent of the labor force in 1999 earned less than the federal minimum wage of \$5.50 per hour, as shown in Table 6.7. However, there were more low-earning workers in nonstandard arrangements than in regular full-time jobs. The only nonstandard group where the percentage of low earners was below the national average was contract workers. These findings may be somewhat misleading since many contract workers are self-employed and earn the difference between their revenue and expenditures, regardless of the number of hours worked. Consequently many of these workers have very low hourly wages. By contrast, workers in nonstandard arrangements who are employed by others are also much more likely to be low earners.

Since some state-set minimum wages are considerably higher than the federal minimum wage, they may provide more income security to contingent workers. In these states minimum wages ranged between \$6.15 per hour in Rhode Island and \$7.15 in Alaska. This means that considerably more workers in contingent employment will be covered by the minimum wage legislation in these states. In general, while all

**Table 6.7 Percentage of Workers in Nonstandard Arrangements Earning Less Than \$5.50 Per Hour, 1999**

Regular part-time	22.5
Temporary help agency	5.6
On-call/day laborer	17.1
Self-employed	18.6
Independent contractor, WS <sup>a</sup>	9.5
Independent contractor, SE <sup>b</sup>	12.1
Contract company	4.2
Regular full-time	4.5
All Nonstandard	15.1
All	9.9

<sup>a</sup> Wage and salary.

<sup>b</sup> Self-employed.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics, The Current Population Survey (CPS) Supplements, Contingent and Alternative Employment Arrangements, February 1999; analysis by author.

states are required to follow federal minimum requirements for the FLSA, many have chosen to raise the minimum requirements. This occurs more frequently when the federal government fails to maintain the real value of the minimum wage as in the 1980s.

### **Policy Evaluation**

The heterogeneity of workers across nonstandard employment arrangements means that earnings will vary. The lack of coverage for the self-employed and independent contractors means that the minimum wage is not a policy with a high score on equity. The economic efficiency considerations for the minimum wage have been written about extensively. In general, researchers argue that increases in the minimum wage result in a reallocation of labor that is not efficient. The standard claim is that increases in the minimum wage increase unemployment, thereby displacing lower-skilled workers. However, research conducted using quasi-experimental analyses of state minimum wage increases has called into question much of the earlier results.<sup>8</sup> There is little reason to believe that workers in nonstandard arrangements present a unique case in terms of efficiency. Empirical evidence suggests that the minimum wage does not cause meaningful reductions in efficiency within a relatively narrow range of values.

As with many of the other policies discussed in this chapter, the largest failing of the minimum wage is on the criterion of security. The people with the most exposure to the vicissitudes of the market are receiving neither enough coverage nor the same coverage. Simply stated, an increase in minimum wages will have a disproportionate impact on part-time workers and temporary help workers.

Perhaps the most controversial aspect of minimum wage policy from an economic point of view is determining whether the government has a legitimate role to play in setting a wage floor (liberty). Many economic analysts believe that markets are better suited to determining wages and that government intervention is unwarranted. This neoclassical or libertarian viewpoint overlooks some of the inequities between the parties negotiating a wage. Employers are in a much better bargaining position; they have more resources, more information, and more bargaining power. Workers in contingent employment arrangements are often at a disadvantage. They have limited bargaining power, largely as

a result of many people vying for the same job, and often have limited information about the job requirements and hence an appropriate wage. In these cases it would seem appropriate to impose a collective outcome on the lowest wage earners and employers.

## **OTHER EMPLOYMENT POLICIES: SAFETY AT THE WORK SITE**

The discussion in this chapter has shown that many of the employment policies in the United States were enacted before the large shifts to contingent and nonstandard employment occurred. The fundamental problem with these policies is that their institutional development took place at a time when the contingent workforce was minuscule. As the nature of work and U.S. labor markets have changed, public policy has increasingly relied on the judicial interpretations of the statutes rather than redesigning the policies to keep pace with the changing patterns of employment. Many of the statutes that seek to provide other protections for workers, such as the reduction of discrimination, protection from workplace hazards, and the protection of workers' rights to fair wages and work conditions, also suffer from these same drawbacks.

Although the Occupational Safety and Health Act of 1970 (OSHA) is used here to illustrate the problems inherent in much workplace law, these lessons are applicable across a broad range of workplace policies. Included among these are the National Labor Relations Act (1935) that governs collective bargaining activities, the Fair Labor Standards Act—Equal Pay Amendment (1963), the Civil Rights Acts of 1964 and 1981, the Age Discrimination in Employment Act (1967), the Americans with Disabilities Act (1990), as well as a host of federal and state labor and employment statutes (Maltby and Yamada 1997).

The mandate of OSHA is to provide, inasmuch as is possible, a safe and healthful work environment for every working man and woman in the United States. The continuing problem for OSHA has been determining who is responsible for providing this safe and healthful workplace as these new employment relations and forms of work have been developing. OSHA places this burden squarely on the employer. The *employer* has the responsibility of providing “a place of employ-

ment which is free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees” (OSHA 1970). However, identifying the employer is not always easy. One illustrative example is the case of workers employed through a temporary help agency who have dual employment relationships: they have one administrative employer (the employer of record) such as a temporary help agency, and a host employer where the work is actually performed. Considerable litigation has resulted around this coemployment issue (see Chapter 5 for more details).

Thus the determination of who employs the worker is the first step in determining the party responsible for carrying out the mandates of OSHA. The issues can be thorny. The administrative employer such as the temporary employment agency has little control over the risk associated with working at the host employer’s work site, and may have only limited knowledge of the potential employment hazards. As a consequence, an information asymmetry is established. This may result in workers being unfamiliar with the risks associated with the work. Worse yet, the information asymmetry may be exploited by host employers who use temporary workers to perform tasks or work under conditions that their regular full-time employees would find objectionable.

The problem that has created much concern is employers classifying their workers to evade the requirements of various federal labor and employment laws. The legal issues center on the legal definitions of “an employee” (Carnevale, Jennings, and Eisenmann 1998). While numerous criteria have been used, the policy consensus reached by the Commission on the Future of Worker Management Relations recommends that a single definition of employer be developed based on the “economic realities” test employed by the courts (Dunlop Commission 1995). The commission recommends “adopting a single definition of employer for all workplace laws based on the economic realities of the employment relationship.” The commission also advises the National Labor Relations Board to develop policies governing joint employment relationships to prevent employers from using “contract arrangements . . . as a subterfuge for avoiding collective bargaining or evading other responsibilities under labor law” (p. 4).

## Policy Evaluation

Perhaps the largest single factor relating to the inadequacy of our public policies and the concomitant gaps in coverage for contingent workers is multiple employer relationships for these workers. Enforcement of antidiscriminatory or sexual harassment laws is difficult under these circumstances. The differences in coverage for contingent workers and noncontingent workers is a considerable source of inequity. A worker employed by a temporary agency has the same rights as the permanent worker, but the mechanism for enforcement is not available. In this sense the contingent worker may be treated in a highly inequitable manner.

From an economic efficiency standpoint, there is no reason to believe that enforcing the health, discrimination, and equal pay rules for contingent workers would be more costly than enforcing them for regular full-time workers. However, from a security standpoint, contingent workers are more likely to need the protections since there are opportunities for employers to take advantage of the information asymmetries described earlier. If contingent workers are hired for the purpose of “protecting” core employees this would result in an increased role for government to ensure security for these workers.

## CONCLUSIONS AND DIRECTIONS FOR FUTURE RESEARCH

Labor market policies in the United States rarely work for contingent and nonstandard workers. The problem is twofold: U.S. employment policies were not designed to protect contingent and nonstandard employees, nor have they kept pace with evolving trends in employment. The fault lies with the development and evolution of labor market policies rather than with the employers and employees.

Public policies that fail to meet their objectives represent an opportunity for change. While any revisions will be complex matters of law, they should be based on consistent criteria.

- 1) **Economic efficiency.** Policies should be efficient in that they should not be so onerous as to cause undue hardship to employ-

ers or eliminate the practice of contingent work. Since there is some evidence that both employers and employees benefit from certain types of contingent and nonstandard employment, eliminating or curtailing the practice may do more harm than good.

- 2) **Equity.** Policies should be fairly and justly applied to all workers regardless of their employment relationship. To the extent possible, coverage should be extended to all employees regardless of occupation, industry, or firm size.
- 3) **Security.** Policies should be targeted to protect the most vulnerable workers from the volatility of the market. There is considerable evidence that workers in nonstandard arrangements are exposed to more market volatility than other types of workers. If this is truly the case, then protecting these workers through social insurance and public policy is important.
- 4) **Liberty.** To the extent that governmental intervention is unnecessary, markets and private parties should be allowed to operate. However, private markets for the provision of disability and unemployment insurance have not been forthcoming. Markets are not likely to provide many protections to these types of workers due to their limited bargaining power relative to employers.

Analysts should avoid understanding liberty as the freedom from government intervention. Liberty is a much broader concept, and individual preferences may be such that freedom from fear and want outweigh freedom from intervention. On occasion, liberty may justify governmental intervention in the market rather than thwart it.

Making employment policy more economically efficient, equitable, and just means that both employers and employees understand their rights and responsibilities. Furthermore, these rights and responsibilities are universal: they do not depend on the class or kind of employment. To that end reform should promote economic efficiency, equity, and security for both employers and employees. Therefore, reforms should do the following:

- Simplify the eligibility rules for workplace policies such as unemployment insurance and family and medical leave. Addition-

ally, reforms should extend these benefits to cover all workers regardless of the industry or size of employer.

- Extend unemployment insurance so that it provides health insurance during the period of unemployment. This could be done by paying the COBRA copayment to the previous employer.
- Strengthen the public pension system. Since so few workers in nonstandard employment receive a pension from their employers, many more nonstandard workers will have to rely on the public pension, Social Security. Nearly all workers are covered by Social Security, and 40 quarters of work are enough to qualify a worker for benefits, but the system must be made fiscally viable in the future to guarantee benefits for the next generation.
- Increase the portability of benefits. For example, once eligible for family medical leave, a worker would remain eligible so long as they continued to work—even after they change jobs.<sup>9</sup> Additionally, increased pension portability would expand coverage for workers who move from employer to employer.
- Provide incentives to business to allay some of the costs associated with increased coverage and portability.
- Adopt the Dunlop Commission’s recommendation calling for “a single definition of employer for all workplace laws.”

If enacted, these policy recommendations would provide increased coverage for contingent and nonstandard workers by making them equivalent, at least in the eyes of the government, to regular full-time workers.

All responsible policy recommendations walk a fine line between job creation and employee protection. Those concerned with the rights of workers believe too little is being done to protect them from the hazards and vicissitudes of the labor market and workplace. Others believe that saddling business with the burden of workplace protections reduces employment and leads to a more insidious harm, strangling innovation and job creation.

It can be argued that the development of contingent and nonstandard employment forms was, and continues to be, a direct response to the increasing burden placed on firms in the form of new legislation. In particular, Autor (2001) has found that limitations on the employment-

at-will doctrine have resulted in an increased use of temporary help by firms. (Employment-at-will basically guarantees the employer the right to fire or lay off an employee without cause. In many states the courts have curtailed the rights of employers to dismiss workers.) In programs such as UI and disability insurance, employer costs are experience-rated; that is, employers are required to pay premiums based on their employees' claims. More claims result in higher payments. Experience-rated programs create incentives for firms to hire contingent workers so that when a worker is laid off or injured, the claim is made against the temporary firm. If policymakers believe that legislation protecting workers from discrimination, unemployment, and workplace hazards is important, they must work to close the loopholes that currently exist and make the system flexible enough so that responding to changes in employment relations is readily accomplished.

Given the increasing role of nonstandard employment both domestically and internationally, the need for policy changes is likely to become more pressing. The U.S. labor force is becoming older and the society is experiencing more inequality. As a result, nonstandard employment will likely increase over time as workers demand flexible work schedules and employer demand for nonstandard employment services increases.

### **Directions for Future Research**

Scholarship on nonstandard employment to date has focused primarily on identifying nonstandard workers by their characteristics and motives for engaging in this type of employment arrangement and why this type of employment has grown. Recent research has begun to outline the deficiencies of current public policies in achieving the goal of protecting these workers by providing them with the same safety net available to regular full-time employees. The next phase of research will have to answer the question "What can be done?" Much of the challenge of this research is that it must transcend traditional disciplines and employ an interdisciplinary approach. Four topics worthy of further research are discussed below.

First, the excellent economy of the latter 1990s masked considerable inequalities in the U.S. labor force. With the onset of recession in 2001, health insurance coverage and pension coverage have emerged as

areas of concern. As health insurance costs continue to climb, coverage for workers in nonstandard employment will become more difficult to secure. Shoring up the existing Social Security program will become more important as the labor force ages. In both these cases research should be done that specifically focuses on older workers in contingent or nonstandard work arrangements. In particular, to what extent was reemployment in contingent work necessary for the older retirees who lost considerable sums in the equities markets? How will the lack of health insurance coverage impact the health of older workers in these types of employment?

Second, recessionary periods always refocus attention on the social safety—in particular, the unemployment insurance system. The UI system is rife with inequality and fails to provide the security that many workers need. Policy research about the design of a system that better serves a more dynamic and mobile labor force than the one the current system was created to serve is much needed.

Third, casual empiricism indicates that few contingent workers are eligible for FMLA benefits. However, to understand the factors determining need, the Commission on Family and Medical Leave (1996) recommends “additional research should be done to assess the impact of family leave policies (both those required by the FMLA and those voluntarily provided) on temporary, part-time and contract workers.”

Finally, as this chapter has repeatedly noted, eligibility criteria determine who is covered under a specific law. Since the Fair Labor Standards Act does not cover the self-employed, there is an increasingly large group of workers who are not protected by this act and its provision for overtime pay. Other workers are not covered by minimum wage laws for similar reasons. One promising area of research is to investigate how well the Fair Labor Standards Act is operating. Are workers being misclassified as independent contractors to avoid payroll taxes? Have workers used nonstandard employment to lower their experience ratings on social insurance?

Workers in the United States have come to expect certain characteristics in a “good” job: reasonable wages, health and pension coverage, and government policies that protect them from the volatility of the market (Kalleberg, Reskin, and Hudson 2000). Unfortunately, many workers in nonstandard employment cannot expect any of these. Wages are typically below those of their full-time counterparts, pension and

health insurance coverage are limited, and government policies have not kept pace with these changes in the workforce.

The four main criteria used in this analysis—economic efficiency, equity, security, and liberty—demonstrate very clearly the inadequacy of much of our safety net for contingent workers. The irony is that many of the policies that are inequitable (those that deny coverage to many contingent workers while covering the full-time labor force) are also those that would provide much-needed security to the contingent workforce. In essence, the workers who most need protection from the vicissitudes of the market are denied coverage. Extending coverage to contingent workers will likely cost more, but not disproportionately, so that making most of these extensions in coverage is relatively efficient.

It is the issue of liberty around which much of the debate centers. The legitimate role of government to intervene is hotly contested and will be the battleground for this issue for years to come. Future research on expanding the safety net for those in need will help determine how the characteristics of “good jobs” can be extended to nonstandard employment. But research alone will not make political decisions to extend the legitimate role of government. A deeper understanding of government’s role coupled with political pressure remains the catalyst for that type of change.

## Notes

1. Typically, an employer must have at least 20 employees and offer a health insurance plan. COBRA allows continued coverage only for those who would be losing coverage for certain reasons such as the loss of a job, the reduction in hours of work, the death or divorce of a parent or spouse, or the change in status as dependent.
2. For a more general discussion of the role of professional part-time employees, see Lawrence and Corwin (2003).
3. Monetary eligibility is determined by state requirements. It is a measure of whether a worker earned enough to qualify for the state’s minimum benefit.
4. While the FMLA is not likely to provide much benefit to workers in contingent and nonstandard employment arrangements, this should not be considered a wholesale criticism of the policy. There is considerable evidence that the policy provides real benefits to those 50 percent of full-time workers covered by the policy in small firms and the 95 percent of full-time workers covered by the policy in large firms (Waldfogel 1999). However, the use of the FMLA leave has been fairly modest. About 1.2 percent of all employees took leave under

the provisions of the FMLA between its enactment and 1999 (see Cantor et al. 2001). Those who needed leave but did not take leave represent 3.4 percent of the sample. When asked, employees consistently remark that this low level of usage is brought about by the lack of paid leave. Of those who needed leave for a birth or illness in the family, fully 63.9 percent of respondents claimed they “cannot afford the accompanying loss of wages” (Cantor et al. 2001).

5. Alaska (\$7.15); California (\$6.75); Connecticut (\$7.10); Delaware (\$6.15); Hawaii (\$6.25); Maine (\$6.25); Massachusetts (\$6.75); Oregon (\$6.90); Rhode Island (\$6.15); Vermont (\$6.25); Washington (\$7.01).
6. Wage and salary independent contractors are paid on a regular basis with a wage or salary instead of by the task.
7. From 1981 until 1990, the nominal value of the minimum wage remained constant at \$3.35, while its real value shrank due to inflation. Phased increases in the minimum wage from 1995 through 1997 have done little to restore it to its pre-1980 levels.
8. There is considerable evidence that the employment disincentives have been overstated by previous research (see, for example, Card and Kreuger 1995).
9. The only way to reform these types of policies is to generalize and make portable a fund for both UI and FMLA. In this way workers make contributions to the UI and FMLA funds. Once sufficient payments have been made, a worker may draw them down. This eliminates eligibility requirements and long-term employment relationships necessary for eligibility without eliminating the work requirement of the policy.

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Sandra E. Gleason  
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