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The Role of Multiemployer Defined Benefit Plans in an Era of Phased Retirement

**Denise M. Clark, Esq.
Shareholder
Feder Semo Clark & Bard, P.C.**

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I. Introduction

The nature of work and the workplace has changed significantly over the years. During most of the twentieth century, an employee expected to spend most, if not all, of his working life with one employer and then retire with a token of a job well done, usually a gold watch, and a small retirement benefit. During this same period, an employer relied on long-term relationships with its employees, who, after developing valuable skills, often became economically irreplaceable. Moreover, the industrial landscape permitted employees having similar skills, craftsmanship, and interests to pursue organized economic advancement through the labor movement. Those relationships further enhanced their skills, wages, benefits, and voice in the workplace.

Toward the end of the twentieth century, the nature of work and the workplace no longer relied upon long-term work relationships. Employers no longer included in their business models highly skilled and highly compensated labor. Instead, employers often looked outside of the United States for their labor needs, often finding cheap non-skilled labor. This was particularly true in the automobile industry. In response, America's workforce no longer began to expect long tenures with the same employer. Moreover, changes in technology, international competition in labor markets, and employer and employee expectations redefined the employment relationship. These changes also lessened the role of the labor union in the American workforce. This was crystallized when the Reagan Administration fired 11,000 members of the striking air traffic controllers' union in August 1981.^{1/}

America's new generations have achieved additional credentials to ensure that their work lives would be in their control. That change has manifested itself in employee mobility and workplace flexibility, which now factor quite heavily in the employment relationships of all U.S. industries. Unlike previous generations, the current generation is unburdened by "lifetime" employment, free to experiment with unorthodox work arrangements such as telecommuting, and unfettered by traditional workdays and workweeks. With this newly found (or perhaps imposed) liberty, though, comes a price: the securities once available to traditional workers, however small they may have been, are slowly disappearing. And as might be expected, traditional models concerning

^{1/}*The Changing Situation Of Workers and Their Unions*, a report by the AFL-CIO Committee on The Evolution of Work (1985).

employment, retirement, and retirement benefits are fast becoming outdated.

Arguably, more people enter a workforce as a result of traditional employment boundaries disappearing. But many workers—new entrants and previously full-timers alike—have been relegated to contingent worker status, which, if defined loosely, means a worker who has no expectation of regular, full-time employment (typically 40 hours per week). By some estimates, these workers compose approximately 30% of the total workforce.^{2/} Many of these workers work in temporary jobs involuntarily, make less money, and have none of the benefits that accompany traditional full-time positions.^{3/} Clearly, these workers would benefit from union representation and collective bargaining. Unfortunately, to the extent that workplace efficiency drives workplace staffing, the temporary nature of an employee's work history with an employer makes union organizing very difficult because the tenure of many workers is short and the workplace experience alienating.^{4/}

Parallel to the changing dynamics of employment relationships have been the evolving ideas regarding retirement. Many workers now consider “phased retirement” instead of a traditional cut-off date that completely severs an employment relationship. In phased retirement, workers do not withdraw completely from the workforce, but they work in some form of reduced capacity, such as part-time or temporary. Thus, these “phased retirees” are merely one type of contingent worker.

Phased retirees, as well as other contingent workers, are presented with unique problems regarding retirement benefits, to the extent that they are participants in a defined benefit plan. Additional benefits may not accrue due to the reduction in work hours. Moreover, benefits may be suspended during periods of active work. Although defined contribution plans have become increasingly popular among employers—primarily because they require little financial commitment or administration on the part of the employer—many contingent workers, union and nonunion alike, seek additional security in their retirement. For these employees, a defined benefit plan may meet their needs best.

^{2/}Advisory Council on Employee Welfare and Pension Benefit Plans, U.S. Dep't of Labor, Report of the Working Group on the Benefit Implications of the Growth of a Contingent Workforce (10 Nov. 1999); see also Richard S. Belous, *Symposium: The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863 (1995).

^{3/}Jonathan P. Hiatt and Lynn Rhinehart, *The Growing Contingent Work Force: A Challenge For the Future*, 10 The Labor Lawyer 143 (1994).

^{4/}See *The Changing Nature of Work*, pp.349-391 (1998).

Appropriate amendments to the Employment Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code) could permit phased retirees to continue to accrue benefits for their active work while receiving a portion of their retirement benefit. In the multiemployer plan context, these changes could also provide unions with a significant organizing tool—the ability to offer a defined retirement benefit for contingent workers. Currently, because contingent workers work fewer hours, have erratic schedules, and work for several employers throughout the year, neither ERISA nor the Code provide defined benefit plans the mechanism to offer meaningful benefit accrual and vesting schedules for those workers.

To address the needs of phased retirees, this article recommends changes to current laws affecting employee benefits, which would provide substantial retirement security for these and other contingent workers. Part II of this article describes the players and plans which may benefit from phased retirement. Part III addresses problems that contingent workers confront in obtaining retirement benefits. In Part IV, the rights of contingent workers are examined as they are being defined by the courts and the legislatures (Defining The Rights of Contingent Workers: Litigation and Legislation). Finally, Part V recommends changes to make multiemployer defined benefit plans work for phased retirees and other contingent workers.

II. The Players And The Plans

A. Unions: Finding Innovative Ways of Reaching the Contingent Workforce

America's labor movement has always stressed the importance of collective activity by workers. However, America's labor laws have permitted employer intimidation at a level that has significantly harmed union representation campaigns.^{5/} As the labor movement began to make strides in overcoming the effects of employer intimidation, the National Labor Relations Board (NLRB) began to dissect which employees were and which employees were not properly members of a bargaining unit, again attacking the voluntary collective action of workers.^{6/} In fact, the labor laws, which were designed to protect employees, have been interpreted to deny employees appropriate protections, as well as access to union representation through collective activity.

^{5/} See Paul Weiler, *Promises to Keep: Securing Workers' Rights To Self-Organization Under the NLRA*, 96 *Harvard Law Review* 1796 (1983).

^{6/} See Christopher L. Tomlins, *The States and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880-1960* Cambridge University Press (1985).

Over the years, the NLRB has been drawing lines between which individuals in the workplace are employees and which individuals in the workplace are independent contractors. Under the “right-to-control” test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in achieving such ends. Where a Company controls only the final result sought, an independent contractor relationship exists.^{7/} Although in subsequent rulings, the NLRB concluded that the common-law agency test, which focuses on all incidents of an individual’s relationship with an employer to determine whether or not “employee” status exists, the fact-based analysis of “control” has resulted in varying rulings regarding employee status.

Coverage under other employment laws is keyed to an individual meeting the definition of “employee.” Temporary workers referred to employers by agencies are typically deemed to be the employees of the referral agency, not the employer to who he or she has been dispatched. These referral agencies typically do not offer retirement and health benefits to the temporary workers. Moreover, because the employer contracting with the referral agency views those temporary workers as not being its employees, they are not entitled to the benefits the employer has established for its full-time staff. In this instance, the employee must establish that the referral agency and the employer to which the employee has been dispatched are “joint employers” to secure coverage under the existing labor laws. However, the process of establishing the facts supporting the legal theories favoring contingent workers is expensive and time consuming. Typically, many of the interested workers may be lost in the process.

These legal challenges make union organizing very difficult, although not impossible. In fact the labor movement has had some victories in securing a voice for contingent workers. For example, the building trades unions of the AFL-CIO have launched a national campaign highlighting abuses of temporary employment in the construction industry and have begun organizing temp workers to help them win a voice at work. The Atlanta Building Trades Council joined forces with day laborers who are suing Labor Ready over the company’s

^{7/}*Roadway Package System, Inc. and General Drivers, Warehousemen and Helpers Local 89*, 288 N.L.R.B. 196, 198, 128 LRRM 1016 (1988). See also *Roadway Package System, Inc., and Wholesale Retail Food, Distribution, Teamster Local 63*, 326 N.L.R.B. 72, 159 LRRM 1153.

policy of deducting a fee, ranging from \$1.00 to \$1.99, from workers when they redeem their day's cash wages from the company's cash-dispensing machines.^{8/}

Unions are also developing new models of representation for contingent workers who, by choice or otherwise, will likely continue to fall outside the traditional employer-employee relationship. Last year the New York State Psychological Association, a membership association of about 3,300 mostly self-employed psychologists, affiliated with the New York State United Teachers and the American Federation of Teachers (AFT). The unions and the association will join forces to advocate legal reforms designed to curb managed care abuse and protect professional standards; they are also exploring strategies for providing benefits to the association's members. In addition, the AFT is collaborating with Working Today to explore the development of a portable benefits program for part-time and self-employed professionals.^{9/}

In Washington State, the Communication Workers of America (CWA) has chartered a new local, WashTech, an organization of high tech workers formed in the wake of the successful "permatemp" litigation against Microsoft. In addition to organizing to win a voice at work for high tech employees, WashTech and CWA are lobbying to secure greater protections for all high tech workers, regardless of their classification, and are exploring strategies for providing benefits and bargaining on behalf of agency employees. AFSCME and OPEIU are organizing among self-employed doctors and dentists in several states.^{10/}

In San Jose, the South Bay Central Labor Council and Working Partnerships USA have established Together@Work, a labor-led temporary employment agency that aims to raise standards for temporary employment in the Valley, thus affecting industry practices, raising the wage floor for low wage earners, and providing greater employment stability. Together@Work temps earn higher hourly wages than other agencies' temps and they receive pension, health benefits, and training. To ensure quality, Together@Work meets regional skills standards prescribed by an employer advisory council.^{11/} It remains to be seen whether this approach will enhance the working life of the contingent workforce.

^{8/}Statement by John J. Sweeney, AFL-CIO President on New GAO Report Shows Contingent Workers Income and Benefits lag. (July 26, 2000), at <http://www.aflcio.org/publ/press2000>.

^{9/}*Id.*

^{10/}*Id.*

^{11/}*Id.*

^{12/}For purposes of Section IV, an exact definition is not necessary.

B. Contingent Workers: A General Snapshot

Since the early- through mid-'90s there has been no consistent definition of a contingent worker.^{12/} In fact, the definition has broadened to encompass many types of employee-employer relationships that are not full-time work. Depending upon the categories of workers included in the definition, contingent workers have been estimated to account for as much as 30% of today's total workforce.^{13/} The Society For Human Resource Management simply defines a contingent worker as one who does not expect regular, full-time employment,^{14/} while the Bureau of Labor Statistics (BLS) defines a contingent worker as any person who holds a job that is temporary or not expected to last.^{15/}

A liberal definition of contingent worker would include:

- *Self-Employed Workers* – doctors, restaurant and shop owners, etc.
- *Standard Part-Time Workers* – individuals who regularly work fewer than 35 hours a week for a particular employer and are wage and salary workers
- *Leased Workers* – individuals who work for leasing companies
- *Day Laborers* – individuals who get work by waiting at a place where employers pick up people to work for the day, such as low-skilled construction workers
- *Agency Temporary Workers* – individuals who work for temp employment agencies and are assigned by the agencies to work for other companies
 - *Direct-Hire Temps* – temp workers, such as seasonal workers, hired directly by companies to work for a specific period of time
 - *On-Call Workers* – individuals who are called to work only as-needed, such as substitute teachers and construction workers provided by union hiring halls
- *Contract Company Workers* – individuals who work for companies that provide services to other firms under contract, such as security or computer programming
- *Independent Contractors* – individuals who obtain customers on their

^{13/}U.S. General Accounting Office, Report to the Honorable Edward M. Kennedy and the Honorable Robert G. Torricelli, U.S. Senate, Contingent Workers, Incomes and Benefits Lag Behind Those of Rest of Workforce (hereinafter "GAO Report") (12 June 2000); see also Belous, *supra* note 1.

^{14/}Society For Human Resource Management, *What Is Contingent Work?*, at <http://www.shrm.org/foundation/conexcerpt1.html> (last visited July 1, 2001).

^{15/} Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (Feb. 1999) (considering the following groups: alternative employment arrangement workers, agency temporary workers, on-call workers, contract workers, and independent contractors), see <http://stats.bls.gov/news.release/conemp.nes.htm> (last visited June 2001).

own and provide a product or service (*for example*, maids, realtors, or management consultants)

In studying the 1999 BLS Contingent Work Supplement, the General Accounting Office made several key findings. First, as might be expected, contingent workers are more likely to have lower incomes than traditional workers.^{16/} For instance, on average, 14.8% of contingent workers belong to families with incomes below \$15,000, whereas only 7.7% of standard full-time workers are similarly situated.^{17/}

Second, contingent workers are less likely to have health insurance, benefits, or employer-provided pensions than traditional workers.^{18/} To compare extremes, only 9% of agency temps have employer-provided health insurance, whereas 73% of standard full-time workers are covered under their employers' sponsored plan.^{19/} Additionally, only 43% of agency temps have any source of health insurance, while 88% of standard full-time employees are covered under some form of insurance.^{20/} The statistics are similar for other employer-provided benefits.

Finally, contingent workers are less likely to be covered by key laws designed to protect workers.^{21/} For example, under ERISA, employers are permitted to exclude workers from their pension plans who have worked fewer than 1,000 hours in a 12-month period.^{22/} Likewise, the Fair Labor Standards Act (FLSA) exempts agricultural employers from the overtime pay requirement.^{23/}

The Department of Labor (DOL) also analyzed the 1999 BLS Contingent Work Supplement. However, it focused on worker coverage status under employer-provided pension plans. With respect to employee sponsorship of plans, the DOL made several findings. First, the employment rate in firms offering plans was 64% for full-time employees, but only 37% for part-time employees.^{24/} Second, 26% of women workers were employed part-time,

^{16/}GAO Report 12.

^{17/}*See Id.*

^{18/}*See Id.*

^{19/}GAO Report 22.

^{20/}*See Id.*

^{21/}*See Id.*

^{22/}GAO Report 30.

^{23/}*See Id.*

^{24/}Department of Labor, *Coverage Status of Workers Under Employer Provided Pension Plans, Findings From the Contingent Work Supplement to the February, 1999 Current Population Survey*, available at <http://www.dol.gov/dol/pwba/public/programs/opr/CWS-Survey/hilites.html> (last visited July 2001).

compared to only 12% of men workers.^{25/} Third, only 40% of workers under age 25 were employed by a firm offering a pension plan, compared to 67% of workers age 35 and older.^{26/}

The DOL also examined pension participation rates and participation rates in firms with plans. The overall pension coverage rate was 51% for full-time employees and 14% for part-time employees.^{27/} Those participating included 47% of whites, 41% of blacks, 38% of Asian and Pacific Islanders, and 27% of Hispanics.^{28/} Regarding earnings levels, pension participation was 3% for workers earning less than \$200 per week, 54% for workers earning \$500-\$599, and 76% for workers earning \$1,000 or more per week.^{29/}

Although 75% of workers participated in plans when their employers offered them, several barriers, such as eligibility requirements, mandatory employee contributions, and low wages discourage or prevent many contingent workers from participating in plans.^{30/} The most common reasons cited by employees for nonparticipation, in rank order, include: (1) failed to meet the plan service or age requirements; (2) chose not to participate (presumably, workers declined employee contribution plans, such as 401(k) plans); or (3) excluded because of part-time status.^{31/}

C. Phased Retirees: A Type of Contingent Worker

The concept of retirement continues to change. During this evolution, the term “phased retirement” has come to represent the reality that the end of one’s work life is no longer sharply defined. Instead of an employment void, a growing number of retirees anticipate retirement that includes some form of work.^{32/} According to a recent survey, phased retirees may reduce their workload by performing part-time or temporary work, by reducing their work

^{25/}*Id.*

^{26/}*Id.*

^{27/}*Id.*

^{28/}*Id.*

^{29/}*Id.*

^{30/}*Id.*

^{31/}*Id.*

^{32/}American Association of Retired Persons (AARP), *Update On The Older Worker: 1997-Participation Rises and Unemployment Falls* (interest in part-time employment rises with age as older workers are more likely than their younger counterparts to work part-time by choice. For example, as of 1997, 39% of working women age 55 or older were voluntary part-time workers; the comparable figure for women under the age of 55 was 28%. Just 23% of older men chose to work part-time, but that was the case for only 13% of younger men), at http://research.aarp.org/econ/dd33_older.html (last visited 18 July 2001)

day or work week by performing consulting services, by transferring to different jobs within a company, or by taking an extended leave of absence.^{33/}

Contributing to the popularity of phased retirement is a growing need for skilled workers to remain in the workforce, coupled with the desire of many soon-to-be retirees to supplement their income, either out of necessity or otherwise.^{34/} For example, employers give the following reasons for implementing phased retirement: to retain skilled workers (49%), to allow workers to retire gradually (28%), to facilitate training new workers (6%), and to control early retirement costs (1%).^{35/}

Similarly, 80% of Baby Boomers plan to work at least part-time during their retirement, whereas only 16% report they will not work at all.^{36/} Moreover, the removal of the earnings cap for retirees between the ages of 65 and 69 is expected to encourage recent retirees and those nearing retirement to continue working and to help ease employers' hiring needs in the currently tight labor market.^{37/}

Broken down by industry sector, employers permitted phased retirements most often in educational services (36%) and professional/technical industry sectors (25%).^{38/} Following those two sectors were public administration (21%), health/social services (18%), and wholesale industry sectors (13%).^{39/} Eleven percent of employers in each of the manufacturing, the information services, and the finance/insurance industry sectors allow phased retirement.^{40/} Lately, in the

^{33/}Watson Wyatt Insider, *Phased Retirement: Reshaping the End of Work*, available at http://www.watsonwyatt.com/homepage/us/new/insider/new/1999/1999_09_06.asp (last visited 15 July 2001) [hereinafter "Watson Wyatt"].

^{34/}While a number of workers look forward to a voluntary semi-retirement, there may be an increasing number of workers who will have an *involuntary* semi-retirement, due to financial limitations. The age of eligibility for full Social Security benefits, commonly referred to as the "normal retirement age," will increase gradually over the next 25 years, from age 65 to 67. As a result, workers may seek part-time employment to supplement income during the years of extension or to supplement an early retirement Social Security benefit. Moreover, some older workers who seek employment may be limited to part-time or temporary work, due to health restrictions.

^{35/}See Watson Wyatt, *supra* note 22.

^{36/}See AARP Update, *supra* note 21.

^{37/}Christopher J. Gearon, *Legislation Courts Older Workers*, Population Reference Bureau: Population Today: August/September, http://www.prb.org/pt/2000/August2000/Legislation_Courts_Older_Workers.html (last visited March 2001).

^{38/}See Watson Wyatt, *supra* note 22.

^{39/}*Id.*

^{40/}*Id.*

utility industry, 7% of employers permitted phased retirement.^{41/} Given the current environment, phased retirement is fast becoming an attractive employment option for employers and employees alike.

It is anticipated that by the year 2010, the labor force growth will approach zero and that between now and 2006, the number of workers age 25 to 34 will shrink by approximately 9%.^{42/}

D. Defined Benefit Plan

A defined *benefit* plan (germane to this article) is distinct from a defined *contribution* plan (extraneous to this article). A defined benefit plan is a pension plan that provides a fixed benefit to each of its participants. Such benefit is usually determined by a formula based on factors such as the number of years of service and compensation. Generally, plan contributions are made by the employer. Some plans, however, may permit employee contributions as well.

The primary advantage of a defined benefit plan is that it offers security to an employee.^{43/} Since the benefit is fixed by an actuarial formula, it can be determined without regard to swings in economic fortuity. Moreover, benefits from a defined benefit plan are generally paid as an annuity over the life of the participant. Because of these unique characteristics, retirees may rely on their benefit and plan their retirement accordingly. Thus, many retirees prefer the assurance that a defined benefit plan affords them. While phased retirees may enjoy the benefit of having participated in a defined benefit plan, the opportunity to continue to accrue benefits under such plans is not available. As for contingent workers, they lack the opportunity to participate in defined benefit plans.

In contrast, a defined contribution plan establishes an individual account for each participant. The benefit of such plan is equal to the sum of all contributions made to each account. Often, the employee must make contributions that may or may not be matched by the employer. Since a defined contribution plan pays only the participant's account balance, the participant is

^{41/}*Id.*

^{42/}See Watson Wyatt, *Current Practices in Phased Retirement-Transforming the End of Work*, p. 11 People Management Resources (2001).

^{43/} Pamela D. Perdue, *Qualified Pension and Profit-Sharing Plans 14-15* (Warren, Gorham & Lamont 2nd ed. 1998).

responsible for ensuring that the account balance will last for the rest of his or her lifetime.

Agencies that place temporary workers note that designing benefit plans for them is difficult because contingent workers remain relatively unattached to any particular agency.^{44/} Moreover, if an employer does provide a plan for contingent workers, it will typically be a 401(k) plan, which depends upon voluntary employee contributions. Employers like these plans because they are less expensive. However, since most contingent workers have limited financial resources, defined contribution plans make little sense for them.

E. Multiemployer Benefit Plan

The two types of plans that ERISA permits to be maintained by more than one employer are the multiemployer benefit plan and the multiple-employer benefit plan. The ultimate difference between the two is that a multiemployer plan is maintained pursuant to a collective bargaining agreement, while a multiple-employer plan is not. In addition, a multiemployer plan allows an employee to continue to earn benefit accruals as long as he works for one of the employers under the plan. Due to increasing interest in organizing contingent workers, this article focuses on multiemployer benefit plans.^{45/} Nevertheless, this article also recommends action to make multiple-employer plans more viable for nonunion contingent worker industries.^{46/}

^{44/}U. S. Dep't of Labor, Report of the Working Group on the Benefit Implications of the Growth of a Contingent Workforce (1999), at <http://www.dol.gov/dol/pwba/public/adccoun/contrpt.htm> (last visited July 2001).

^{45/}Assuming that unionization efforts are successful, plans involving contingent workers and several employers will be multiemployer plans, by definition. To the extent that there are contingent workers who are not unionized, they could still benefit under a multiple-employer benefit plan.

^{46/}Defined benefit plans can be attractive even though some industries may not unionize. A multiple-employer benefit plan consists of several employers who sponsor a plan together, but none of the workers are subject to a collective bargaining agreement. Similar to the multiemployer plan, a participant under the plan accrues benefits as long as he or she works for an employer under the plan. However, a significant obstacle to the multiple-employer benefit plan is that each individual employer must pass nondiscrimination testing. Treas. Reg. Sec. 1.413-1(a)(3)(A).

Multiemployer plans can be complex for several reasons. Politically, a board of trustees, which is composed of both employer and union representatives, makes decisions by majority vote. Administratively, activities such as disbursing benefits or completing application forms are performed in central locations that are usually distant from the locations of some employers. Despite such complexities, compliance under ERISA is relatively hassle-free. Since the plans must be maintained pursuant to collective bargaining agreements, coverage and nondiscrimination testing are only required for employees who are not covered by the collective bargaining agreement. Moreover, the cost of providing retirement benefits is lower because expenses are borne by all of the employers who contribute to the Fund.

III. Challenges Confronting Phased Retirees And Other Contingent Workers

Today, employers have a greater incentive to find ways of attracting and keeping phased retirees. The trend towards early retirement has increased, as the median age for retirement declined in the United States during the latter half of the twentieth century. During the period 1950-1955 the median retirement age for men was 66.9 compared to 62.7 during the period 1990-1995.^{47/} During the period 1950-1955, the median retirement age for women was 67.7 compared to 61.7 during the period 1990-1995.^{48/} If that trend continues, employers will experience a rapid decline in skilled, knowledgeable, and experienced labor at a time when the numbers of skilled individuals entering the labor force is much smaller.^{49/} Phased retirees can provide the necessary skill level in the workplace supplementing the gap this phenomenon creates.

Phased retirement offers many benefits to both employers and their employees. However, many statutory obstacles deter employers from fully embracing defined benefit pension plans as a tool to attract and retain phased retirees. Consequently, the potential value that defined benefit plans offer employers and phased retirees is made nugatory. This is especially true for multiemployer plans. Until Congress removes some of the more egregious

^{47/}Employee Benefit Research Institute, July 2001 Issue Brief.

^{48/}*Id.*

^{49/}*See Census 2000 Data Shows Characteristics of National Population*, The Segal Company May 2001 Bulletin. The working-age population demonstrates that approximately 35.4% are age 20-34 versus 49% that are age 35-54.

statutory obstacles, the benefits of multiemployer defined benefit plans will remain unrealized for employers and phased retirees alike.

A. Employers May Be Less Likely to Provide Benefits to Phased Retirees

Of primary concern is that employees who continue to work after retirement may sacrifice their pension benefits. Due to benefit plan design constraints, phased retirees and other contingent workers often lack the rights and privileges available to full-time employees. For instance, while 59% of full-time employees were eligible for benefits under their employer's defined benefit plan, only 29% of phased retirees were offered the same deal.^{50/} This means that 71% of phased retirees who worked for employers offering a defined benefit plan were ineligible to participate in that plan.

In addition, employers who permit phased retirement arrangements are likely to reduce benefits provided to phased retirees relative to full-time employees.^{51/} For instance, 13% of employers offering a defined benefit plan reduced the benefits of phased retirees.^{52/} Therefore, even though these phased retirees continued to work (that is, contributed to their employer's bottom-line) when they could have retired, they were limited to the benefit that they accrued when they began their phased retirement.

Although legislative incentives could move more employers to share the pecuniary benefits that phased retirement promises, it is more likely that the economic necessities will provide such an incentive. For example, to ward off the trend towards early retirement, the design of the defined benefit plan could be changed to provide greater benefits for additional service. In contrast, defined contribution plans, which are driven by investment performance, are more difficult to use as leverage to maintain older skilled workers.

B. ERISA Fails to Protect a Phased Retiree's Accrued Benefit

Most of the opportunities to make multiemployer defined benefit plans more valuable to phased retirees involve amending ERISA. In general, ERISA protects a participant's right to an accrued benefit.^{53/} However, if an employee who terminates service begins to receive benefit payments under a plan and is then re-employed, a plan may suspend benefit payments until the employee

^{50/}See Watson Wyatt, *supra* note 22.

^{51/}*Id.*

^{52/}*Id.*

^{53/}ERISA Sec. 203(a).

reaches normal retirement age.^{54/} Since many potential phased retirees hope to augment their retirement income, this rule obviously works contrary to such purpose.

Under a multiemployer plan, the impact is even more extreme. For one, the plan may suspend benefit payments if the retiree works in the same industry, trade, or craft, and in the same geographic area covered by the plan.^{55/} In addition, even if an employee takes several temporary jobs during a year, it is unlikely he will earn enough service with any one employer to earn benefit accruals,^{56/} and the inconvenience of moving retirement savings from one plan to another is extraordinarily daunting. Obviously, this rule discourages continued employment after the attainment of normal retirement age. In fact, the rule nullifies the benefit of a multiemployer defined benefit plan for phased retirement because a phased retiree's benefit payments are often subject to forfeiture under such plans' suspension of benefit rules.

Another obstacle is that the rule pertaining to multiemployer plans severely limits a phased retiree's choice of employment and may encourage employees departure from a collectively-bargained industry. Although an employee is likely to first consider post-retirement work with a current employer, potential forfeiture of accrued benefits may cause an employee to look elsewhere for employment opportunities. Additionally, some plans may suspend benefits if a retiree continues to work in the industry from which he retired. As a result, an employer loses, among other things, the opportunity to retain a skilled worker, and an employee must expend additional efforts to find and possibly retrain for a new job. Such a rule provides no incentive for the parties to stay together. In short, both sides lose.

In addition to the lack of incentive to continue working post-retirement, current pension accrual laws, which are structured to prevent "backloading" of benefits work against both phased retirees and contingent workers.^{57/} Despite the enormous growth in employee benefit plans, when Congress enacted ERISA, it found that "many employees with long years of employment [were] losing

^{54/}ERISA Sec. § 203(a)(3)(B)(i). Normal retirement age is the earlier of the date specified in the plan as normal retirement age, or the later of the date the participant attains age 65 and the fifth anniversary of his or her participation in the plan. IRC Sec. 411(a)(8). However, a plan must provide that the payment of benefits begin by April 1 of the calendar year following the later of the calendar year in which the employee attains age 70.5 or the calendar year in which the participant retires. IRC Sec. 401(a)(9).

^{55/}ERISA Sec. 203(a)(3)(B)(ii).

^{56/}Rev. Rule 81-140, 1981-1 C.B. 180.

^{57/} Plans that backload benefits cause the majority of the accrual to occur in later years of service.

anticipated retirement benefits owing to the lack of vesting provisions in such plans.”^{58/} To combat this practice, Congress established minimum accrual rates,^{59/} which cause a plan’s normal retirement benefits to accrue fairly evenly across a participant’s years of participation. Thus, excessive backloading was prevented.^{60/}

Although this requirement allows for effective preretirement vesting, it also dilutes incentives to persuade employees to consider phased retirement. To illustrate, by the time a worker reaches retirement age, he has likely earned some sort of a pension benefit. Therefore, a phased retiree is not working in order to establish a retirement benefit, but rather to supplement his vested retirement benefit.

The DOL has attempted to provide some relief: a plan may only suspend benefit payments if a participant works more than 40 hours in a month.^{61/} Nevertheless, such relief changes very little. For example, only 8.5% of employed persons age 55 or older worked less than 15 hours a week in 1998.^{62/} Therefore, more than 91.5% of retirement age workers were at risk of having their benefit payments suspended. Perhaps relief can be found in Congress.

C. Organizing Contingent Workers: Finding a Community of Interest

The underlying premise of labor organizing is strength in numbers. If the contingent workforce could be organized, there would be leverage at the bargaining table to ensure adequate retirement benefits. However, organizing the contingent workforce is a difficult task. Contingent work is often characterized by low wages and few or no employee benefits. While some older workers, with adequate income from other sources, may enjoy the flexibility and variety of a contingent job, many others require good wages, benefits, and job security.^{63/} The fact that union workers are more likely to be employed by firms sponsoring employee benefit plans,^{64/} and that among those workers, 70% participate in a pension plan,^{65/} suggests that contingent workers of all sorts may benefit greatly from organization.

^{58/} 29 U.S.C. Sec. © 1001(a).

^{59/} See *Jones v. UOP*, 16 F.3d 141, 143 (7th Cir. 1994) (citing *Asbestos Workers Local 53 Pension Benefit Fund v. Dupuis*, No. 91-93, 1992 U.S. Dist. LEXIS 9912 (E.D. La., July 3, 1992)).

^{60/} In addition, the rate of accrual cannot increase for participants with longer years of service.

^{61/} DOL Reg. Sec. ©2530.203-3(c).

^{62/} U.S. Department of Labor, Report on the American Workforce 110 (1999).

^{63/} See AARP Update, *supra* note 21.

^{64/} See DOL Findings, *supra* note 13.

^{65/} *Id.*

On August 25, 2000, the NLRB issued its ruling in *M.B. Sturgis and Jeffboat Division*^{66/} which makes it easier for temporary workers, a segment of contingent workers, to join unions. In prefacing its ruling, the NLRB noted, “a growing number of employees who are part of what is commonly described as the ‘contingent work force’ are being effectively denied representational rights guaranteed them under the National Labor Relations Act.”^{67/} Under the ruling, the NLRB determined that employees jointly employed by a user employer and a supplier employer, and employees solely employed by the user employer, need not obtain consent of the employers to form a collective bargaining unit.^{68/}

Prior to that ruling, a temporary employee needed permission from the temporary service agency that paid him and the company for which he was performing labor to join the bargaining unit – rarely was he able to obtain permission from both. Consequently, contingent workers rarely organized. However, the NLRB’s ruling in *M.B. Sturgis and Jeffboat Division*,^{69/} provides that the solely- and-jointly-employed employees of a common employer (temporary agency) may form a bargaining unit without seeking consent from each of the employers to which they have been dispatched. Therefore, a bargaining unit made up of temporary and full-time employees of the same user employer is not considered a “multiemployer unit,”^{70/} and employer approval is unnecessary.

This ruling, motivated by changes in the workforce,^{71/} has the potential to affect industries in addition to those that are currently unionized. For instance, it may result in organizing in industries without historical ties to unions, such as the technology industry.^{72/} In this industry, many hi-tech firms keep a lean workforce, which is largely composed of contract workers and temporary employees who work on long-term projects.^{73/} Prior to the NLRB ruling, this made it especially hard for a union to define a bargaining unit. But the

^{66/}331 N.L.R.B.173, 165 LRRM 1017 (2000).

^{67/}*See Id.* at 36.

^{68/}*Id.*

^{69/} 331 N.L.R.B.173, 165 LRRM 1017 (2000).

^{70/}*See Id.* at 36.

^{71/} John F. Licari and Melissa R. Magee, *Your Temporary Employees May Be Eligible To Join A Labor Union Now*, THE METROPOLITAN CORPORATE COUNSEL, Mid-Atlantic Edition, November 2000.

^{72/}Michael Joe, *NLRB Ruling Boosts Temp Workers Union Efforts*, NEW YORK LAW JOURNAL, September 28, 2000.

^{73/}Kevin Galvin, *Unions Finding It Hard To Organize High-Tech Workers*, Associated Press (1998), http://archive.nandotimes.com/newsroom/ntn/biz/072798/biz29_20339_noframes.html (last visited 19 July 2001).

temporary workers in the technology industry would benefit greatly from the potential union organizing that may result from this decision.^{74/}

In Silicon Valley, labor leaders are borrowing an approach used long ago.^{75/} Union organizers are setting up a clearinghouse for hi-tech workers that provides job training, certification, and job placement, and one day it may offer portable benefits.^{76/} The Associated Press reported that “[t]his approach resembles the craft guilds of a century ago that evolved into today’s construction unions. It would encourage workers to identify with the union instead of a specific employer.”^{77/}

At this juncture, attempting to predict the extent to which the NLRB ruling will assist unions in organizing the contingent workforce is premature. No new legislation affecting this ruling has been passed, litigation has yet to test the NLRB’s new ruling, and the effects of attempts to organize nontraditional industries since the ruling are unknown. However, the ruling suggests that there may be an opportunity for contingent workers to begin to obtain the same benefits and entitlements as workers hired directly by a company, should a court conclude that the two groups of employees share common interests.

IV. Defining the Rights of Contingent Workers: Litigation and Legislation

A. Microsoft and Subsequent Contingent Worker Cases

Over the years, many employers have inadvertently or perhaps intentionally misclassified contingent workers. These misclassifications have given rise to both litigation and legislative proposals on behalf of contingent workers. In 1993, contingent workers sued Microsoft Corporation because they were denied benefits available to Microsoft employees.^{78/} The *Microsoft* case is interesting because it involves most of the elements discussed thus far.

^{74/}See Washington Alliance of Technology Workers (WashTech), *Organize Your Workplace*, at <http://www.washtech.org/organize.php3> (last visited 18 July 2001).

^{75/}See Michael Joe, *supra* note 57.

^{76/}See *Id.* The NLRB ruling goes far in sanctioning unions offering portable benefits to contingent workers, but express statutory declaration of such authority should make the practice truly thrive.

^{77/}See *Id.*

^{78/}See *Vizcaino v. Microsoft Corp.*, 1993 U.S. Dist. Lexis 21068 (W.D. Wash. July 21, 1993).

In addition to regular employees, Microsoft employed a large number of workers that it classified as “independent contractors” and “temporary agency employees.”^{79/} Microsoft entered into special agreements with these contingent workers that stated that a worker was an “Independent Contractor,” that there was no “employer-employee relationship,” and that the worker would be “responsible for all of [his] federal and state taxes, withholding, social security, insurance, and other benefits.”^{80/} Microsoft also paid the contingent workers through its accounts payable department instead of through payroll and did not allow contingent workers to participate in the company’s SPP or ESPP plans.^{81/}

However, the IRS determined, and Microsoft conceded, that the contingent workers were common-law employees for purposes of federal income taxes.^{82/} Subsequently, many contingent workers asserted that they were common-law employees, and they sought to be included in the Microsoft employee benefit plans.^{83/} Eventually, the United States Court of Appeals, Ninth Circuit, held that the contingent workers were indeed common-law employees, and as such, they were entitled to participate in the Microsoft employee benefit plans based upon the express terms of the plan.^{84/}

Although this ruling inspired many contingent workers from a variety of fields to assert similar rights,^{85/} the results have been somewhat disheartening for them. For example, in *Admin. Comm. of the Time Warner, Inc. v. Biscardi*, independent contractors who worked for subsidiary companies claimed that Time Warner’s employee benefit plans extended to all common-law employees.^{86/}

^{79/}See *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1008 (9th Cir. 1997).

^{80/}See *Id.* at 1010 (citing Microsoft’s agreements with contingent workers. The contract further stated, “As an Independent Contractor to Microsoft...You are not either an employee of Microsoft, or a temporary employee of Microsoft.”)

^{81/}See *Vizcaino*, 120 F.3d at 1010-11. Eligibility for plans depended upon the definition of “employee” which, according to the SPP, meant “any common law employee...who is on the United States payroll of the employer.”

^{82/}See *Id.* at 1008. Shortly thereafter, Microsoft tendered offers to some of the contingent workers to become acknowledged employees, and terminated employment of the rest of the contingent workers, who had the option of working for a temporary employment agency.

^{83/}See *Id.*

^{84/}See *Vizcaino v. Microsoft Corp.*, 120 F. 3d 1006 (9th Cir. 1997); see also *Vizcaino v. Microsoft Corp.*, 1998 U.S. Dist. Lexis 2008 (W.D. Wash., Feb. 13, 1998); see also *Vizcaino v. Microsoft Corp.*, 173 F.3d 713 (9th Cir. 1999).

^{85/}See *Health v. Perdue Farms, Inc.*, 87 F. Supp. 2d. 452 (D. Md. 2000) (chicken catchers sued for overtime and benefits even though Perdue argued that they were employees of supervisors who were labeled as “independent contractors”); see also *Herman v. Time Warner Inc.*, 56 F. Supp. 2d 411 (S.D.N.Y. 1999) (U.S. Dept. of Labor sued Time Warner, Inc., seeking benefits for workers classified as independent contractors.).

^{86/}See *Admin. Comm. of the Time Warner, Inc. v. Biscardi*, 2000 U.S. Dist. LEXIS 16707, at *1-2 (S.D.N.Y., Nov. 20, 2000).

The issue, however, was not whether they were common-law employees. In fact, the court concluded that “[e]ven if the defendants were employees for statutory purposes, they are entitled to benefits only if eligible under the terms of the Plan.”^{87/} The court held that the plan terms effectively excluded independent contractors from eligibility.^{88/}

Similarly, in *Montesano v. Xerox Corp. Ret. Income Guarantee Plan*, contract workers who performed work through a leasing agency sued Xerox after being denied participation in its employee benefit plans.^{89/} In reviewing the plan administrator’s denial of employee benefit coverage, the court held that the plan administrator’s conclusion was not unreasonable.^{90/} Obviously, a company may still exclude contingent workers from employee benefit plan participation.

In *Casey v. Atlantic Richfield Co.*, the results for leased employee plaintiffs were the same.^{91/} The court noted that the contingent workers wrongfully asserted that *Vizcaino* stood for the proposition that all common-law employees are entitled to ERISA benefits.^{92/} In holding that the employer was not required to make its ERISA plan available to all common-law employees because the plan specifically excluded leased employees from eligibility,^{93/} the court described the requirements for participant status under ERISA. First, a contingent worker must be an employee;^{94/} second, a contingent worker must be, according to the language of the plan itself, eligible to receive a benefit under the plan.^{95/}

^{87/}See *Id.* at *34.

^{88/}See *Id.* at *31-32.

^{89/}See *Montesano v. Xerox Corp. Retirement Income Guarantee Plan*, 117 F. Supp. 2d 147 (D. Conn. 2000). The summary plan description expressly excluded independent contractors, leased employees, supplemental contract workers, consultants, or any other third-party personnel who performed services for the company.

^{90/}See *Id.* at 160-61.

^{91/}See *Casey v. Atlantic Richfield Co.*, 2000 U.S. Dist. LEXIS 6836 (C.D. Cal., Mar. 30, 2000).

^{92/}See *Id.* at *19.

^{93/}See *Id.* at *22-23.

^{94/}See *Id.* at *14-16. The court further stated that if the plaintiff is a common-law employee of the company, the first prong is established. To determine whether a worker is a common-law employee, the courts look to the “*Darden Test*,” see *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992), and the Internal Revenue Service common-law factors, see Rev. Rul. 87-41, 1987-1 C.B. 296, which include: instructions; training; integration; services rendered personally; hiring, supervising, and paying assistants; continuing relationship; set hours of work; full time required; doing work on employer’s premises; order or sequence set; oral or written reports; payment by hour, week, or month; payment of business and/or traveling expenses; furnishing of tools and materials; significant investment; realization of profit or loss; working for more than one firm at a time; making service available to general public; right to discharge; and right to terminate.

^{95/}See *Id.* at *14, 17-18. The court found that “the only limitations imposed by [ERISA]Sec. 1052 are that an ERISA plan not exclude common-law employees on the basis of an age older than 21 or a term of service longer than one year – other grounds for exclusion from ERISA plans are permitted”

Over the years, misclassification of employees may have prevented many “common-law” employees, who were eligible for pension benefits under the terms of the plan, from obtaining such benefits. However, to the dismay of most contingent workers, *Vizcaino* does not preclude an employer-sponsored benefit plan from excluding contingent workers from participation in a pension plan. It merely describes what a plan must do in order to properly exclude certain employees from plan participation. Even though the courts subsequent to *Vizcaino* have not extended rights to contingent workers — contingent workers continue to be diligent in their efforts to capture what is available to most traditional employees — pension plan benefits. However, legislation is needed to provide better opportunities for contingent workers, including phased retirees, to secure both employment rights and employee benefits from employers.

B. Past and Present Legislative Initiatives

In July 2000, Sen. Edward M. Kennedy (D-MA), Sen. Robert Torricelli (D-NJ), and Rep. Robert A. Andrews (D-NJ) introduced the Employee Benefits Fairness Act of 2000.^{96/} The proposed Act was intended to amend Title 1 of ERISA, to ensure that employees were not improperly disqualified from benefits under pension plans and welfare plans based on a misclassification of their employee status.

If this bill had been enacted, it would have increased the ability of contingent workers to participate in employer-sponsored benefit plans. For instance, the bill’s preamble declared that “[t]he intent of [ERISA] to protect the pension and welfare benefits of workers is frustrated by the practice of mislabeling employees to improperly exclude them from employee benefit plans.”^{97/} Furthermore, the active parts of the bill attempted to codify the following contingent worker rights:

^{96/}S. 2946, 107th Cong. (2001). On July 27, 2000, this bill was assigned to the Senate Committee on Health, Education, Labor, and Pensions, where it died.

^{97/}S. 2946, Sec. © 2. The Preamble also found that the following acts violated ERISA: (1) mislabeled employees are often paid through staffing, temporary, employee leasing, or other similar firms to give the appearance that the employees do not work for their worksite employer; (2) employees are mislabeled as contractors and paid from nonpayroll accounts to give the appearance that they are not employees of their worksite employer; (3) employers are amending their benefit plans to add provisions that exclude mislabeled employees from participation in the plan, even in the event that such employees are determined to be common-law employees and otherwise eligible to participate in the plan; and (4) mislabeled employees are often required to sign documents that purport to waive their right to participate in employee benefit plans.

- service includes all service for the employer under the common law, irrespective of the manner in which such employee is paid;^{98/}
- a pension plan may not exclude a common-law employee who performs substantially the same work as other employees, irrespective of employee classification (*for example*, temporary, part-time, leased, agency, staffing firm, contractors, or any similar category);^{99/}
- any waiver by an employee of participation in a pension plan or welfare plan shall be ineffective if related to the misclassification of the employee;^{100/} and
- no plan may exclude a common-law employee from plan participation, irrespective of employee classification, if the employee performs substantially the same work as other employees.^{101/}

Based on the preamble alone, S. 2946 appears to be written either in response to actions taken by employers reacting to the *Vizcaino* decision or in an attempt to preempt such potential reactions. Either way, the bill addressed many of the important issues already illuminated by the *Vizcaino* Court.

Just as some legislators have attempted to shore up contingent worker rights, it follows that others in the legislature would attempt to stifle them. In May of 2001, U.S. Senator Christopher Bond introduced the Independent Contractor Determination Act of 2001.^{102/} This bill would do two things. First, it would amend the Internal Revenue Code to set forth criteria for determining whether a service provider and a service recipient are in an employer-employee relationship or in an independent contractor relationship.^{103/} Second, the bill would amend the Revenue Act of 1978 (as amended by the Tax Reform Act of 1986) to repeal the prohibition on treating certain technical service providers as

^{98/}S. 2946, Sec. © 3(a).

^{99/}S. 2946, Sec. © 3(b).

^{100/}S. 2946, Sec.© 4(d). This section appears to codify what was already determined in *Vizcaino*, specifically, that the terms in the special agreements “merely warn the Workers about what happens to them if they are independent contractors. Again, those are simply results which hinge on the status determination itself; they are not separate freestanding agreements.” See *Vizcaino*, 120 F.3d 1006, 1011-12.

^{101/}S. 2946, Sec. © 5(c)(2).

^{102/}S. 837, 107th Cong. (2001). The bill was assigned to the Senate Finance Committee on May 7, 2001. As of the completion of this article, no action has been scheduled for the bill.

^{103/}S. 837, Sec. 2(a).

independent contractors.^{104/} In essence, this bill represents an attempt to ensure that independent contractors may not also be considered common-law employees. If this law were enacted prior to *Vizcaino*, the court could have easily reached a different conclusion.

In summary, laws have been proposed since *Vizcaino* that would significantly guarantee or alter the rights of contingent workers. Although Senate Bill 2946 failed to survive the 106th Congress, its mere presence demonstrated a new-found interest in strengthening the rights of contingent workers. Similarly, legislation sitting in the 107th Congress indicates that those opposed to extending employee benefit coverage to contingent workers also hope to codify their preferences.

V. Changes To Make Multiemployer Defined Benefit Plans Work for Phased Retirees and Other Contingent Workers

As the definition of today's and tomorrow's workforce continues to change, its contingent workers become ever more in need of defining their rights. Of the rights desired by phased retirees, being able to accrue pension benefits is most important. A multiemployer pension benefit is probably the most appropriate vehicle in which to administer employee benefits to all contingent workers and especially to phased retirees. But since current laws – in particular, ERISA and the NLRA – fail to secure these rights to contingent workers by way of a multiemployer benefit plan, those laws must be changed. The following recommendations are made to help provide phased retirees, and contingent workers in general, better access to multiemployer defined benefit plans (and to defined contribution plans, if appropriate).

A. Define “Contingent Worker”

Preliminary to strengthening laws to assist contingent workers is the need to adequately define a contingent worker. To comport with the purposes of ERISA^{105/} and the NLRA,^{106/} this article recommends a broad and encompassing

^{104/}S. 837, Sec. 2(b).

^{105/}ERISA Sec. 2, finding in subsection (a) that the “continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans.” Furthermore, the subsection recognizes that providing minimum standards that assure the equitable character of employee benefit plans and their financial soundness is desirable in the interest of employees and their beneficiaries. Consequently, subsection (c) declares that the Act is meant to “protect...the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans....”

definition that will open access to employee pension plans and better protect those rights once they are realized. This article also recognizes that more empirical study needs to be conducted on the effects of such a definition. Therefore, any statutory definition of contingent worker should be reviewed and revised, if necessary.

In short, this article recommends defining a contingent worker as any worker who works less than the maximum hours permitted by the Fair Labor Standards Act,^{107/} or as any worker who does not expect regular, full-time employment.^{108/} This definition would include, but not be limited to, the following identified groups: phased retirees, self-employed workers, part-time workers, leased workers, day laborers, agency temporary workers, direct-hire temporary workers, on-call workers, contract company workers, independent contractors, and others.

B. Amend the NLRA to Permit Contingent Workers to Organize Effectively

The recent NLRB ruling recognized the inherent difficulties of contingent workers to obtain benefits under the NLRA. As such, it provided some relief for temporary workers by allowing employees jointly employed by a user employer and a supplier employer, and employees solely employed by the user employer, to form a collective bargaining agreement without the consent of the employers.^{109/} More must be done to strengthen the rights of contingent workers and to help phased retirement and other forms of contingent work to become viable options for tomorrow's labor market.

However, the NLRA must do more than simply codify the NLRB ruling. It should provide similar rights for phased retirees and all contingent workers by permitting them to organize without the consent of each user employer, notwithstanding whether a collective bargaining unit is categorized as multiemployer. Specifically, a contingent worker – despite not being employed by a service employer – should be entitled to organize in a bargaining unit and to

^{106/}National Labor Relations Act, 29 U.S.C. Sec. 151, declaring, in subsection (d), that the denial by some employers of the right of employees to organize burdens or obstructs commerce by causing “diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce”.

^{107/}Fair Labor Standards Act of 1938, 29 U.S.C. Sec. 207, stating that no employer shall employ any of his employees in a work week longer than 40 hours unless he receives compensation for excess hours of employment at a rate of one and one-half times that of his normal rate.

^{108/}The Wage and Hour Division in the Department of Labor would be responsible for enforcing many contingent workers' rights.

^{109/}*Id.*

accrue benefits by working for any one of a number of user employers that offer employees a multiemployer pension benefit plan. In other words, unions could organize contingent workers in a given field and provide them with a multiemployer benefit plan that would normally be available only to traditional workers of a user employer. Such an amendment would be consistent with the needs of phased retirees and the contingent workforce in general, and also with industry trends.

C. Repeal ERISA's Suspension Rules

ERISA Sec. 203 allows a plan to suspend a participant's benefit payments under certain circumstances. Specifically, if an employee who terminates service begins to receive benefit payments under a plan and is then re-employed, a plan may suspend benefit payments until the employee reaches normal retirement age.^{110/} Because many plans have adopted provisions tracking ERISA, this provision provides a huge disincentive to employees considering phased retirement as a manner in which to supplement their retirement income. As such, this provision should be amended, to take into consideration the changing patterns of retirement. Such changes could ultimately benefit other contingent workers.

Furthermore, ERISA Sec. 203 provides less of an incentive for workers to embrace multiemployer benefit plans. By allowing a plan to suspend benefit payments if a retiree works in the same industry, trade, or craft, and in the same geographic area,^{111/} the statute severely cripples a retiree's chance of continuing meaningful work for which he is skilled. It also prevents an employer from retaining older skilled workers in the same industry, trade, or craft, and in the same geographic area covered by the plan. This provision not only obstructs an employer from offering phased retirement, it may ultimately impact unions effectively retaining skilled members who could assist in organizing and training new union members. Without a doubt, ERISA Sec. 203(a)(3)(B)(ii) as currently applied by most plans is counterintuitive to the purposes of phased retirement, and as such, should be repealed.

^{110/}ERISA Sec. 203(a)(3)(B)(i). Normal retirement age is the earlier of the date specified in the plan as normal retirement age or the later of the date the participant attains age 65 and the fifth anniversary of his or her participation in the plan. IRC Sec. 411(a)(8). However, a plan must provide that the payment of benefits begin by April 1 of the calendar year following the later of the calendar year in which the employee attains age 70.5 or the calendar year in which the participant retires. IRC Sec. 401(a)(9).

^{111/} Sec. 203(a)(3)(B)(ii).

D. Amend ERISA’s Benefit Accrual Rules

The current ERISA benefit accrual rules – which do not distinguish between benefit accrual rates for traditional full-time employees or for contingent workers – must be changed.^{112/} Under ERISA Sec. 203, a plan may provide that an employee has a nonforfeitable right to 100% of his accrued benefit derived from employee contributions (read “defined benefit plan”) if he completes five years of service.^{113/} Alternatively, a plan may provide that an employee has a nonforfeitable right to a percentage of his accrued benefit derived from employee contributions based upon a schedule of years of service completed: 3 years (20%), 4 years (40%), 5 years (60%), 6 years (80%), and 7 years (100%).^{114/}

Particularly troublesome to contingent workers is that a year of service is calculated as completing 1,000 hours of service in a calendar year, a plan year, or another 12-consecutive-month period designated by the plan.^{115/} Although this requirement may be achieved by some contingent workers, such as independent contractors, it severely limits the chance of others, such as phased retirees, to accrue nonforfeitable benefits.

To encourage employers to offer defined benefit plans to their contingent workers, the accrual rates must provide more flexibility. More importantly, a meaningful change in the accrual rates would provide unions with a tool with which to organize temporary, part-time, and seasonal workers. The notion that in addition to increased wages, a contingent worker could obtain a future benefit at the end of his or her worklife, for the hours he or she currently works, is a significant incentive to support a union organizing campaign. A good start would be to amend the ERISA “year of service” definition so that contingent workers are not required to meet the 1,000-hour standard. Although ERISA must continue to penalize plans that backload benefits for traditional workers, it should be amended to allow different benefit accrual rates to be applied to contingent workers.

E. A Multiple-Employer Defined Benefit Plan Fix: Eliminate Nondiscrimination Testing Requirements for Employers of Contingent Workers

^{112/}Sec. 203(a).

^{113/}Sec. 203(a)(2)(a).

^{114/}Sec. 203(a)(2)(B).

^{115/}Sec. 203(b)(2)(A).

One of the requirements to qualify as an employee benefit plan under ERISA, and to receive the tax advantages associated with such status, is that contributions or benefits provided under the plan may not discriminate in favor of officers, shareholders, or highly compensated employees.^{116/} Plans maintained pursuant to a collective bargaining agreement, such as multiemployer plans, are given a presumption of nondiscrimination, and, therefore, employers need not test for discrimination. However, multiple-employer plans are afforded no such exception, and nondiscrimination testing is required of them.

Nondiscrimination testing is costly, especially when considering testing all employers of a multiple-employer plan created for the benefit of contingent workers. In addition, employers are ineligible to receive tax credits for contributions made to employee benefit plans that are not ERISA-qualified. Consequently, including phased retirees and other contingent workers in a multiple-employer plan can be extremely expensive for employers and cost-prohibitive for many.

Incentives for employers to provide benefits to nonunion contingent workers is essential to the success of phased retirement. One way to encourage employers to create multiple-employer defined benefit plans for contingent workers is to exempt them from the nondiscrimination testing requirements. This would give nonunion contingent workers, who currently compose the majority of contingent workers, a chance to obtain retirement benefits otherwise unavailable, while relieving employers of excessive administrative burden and expense.

F. Amend the Code To Promote Phased Retirement

Much has been done to promote retirement savings over the past several months.^{116/} During previous Congressional terms, bills have been introduced to amend the Code to allow for distributions to be made from certain qualified plans before a participant separated from employment.^{117/} Such legislative actions should be closely examined because the need for skilled workers, both union and nonunion, will undoubtedly increase over time. Therefore, the incentives for

^{116/}Treas. Reg. Sec. 1.413-1(c)(2).

^{117/}On May 26, 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001, which contains many incentives for retirement savings.

^{118/}During the 106th Congress, Congressman Earl Pomeroy introduced H.R. 4837 which permitted distributions from either a defined benefit plan or a defined contribution plan, limiting such distributions to the earliest of the participant's normal retirement age, attainment of age 59 ½, or the completion of 30 years of service.

remaining or returning to the workplace may be addressed through legislation that provides that the qualified nature of a trust under Code Sec. 401 (a) will not be threatened by in-service distributions. Clearly, in the unionized setting, the ability to retain skilled union members capable of both organizing and training new members would be an enhancement to both the labor movement as well as to employers across the country.

VI. Conclusion

As baby boomers increase in age, the need for older workers in the workplace has increased. Today, one in every nine Americans is 65 or older. By the year 2030, this number will grow to one in five.^{118/} One way to lessen the strain on the labor market is to make phased retirement more attractive than complete retirement. According to market tests, employees are more likely to phase their retirement if they can increase their pension benefits.^{119/} Defined benefit plans could help by allowing older workers to accrue additional benefits while continuing to work, even if such work is not full time. This, of course, will only become reality if there are appropriate legislative changes made to the current pension laws. Such legislative changes must allow short-term work durations to count towards accrual and vesting in some portion of a retirement benefit. Those same legislative changes would also permit the contingent work force access to defined pension plans.

Multiemployer plans can serve as a tool for union organizing in an era of phased retirement. Furthermore, with appropriate changes to the laws, a multiemployer defined benefit plan is well suited to contingent workers who are more likely to work for more than one employer and less likely to be able to make voluntary contributions. First, a multiemployer plan can provide the employee portability with respect to his or her service in temporary positions, so long as the employers for whom he or she works participate in the plan. Second, a defined benefit plan does not require voluntary employee contributions. Contingent workers who are phased retirees would benefit greatly from a multiemployer defined benefit plan because they would be able to participate in the plan without sacrificing current income. Therefore, whether an employee is

^{119/}Anthony Kane, *Older Workers Widen Role in Work Force*, at <http://www.smartbiz.com/sbs/arts/kane1.htm> (last visited Mar. 2001).

^{120/}Anthony Kane, *Older Workers Widen Role in Work Force* (citing a study conducted by the American Association of Retired Persons, among 1300 workers ages 40 and above), at <http://www.smartbiz.com/sbs/arts/kane1.htm> (last visited Mar. 2001).

continuing in employment or taking on new employment, the idea of part-time or temporary work would not require the employee to forego additional retirement benefits. With the multiemployer plan as the tool, unions could reach the contingent work force and attract them with the promise of retirement security.