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U.S. EMPLOYMENT RIGHTS LEGISLATION AND THE LEGAL THEORY OF CO-EMPLOYMENT AS CONSTRAINTS ON THE USE OF CONTRACT LABOR

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ABSTRACT

This article examines the implications of U.S. individual employment rights for secondary employment under the contract labor mechanism. Based on an analysis of common law and regulatory agency tests and the evolving legal theory of co-employment, it is argued that employment rights management is fundamentally problematic for firms using contract labor. Factors which make it difficult to externalize employment management through contract labor agencies include 1) moral hazard problems associated with such agencies, 2) costs of monitoring rights compliance, 3) rights violations involving third-party liability and 4) related problems associated with the extension of contract labor to professional occupations. Anticipated managerial responses (in terms of refinements to contract labor practice) are discussed, together with their limitations. Also considered are the implications of such refinements for dual labor market configurations involving primary workers under the human resources or "salaried" model.

Historically, secondary employment, with its key characteristics of market-based pricing and tenuous attachment to the firm, has been the norm in America. Its counterpart—rule-based primary employment via internal labor markets—is a phenomenon of this century [1]. As Jacoby [2] has documented, the development of internal labor markets (and personnel/administrative control over employment) is best understood as a response to legal-institutional support for collective organization and individual employment rights rather than limitations of market-based employment, per se. While market forces and direct efficiency incentives identified by Doeringer and Piore [3] and others certainly play a role in the

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maintenance of internal labor markets, these influences vary greatly with the occupational composition of firms and industries (e.g., the transaction costs imposed by high turnover involving firm-specific human capital). We assume, therefore, that general insights concerning an evolving mix of internal and external markets will continue to emerge from a detailed appreciation of universal legal-institutional forces, with particular reference to employment rights, costs associated with compliance and noncompliance, and their implications for the locus of administrative control.

Specifically, we considered legal-institutional constraints on the use of contract labor—a subdomain of secondary employment that has grown dramatically in recent years [7]. Through analysis of relevant statutes and common law, we developed the thesis that the management of employee rights in the context of contract labor is fundamentally problematic for "client" firms.

While use of contract labor facilitates flexible staffing and market-based compensation, the legal-regulatory environment obliges firms to externalize managerial control to realize these gains. This, in turn, creates a variant of the classical managerial problem of delegating authority (control) greater than the responsibility (liability) associated with it; one in which there are also moral hazard problems in relation to the conduct of contract labor agencies. An effective strategic position on rights management through a mix of internal and external control is confounded by multiple sources of liability in certain areas. In some instances, liability for direct (employment-related) rights violations cannot be reduced without simultaneously increasing the risk of external (third-party) liability (and vice-versa). In addition, anticipated refinements in the externalization of direct control over contract labor can be expected to reduce the effectiveness of dual labor market configurations that otherwise focus on the high-commitment (human resources) employment model.

This article is divided into three parts. In the first section, we discuss relationships among contract labor, the legal doctrine of master-servant, and the attendant theory of co-employment. Here, the institutional factors that promote externalized control over secondary employment are elucidated. Precursor linkages with collective organization rights are also discussed. In the second section, we consider the implications of a range of individual employment rights statutes for contract labor. In the concluding section, we offer some initial thoughts on the implications of this topic for dual labor market development within firms as well as efforts to enhance employee rights through collective organization.

CONTRACT LABOR AND ITS LEGAL CONTEXT

It is important to differentiate contract labor from other forms of secondary employment. This labor strategy has been differentiated in the literature (e.g., Mangum, Mayall, and Nelson [8]; Baron and Pfeffer [6]) and, in labor law, is clearly distinguished by the common law master-servant doctrine and the theory of co-employment.

Contract Labor

Contract labor may be defined as that component of secondary labor market work that takes place under conditions in which service is obtained through a contract labor agency (or other employment-related business entity) that leases individuals to a client firm. Payment for service is indirect and via the agency. The client has some control over the labor process, ranging from modest to complete but certainly involving some specific direction. In the present study, we restrict consideration to contract labor undertaken at the client's place of business with appreciable dependence on the client's equipment and materials.

This definition includes contract workers whose immediate employment associations would range from national and international contract labor firms (such as Kelly, Olsten, Manpower, and "CDI"), through personal professional corporations and even simple doing-business-as ("dba") entities. It excludes all forms of direct-hire secondary employment of a temporary or part-time nature. Contract placements may be of any duration or time status, and some contract workers remain in a single position for many years [9]. Also excluded are professional consulting and independently contracted work in which clients would typically violate either professional ethics or the contract itself by attempting to direct work in any detail.

The focus of the analysis, then, is on the employment rights implications of externalizing administrative control over work to a third-party "employer." Contract labor constitutes a discrete and increasingly important element of the broader phenomenon of secondary employment.

THE MASTER-SERVANT DOCTRINE AND THEORY OF CO-EMPLOYMENT

As used in labor law, "co-employment" may be defined as conditions of contract work in which the worker is considered, for certain purposes, to be an employee not of the contract labor agency alone, but of the client firm as well. In using contract labor, firms seek not only to externalize the transaction costs associated with market-based acquisition, training, and dismissal of labor, but also to avoid common law liability for important employment benefits that direct-hire secondary workers might seek through litigation. Avoidance of co-employment status is critical to the latter objective.

While some variance across specific legal compliance matters exists, there are two general sets of legal tests concerning the question of whether or not a contract worker is, in fact, also an "employee" of a client firm retaining his/her services through a contract labor agency. These tests (which originate in union-management disputes over bargaining unit specification) deeply inform the practices that constitute contract labor as we presently know it.

Before considering these tests, it is important to briefly review the broader common law doctrine that gives rise to co-employment litigation in the context of worker rights—the master-servant doctrine. Through this doctrine, secondary workers may seek to establish employee status, which, in turn, may bring entitlement to benefits such as pensions, medical and life insurance, or severance pay. As discussed later, the doctrine also creates an incentive for contract labor agencies to circumvent client firm expectations with respect to the externalization of employee rights management. Should this occur, a basis is established for potentially open-ended client liability in third-party suits concerned with the actions or negligence of contract workers.

The Master-Servant Doctrine

As originally defined by Wood [10], the common law terms "master" and "servant" are synonymous with "employer" and "employee," respectively. The master-servant doctrine is concerned with the principles on which employment relationships are established. Its role in the arena of employee rights is fundamental. In industrial relations, it is most familiar to those concerned with at-will employment as a constraint on employee rights (e.g., Stieber [11]). The doctrine is central to an understanding of modern tests of direct co-employment. While the matter cannot be taken up here, an appreciation of its evolution may also help explain historical patterns of externalization in employment administration.

The master-servant doctrine has evolved to the position that four elements are to be considered in determining whether or not the relationship of master and servant exists. In declining order of importance, these are: 1) the power of control over the servant's conduct, 2) selection and engagement of the servant, 3) the power of dismissal, and 4) payment of wages [12]. Among other analytical virtues, control over servant conduct/labor process is now accepted as the best means of distinguishing an employment relationship from independent contracting under conditions in which either relationship might involve third-party control over such tasks as hiring/placement and compensation. It is also a relatively strict test for contract labor "clients" wishing to avoid co-employment status since routine administration of employment is easier to delegate than control over work itself.

LEGAL BASES OF CO-EMPLOYMENT STATUS

A contract worker is regarded as being in a state of co-employment when, under extensions of the master-servant doctrine, agency and client firm have joint control over the individual, either directly (through fairly specific employment practice tests, including the aforementioned matter of immediate control over work) or indirectly (through broader relationships between firms). Tests pertaining to each form of control are discussed below.

Indirect Co-employment

Indirect co-employment occurs when the two firms (client and employment agent), whatever their nominal status, effectively constitute a single integrated enterprise. With origins in National Labor Relations Board (NLRB) bargaining unit determination guidelines later adopted by the Supreme Court, four factors have come to comprise a common legal test [13]. These factors include the degree to which the two business entities exhibit: 1) interrelated operations, 2) common management, 3) common ownership or financial control, and 4) common control of labor relations [14]. Following the master-servant doctrine, common control of labor relations is typically most central to NLRB decisions based on indirect tests.

A second test focuses explicitly on the employment relationship and accounts for asymmetric relations between the firms. Co-employment status may be attributed to a firm when a subservient corporation serves as its agent with respect to employment practices [15]. Less commonly, indirect co-employment may be established around a more general "alter-ego" argument, in which it could be said that the operation of one firm could not be understood without consideration of the other [16].

Under the first two tests, it is incumbent on client firms wishing to avoid co-employment status to abstain from direct involvement in a contract labor agency's management of contract workers. As discussed in the following section, there are numerous conditions under which such an influence would be beneficial to employee rights compliance, but this would constrain the overarching objective of flexible use of labor.

Direct Co-employment

The second general set of co-employment tests pertains to locus of control over the labor process itself. The dimension of contract labor that distinguishes it from both independent contracting and consulting is the condition that contract workers are subject to at least *some* specific direction by client supervisors. However, should the client exert *substantial* control over work or its conditions, the general test of direct co-employment has been met.

As a legal status, direct co-employment also originates in an NLRB decision that was supported by the Supreme Court. In the case of *Boire v. Greyhound Corp.* [17] the original issue involved the appropriateness of including contract maintenance workers in a bargaining unit otherwise comprised of a bus company's employees. While Greyhound (client) and Floors Inc. (agency) were accepted as being distinctive business entities, the Court concluded that "common control over employees" was being exercised by the two firms and thus supported the inclusion of contract workers in the bargaining unit on the basis of co-employment status. The contract labor agency held general administrative control over matters of compensation, position placement, and discipline. Greyhound, however, had virtually complete responsibility for directing work, including scheduling and staffing levels. The Court was also influenced by 1) the general absence of Floor Inc. supervisors ("on occasion not appearing for as much as two days at a time": [17: 30,948]) and 2) indications of Greyhound influence over termination decisions. At present, of course, it would be uncommon for a contract labor agency supervisor to appear as often as those of Floors Inc.

Over time, the scope of tests that must be met to avoid co-employment status has expanded dramatically. The reader may gain a sense of client firm vulnerability through the list of criteria generated in the 1979 case of *Spirides v. Reinhardt:*

> . . . (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties [18: 11,357].

While developed in the context of federal employment (and, therefore, perhaps not fully generalizable), the *Spirides* criteria constitute a virtual checklist of work externalization strategies and dimensions of secondary labor market development (e.g., [6]). Also implicit in this list are many of the incentives to use contract labor, as well as some of the managerial challenges involved. Contract labor clearly involves increased flexibility in the nature and level of the labor force and probably reduces labor costs (although this is less certain). However, as is discussed later in the article, an effective strategy for rights management is difficult to achieve in the context of contract labor, particularly when the interests of third-parties are involved.

Third-Party Liability

In instances in which contract workers cause damage to third parties such as customers or the community-at-large (e.g., major industrial accidents), the master-servant doctrine and the attendant issue of co-employment constitute the basis of broad client liability. Under the doctrine of *respondeat superior,* employers are responsible for the actions of their employees. Therefore, injured third parties may use the master-servant doctrine to establish a basis for *respondeat superior* actions against client firms.

As illustrated by the early case of *Densby v. Bartlett* [19], contract labor agencies have an interest in the success of such actions. Densby provided realtor Bartlett with cars and drivers to chauffeur the latter's salespersons and clients. When an accident occurred, Densby's defense against negligence centered on the argument that—under common law—the offending driver actually had worked for Bartlett all along [19]. While Densby's argument failed under the weaker master-servant test of that era, it might have succeeded under modern co-employment criteria.

DIMENSIONS OF EMPLOYEE RIGHTS: THE IMPLICATIONS OF AVERSION TO CO-EMPLOYMENT

In this section, we examine a range of individual employee rights statutes in terms of their nexus with the co-employment theory. The relationships indicate that, in the present legal-institutional context, externalization of employment management often does little to reduce the firm's ultimate responsibility for worker rights, but clearly reduces management's ability to prevent violations. In areas that may involve third-party liability (such as health and safety), the likelihood of extensive costs probably increases with externalized management.

Employment and Wage Discrimination under Title VII of the Civil Rights Act

Contract labor agencies significantly reduce client firms' direct recruitment and selection costs. As Pfeffer and Baron pointed out [6, p. 276], real economic gains may be involved, since such firms probably have a comparative advantage in such activities and may reduce spillover compensation effects from internal labor market practices. In some cases, they may also tacitly support client tastes for discrimination by discouraging protected-class candidates from interviewing with such firms or facilitating discriminatory dismissal requests.

The risks inherent in doing so are illustrated by the case of *Amarnare v. Merrill Lynch* [20]. Here, Tanyah Amarnare (a black woman) was employed, through the Mature Temps, Inc. agency, as an administrative assistant with Merrill Lynch. Amarnare was dismissed after two weeks and charged Merrill Lynch with violation of Title VII on the basis of gender and race-based discrimination, arguing that no white male or white female had been terminated in this manner. Merrill Lynch moved for dismissal, arguing that Amarnare was an independent contractor paid by Mature Temps, had no direct employment relationship to the company and, therefore, had no basis for a Title VII action against them.

The court rejected the motion for dismissal and the case proceeded as if Merrill Lynch had employed Amarnare directly. Title VII makes no specific contractor-employee distinction and has been interpreted by the Supreme Court as comprising a broad mandate to prevent discrimination in hiring as well as postemployment treatment [21]. In consequence, the act, as applied to contract labor cases by the Equal Employment Opportunity Commission (EEOC) and supported by the courts, does not require that a person be an employee in order to sue; it being sufficient to be "a person claiming to be aggrieved" [22].

Here, then, the externalization of initial recruitment and selection duties in no way obviates the task of Equal Employment Opportunity (EEO) compliance and, in fact, complicates it. In such cases, plaintiffs such as Amarnare may also charge contracting firms such as Merrill Lynch with interference in civil rights pertaining to the contract labor agency. The most obvious basis of such a charge would lie in reduced alternative opportunities through Mature Temps stemming from the unsuccessful placement at Merrill Lynch. Even if this could not be shown, Merrill Lynch has denied at least one opportunity—its own.

The dilemma thus illustrated is likely to be an enduring one. A client firm that successfully establishes practices that reduce or eliminate co-employer status aggravates the potential damage done to the plaintiff as an employee of the contract labor agency (for which the client firm is also liable).

An extreme instance of this appears in another industry in which contract labor has been flourishing—health care—and the case of *Gomez v. Alexian Brothers Hospital* [23]. Here, the plaintiff (a physician) had established a professional corporation that proposed to operate the defendant hospital's emergency room on a contract basis. Under the proposed contract, Gomez was to serve as emergency room director while remaining an employee of his professional corporation. Given the occupation involved, the opportunity to create employment conditions in which it could be argued that the doctor was not, in fact, directly controlled by the hospital are very strong; certainly so relative to the duties of administrative assistant Amarnare.

However, after the hospital rejected the proposed contract on allegedly discriminatory grounds, the plaintiff was permitted to sue the hospital under Title VII for denying him the "opportunity to be employed by [the professional corporation] as director of [the] defendants' emergency room." The court reasoned that the hospital had markedly interfered with the plaintiff's employment (with his own corporation) by leaving him with employment conditions that did not include an emergency room director's duties.

The contract labor paradox that emerges is this—the level of indirect damage claims to which the client employer is liable tends to increase as externalization practices that reduce *direct* claim liability are put in place.

Refined relationships between contract labor agencies and clients have little potential for ameliorating this dilemma. While generally subject to employment rights statutes, the contract labor agency has limited incentive to manage EEO on behalf of the client as the contractual basis lies in labor supply and immediate cost savings, not general employee rights liability for the firm. Responsibility for EEO cannot be bifurcated easily, since, with the exception of externalized contract labor hiring, most EEO claims involve general practice and disparate-treatment analyses made within the client firm, factors an external agent could have but limited influence over. In addition, individual plaintiffs are likely to find greater rewards through suits against client firms and so contract agencies will tend to face lower risk through inadequate joint EEO performance.

The Equal Pay Act

Perhaps due to the inclusion of unequal pay actions in Title VII provisions, the present review of the case literature produces no instances of contract labor actions initiated under the Equal Pay Act of 1963. However, and with the discussion of the managerial implications of Title VII in mind, now assume that client employers scrupulously maintain enlightened EEO practices and attempt to minimize externalization of this task. Clients monitor the practices of contract labor agencies and tie this to powerful sanctions (viz., alternative labor sourcing). The viability of such threats depends on competition among agencies, which, in turn, implies heterogeneity in practices and increases monitoring costs.

Here, Equal Pay Act (or Title VII) actions could become a distinct possibility as agencies increasingly compete for placements in similar positions. Employees of two agencies could be found working at the client's site in positions requiring similar skill, effort, and responsibility under similar working conditions but at different rates of pay. Unless their direct compensation through the two agencies reflected a permissible distinction, the lower paid could conceivably sue the client firm.

The client firm's defense would rest in the demonstration of clear contractual relations and the absence of co-employment. As we've seen, the test is quite strict and (again, paradoxically) would be undermined by active intervention in the EEO practices of the agencies involved. In addition, contract workers will not (except under co-employment) have access to internal grievance procedures, a factor that may increase the likelihood of rights violations and leaves the plaintiff entirely dependent on the external justice system.

General Employment Rights and the Fair Labor Standards Act

Early cases involving liability for violations of the Fair Labor Standards Act (FLSA) of 1938 tended to minimize the problem of co-employment, leaving responsibility with the contract labor agencies (e.g., [24], [25]). However, the federal department of labor has since created scope for co-employment litigation by ruling that, for FLSA purposes, clients are "joint employers" with agencies; the latter being merely "primarily responsible" for compliance and administration in terms of minimum wage, work-week limitations, and overtime payments, etc. [26, p. 695].

Here, then, attempts to avoid co-employment status through minimization of direct managerial control are thwarted by regulatory standard. In addition to fines and civil penalties, client firms may be liable for large back-pay assessments should agency practice in this area by found wanting. Such risks add to the transaction costs of contract labor by obliging prudent management to carefully monitor agency FLSA practices. At the same time, there is a clear incentive for agencies to allow and encourage direct control by clients so as to reduce their own liability in such a case.

Safety and Health: The Occupational Safety and Health Act (OSHA)

While firms contracting for labor invariably carry the general obligation of maintaining safe and healthy work conditions under OSHA (1970), agencies are regarded as employers for the purpose of experience-rated workers' compensation insurance assessments. Rebitzer's study [27] of the relationship between contract labor and industrial safety underscores the externalization dilemma in this area. Employers' workers' compensation premiums are derived from a risk-related industry base rate modified by firm "experience" (accident history) and size (employment). Therefore, there is an incentive for firms to export the cost of workers' compensation through contracted work since this will reduce firm "size" substantially while having little impact on the employment-based assessment of several, typically much smaller, agencies. The benefits of doing so would be more pronounced for hazardous jobs or firms in hazardous industries [27, pp 12-13].

The difficulty here is that neither firm "experience" nor "head-count" considerations (which govern compensation insurance premiums) correspond with the scope of accident liability implications. Accidents are likely to be either smaller in scope (e.g., one or more employees or contract workers affected by an accident) or well beyond the limits of the firm (i.e., involving whole communities). Ethical considerations aside, liability of this kind (which occasionally drives firms to strategic bankruptcy) must be balanced against the certainty of medium-term reductions in compensation insurance costs.

Agency incentive and ability to accept externalization of safety management are both quite limited. Incentives are largely restricted to adverse changes in their own experience rates, overall business profile, and employment levels, all of which are likely to be modest in the context of a reasonably diversified placement business. Their employees, if injured, are perhaps more likely to seek restitution from major client firms under common law and must do so if the agency benefits from workers' compensation exclusivity provisions denying employees the right to bring a negligence action against a participating employer. With respect to ability to manage safety, contract labor agencies are not well-placed, since adequate training depends on current knowledge of site-specific hazards [27].

In the petrochemical industry, Rebitzer [27] documented client firm reluctance to become actively involved in safety training (and, thereby, control over contract worker activity). In the context of limiting general co-employment liability, this is prudent. In the broader context of liability for accidents or catastrophes involving contract workers, it is indeed risky. While direct responsibility for safety management does not reduce third-party liability for major accidents, it is very likely to reduce the probability of such accidents.

To summarize, employment rights statutes generally create incentives for firms to externalize administration of employment as well as control over the immediate direction of work. The master-servant doctrine and co-employment theory provide the immediate legal impetus in every instance examined, and legal tests are not dissimilar. Therefore, the managerial actions required to avoid co-employment liability are generally identical across rights management tasks. The exception concerns FLSA compliance, for which some co-employment liability appears to be inevitable. Nonetheless, no clear strategy for effective rights management emerges. This is due to 1) incentives for agencies to exploit a tendency for firms to exercise direct control over contract workers, 2) difficulties in monitoring rights compliance in agencies, and 3) the truly confounding effects of third-party liability concerning contract labor.

Being subject to the same legal environment (and wishing to minimize their own supervisory costs), contract labor agencies have incentives to allow and even tacitly encourage client firms to exercise immediate control over work. This becomes a form of insurance in the event of contract worker litigation for rights violations or third-party actions involving the performance of contract work.

With respect to external control, client firm efforts to monitor or otherwise influence agency administration of employment to ensure rights compliance increases the likelihood of general co-employment liability should violations nonetheless occur. Market-based efforts to control agency rights management through competitive sourcing increases monitoring costs as well as the likelihood of some violations (e.g., Equal Pay and Title VII—disparate treatment).

Finally, a strategy intended to reduce liability for direct (employment-related) rights violations will tend to simultaneously increase the risk of external (third-party) liability. The reverse is also true. For example, externalizing safety training as part of a co-employment avoidance strategy may increase the likelihood of accidents involving third-party liability. If, alternatively, firms choose to supply contract workers with safety training to reduce the likelihood of accidents and attendant liability for injury to third parties (or regular employees), they do so at the cost of potential co-employment liability in other areas of the employment relationship.

DISCUSSION

While not comprehensive of contract labor-employment rights linkages, the present analysis allows us to make some tentative observations concerning expected developments in managerial practices, as well as implications for organized labor and the research community.

Implications for Employment Practice

Relative to other forms of secondary labor market development, such as the use of direct-hire temporary or part-time workers, refinement of contract labor practices tends to be particularly incompatible with the labor strategy managers are increasingly likely to pursue with primary employees—human resource management (e.g., [28]) or, in Osterman's [29] terms, the "salaried" model. While the objective of labor flexibility, in different forms, is common to both systems, human resource management's emphasis on personalized administrative procedures, flexible job content, group-based work, intrinsic rewards, and the development of organizational commitment and "culture" run counter to the conditions contract labor policies must actively pursue to avoid co-employment liability.

As we have seen, externalization of employment administration is central to the contract labor strategy and seriously constrains opportunities for internal personalization of employment practices. *Ad hoc* internal revision of job content and provision of opportunities for intrinsic rewards are difficult in the context of an effort to avoid direct control over work (co-employment risk) or fundamentally autonomous work (independent contractor risk). Finally, the social-psychological aspects of the human resources strategy (i.e., intrinsic rewards, group-based work, commitment, and culture development) are incompatible with prescriptions for reducing co-employment liability that involve cultivating distinctions between direct-hire and contract workers. For example, Jarmon [9, p. 17] recommended that management avoid inviting contract workers to general-interest meetings, not list them in corporate directories, ensure that such workers are issued distinctive badges, and so on. While seemingly trivial in isolation, the aggregate effect of such measures may be discernibly negative in relation to the human resource management objective of generating a shared organizational culture.

We are inclined to disagree with Pfeffer and Baron [6], who suggest that secondary labor forces, by facilitating employment security for primary workers, effectively complement use of the human resources model with the latter. Their argument extrapolates from Japanese experience, where egalitarian principles are weak at the societal level and poorly institutionalized in employment law. In keeping with the expectancy theory of motivation (e.g., [30]), we would argue that American primary workers, relative to Japanese, are more likely to experience negative cognitive dissonance through sustained juxtaposition of refined contract labor practices against a high-commitment employment model. Therefore, unless the dual labor market strategy effectively accommodates domestic norms pertaining to employment rights, we would expect primary worker attitudes and work attachment to resemble bureaucratic careerism (as a response to relative employment security) more closely than the psychological commitment model.

With respect to the employment motivations of contract workers, there are other problems. Mangum et al. [8] suggested that contract workers (though typically not direct-hire temporaries or part-timers) will tend to have fairly high commitment to client firms based on the hope of later securing regular employment. Such motives, if extant, would tend to increase regular employees' perceptions of inequity in the treatment of contract workers, as well as the sense that the contract workers serve as a form of "threat" labor—neither of which is conducive to the achievement of the human resource model's objectives. In addition, contract workers with such a commitment are probably more likely to initiate co-employment actions should their expectations not be met. These questions warrant empirical investigation. In the interim, management would presumably wish to be cognizant of this factor and its potential impact on employment strategies pertaining to primary workers.

Implications for Collective Organization

Current public policy-related analyses of United States relations tend to emphasize legal-regulatory change as a means of balancing labor-management power. Zero-sum outcomes are often involved, as in the case of debate concerning the employment rights of replacement workers versus on-strike employees and managerial rights in the context of same. The present topic, on the other hand, indicates potential for organized labor to pursue an integrative problem in the context of existing public policy—an opportunity to promote employment rights while also reducing managerial liability for rights violations and third-party damages.

However, mutual perception of the integrative dimensions of employee rights management probably requires dialectical development. As clients of contract labor, most U.S. employers are still far from exhausting the possibilities of independently pursuing co-employment avoidance. Thus, it is perhaps in the interests of organized labor to directly assert the co-employment rights of the unorganized. In this regard, long indirect experience of co-employment principles via the master-servant doctrine and bargaining-unit determination becomes an important resource. While near-term costs would be substantial (including the sharing or loss of some benefits of primary employment), strategic gains in universal employment rights could be considerable.

More directly, present and foreseeable conditions suggest the efficacy of renewed emphasis on craft-like organization and the development of occupational internal labor markets (independent of firms). Institutionally, an important precedent may lie in the hiring-hall arrangements that are still quite prominent in longshoring, construction, and other industries characterized by highly variant demand for labor (e.g., [31, 32].

In the context of the co-employment problem, the incentive to externalize liability for both employment and third-party rights violations to firms is lower for agencies at least nominally controlled by workers than for contract labor agencies as presently constituted. The clientele of the former, of course, is primarily its membership and only secondarily the contracting firm. Such a scenario raises many issues pertaining to public policy, principal-agent relationships, and the socioeconomic role of unions. Secondary workers are also difficult to organize. However, an important moral hazard problem associated with contemporary contract labor agencies could be ameliorated, leaving firms with greater confidence in external rights management conducted on this basis. The likelihood of third-party liability would be similarly reduced.

Implications for Theory

In detailing relationships among legal institutions, employment rights, and a selected domain of secondary employment, we have not attempted to systematically place the work in secondary and dual labor market theory. To do so, one would wish to begin with a thorough historical analysis. The rough history we have traced led us to several legal-institutional junctions with Jacoby's [2, 33] appreciation of the development of contract labor's counterpart—U.S. internal labor markets. In that history, market-based efficiency considerations are assigned a secondary (maintenance) role relative to the institutionalization of personnel management. Although there are important exceptions (e.g., [34], efficiency arguments concerning perceived weaknesses of internal labor markets tend to extend into explanations of evolving institutional arrangements such as contract labor. By demonstrating the instability of the contract labor phenomena in relation to employment rights, we hope to encourage reflection on the transaction costs and moral hazard problems associated with alternative forms of employment under the constraint of effective rights management.

Finally, while we have addressed employment rights issues concerning contract labor, we note that another important aspect to it involves taxation. The U.S. small business community has expressed substantial concern about the Internal Revenue Service's supposed eagerness to hold that contract workers are really employees of client firms, and that client firms thus incur liability for taxes owed by those contractors. This aspect is at the heart of deliberations over the proposed Independent Contractor Tax Simplification Act of 1995 (HR 1972).

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ENDNOTES

1. The seminal work in this area is Kerr (1954). Subsequent research is well-summarized in Doeringer and Piore [3], Cain [4], Osterman [5], and Pfeffer and Baron [6].
2. S. M. Jacoby, *Employing Bureaucracy: Managers, Unions and the Transformation of Work in American Industry, 1900-1945* Columbia University Press, New York, 1985.
3. P. B. Doeringer and M. J. Piore, *Internal Labor Markets and Manpower Analysis,* D. C. Heath, Lexington, Massachusetts, 1971.
4. G. C. Cain, The challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey, *Journal of Economic Literature, 14*:4, pp. 1215-1257, 1976.
5. P. Osterman (ed.), *Internal Labor Markets,* MIT Press, Cambridge, Massachusetts, 1986.
6. J. Pfeffer and J. N. Barron, Taking the Workers Back Out: Recent Trends in the Structuring of Employment, in *Research in Organizational Behavior,* Volume 10, B. M. Staw and L. L. Cummings (eds.), JAI, Greenwich, Connecticut, pp. 213-256, 1988.
7. During the 1980s, revenues of major U.S. contract labor agencies grew as follows:

Firm[a]	1980 Revenues (millions)	1990 Revenues (est.) (millions)
CDI[b]	$227.9	$ 935
Kelly Services	$409.7	$1500
Olsten Corp.	$ 83	$ 630
Volt Information	$169.9	$ 515

[a]Excludes Manpower, perhaps the largest such agency but wholly-owned or privately held and so not reported in *Value Line.*

[b]Includes revenues from permanent placement operations.

Source: *Value Line Investment Survey,* 1991.

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