CHANGING ECONOMY, CHANGING LIVES: UNEMPLOYMENT INSURANCE AND THE CONTINGENT WORKFORCE*

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I. INTRODUCTION

Advocacy on behalf of recipients of unemployment insurance has long been a topic of concern for both legal services organizations and law school clinical programs.[1] Poverty law specialists, however, have tended to focus their attention on the poorest of the poor — those receiving any of a variety of means-tested welfare benefits — occasionally to the neglect of the "working poor" and with insufficient attention to the overlaps between the two groups. Though a small and committed group of legal services advocates has had a significant effect on the development of the case law in the area, the unemployment insurance system[2] has not typically been a major focus of advocacy, nor has it generated extensive scholarly attention by the many academic alumni of the

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[1] The early issues of the Clearinghouse Review demonstrate the involvement of legal services program in unemployment compensation programs. *See, e.g.*, 4 CLEARINGHOUSE REV. (Issue 2) (reporting on proceedings leading up to California Department of Human Resources Development v. Java, 402 U.S. 121 (1971)).

[2] Though decentralized, the American unemployment insurance system is indeed a system. As the result of the political and constitutional concerns that followed the Supreme Court's invalidation of several early pieces of New Deal legislation, Congress chose not to create a uniform federal program. Instead, Congress enacted the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et. seq. (1988), which imposed a federal payroll tax with a credit to employers for taxes paid under a state unemployment insurance system meeting minimum federal standards. In addition, as part of the Social Security Act, the federal government provides grants to the states for the administration of their unemployment compensation programs. 42 U.S.C. §§ 501 et seq. (1988). To qualify for these funds, the states must operate their programs in compliance with federal standards. The state unemployment insurance programs exhibit great similarity in overall design, although funding and eligibility details vary significantly.

anti-poverty movement.[3]

One sign of increased interest in the subject of unemployment insurance is the Peer Exchange on Unemployment Compensation[4] ("The Peer Exchange"), a day-long discussion of current unemployment insurance issues which brought together lawyers from a variety of backgrounds — law school clinics, legal services programs, and private and in-house union-side labor law practices. Discussion at the Peer Exchange focused on two broad sets of issues: (1) the disparate impact of the rise of the "contingent workforce"[5] on women, people of color and low-income workers, and (2) the interrelationships between unemployment insurance and the Aid to Families with Dependent Children program. The issues discussed at the Peer Exchange have particular salience now for three reasons.

First, many gender-based assumptions underlying the unemployment insur-

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[3] As the saying goes, it's hard to prove a negative. But search the Index to Legal Periodicals and contrast the literature on unemployment insurance with that on welfare. Much of the unemployment insurance literature is either by an older generation of specialists, by non-lawyers such as Diana Pearce, or by practitioners such as Rick McHugh. Writers on welfare, on the other hand, include at least two generations of poverty lawyers turned academics, including Sylvia Law, William Simon, Edward Sparer, Lucie White, and Lucy Williams.

[4] Participants in the unemployment compensation peer exchange, held on April 9, 1994 in Seattle, Washington, were Greg Bass, Staff Attorney, Longview Office of Evergreen Legal Services; Liz Ford, Schwerin, Burns, Campbell and French; Martha Lindley, Director, Unemployment Law Project; Rick McHugh, Associate General Counsel, United Auto Workers Legal Department; Liz Schott, Litigation, Advocacy and Training Coordinator, Evergreen Legal Services; Marci Seville, Associate Professor, Golden Gate Law School; Rebecca Smith, Staff Attorney, Farmworkers Division, Evergreen Legal Services. Discussion ranged from the structure of the unemployment insurance system to specific legal issues to litigation tactics. I leave to the reader the decision which constitute the ridiculous and which the sublime.

[5] For the purposes of this paper the contingent workforce includes the following two groups. First, are workers in jobs that are structured outside the traditional pattern of full-time, full-year work for a single employer. These include work with temporary agencies or employee leasing firms, both voluntary and involuntary part-time work, and contract work. The second group includes workers, still primarily women, whose family responsibilities result in more entries into and exits from the workforce, and limits on their work schedules or hours of work. I am uncomfortable with labelling members of the second group "contingent" workers, because that term feeds into the historical assumption that women are not "serious" workers. Many women who drop out of the labor force due to family responsibilities would prefer to remain part of the workforce if employer accommodation or social support programs permitted. For the lack of a better term, however, I have used the word "contingent" for both groups.

Note that the two groups overlap substantially, because it is disproportionately women who are shunted into, and in some cases arguably "choose," less traditionally structured jobs. Although neither group is limited to the low-wage workers who are the subject of Karl Klare's article, the contingent worker and low-wage worker categories also overlap significantly.

ance system are no longer valid. The world contemplated by the architects of the American social welfare system,[6] including unemployment insurance, consisted mostly of white, male breadwinners and their full-time, homemaker wives.[7] With that social framework in mind, the unemployment insurance system in the United States intended to provide the best protection to workers who were available for work on a full-time, year round basis. In addition, unemployment insurance targeted workers in relatively stable jobs structured around the traditional employer-employee relationships. But because workers and jobs in the United States economy increasingly fail to reflect the assumptions underlying the program as originally designed,[8] the protection afforded by the unemployment insurance system has become increasingly inadequate.

With the entry of a substantial number of women into the workforce, fewer workers fit the traditional male breadwinner script.[9] Yet women continue to bear greater responsibility for family care,[10] and thus are more likely to drop out of the labor force with greater frequency, and for longer time periods than men.[11] Women also are more likely to take part-time employment[12] and to

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[6] For an excellent recent overview, see Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421 (1993).

[7] On the social welfare system generally, see O'Connell, *supra*, note 6; Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989); Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983). On unemployment insurance, see Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081 (1992); Diana Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, 10 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 439, 454 (1985).

[8] Even in the 1930's, when the unemployment insurance program was established, a substantial minority of women did not live according to the homemaker script. The labor force participation rates of single white women under 34 have always exceeded 75% since 1930; the rates for widowed and divorced white women ranged from 25% for older women aged 55-64 to 64% for women aged 25-34 in 1930, fluctuating mostly upward in succeeding decades. Rates for black women have significantly exceeded those for white women. CLAUDIA GOLDEN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN, 18, Table 2.2 & 2.7 (1990). Since 1980, the majority of women, married and single, though not those widowed, divorced or separated, have been labor force participants. STATISTICAL ABSTRACT OF THE UNITED STATES, Table No. 633 (1993).

[9] As of 1984 only 27% of married women with children worked full-time, year round. Another 38% worked part time or part year, of whom only 7% would have worked had more work been available. DAVID ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 133, Table 5.1 (1988).

[10] *See, e.g.*, ARLIE HOCHSCHILD, THE SECOND SHIFT (1989) (discussing women's greater responsibilities for housework and caretaking).

[11] O'Connell, *supra* note 6 (citing data on women's spells out of the paid labor force).

[12] *See, Employed and Unemployed Workers, by Work Schedules, Sex, and Age:*

place limits on their availability for work on weekends or for particular shifts. Moreover, labor market segregation continues to result in women holding lower-paying jobs with less security and fewer benefits than men.[13] As this paper will demonstrate, each of these factors results in women receiving less favorable treatment under the unemployment insurance system.

Second, the American economy in recent decades has undergone a major transformation away from the assumption of job stability contemplated by those who designed the nation's unemployment insurance system. This transformation has had four primary components: a shift from manufacturing jobs to service jobs, with an accompanying decline in the percentage of the workforce that is unionized;[14] an increasing gap between high-paying jobs requiring significant educational prerequisites and low-paying unskilled jobs;[15] a growing disparity in income, marked by a decrease in the real value of the minimum wage, and a rising differential between average wages and executive salaries;[16] and a trend away from job security and long-term employment toward increased reliance on contract, temporary, and part-time workers.[17] These changes have had a pervasive effect on unemployment insurance, including a steadily decreasing percentage of unemployed workers who receive benefits,[18] an increasing fixation with job training programs,[19] and a rise in

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1980 to 1992, STATISTICAL ABSTRACT OF THE UNITED STATES 402 Table 639 (1993). In all age groups during the period 1980 through 1992, women have been more likely than men to hold part-time jobs. The largest differential is found in the group aged 25 to 54: in 1992 over three times as many women in that age group worked part-time as men, or 7,702,000 women as opposed to 2,180,000 men.

[13] *See, e.g.*, CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN Chs. 2 and 3 (1990); FRANCINE D. BLAU & MARIANNE A. FERBER, THE ECONOMICS OF WOMEN, MEN, AND WORK Chs. 6-8 (1986).

[14] The percentage of workers belonging to a union decreased by 25% between 1979 and 1988. ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, REPORT AND RECOMMENDATIONS, 42 (February, 1994). *See generally*, MICHAEL J. PIORE & CHARLES SABLE, THE SECOND INDUSTRIAL DIVIDE (1984); LAWRENCE MISHEL & JACQUELINE SIMON, THE STATE OF WORKING AMERICA (1988).

[15] *See, e.g.*, SAR LEVITAN & FRANK GALLO, GOT TO LEARN TO EARN: PREPARING AMERICANS FOR WORK (George Washington University Center for Social Policy Studies, September, 1991); *Poverty in the U.S.: Why Is It So Persistent*, JOURNAL OF ECONOMIC LITERATURE 1090 (September, 1988).

[16] STEPHEN ROSE, SOCIAL STRATIFICATION IN THE U.S. (1992); FRANK LEVY, DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION (1987).

[17] Jonathan P. Hiatt and Lynn Rhinehart, *The Growing Contingent Workforce*, (Paper Presented to American Bar Association Section of Labor and Employment Law, August 10, 1993); BNA DAILY LABOR REPORT, No. 154, at E-1 (August 12, 1993); RICHARD S. BELOUS, THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE (1989).

[18] ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, REPORT AND RECOMMENDATIONS 24 & Ch. 4 (February, 1994).

[19] *See, e.g.*, Reemployment Act of 1994, Titles I and II, H.R. 4040, 103rd Cong., 2d Sess. (1994).

eligibility issues affecting contingent workers.[20]

Third, legislative efforts during the 1980's[21] have exacerbated the effects of economic and social changes on the number of workers covered by the unemployment compensation system. Rapid inflation in the 1970's, combined with high unemployment, strained the solvency of many state unemployment programs,[22] forcing many states to borrow from the federal loan fund available in such emergencies.[23]

The states' fiscal crises coincided with pressures at the federal level to restrict expenditures on unemployment insurance. The early Reagan years were marked by intense efforts to decrease spending on social welfare programs generally. In addition, a unified federal budget was developed for deficit calculation purposes under which unemployment compensation tax revenues were included for the first time, and payments from the unemployment trust fund appeared as an expenditure item.[24]

In response to these pressures, Congress took several measures[25] to create incentives for states to restrict their unemployment insurance programs and

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[20] While some of these issues are novel, others are not. Issues concerning shift workers, in particular, were prominent in the years during and immediately after World War II. *See* Ralph Altman and Virginia Lewis, *Limited Availability for Shift Employment: A Criterion of Eligibility for Unemployment Compensation*, 22 N.C. L. REV. 189 (1944); 28 MINN. L. REV. 387 (1944).

[21] Histories of these legislative efforts and previous developments in the unemployment insurance system are contained in three symposia on unemployment insurance: Symposium, *Long Lines and Hard Times: Future Unemployment Insurance Alternatives*, 55 U. DET. J. OF URBAN L. 481-683 (1982); Symposium on Unemployment Insurance, 8 VAND. L. REV. 179 (1955); 55 YALE L.J. 1 (1945); In particular, see Joseph E. Hight, *Unemployment Insurance: Changes in the Federal-State Balance*, 59 U. DET. J. OF URBAN LAW 615 (1982); Arthur Larson and Merrill G. Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181 (1955); Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21 (1945).

[22] Joseph M. Becker, S.J., *The Location of Financial Responsibility in Unemployment Insurance*, 59 U. DET. J. OF URBAN L. 509, 511-514 (1982) (elaborating on the factors leading up to the fiscal crisis).

[23] *Id.* at 514, Table I; *see also*, ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION. REPORT AND RECOMMENDATIONS 93 & Fig. 7-5 (February 1994).

[24] Hight, *supra* note 21, at 621-623.

[25] Largely in response to the fiscal concerns that surfaced in the mid-1970's, Congress established a National Commission on Unemployment Compensation. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 411(a), 90 Stat. 2667, 2681 (1976), *reprinted in* 26 U.S.C. app. § 3304 (1976). The Commission filed a comprehensive report in 1980 which included some of the measures described here, such as requiring interest on federal loans to the states. NATIONAL COMM'N ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION: FINAL REPORT (1980). The work of the Commission was the impetus for the articles collected in Symposium, *Long Lines and Hard Times: Future Unemployment Insurance Alternatives*, 59 U. DET. J. OF URBAN LAW 481 (1982).

placed additional burdens on claimants collecting benefits.[26] For example, Congress required the states to pay interest on federal loans to their employment insurance trust funds[27] as well as to ensure the solvency of the funds. In addition, Congress partly[28] and then completely included unemployment benefits as income for purposes of computing federal personal income taxes.[29] States responded to Congressional pressure and their own fiscal crises by cutting back their unemployment programs, primarily through tightening eligibility standards and imposing stricter penalties[30] on claimants who were fired for misconduct or who voluntarily quit their jobs.[31] These factors — the entry of more women into the labor force, structural changes in the economy, and more restrictive state unemployment insurance statutes — have had significant implications in terms of gender, race and economic class. Women, minorities and low-wage workers tend to fill precisely those jobs that lack the comparatively stable, predictable characteristics contemplated by the architects of the system.

The unemployment insurance system in the United States is presently an area of considerable ferment on both the federal[32] and state levels as advocates

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[26] These steps are summarized in ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, REPORT AND RECOMMENDATIONS 39-40 (February 1994).

[27] 42 U.S.C. § 1323 (1988).

[28] Pub. L. No. 95-600, § 112(a), 92 Stat. 2777 (1978) (adding section 86 to the Internal Revenue Code, 26 U.S.C.§§ 1 *et. seq.* (1988)).

[29] Pub. L. No. 99-514, § 121, 100 Stat. 2109 (1986) (codified at 26 U.S.C. § 86 (1988)).

[30] States moved from "denial periods" which disqualify a claimant for a set number of weeks, but allow an individual who remains unemployed at the end of that period to claim benefits, to "durational disqualifications" under which a claimant is disqualified for the entire period of unemployment and until the individual works for a specified number of weeks. *See* Marc Baldwin and Richard McHugh, *Unprepared for Recession: The Erosion of State Unemployment Insurance Coverage Fostered by Public Policy in the 1980s, in* ECONOMIC POLICY INSTITUTE BRIEFING PAPER 9 (February 1992); U.S. DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, Tables 401 and 402 (August 1994).

[31] Several studies attempted to identify the changes and determine their impact on the declining proportion of unemployed workers receiving unemployment insurance. For the most recent analysis and a summary of other studies, see Marc Baldwin, *Benefit Recipiency Rates Under the Federal /State Unemployment Insurance Program: Explaining and Reversing Decline* (1993) (unpublished dissertation, Massachusetts Institute of Technology).

[32] For instance, an Advisory Council on Unemployment Compensation is currently preparing recommendations for Congress concerning the design of the system. Labor Secretary Robert Reich recently ordered a comprehensive review of all Department of Labor policies affecting the "contingent workforce." In addition, the "Metzenbaum bill," S. Bill 2504, would require states to make unemployment insurance benefits available to workers who are seeking part-time work. *See* 140 CONG. REC. S14,247-51 (Oct. 5, 1994). The Clinton welfare reform bill incorporates unemployment compensation concepts into the welfare system. In evaluating whether a claimant meets the two

and policymakers attempt to respond to the factors identified above. This paper suggests that unemployment insurance currently presents significant challenges and potential for both advocates and academics interested in improving the situation of poor people. However, I argue that absent thoughtful and sustained attention by those sympathetic to the needs of the poor, the unemployment insurance system will likely provide benefits for even fewer unemployed workers, and may ultimately exclude from protection those most in need of assistance.

II. Implications of the Rise of the "Contingent Workforce" for Advocates Facing Unemployment Compensation Issues

Recent structural changes in the American workforce and job market have major implications for unemployment compensation advocates. These implications will surface in all forms of advocacy: legislative reform, adminstrative rulemaking, individual casework, and litigation reform efforts. A successful response to these changes will require efforts to bridge the divisions among traditional legal practice areas including public benefits, employment, and labor law.

Two sets of issues stand out. The first concerns eligibility requirements affecting workers whose jobs do not fit the traditional model of full-time, year-round employment with a single employer. Many of these issues are related to the increased participation of women in the work force, as well as the disproportionate number of women and men of color holding non-traditional jobs. The second implicates relationships between the unemployment compensation system and the American welfare system.[33]

A. *The "Contingent" Workforce and Eligibility for Unemployment Insurance*

Unemployment insurance typically imposes four requirements that can create eligibility problems for contingent workers. First, all states make eligibility for unemployment benefits contingent upon satisfying a "work test," whereby a claimant must have worked in statutorily approved employment for a specified number of hours or weeks, or must have earned a prescribed sum during a specified period before becoming unemployed.[34] Thus, the system excludes

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year limit for eligibility, the bill relies on unemployment insurance good cause standards used to determining whether a worker voluntarily quit employment with good cause.

[33] As with unemployment insurance, Aid to Families with Dependent Children, the program primarily conceptualized as "welfare" in the United States is a joint federal and state program. In the case of AFDC, the federal government provides matching funds to the states for the operation of their AFDC programs. In order to qualify for matching funds, each state must operate its program consistently with federal statutory and regulatory requirements. 42 U.S.C. § 602(a) (1988).

[34] Three major approaches are in force, although combinations of requirements and

women following the traditional homemaker script who are forced into the labor market by unexpected necessities until they can satisfy the work test.[35] Similarly, many individuals who combine work and caretaking activities are likely, at times, to fail the "work test" requirement, either because they move in and out of the work force, or because of insufficient part-time earnings. In addition, the number of part-time, seasonal, and temporary workers who qualify for unemployment insurance will vary greatly depending on the specifics of the work test, particularly the requirements covering the number of weeks worked, earnings, and the period(s) of employment.

Second, in all states, workers who "voluntarily quit" their employment without good cause are disqualified from receiving unemployment benefits.[36] To the extent that family reasons are not considered good cause, workers who leave their employment either due to family emergencies or because they are unable to comply with a change in their work schedule are disadvantaged by this requirement.[37] Women, of course, still perform the bulk of family care

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alternative qualifying methods complicate the picture considerably. Over half the states require that a claimant must have earned wages equal to a specified multiple of the state's weekly benefit amount. By using a formula that relies on high-quarter wages, most of these states require wages in at least two quarters out of the base year. A second group of states requires that an employee earn a minimum dollar amount during the base year. In some states greater earnings during the base period will entitle the claimant to higher weekly benefits and more weeks of benefits. A third group of states require work for a specified number of weeks at a specified weekly wage, or some combination of weeks worked and base period wages. The state of Washington requires only that the claimant have worked at least 680 hours in the base period. U.S. DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, § 310, Table 301 (1994).

[35] O'Connell, *supra* note 6, at 1449-54 and 1468-70.

[36] For an early discussion of the disqualification, see Katherine Kempfer, *Disqualifications for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147 (1945) . The basic requirement has remained the same, but in many states the details of its implementation have fluctuated. A major area of controversy has been the definition of good cause for voluntary leaving, and whether it can encompass leaving as a result of domestic responsibilities. In over half the states, good cause must be "connected with work" or "attributable to the employer," so a domestic quit typically disqualifies the claimant. *But see infra*, notes 94-96 and accompanying text. Another area of change has concerned the penalty imposed for a domestic quit. The trend during the 1980's was toward an absolute disqualification for the period of unemployment, rather than a period of weeks of ineligibility. U.S. DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, § 430, Table 401 (1992).

[37] Three additional voluntary quit issues not discussed here disparately affect women: quitting due to pregnancy, sexual harassment, and domestic violence. *See* S. Dietrich, M. Emsellem and S. McNeil, *Violence and the Workplace: Exploring Employee Rights and Remedies*, 28 CLEARINGHOUSE REV. 467, 474-476 (Special Issue 1994); Diana M. Pearce & Monica L. Phillips, *When Sexual Harassment Happens: State Unemployment Insurance Coverage of Workers Who Leave Their Jobs Because of Sexual Harassment*, 5 STAN. L. & POL'Y REV. 75 (Spring 1994); Richard McHugh

and disproportionately comprise those quitting for family reasons.

Third, all states require that an individual be "able and available for work" in order to qualify for unemployment benefits.[38] Typically, availability is defined according to standards fitting the male breadwinner script. In other words, an individual is likely to face legal obstacles in receiving benefits unless he or she is available for employment on a full-time, year-round basis, regardless of the assigned shift.[39] A fourth requirement, closely related to the third, is that a worker receiving benefits who refuses an offer of "suitable" employment will be disqualified from receiving further benefits. In addition to monitoring the effect of these specific eligibility requirements, advocates for the poor must also consider the ways in which the legal system in general, and unemployment insurance statutes in particular, create unnecessary incentives for employers to rely on contingent workers.

1. Attachment to the labor force requirements

Traditional gender-based assumptions regarding the American labor force have been severely undermined by the rise of women holding paid employment as well as employers' increased reliance on contingent workers. As a result, it seems increasingly necessary to modify those technical requirements that exclude low-income workers from receiving unemployment benefits as well as reexamine the rationale underlying them.

a. Part-year workers and the moveable base year

Any attachment prerequisite requires the determination of a "base year" for each claimant, typically the first four of the last five completed calendar quarters prior to the claimant's application for benefits. Under the "first four" approach, the calendar year is divided into four quarters: January-March, April-June, July-September and October through December.

As an illustration, assume that a woman applies for benefits in February of 1995. The relevant quarters for determining her eligibility will be determined on the basis of her earnings in the first four of the last work quarters. Because the current quarter (January-March 1995) will not count, nor will the most

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and Ingrid Kock, *Unemployment Insurance: Responding to the Expanding Role of Women in the Workforce*, 27 CLEARINGHOUSE REV. 1422 (1994); see *also*, Pearce, *supra* note 7, at 454.

[38] *See* Louise F. Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123 (1945). Again, the requirement has stayed in place over the years, although definitions of availability now vary substantially. The three basic versions of the availability requirement are (1) available for work, (2) available for suitable work, and (3) available for work in the claimant's usual occupation or one for which claimant is reasonably fitted by prior training or experience, but these are subject to numerous specific variations. U.S. DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, §§ 405, 410, Table 400 (1992).

[39] *See infra* notes 111-148 and accompanying text.

recent quarter (the fifth of the last five, or October-December 1994) the quarters at issue will cover October-December 1993, and January-September 1994.

Under the "first four" method, individuals whose recent work is concentrated in the current and immediately preceeding quarters are unlikely to be eligible for benefits, even though they would meet the hours or earnings requirements if their most recent work were considered. This approach particularly disadvantages white women, men and women of color, and low income workers, all of whom are far more likely than middle-class white men to enter, exit, and then reenter the labor force.[40]

The "first four" approach is a relic of the pre-computer era when agencies needed significant lag periods to process employer reports for determining worker eligibility. Modern technology has already enabled eight states[41] to adopt a "moveable base period" which allows claimants to qualify for benefits based on wages earned in a recent or current quarter. In addition, both litigation efforts and other forms of advocacy are now underway to ensure that all states convert to the movable base year. In the recent case of *Pennington v. Didrickson,*[42] the Seventh Circuit considered whether or not the "first four" method is consistent with the federal statutory requirement that benefits be paid "when due."[43] The court remanded the case to determine whether the moveable base period complies with the governing federal regulation which provides that a state law must "include provision for such methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible."[44]

Even before the *Pennington* court issued its decision, the litigation prompted

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[40] O'Connell, *supra* note 6, at 1453 (citing studies suggesting that women enter the labor force 4.5 times as compared to 3 entries for men, men become reemployed faster, and black men spend about 7% of their potential work years away from work as compared to white men). *See also* Pearce, *supra* note 7, at 446-47. Women account for about 45 percent of the labor force, but constitute nearly two-thirds of all minimum wage workers. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 175, *Poverty in the United States: 1990.*

[41] *See* ME. REV. STAT. ANN. tit. 26 § 1043(3A) (West 1993) (effective after September 27, 1992 and before March 25, 1995); MASS. GEN. LAWS ANN. ch. 151A, § 1 (1992) (effective after October 3, 1993); MINN. STAT. § 268.04(2)(b) (1992) (limited to use once during a five calendar year period); OHIO REV. CODE ANN. § 4141.01(Q)(2) (1992) (effective September 25, 1990); R.I. GEN. LAWS § 28-42-3(10) (1993) (effective after October 4, 1992); UTAH CODE ANN. §§ 35-4-22(1), 35-4-201(4) (1994) (effective October 2, 1994); VT. STAT. ANN. tit. 21, § 1301(17)(B) (1987) (allows use of last four completed calendar quarters); WASH. REV. CODE § 50.04.020 (1994).

[42] 22 F.3d 1376 (7th Cir. 1994), *cert. denied sub. nom.* Doherty v. Pennington, 115 S. Ct. 613 (1994).

[43] 42 U.S.C. § 503(a)(1) (1988).

[44] 20 C.F.R. § 640.3(a) (1994).

similar legal challenges in other states.[45] The Seventh Circuit's ruling will undoubtedly result in renewed litigation efforts. In addition, the Department of Labor, in response to *Pennington*, has initiated a study of the administrative costs of adopting a moveable base period,[46] an effort that may presage a new federal position. Advocates should continue urging the Department of Labor to require that states adopt a moveable base year, and in the meantime, must press for its adoption on a state-by-state basis.

b. Covering domestic and farmworkers

The Federal Unemployment Tax Act (FUTA)[47] originally excluded employers of domestic laborers and farmworkers from tax liability. The states followed this policy by not including domestics and farmworkers under their unemployment insurance programs.[48] In 1976, Congress amended FUTA in order to extend coverage to domestic workers earning more than $1,000 per quarter and to farmworkers employed on large farms.[49] Again the states followed Congress' lead by quickly extending coverage in accordance with the federal definition.[50] As of early 1992, eight jurisdictions went beyond the federal definition by extending coverage to workers on some smaller farms.[51] However, even in states where farmwork qualifies for coverage, farmworkers do not necessarily receive the benefits which they are entitled to, although accurate data on this issue in not easily accessible.[52] Advocates have already played a significant role in this politically difficult and often exhausting process of extending coverage to farmworkers, but much work remains to be done.

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[45] *See, e.g.*, Duncan v. Turner, No. C86-227TB (dismissed after 1987 amendment of WASH. REV. CODE § 50.04.020 to authorize an alternative base year of "the last four completed calendar quarters.").

[46] Personal communication with Wayne Vroman of the Urban Institute, one of the researchers on the study.

[47] 26 U.S.C.A. § 3306(a)(2) (1994).

[48] *See*, Margaret Wein, *The Federal Government and Unemployment: The Frustration of Policy Innovation From the New Deal to the Great Society*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (MARGARET WEIN ET. AL. eds. 1988).

[49] Farms covered are those paying $20,000 or more in wages in one calendar quarter, or employing at least ten individuals in agricultural labor on twenty days in twenty different weeks. 26 U.S.C.A. § 3306(a)(2)(A) and (B) (1994).

[50] *See* U.S. DEPT. OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, § 125.01, Table 100 (1992).

[51] *Id.* The jurisdictions are California, the District of Columbia, Florida, Minnesota, Puerto Rico, Rhode Island, Texas, the Virgin Islands, and Washington. The provisions range from TEX. LAB. CODE ANN. §§ 201.041, 201.047 (West 1994) (covering farms employing 3 workers in twenty weeks or $6,250 in a calendar quarter) to WASH. LAWS Ch. 380, § 78 (1989) (covering all workers). Note that this amendment has not been incorporated into the codified statute found at WASH. REV. CODE ANN. § 50.04.155 (West 1990).

[52] Testimony of Don Villarajo, Executive Director, California Institute for Rural Studies, Inc. on January 12, 1994 (copy available from the author).

As a number of recent highly-publicized cases have demonstrated, individual employers of domestic workers often fail to pay payroll taxes on behalf of their employees.[53] Thus, many domestic workers — a group composed disproportionately of women, particularly women of color — remain outside the protections of wage-based social welfare programs,[54] including unemployment insurance. Reform proposals that surfaced after the Zoe Baird episode focused on raising the earnings threshold giving rise to tax liability, in effect exempting middle class employers from the burden of recordkeeping and tax liability, rather than at ensuring coverage for domestic workers.

c. Rethinking the attachment requirement

The "attachment requirement" is an entrenched and rarely questioned aspect of the unemployment insurance system. Three significant groups of individuals are affected by attachment requirements. They include new entrants to the labor force, such as high school or college graduates (or dropouts) and some displaced homemakers; individuals, predominantly women, who are returning to the labor force after a hiatus for caretaking activities; and individuals returning to the labor force after a period of illness or disability. While it seems unlikely that the states will abandon the attachment requirement entirely, advocates should consider strategies for incremental change.

In seeking changes to the attachment requirement that would benefit contingent workers, advocates can draw support from two existing statutory approaches. First, Rhode Island disregards periods of active military service in determining whether a claimant satisfies the base year earnings requirement.[55] Because military service remains primarily a male activity, the widespread adoption of this statute would only exacerbate the structural gender bias of the unemployment insurance system.[56] Nonetheless, the statute demonstrates that

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[53] *See, After Wood and Baird, Illegal-Nanny Anxiety Creeps Across Many Homes*, N.Y. TIMES, Feb. 15, 1993, at A13.

[54] The earnings threshhold for Social Security coverage for household workers has recently been increased from $50 per quarter to $1,000 per year. *See*, Marc Linder and Larry Norton, *Nanny Tax Lets Poor Pay, Rich Profit*, N.Y. TIMES, Nov. 13, 1994, Sec. 3 (Magazine), at 13.

[55] R.I. GEN. LAWS § 28-44-29 (1993). In formulating alternative ways of structuring the unemployment insurance system, it is worth noting that Indiana, Ohio, and Texas also waive the voluntary quit disqualification for veterans. *See, e.g.*, TEX. LAB. CODE ANN. § 207.045(f) (West 1994). Rhode Island waives all disqualifications prior to military service, R.I. GEN. LAWS § 28-44-34 (1993).

[56] The gender implications of statutes favoring veterans have been litigated and analyzed at length. *See, e.g.* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) (rejecting equal protection challenge to Massachusetts' veterans preference for state employment); David Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

waiving the attachment requirement in specific instances is not an unprecedented idea. In addition, thirteen states have enacted special statutory provisions designed to offset the effects of the attachment requirement on individuals returning to the work force after a period of disability by disregarding an individual's period of disability or their receipt of worker's compensation in calculating the base year.[57]

In addition to lobbying for the adoption of statutes that would disregard periods of disability, advocates should seek to extend such provisions to workers who have been out of the workforce while engaging in caretaking activities. For instance, leave time as calculated by the Family and Medical Leave Act of 1993[58] could similarly be relied upon to calculate the base year for workers who are laid off after returning to work following an extended absence.

d. Lowering the earnings threshold

A final modification to the attachment requirement would lower the earnings threshold necessary to qualify for benefits. Depending on the state, this could be accomplished by lowering either the total amount of earnings required or the total number of weeks necessarily worked. Alternatively, a state could rely simply on a threshhold number of hours worked.[59]

The potential impact of states changing their earnings threshhold remains unclear, though some data suggest that the effects could be significant. Several studies have sought to explain the declining percentage of unemployed workers receiving benefits. Although estimates vary, these studies suggest that

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[57] *See*, ALASKA STAT. § 2323.20.376 (1990) (individual incapable of working during greater part of working time in calendar quarter); CONN. GEN. STAT. ANN. § 21-230 (West 1994) (individuals eligible for or receiving workers compensation or properly absent under an employer sick leave or disability policy); IDAHO CODE § 72-1306 (1993) (medically verifiable temporary total disability); ILL. ANN. STAT ch. 405 para. 237 (Smith-Hurd 1994) (awarded temporary total disability under any worker's compensation act or occupational diseases act); IOWA CODE § 96.23 (1993) (received worker's compensation benefits but did not receive wages for three quarters); MICH. COMP. LAWS. § 421.28a (1994); MINN. STAT. § 268.04 (West 1994)(received compensation for temporary disability); MONT. CODE ANN. § 39-51-201(2) (1993) (disability); NEV. REV. STAT. ANN. § 612.344 (Michie 1993) (received worker's compensation, vocational rehabilitation, etc.); N.J. REV. STAT. § 43:21-319 (West 1994)(total disability benefits); N.C. GEN. STAT. § 96-12-1 (1994) (job related injury for which received worker's compensation); S.D. CODIFIED LAWS ANN § 61-1-1(1) (1993) (awards temporary total disabiity under worker's compensation); WASH. REV. ANN. CODE § 50.06.020 (West 1990) (temporary total disability under industrial insurance or crime victims compensation laws; and effective January 2, 1994 "individuals who are reentering the work force after an absence of not less than thirteen consecutive calendar weeks resulting from temporary total physical disability because of a nonwork-related injury or illness.") *Id.*

[58] Pub. L. 103-03, § 2, Feb. 5, 1993, 107 Stat. 6 (codified at 229 U.S.C.A. § 2601, 2 U.S.C.A. §§ 60m and 60n, 5 U.S.C.A. §§ 6381-6387, 2105 (1993)).

[59] WASH. REV. CODE ANN. § 50.04.030 (West 1991).

increases in the earnings threshhold during the 1980's caused a decline by several percentage points in the number of unemployed workers covered by insurance.[60]

2. The voluntary quit disqualification

Statutory provisions that disqualify a claimant for voluntarily quitting a job raise other troubling issues. Among the concerns facing advocates: when will a worker be deemed to have quit a job; which "job quits" will be considered for workers who "moonlight" or hold a series of short-term jobs; and finally, what constitutes "good cause" for quitting.

a. "Moonlighting" and related problems

As real wages have stagnated over the last two decades and more workers have become unable to find full-time jobs paying "family" wages, the number of workers either combining full-time and part-time work, or taking several part-time jobs has increased.[61] When an individual has more than one employer, questions may arise over whether she should be disqualified from receiving benefits for voluntarily quitting one of her jobs.

i. Quitting (or Losing) Part-Time Job, Then Losing Full-time Job

When an individual quits her part-time job for reasons that do not constitute "good cause" and subsequently is laid off her full-time job, the worker may be disqualified from receiving benefits due to the earlier quit, even though she was still working at a full-time job. Resolution of this problem depends significantly on the applicable statutory scheme.

Three states have special statutory provisions making the voluntary quit dis-

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[60] *See* Marc Baldwin, *Benefit Recipiency Rates Under The Federal/State Unemployment Insurance Program: Explaining and Reversing Decline* 168, Table 3.6 (1993) (unpublished dissertation, Massachusetts Institute of Technology) (higher minimum earnings requirements account for 5.1% of the decline in insured unemployment/total unemployment); Walter Corson and Walter Nicholson, *An Examination of Declining UI Claims During the 1980's*, *in* Unemployment Insurance Occasional Paper 88-3, p. 119, Table VI.1 (increase in qualifying weeks accounts for 3.4% of decline in UI claims ratio); Marc Baldwin and Richard McHugh, *Unprepared for Recession: the Erosion of State Unemployment Insurance Coverage Fostered by Public Policy in the 1980s*, *in* ECONOMIC POLICY INSTITUTE BRIEFING PAPER (February 1992) (every $1,000 increase in the minimum earnings requirement pulls down the recipience rate by 2.4 percentage points).

[61] Between 1976 and 1989 the number of multiple jobholders increased from 4.0 milion to 7.2 million, or 6.2% of the workforce. The numbers held constant from 1989 to 1992. More women (6.4%) than men (5.9%) held more than one part-time job. U.S. Bureau of Labor Statistics, USDL 91-547 (October 28, 1991), 1991 WL 283581 (D.O.L.); STATISTICAL ABSTRACT OF THE UNITED STATES Table No. 640, p. 403 (1993).

qualification inapplicable to individuals who quit a part-time job and then lose a full-time job.[62] In sixteen other jurisdictions, the voluntary quit statute applies only to the "most recent work;"[63] a seventeenth covers the "last or next to last employment."[64] However, in three states disqualification provisions are triggered if a claimant quits any job during the base period used for computing her benefits.[65]

In the remaining states, the question of disqualification is governed by regulation or case law. Several courts have limited voluntary quit provisions to separations from full-time employment, an approach that in effect adopts the

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[62] CONN. GEN. STAT. ANN. § 31-236(b)(1) (West 1987 and Supp. 1993) (benefits given only if separation from the individual's part-time employment preceeded a compensable separation from his full-time employment, otherwise the amount of the part-time earnings is deducted from the weekly benefit amount); MINN. STAT. ANN. § 268.09, Subdiv. 1(c)(7), 1(c)(9) (West 1992) (voluntary quit disqualification inapplicable where claimant voluntarily leaves part-time employment while continuing full-time employment, if the claimant attempts to return to part-time employment after separating from full-time employment and substantially the same part-time employment is not available or where the claim is based on sufficient full-time employment to establish the claim and the full-time separation is for nondisqualifying reasons) (codifying in modified form, Berzac v. Marsden Bldg. Maintenance Co., 311 N.W.2d 873 (Minn. 1981)); OHIO REV. CODE ANN. § 4141-29(D)(2)(iii) (Anderson 1991 & Supp. 1993) (disqualification does not apply to one who "left or separated from employment which was concurrent at the time of the most recent separation or within six weeks prior to the most recent separation where the remuneration, hours, or other conditions of such concurrent employment were substantially less favorable and where such employment, if offered as new work, would be considered not suitable"). Note that Ohio's statute also protects at least some workers who quit a part-time job and then lose another part-time job. In addition, Louisiana's statute might protect some dual-job workers by means of statutory language which provides that "[n]o one shall be disqualified for benefits . . . for leaving part-time or interim employment in order to protect his full-time or regular employment," and requires the agency to adopt implementing regulations. LA. REV. STAT. ANN. § 23: 1601(1)(c) (West 1985 & Supp. 1990).

[63] The statutes of six jurisdictions—Alabama, California, the District of Columbia, Georgia, South Carolina, and Tennessee--use the "most recent work" language. *See, e.g.*, ALA. CODE § 25-4-78(2) (1992); D.C. CODE ANN. § 46-111(a) (1984). *See also* Hamel & Park v. Department of Employment Services, 487 A.2d 603 (D.C. 1985). The statutes of ten other jurisdictions— Alaska, Arkansas, New Mexico, New York, North Dakota, South Dakota, Texas, Vermont, the Virgin Islands, and Virginia—refer in various terms to the last suitable work or most recent employer. *See, e.g.*, ALASKA STAT. § 23.20.379(A)(1) (1990); VT. STAT. ANN. tit. 21, § 1344(a)(2)(A) (1977); VA. CODE ANN. § 60.2-618 (Michie 1993).

[64] NEV. REV. STAT. ANN. § 612.380 (Michie 1993).

[65] COLO. REV. STAT. ANN. § 8-73-108(3)(a)(I) (West 1989) ("The most recent separation and all separations from base period employers . . . shall be considered"); KY. REV. STAT. ANN. § 341.370(1)(c) (Baldwin 1990) (worker has most recent suitable work or any other suitable work after the first day of the base period and which last preceeded the most recent work); LA. REV. STAT. ANN. § 23:1601(1)(a) (West 1985 & Supp. 1990) ("employment from a base period or subsequent employer").

"most recent work" approach.[66] Other courts have considered prior employers unless the subsequent employment was of sufficient length to "purge"[67] a durational voluntary quit disqualification by satisfying the applicable statutory requalification requirement.[68] A similar question may arise when an individual is fired from a part-time job for misconduct. At least one court has upheld a claimant's eligibility for benefits in this situation.[69]

ii. Quitting Part-time Work After Losing Full-time Work

A variation on the voluntary quit problem arises when moonlighters lose a full-time job, and as a result cannot afford to continue their part-time work. In the absence of specific statutory guidance, a few courts have held claimants ineligible.[70] After the Wisconsin Supreme Court held such a worker ineligible,[71] the state legislature responded by enacting a statutory exception to the voluntary quit disqualification.[72]

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[66] Gilbert v. Hanlon, 335 N.W.2d 548 (Neb. 1983) (claimant who voluntarily gave notice at part-time job before receiving notice of discharge from full-time job not disqualified from receiving benefits); Berzac v. Marsden Bldg. Maint., 311 N.W.2d 873 (Minn. 1981) (in cases involving multiple employers consider each job separation individually); Brown v. Labor and Indus. Relations Comm'n, 577 S.W.2d 90 (Mo. Ct. App. 1978) (claimant quit part-time job, then laid off from full-time job entitled to benefits charged only against experience rating of full-time employer); McCarthy v. Employment Sec. Comm'n, 76 N.W.2d 201 (Iowa 1956) (claimant who quit part-time job two months before being laid off from full-time job entitled to benefits based on wage credits earned with full-time employer).

[67] In states with "durational disqualifications," *supra* note 30, a claimant disqualified for voluntarily quitting work cannot receive benefits until the worker has been employed again for a statutorily set period of time and, sometimes, until the claimant has earned a prescribed amount. Thus, unless the worker obtains a new job and loses it for non-disqualifying reasons, the worker will receive no unemployment insurance benefits.

[68] *See, e.g.*, Employment Div. v. Sears, Roebuck & Co., 794 P.2d 828 (Or. App. 1990) (may consider grounds for separation from prior employer if claimant has not earned four times weekly benefit amount since separation); Othello Community Hosp. v. Employment Sec. Dep't, 762 P.2d 1149 (Wa. 1988) (consider separation from prior employer if requalification requirements not met).

[69] Glende v. Commission of Economic Sec., 345 N.W.2d 283 (Minn. 1984) (claimant terminated from part-time job for misconduct was not disqualified from receiving unemployment benefits based on earnings from full-time job). *See also* Richards v. Commonwealth of Pennsylvania, 480 A.2d 1338 (Pa. 1984).

[70] *See, e.g.*, Minfield v. Bernardi, 460 N.E.2d 766 (Ill. 1984) (treating case as simply involving dissatisfaction with hours and pay, even though claimant was a single parent with a learning disabled, speech impaired child).

[71] Ellingson v. Department of Indus., Labor and Human Relations, 291 N.W.2d 649 (Wis. 1980).

[72] WIS. STAT. § 108.04(7)(k) (1988) (disqualification does not apply to an employee who terminates part-time work of not more than thirty hours per week if otherwise eligible to receive benefits because of the loss of the employee's full-time employment,

Most courts, however, have allowed such claimants to receive benefits. In determining eligibility, some courts will consider only a claimant's "primary employer," meaning her last full-time or steady employment, thus disregarding part-time employment.[73] Others have found claimants eligible on the ground that part-time work is not "suitable" and therefore should not lead to disqualification.[74] Finally, some courts that do consider part-time work provide that a claimant may face only a reduction in benefits based on the amount of income foregone from part-time work, rather than total disqualification from eligibility.[75]

iii. Quitting Interim Part-time Work

Obtaining new part-time work can be an attractive option for unemployed

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and the loss of the full-time employment makes it economically unfeasible for the employee to continue the part-time work).

[73] Hopkins v. Stiles, 662 S.W.2d 177 (Ark. 1983), *rev'd on other grounds*, 666 S.W.2d 703 (1985) (unemployment insurance not affected by claimant quitting part-time job, where part-time job is not primary employer and part-time wages too low to reduce benefits); Tomlin v. Unemployment Ins. Appeals Bd., 147 Cal. Rptr. 403 (Cal. 1978) (effectively overruled by enactment of CAL. UNEMP. INS. CODE § 1256.3 (West 1979) (defining "most recent work" to include work obtained after opening an unemployment insurance claim); Rodgers v. Department of Employment Sec., 542 N.E.2d 168 (Ill. App. Ct. 1989) (claimant was laid off full-time work, "quit" when transferred to new location at part-time work and failed to show due to transportation problems); Welch v. Department of Employment, 421 N.W.2d 150 (Iowa Ct. App. 1988) (total disqualification applies only to separation from primary or regular employer, but claimant's benefits reduced by amount of reduction from part-time jobs); Sticka v. Holiday Village South, 348 N.W.2d 761 (Minn. 1984) (claimant's full-time hours were reduced; she took one part-time job and then a second, was laid off from full-time job, and quit part-time jobs to seek full-time work in other parts of country. Court held voluntary quit disqualification provision inapplicable where claimant was eligible due to layoff, before quitting part-time job. Court noted that the statute allows partial benefits for partially unemployed claimants and that the part-time work would probably have been considered unsuitable). *Cf.* Fellin v. Administrator, Unemployment Compensation Act, 493 A.2d 174 (Conn. 1985) (employee could be disqualified from receiving unemployment benefits from full-time job if voluntarily left part-time job, although may be entitled to partial benefits that he could have collected if continued working part-time).

[74] Appeal of John F. Borichevsky, 494 A.2d 772 (N.H. 1985) (claimant lost full-time job, qualified for benefits, then left pre-existing part-time job because couldn't support self. Court held claimant eligible on ground that part-time work was not suitable work for statutory purposes.).

[75] Wright v. Unemployment Appeals Comm'n, 512 So. 2d 333 (Fla. Dist. Ct. App. 1987) (claimant held long-term full-time job, added part-time work for six months, lost full-time job, then quit part-time job to seek full-time work); Butler v. Board of Review, 484 N.E.2d 318 (Ill. App. Ct. 1985) (claimant was laid off from full-time computer programmer job, then quit part-time commuter bus driver job). *See also* Welch v. Department of Employment, 421 N.W.2d 150 (Iowa Ct. App. 1988); Sticka v. Holiday Village South, 348 N.W.2d 761 (Minn. 1984).

workers seeking stop-gap employment. These workers may then face a voluntary quit disqualification, however, if they later quit part-time work in order to seek (or accept) full-time employment.[76] Interim part-time work typically will be considered in evaluating a claimant's eligibility, because it is often one's "most recent work," and quitting usually leaves the claimant with no job.[77] Any reduction in benefits, however, may be limited to the amount earned from the part-time work.[78] Some courts, though, find claimants eligible on the ground that part-time work is not "suitable" and thus should not lead to application of the voluntary quit disqualification.[79]

iv. Strategies for the Part-time Problem

In each of the situations just described, the goal of advocates should be to ensure that individuals are not penalized as a result of their extraordinary work effort or willingness to take "bad" jobs. Unfortunately, many approaches that protect one group of workers may be counterproductive for another group. Thus, advocates must be alert to the range of factual scenerios that may arise. For instance, applying the voluntary quit disqualification to "most recent work" solves the problem of the individual who quits a part-time job before losing a full-time job, but does nothing to protect an individual who quits either concurrent or interim part-time work after losing a full-time job. In many states, the harshness of the voluntary quit disqualification has been mitigated by reducing benefits only in the amount that would have been deducted

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[76] *See, e.g.*, Stewart v. Unemployment Appeals Comm'n, 635 So. 2d 73 (Fla. Dist. Ct. App. 1994) (claimant lost full-time job, qualified for unemployment, got part-time job, then left it to accept a different part-time job offering more pay, more hours, and the prospect of eventual full-time job); Coelho v. Balasky, 631 So. 2d 335 (Fla. Dist. Ct. App. 1994) (claimant lost full-time job, qualified for unemployment insurance, obtained part-time job, then left part-time job to attend school and search for suitable employment); Lopez v. Employment Sec. Dep't, 802 P.2d 9 (N.M. 1990) (claimant was laid off from full-time work at TV station, started part-time work as waitress after laid off, then quit to seek full-time employment. Court held eligible, because voluntary quit provision applies only to base year employer, but deducted amount would have earned from part-time.).

[77] *See supra* notes 63-69 and accompanying text.

[78] Fellin v. Administrator, 493 A.2d 174 (Conn. 1985) (employee could be disqualified from receiving unemployment benefits from full-time job if voluntarily left part-time job, although may be entitled to partial benefits); Holman v. Olsten Corp., 389 N.W.2d 236 (Minn. 1986) (remanded to determine whether deduction appropriate); Unemployment Compensation Bd. v. Fabric, 354 A.2d 905 (Pa. Commw. Ct. 1976) (claimant tried job for one evening; disqualified only to extent of deduction from benefits, in this case none).

[79] Crocker v. Department of Labor, 459 N.E.2d 332 (Ill. App. Ct. 1984) (part-time janitorial job at lower wage held to be unsuitable work for former store manager); Goodman v. Board of Review, 586 A.2d 313 (N.J. 1991) (interim part-time work as telemarketer not suitable). *Cf.* Appeal of John F. Borichevsky, 494 A.2d 772 (N.H. 1985); Holman v. Olsten Corp., 389 N.W.2d 236 (Minn. 1986).

if the worker had retained part-time work. Nonetheless, such an approach creates an undesireable disincentive to maximize work effort. Thus, the goal of encouraging maximum work effort can best be accomplished by combining (1) the "most recent work" approach with the understanding that (2) part-time work is unsuitable for workers seeking full-time work, and (3) a claimant is not disqualified after quitting unsuitable work taken or retained after losing a full-time job.

b. Temporary agency workers

Similar issues often arise when an individual ends a relationship with a temporary agency. Again, it must first be determined whether the individual "voluntarily quit" temporary employment. If the worker did in fact quit, it is then relevant whether she had "good cause" to do so.

i. Did the claimant "quit"?

When a claimant ceases to perform temporary work, the temporary agency and the worker often disagree as to whether the worker has "voluntarily quit" her employment. Arguments concerning this question have focused on three issues. First, if a worker knowingly accepts employment that is limited in time, should she be deemed to have "constructively" quit her job when the assignment ends. Second, should a worker be deemed to have quit employment if she fails to request or accept additional work from a temporary employer after an initial assignment ends. Finally, if a worker is found to have quit employment, what constitutes "good cause" for the decision.

The first cases involving these issues arose outside the context of work for temporary agencies. In numerous early cases where an employee failed to complete a temporary assignment, the employer argued that the employee should be treated as having voluntarily quit at the end of the term of employment.[80] Unlike temporary agency cases, however, these cases did not necessa-

[80] At least one court accepted the employer's argument. *See* Wilmington Country Club v. Unemployment Ins. Appeals Bd., 301 A.2d 289 (Del. 1973) (bartender "quit" at end of time-limited job). *See also* Loftis v. Legionville Sch. Safety Patrol Training Ctr. Inc., 297 N.W.2d 237 (Minn. 1980) (eleven week contract expired; original decision adverse to claimant was withdrawn on reconsideration after legislature enacted current Minnesota statute MINN. STAT. ANN. § 268.09(1)(c)(9) (West 1992) (providing that "separation from employment by reason of its temporary nature" does not fall within the voluntary quit statute)).

Numerous other cases, however, have found that the claimant was laid off in such a situation and did not voluntarily quit. State Dep't of Indus. Relations v. Montgomery Baptist Hosp., Inc., 359 So. 2d 410 (Ala. Civ. App. 1978) (nine-month pharmacy internship completed); Intermountain Jewish News, Inc. v. Industrial Comm'n, 564 P.2d 132 (Col. 1977) (shortly after hiring, parties agreed employment would be temporary); Cervantes v. Administrator, 411 A.2d 921 (Conn. 1979) (violinist completed contract for ten concerts); Unemployment Ins. Comm'n v. American Nat'l Bank, 367 S.W.2d 260 (Ky. Ct. App. 1963) (security guard hired for one year during bank reno-

rily involve a claim that additional work was in fact available.

In more recent cases, employers have focused on the availability of ongoing work and have argued that if other assignments are available, the individual "voluntarily quits" by not accepting them. However, traditional contract principles suggest that in these circumstances, the worker is no longer an employee of the temporary agency. The worker is under no contractual obligation to accept additional assignments but is merely registered for work with the agency, and indeed may be registered with numerous temporary agencies. Similarly, the agency is under no obligation to offer additional assignments to the worker. In the absence of statutory guidance,[81] several courts have adhered to a contract based analysis, finding claimants eligible provided they did not quit in the middle of an assignment.[82] As similar cases continue to arise, advo-

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vation.); Kubelka v. Board of Review, 12 Ohio Op. 3d 67 (1978) (discharged sailor took temporary job to earn money to return home to visit ailing mother); Commissioner of Minn. Dep't of Economic Sec. v. City of Duluth, 297 N.W.2d 239 (Minn. 1980) (city's temporary positions limited to one hundred working days); Walker Mfg. Co. v. Pogreba, 316 N.W.2d 315 (Neb. 1982) (claimant applied for both temporary and permanent work, was offered a temporary position, but was not informed permanent positions were available); Losordo v. Department of Employment Sec., 449 A.2d 941 (Vt. 1982) (refusal of third temporary assignment). *See also* Annotation, *Unemployment Compensation: Termination of Employment, Known to Be For a Specific, Limited Duration, Upon Expiration of Period, As Voluntary,* 30 A.L.R.4th 1201 (1984). However, one court suggested that a claimant would be ineligible if the claimant, rather than the employer, sought to make the employment temporary. Anthony Adams AIA Architect v. Department of Employment Sec., 430 A.2d 446 (Vt. 1981) (architect worked six weeks at temporary assignment).

[81] Both Minnesota, *supra* note 62, and Delaware have provided such statutory guidance. In both 1990 and 1992, the Delaware legislature enacted statutory amendments aimed at repairing the confusion created by Wilmington Country Club v. Unemployment Ins. Appeals Bd., 516 A.2d 166 (Del. 1986). The current statute provides that "[a]n individual who becomes unemployed solely as the result of completing a period of employment that was of a seasonal, durational, temporary or casual duration will not be considered as a matter of law to have left such work voluntarily without good cause attributable to such work solely on the basis of the duration of the employment." 68 Del. Laws ch. 421 (1992) (effective July 20, 1992). At least three trial court cases interpreted the various statutes: Kahn v. CDI Temporary Services, Inc., No. 91A-12-9, 1994 WL 150868 (Del. Super. Ct. Mar. 21, 1994) (under statute in effect from 1992-94, claimant was not disqualified if assignments were for an indefinite amount of time—in this case, less than thirty days); Smith v. The Placers, Inc., No. 90A-12-001, 1993 WL 603375 (Del. Super. Ct. Nov. 17, 1993) (claimant had right to refuse offer from temporary agency and not be disqualified from receiving benefits, but having accepted a position "they became her employer and she had the burden of showing good cause for terminating the relationship"); Compton v. Unemployment Ins. Appeal Bd., No. 91A-04-5, 1991 WL 215717 (Del. Super. Ct. Oct. 7, 1991) (1990 statute did not protect claimant who accepted temporary assignments after layoff, before applying for unemployment insurance).

[82] Prentice v. Albert & Bassett, 623 N.E.2d 744 (Ohio 1993) (claimant remained

cates will no doubt find this contract-based analysis useful to counter claims that workers ending their relationship with a temporary agency have voluntarily quit employment.

A traditional contract analysis, however, avoids broader underlying questions concerning the purposes of unemployment insurance. Is the function of unemployment insurance now to create a surplus labor pool of unskilled workers for employers? If so, society might wish to say "once a temporary worker, always a temporary worker" and bind workers to such work as long as it is available. On the other hand, if the purpose of unemployment insurance is still to provide workers with the freedom to hold out for jobs that utilize their skills most effectively, then it is more sensible to encourage workers to take advantage of the temporary employment market, without becoming locked into it.[83] Not surprisingly, no societal consensus exists on this issue.

Pressure by employers seeking to bind temporary workers led five states to enact restrictive statutes designed to resolve such disputes in favor of the temporary agency.[84] Colorado's approach overrides contract principles by providing that temporary workers remain employees of an agency after an assignment ends, unless no other assignments are offered in the next five days.[85] Delaware and Florida, on the other hand, simply provide that a claimant who completes an assignment for a temporary agency is disqualified from receiving benefits, unless the claimant takes the initiative to contact the agency and determine whether additional work is available.[86]

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eligible where after period of unemployment, he took temporary work for one week in another state); *Cf.* Smith v. Employers' Overload Co., 314 N.W.2d 220, 224 (Minn. 1981) (claimant who took unskilled day assignments with a temporary labor service but did not accept additional assignments held eligible).

[83] The possible purposes for the unemployment insurance system are not, of course, limited to the two identified in this paragraph. My purpose in this section is not to provide a thorough analysis of the ideologies and political disputes underlying this issue, but merely to note the complexity and disagreement underlying the doctrinal, statutory interpretation issues. Historical insight into this question is provided in Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259 (1994).

[84] In addition to the four states discussed in the text, New Jersey has adopted a statute targeted at agricultural workers, which provides that such a worker is disqualified under the voluntary quit statute if the individual is employed on a contract basis and has refused an offer of continuing work after completing the minimum period necessary to fulfill the contract. N.J. REV. STAT. § 43:21-5(a) (1994).

[85] COLO. REV. STAT. § 8-73-105.5 (1993).

[86] FLA. STAT. ch. 443.101(10)(b) (1994); 68 Del. Laws ch. 357 (1992). Both statutes require the temporary agency to notify the claimant of this requirement. *See also* Manpower Inc., v. Kansas Employment Sec. Bd. of Review, 724 P.2d 690 (Kan. Ct. App. 1986) (imposing requirement of notice by claimant to temporary agency through caselaw). *Cf.* Beaumont v. Texas Employment Comm'n, 753 S.W.2d 770 (Tex. 1988) (disqualifying claimant who claimed unemployment benefits before notifying temporary agency that assignment had ended).

Georgia addresses the problem through its suitable work provisions, under which an individual does not have good cause to refuse a temporary assignment that is comparable to assignments the person previously performed.[87] Given the recent legislative action on this issue, advocates in other states can expect to encounter similar proposals in the near future.

ii. Temporary employees and "good cause"

A variation on the "voluntary quit" issue arises when a worker qualified to receive benefits has difficulty finding a new job and accepts temporary employment in order to avoid exhausting her benefits. If such a worker accepts temporary assignments for a limited time period, or accepts an assignment and then quits, she may be disqualified,[88] even though she was not required to accept such employment in the first place.[89] Disqualifying a claimant in this scenerio creates a disincentive to work that is both counterproductive and inconsistent with the goals of unemployment insurance. Recognizing this, two states have adopted statutes excusing claimants who take otherwise "unsuitable" work and quit within ten weeks. [90] Even without such statutory authority, most courts facing this issue require individuals only to complete any temporary assignments,[91] rather than to continue accepting new assignments.[92]

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[87] GA. CODE ANN. § 37-8-195(a)(4) & (c) (1994).

[88] I recently supervised students handling a successful appeal in just such a case. *See* Hendrickson v. Employment Sec. Dep't., Case No. 93-2-30342-4 (Wash. Super. Ct. 1994).

[89] In three states the temporary nature of the work might be irrelevant. OR. ADMIN. R. 471-30-036 (1994) provides that an individual must be "[w]illing to work full time, part time, and accept temporary work opportunities . . . unless . . . such . . . temporary opportunitites would substantially interfere with return to the individual's regular employment." The Arkansas Supreme Court has held that a claimant has a duty to accept available, suitable work, whether it is temporary or permanent. The case involved a claimant who had performed less than full-time work for a city library, was laid off due to budget cuts, then refused an offer to return to work temporarily for 3-½ more hours a week for the the same pay. Wacaster v. Daniels, 603 S.W.2d 907 (Ark. 1980). Georgia's availability statute provides that an individual is "not deemed unemployed in any week in which he refuses an intermittent or temporary assignment without good cause when the assignments offered is comparable to previous work or assignments performed by the individual or meets conditions of employment previously agreed to." GA. CODE ANN. § 34-8-195 (1994). It is not clear whether the "comparable" requirement limits the application of the statute to claimants who previously performed temporary work. *See* Howard v. Department of Employment, 597 P.2d 37 (Idaho 1979) (work in temporary, part-time telephone solicitation sales was suitable in light of claimant's work history of four jobs in one year, two through CETA).

[90] N.D. CENT. CODE § 52-06-02(1)(b) (1993); WIS. STAT. § 108.04(7)(e) (1988).

[91] *See, e.g.*, McDonnell v. Anytime Temporaries, 349 N.W.2d 339 (Minn. 1984) (claimant reluctantly accepted a two-week temporary job, but left after one day, without completing assignment, because she wanted full-time, permanent employment. Court held claimant must finish temporary assignment. A claimant need not accept

c. Voluntarily quits due to domestic responsibilities

Workers with domestic responsibilities often face two barriers in their efforts to balance paid employment with family obligations. First, an employer may unilaterally alter the terms of employment in a manner that interferes with the employee's domestic obligations. Second, changes in the availability of child-care or the onset of a domestic crisis may render existing work schedules unmanageable. Where the employer unilaterally changes the terms of employment, an employee's subsequent decision to quit or her dismissal after refusing to comply with the new terms raises the issue of whether she has voluntarily quit or has been fired. Furthermore, when an employee has quit or is held to have done so, the issue again becomes whether she had good cause.

i. Quit v. Fired characterizations

When an employer unilaterally changes the terms of the employment, a worker with domestic responsibilities who is unable to fulfill the new requirements of her job may be fired expressly or may be forced to quit. Of course in many situations, the precise nature of any separation will be difficut to determine since the language of the parties or their recollections may be controverted. Unless the worker expressly quits, disputes will arise once again over whether the individual has quit voluntarily. Several courts have rejected such claims.[93]

ii. Good cause

The determination whether a worker had good cause for quitting is heavily influenced by the wording of a state's voluntary quit statute. In thirty-one jurisdictions,[94] good cause for voluntarily quitting work is restricted to reasons

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additional assignments if unsuitable, but no unsuitability exception to voluntary quit statute.).

[92] *See supra* note 82; *see also*, Compton v. Unemployment Ins. Appeal Bd., No. 91A-04-5, 1991 WL 215717 (Del. Super. Ct. 1991).

[93] *See, e.g.*, Von Hoffman Press, Inc. v. Industrial Comm'n of Missouri, 478 S.W.2d 403 (Mo. 1972) (claimant was discharged but not for misconduct, and did not voluntarily quit, where employer converted job from part time to full time); Gale v. Department of Employment Sec., 385 A.2d 1073 (Vt. 1978) (claimant worked six years, setting own hours, average forty hours per week. Employer asked her to work 8:30 a.m to 5:00 p.m. three days, 9:00 a.m. to 4:00 p.m. two days, and 9:00 a.m. to noon on alternate Saturdays. Claimant worked schedule for few weeks, coudn't continue due to childcare problems and employer terminated. Court reversed agency denial under voluntary quit statute, holding claimant was discharged, where employer admitted saying so.).

[94] Unemployment insurance programs are operated in the District of Columbia, Puerto Rico, and the Virgin Islands, in addition to all fifty states. For convenience, I will use the term "states" to apply to all fifty-three jurisdictions.

"attributable to employment."[95] These statutes raise further questions, however, since it is often impossible to separate employment-related factors from the employee's personal concerns and responsibilities. In almost all cases, an individual quits work for reasons involving both the nature of the work and her personal tolerance for the risks and demands of the work. In domestic quit situations, for instance, family obligations may significantly affect an employee's capacity to meet the hourly demands of her employment. Thus, in applying these provisions, judges inevitably rely upon their own conceptions about what workers should "put up with" as a matter of course.

Presumably the "attributable to employment" provisions are designed to limit benefits to situations in which the claimant is not "voluntarily" unemployed. Yet even in "attributable to employment" states, statutes often recognize that medical reasons can constitute good cause,[96] since medical problems

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[95] ARIZ. REV. STAT. ANN. § 23-775(1) (1993); ARK. CODE ANN. § 11-10-513(a)(1) (Michie 1993); DEL. CODE ANN. tit. 19, § 3315(1) (1993); D.C. CODE ANN. § 46-111(a) (1993); FLA. STAT. ch. 443.101(1)(a) (1993); GA. CODE ANN. § 34-8-194(1) (1994) (in connection with the individual's most recent work); IDAHO CODE § 72-1366(e) (1994); ILL. REV. STAT. ch. 820, para. 405/601A (1994); IND. Code § 22-4-15-1(a) (1994); IOWA CODE § 96.5(1) (1993); KAN. STAT. ANN. § 44-706(a) (1993); KY. REV. STAT. § 341.370(1)(c) (Baldwin 1993); LA. REV. STAT. ANN. § 23:1601(1)(a) (West 1993) ("without good cause attributable to a substantial change made to the employment by the employer"); ME. REV. STAT. ANN. tit. 26, § 1193(1) (West 1994) ("directly attributable to (i) the conditions of employment or (ii) the actions of the employing unit"); MD. ANN. CODE art. 8, § 1001(b)(1) (1994) ("directly attributable to the conditions of employment or the actions of the employing unit"); MASS. GEN. LAWS ANN., ch. 151A, § 25(e)(1) (West 1994); MICH. COMP. LAWS § 421.29(1)(a) (1994); MINN STAT. § 268.09(1)(a) (1994); MISS. CODE ANN. § 71-5-513(A)(1) (1993) ("without good cause . . . provided marital, filial and domestic circumstances shall not be deemed good cause"); MO. REV. STAT. § 288.050(1) (1993) ("attributable to his work or to his employer"); N.J. REV. STAT. ANN. § 43:21-5(a) (West 1993) ("attributable to such work"); N.M. STAT. ANN. § 51-1-7A (Michie 1993) ("in connection with employment"); N.C. GEN. STAT. § 96-14(1) (1994) ("attributable to the employer"); N.D. CENT. CODE § 52-06-02(1) (1993) ("attributable to the employer"); OKLA. STAT. tit. 40, § 2-404 (1994) ("connected to the work"); TENN. CODE ANN. § 50-7-303(a)(1) (1994) ("connected with such claimant's work"); TEX. LAB. CODE ANN. § 207.045(a) (West 1994) ("connected with the individual's work"); VT. STAT. ANN. tit. 21, § 1344(a)(2)(A) (1993); W. VA. CODE § 21A-6-3(1) (1994) ("involving fault on the part of the employer"); WIS. STAT. § 108.04(7)(b) (1994) ("attributable to the employing unit"); WYO. STAT. § 27-3-311(a)(i) (1994) ("attributable directly to employment").

[96] *See e.g.*, the statutes of Delaware, Indiana, Iowa, Kansas, Maine, Minnesota, North Carolina, Texas, North Dakota (limited to injury or illness caused or aggravated by employment), and West Virginia, *supra* note 95. By caselaw, the Florida and Georgia statutes have been interpreted to find good cause where a claimant quits for health reasons. Thurston v. Florida UAC Comm'n, 507 So. 2d 728 (Fla. Dist. Ct. App. 1987) (employment aggravates a pre-existing medical condition); Holstein v. North Chem. Co., 390 S.E.2d 910 (Ga. 1990) (employment caused, or aggravated a pre-existing,

are generally beyond the control of the claimant. Thus, one could argue that when a job is structured in a manner that makes it incompatible with an employee's fundamental ability to care for her family, the claimant's decision to quit is in a real sense "attributable to employment."

(a) Unilateral changes by the employer

Two types of unilateral decisions by an employer tend to have the greatest impact on workers with domestic responsibilities. First, the employer may convert a part-time job to full-time.[97] Likewise, the employer may transfer the worker from her usual shift to one which is incompatible with her family obligations.

To the extent that the employer has changed the original terms of the employment, the claimant has a powerful argument that her subsequent decision to quit is "attributable to employment." Several state statutes recognize as good cause a decision to quit following some unilateral change in the terms of employment,[98] although North Carolina provides that a shift change by itself is insufficient.[99] Similarly, many courts recognize that unilateral changes by the employer may constitute good cause for quitting,[100] although some will

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medical condition).

[97] *See, e.g.*, Skudlarek v. Department of Employment and Training, 627 A.2d 340 (Vt. 1993) (under VT. STAT. ANN. § 1344(a)(2)(A) (1987), nurse's aide voluntarily terminated employment with good cause attributable to her employment where employer attempted to convert position from part time to full time or to a time and half position on weekends that was considered full time. Claimant refused due to child-care difficulties.).

[98] Minnesota exempts from the voluntary quit disqualification an individual who accepts work from a base period employer which involves a change in location of work so that it would not be suitable under the requirement that claimants be available for suitable work and the individual quits within thirteen weeks. MINN. STAT. § 268.09(1)(C)(3) (1993); North Carolina, for instance, explicitly recognizes a unilateral reduction in hours or pay by the employer as good cause. N.C. GEN. STAT. §§ 96-14(1B), (1C) (1993). South Dakota has adopted an exemption from the voluntary quit disqualification where the employer requires the employee to relocate his or her residence in order to hold the job. S.D. CODIFIED LAWS ANN. § 61-6-13.1(2) (1993). Wisconsin imposes a lesser penalty for the voluntary quit disqualification where the worker terminated employment, due to a transfer to work paying less than two-thirds of the preceding wage. WIS. STAT. § 108.04(7)(f) (1994).

[99] N.C. GEN. STAT. § 96-14(1A) (1993).

[100] *See,* Acuff v. California Unemployment Ins. Appeals Bd., 256 Cal. Rptr. 513 (Cal. App. 3d Dist. 1989); Stevenson v. TR Video, Inc., 739 P.2d 380 (Idaho 1987); Uvello v. Director of Employment Sec., 489 N.E.2d 199 (Mass. 1986); Erickson v. Universal Oil Products Corp., 194 N.W.2d 13 (Mich. App. 1971) (but employee must follow statutory "grievance" procedure unless change significantly increases dangers to employee); Forester v. Value Travel, Inc., 506 N.W.2d 667 (Minn. App. 1993); Stackley v. State Dept. of Environmental Control, 386 N.W.2d 884 (Neb. 1986); Sankar v. Federated Answering Service, 401 N.Y.S.2d 895 (N.Y. App. Div. 1978);

restrict this theory to situations where the employer was aware of an employee's limited availability at the time of her hiring.[101]

A key factor in the courts' determination of good cause is the extent to which the employee experiences hardship on account of the employer's changes. A secondary factor is whether the claimant exhausted any alternatives before quitting. At least two courts have held that shift changes, in combination with domestic responsibilities, might constitute good cause, though neither court seemed ready to pronounce this the rule in all such circumstances.[102] On the other hand, courts in Indiana and Louisiana have disqualified claimants who quit after initially accepting employer changes.[103] In several recent cases where courts refused to find good cause, the claimant failed to make a strong showing of either hardship or exhaustion of alternatives.[104]

It remains difficult to assess whether the wording of a "good cause" statute is a significant factor in these cases. Only two courts have considered cases where good cause was not limited by statute to factors attributable to the employer, and the results are divided.[105] Yet over the last decade, there are

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Watson v. Employment Sec. Comm'n. of North Carolina, 432 S.E.2d 399 (N.C. App. 1993); Sachs Corp. of U.S.A. v. Rossman, 459 N.E.2d 227 (Ohio App. 1983); Roseburg Forest Products Co. v. Employment Div., 835 P.2d 889 (Or. 1992) (unilateral modification under a collective bargaining agreement is good cause only if it amounted to a breach of the agreement); Miceli v. Unemployment Compensation Bd., 549 A.2d 113 (Pa. 1988); American Petrofina Co. v. Texas Employment Comm'n., 795 S.W.2d 899 (Tex. App. 1990); Skudlarek v. Department of Employment and Training, 627 A.2d 340 (Vt. 1993); Wolford v. Gatson, 391 S.E.2d 364 (W.Va. 1990).

[101] David v. Board of Review, 465 N.E.2d 576 (Ill. App. Ct. 1984); Dubinin v. Ward, 484 N.E.2d 870 (Ill. App. Ct. 1985); Collier v. Department of Employment Sec., 510 N.E.2d 623 (Ill. App. Ct. 1987); Henderson v. Department of Employment Sec., 595 N.E. 2d 96 (Ill. App. Ct. 1992); Jones v. Review Bd., 399 N.E.2d 844 (Ind. Ct. App. 1980); Quillen v. Review Bd., 468 N.E.2d 238 (Ind. Ct. App. 1984).

[102] MASSACHUSETTS: Uvello v. Director of Employment Sec., 489 N.E.2d 199 (1986); Zukowski v. Director of Employment Sec., 459 N.E.2d 467 (1984); Manias v. Director of Employment Sec., 445 N.E.2d 1068 (1983); NORTH DAKOTA: Newland v. Job Service of North Dakota, 460 N.W.2d 118 (1990).

[103] Jones v. Review Bd., 399 N.E.2d 844 (Ind. Ct. App. 1980) (claimant agreed to accept change from regular day shift to 9:00 a.m. to 6:00 p.m., then quit next day due to childcare responsibilities. Court held inapplicable exception for unilateral changes in working conditions, because claimant initially accepted position); Rogers v. Doyal, 215 So. 2d 377 (La. Ct. App. 1968) (claimant was transferred from day shift to night shift. After four months she requested to go back to day shift, but was refused, so she quit to be at home more with her child.).

[104] Lingo v. Department of Employment Sec., 364 So. 2d 1367 (La. Ct. App. 1978) (claimant, employed on same shift, had hours changed so as to begin and end one hour later; request to change denied); Johnson v. Employment Div., 570 P.2d 425 (Or. Ct. App. 1977) (finding claimant failed to pursue alternatives); Adams v. Board of Review, 776 P.2d 639 (Utah Ct. App. 1989) (claimant quit work, rather than work nights for two weeks).

[105] Compare Johnson v. Employment Div., *supra* note 104 (denying benefits) with *In*

signs of a trend that good cause will be found when claimants quit because unilateral employer changes are incompatible with their domestic responsibilities.

Early cases almost unanimously rejected good cause claims in unilateral employee domestic quit cases.[106] Recently however, courts in three states[107]

Re McEvoy, 456 N.Y.S.2d 110 (N.Y. 1982) (granting benefits).

[106] Miller v. Administrator, 293 A.2d 793 (Conn. 1972); Jones v. Review Bd., 399 N.E.2d 844 (Ind. Ct. App. 1980); *cf.* Gray v. Dobbs House, Inc., 357 N.E.2d 900 (Ind. 1976) (claimant worked days for three months, was reassigned to evening shift, accepted change but after several days quit due to transporation difficulties and parental obligations); Ingress-Plastene, Inc. v. Review Bd., 238 N.E.2d 490 (Ind. 1968) (claimant voluntarily quit after transferred to department requiring rotating seven day shift, and unable to find babysitter for five children); Lingo v. Department of Employment Sec., 364 So. 2d 367 (La. Ct. App. 1978); George v. Grill, 268 So. 2d 397 (La. Ct. App. 1973) (claimant resigned graveyard shift job as dishwasher after two years, claiming unable to rest properly during day with four children); Rogers v. Doyal, 215 So. 2d 377 (La. Ct. App. 1968) (after four months, claimant sought transfer from day shift to night shift, but was refused, so she quit to be at home more with her child); Ford Motor Co. v. Appeal Bd. of Michigan, 25 N.W.2d 586 (Mich. 1947) (claimant limited availability to 3:40 p.m. to 11:40 p.m. so she could get 10 and 17 year old sons breakfast and to school); Melody Manor Inc. v. McLeod, 511 So. 2d 1383 (Miss. 1987) (claimant quit after change from evening to day shift; also alleged move from full to part-time and loss of vacation and paid holidays); Johnson v. Employment Div., 570 P.2d 425 (Or. 1977) (after seven years, woman transferred from day to night janitorial shift at new location); Aladdin Industries, Inc. v. Scott, 407 S.W.2d 161 (Tenn. 1966) (woman refused to accept transfer from day shift to evening shift, 4:00 to midnight); Adams v. Board of Review, 776 P.2d 639 (Utah 1989) (claimant quit work, rather than work nights for two weeks).

[107] MASSACHUSETTS: Uvello v. Director of Employment Sec., 489 N.E.2d 199 (1986) (claimant quit after hours changed from 6:00 a.m. to 2:00 p.m. to 11:00 a.m. to 6:00 p.m. Husband unwilling to provide transporation for new hours and hours interfered with making dinner. Court remanded for additional findings to support denial of benefits, noting that that family responsiblities and transportation could be good cause, but claimant had not shown "urgent, compelling, and neccessitous" reasons as required by statute); Zukowski v. Director of Employment Sec., 459 N.E.2d 467 (1984) (claimant worked 8:00 a.m. to 4:30 p.m. shift for seven months, then transferred to evening shift. Claimant quit because unable to work Monday nights, because wife was employed and claimant cared for children. Court remanded for additional findings.). NORTH DAKOTA: Newland v. Job Service North Dakota, 460 N.W.2d 118 (1990) (claimant worked one and a half years from 7:30 a.m. to 4:30 p.m. On two weeks notice, employer changed hours to 4:30 p.m. until 8:30 p.m. with early and late hours to make up forty hour work week. Court reversed agency denial of benefits and remanded for findings regarding availability of childcare.); *cf.* Sonterre v. Job Service, 379 N.W.2d 281 (1985) (claimant worked 8:00 a.m. to 4:30 p.m. On two weeks notice shift was changed to 10:00 a.m. to 6:30 p.m. and every third weekend from 3:00 p.m. to 11:30 p.m. Claimant quit due to insufficient time to find a babysitter. Court reversed agency decision granting benefits, holding claimant quit for personal reasons, not good cause.). NEW YORK: *In Re* McEvoy, 456 N.Y.S.2d 110 (1982) (claimant worked 5:30 a.m. to 2:30 p.m. for thir-

have found that claimants may have good cause for quitting in such circumstances. On the other hand, two jurisdictions refused to find good cause during the same period,[108] so the issue has not been definitively resolved.

A general trend toward accommodation of caretaking responsibilities might be predicted from women's increased entry into the legal profession and into judicial positions, and the accompanying public attention paid to issues of gender bias. Such a trend seems especially likely since "good cause" is a subjective standard that depends in particular on the decisionmaker's personal philosophy. Thus, the results in these cases seem thoroughly dependent on whether the court views childcare responsibilities as a strictly personal matter, or as a factor requiring legal accommodation. A judge who has had significant caretaking responsibilities may well be more likely to believe that accommodation is appropriate.

(b) Changes in the Claimant's Situation

Of the reported cases in which an employee quits her employment for domestic reasons, only a small percentage are not prompted by some unilateral change by the employer. In two such cases, claimants succeeded in obtaining benefits although both involved sympathetic factual circumstances. Furthermore, one relied on an atypical statute which allows for a finding of good cause for reasons "of a necessitous and compelling nature," not merely for reasons attributable to the employer.[109] By contrast, claimants were denied benefits in three cases involving statutes that limited good cause to reasons attributable to the employer.[110]

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teen years, while husband worked days, and tended for children nights. Office closed and claimant refused to transfer, because she was not guaranteed a night shift and daytime childcare was too expensive. Preference for hours is good cause if reasons are compelling).

[108] Melody Manor Inc. v. McLeod, 511 So. 2d 1383 (Miss. 1987) (claimant quit after her shift was changed from evening to day. Claimant also alleged move from full-time to part-time and loss of vacation and paid holidays. No good cause for voluntary quit.); Adams v. Board of Review, 776 P.2d 639 (Utah 1989) (claimant quit work, rather than work nights for two weeks. Court held ineligible, no good cause.).

[109] *Truitt v. Commonwealth, Unemployment compensation Bd. of Rev.*, 589 A.2d 208 (Pa. 1991) (After layoff as clerk, claimant got job as waitress involving weekly schedules changes between shifts. Claimant's mother, her daycare provider, became incapacitated, and claimant, unable to find substitute, quit. Court reversed agency denial of benefits, finding claimant quit for necessitous and compelling reasons under statute, applying reasonable person standard.); *Yordlamis v. Florida Industrial Comm.*, 158 So. 2d 791 (Fla. Dist. Ct. App. 1963) (Single father quit job requiring work until 9:00 p.m. after arranging day job. Employer convinced him to stay additional week, and day job was filled. Claimant then refused job with rotating hours and occasional night-time hours. Court held good cause for quitting employment.)

[110] George v. Grill, 268 So. 2d 397 (La. Ct. App. 1973) (claimant resigned graveyard shift job as dishwasher after two years, claiming unable to rest properly during day with four children, wanted to get a daytime housekeeping job. Court found ineligi-

B. *Availability Requirements and the Refusal of Work Disqualification*

All states have statutory provisions that require claimants to be "available" for work in order to qualify for benefits. However, the simple term "available" has bedevilled courts and administrative agencies since the statutes were first enacted. The growth of the contingent workforce and the increasing number of women in the workplace have brought renewed attention to the problem of defininining "available for work."

The availability statutes are generally accompanied by related provisions meant to disqualify claimants who refuse an offer of suitable work without good cause. Attempts to define "suitable" work typically involve the same types of difficulties encountered in attempting to define "available for work."

1. Part-time workers[111]

Part-time workers who become unemployed may find that the statutes and regulations defining availability create obstacles to their receipt of unemployment benefits. In many states, availability is defined to require workers to be available for full-time work in order to qualify for benefits. Though such a requirement will not affect workers who held part-time employment but preferred to work full-time,[112] it will disqualify unemployed workers who choose to work part-time and wish to continue doing so.

Seven state statutes[113] and regulations in five additional states[114] expressly

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ble); Price v. Labor & Industrial Relations Comm'n., 811 S.W.2d 457 (Mo. Ct. App. 1991) (employer required all employees to work at least two nights per week. Claimant had baby, stopped working evenings, because she had no child care after 5:00 p.m. Supervisor offered different day-time position, that was full-time position for Christmas season then part-time, but paid less than fomer management position, and offered to review situation in January. Court held no good cause for voluntary quit.); Mills v. Unemployment Compensation Comm'n., 28 S.E.2d 535 (S.C. 1944) (finding claimant ineligible, because she quit due to personal circumstances and was not available for work previously performed.).

[111] The term "part-time workers" can be used both for workers who work less than a thirty-five to forty hour week, and for part-year, seasonal workers. This discussion will cover only the former.

[112] The number of involuntary part time workers was more than 6 million as of 1992 according to the Bureau of Labor Statistics. U.S. DEPARTMENT OF LABOR, EMPLOYMENT & EARNINGS (January 1993).

[113] GA. CODE ANN. § 34-8-24 (1994) ("'bona fide in the labor market' means . . . must be available for full-time employment"); IND. CODE § 22-4-14-3(a)(3) (1994) (making an effort to secure full-time work) (an apparent tension arises in the Indiana statute given IND. CODE § 22-4-12-3, which requires the state agency to adopt rules governing eligibility of workers who qualify for benefits on the basis of part-time work); ME. REV. STAT. ANN. tit. 26, § 1192(3) (West 1993) ("available for full-time work"); MICH. COMP. LAWS § 421.28(c) (1992) ("able and available to perform suitable full-time work"); N.H. REV. STAT. ANN. § 282-A:31(I)(d) (1993) ("available for and seeking permanent, full-time work"); N.M. STAT. ANN. § 51-1-5(A.)(3) (Michie 1994)

require that individuals be available for full-time work. On the other hand, five states, either by statute[115] or regulation,[116] authorize payment of benefits to at

("actively seeking permanent and substantially fulltime work"), interpreted in N.M. Reg. 320 (1990); OKLA. STAT. tit. 40, § 2-203 (1993) ("accepting full-time employment immediately"); W. VA. CODE § 21A-6-1(3) (1994) ("available for full-time work").

[114] ALA. ADMIN. CODE r. 480-4-3-15 (1982); CONN. AGENCIES REGS. § 31-235-6(a) (1986); IDAHO EMPL. SEC. LAW r. 09.30.468 and 09.30.062 (1994); IOWA ADMIN. CODE r. 345-4.22 (1994); MONT. ADMIN. R. 24.11.452 (2) (1990); NEB. ADMIN. R. & REGS. 4.004 (1988); OR. ADMIN. R. 471-30-036 (3)(a) (1994); *See also*, Dennis v. Employment Div., 728 P.2d 12 (Or. 1986) and Rasmussen v. Morgan, 517 P.2d 303 (Or. Ct. App. 1973) (woman worked for seven years as part-time legal secretary; employer asked her to work one full day each week, but she refused, citing need to care for three children; only willing to work a maximum of five hours per day); VT. ADMIN. COMP. ESB R. 13(H) (1993), *but see* Stryker v. Department of Employment Sec., 356 A.2d 534 (Vt. 1976) (allowing benefits to claimant with long history of part-time work and restricted availability); WIS. ADMIN. CODE § [I.L.H.R.] 128.01 (2)(a) (1984) (claimant unavailable if availability is restricted to less than 50% of full-time opportunities.).

[115] N.J. STAT. ANN. § 43:21-20.1 (West 1993) (allowing payment to individuals who performed part-time work during the base year and have good cause for limiting their availability to part-time work, so long as a sufficient market exists to justify the limitation and the claimant is eligible for enough hours to earn wages equal to the individual's unemployment benefits). *See,* Levine v. Universal Furniture, 369 A.2d 968 (N.J. Super. Ct. App. Div. 1977) (interpreting base year earnings requirement); Edmundson v. DES, 176 A.2d 520 (N.J. Super. Ct. App. Div. 1961) (holding claimant ineligible because had not worked part-time during base year). N.Y. LAB. LAW §§ 591(2) and 596.4 (McKinney 1994) (allowing payment to "claimant who for reasons personal to himself is unable or unwilling to work usual full-time hours and who customarily works less than full-time). *See,* Horowitz v. Ross, 53 A.D.2d 949 (N.Y. App. Div. 1976) (finding claimant ineligible who moved after losing job, sought only part-time employment but failed to make active search); *In re* Goldwag, 280 N.Y.S.2d 738 (N.Y. App. Div. 1967) (holding claimant ineligible where no history of part-time work and part-time work not available in claimant's line of work).

[116] 7 COLO. CODE REGS. §§ 2.2.2, 2.2.3 (1980) (eligible if 60% of base period earnings from part-time work, seeking part-time work, and such work exist in locality), *interpreted in* Bartholomay v. Industrial Comm'n., 642 P.2d 50 (Colo. Ct. App. 1982). *See also*, Medina v. Industrial Comm'n., 554 P.2d 1360 (Colo. Ct. App. 1976) (no standing; court held availability for full-time work not required, but not actively seeking work, because only contacted former employer); Industrial Comm'n. v. Redmond, 514 P.2d 623 (Colo. 1973) (full-time college student laid off from part-time job, available part-time; court held not per se ineligible, reversed agency, required agency to adopt rules governing part-time employment as provided by statute and remanded for new hearing regarding whether claimant unduly restricted availability for suitable work in relation to condition of surrounding labor market); IDAHO EMPL. SEC. LAW R. 09.30.468 & 09.30.068 (1994) (claimant restricting availability to part-time shall be ineligible); ILL. RULES OF UNEMPL. INS. ACT § 2865.125 (1990) (eligible if restrictions beyond claimant's control, or suitable work available on part-time basis only, labor

least some individuals who limit their availability to part-time employment.

In states without statutes or regulations that specifically address part-time work, the courts have addressed the issue where individuals seek to work part-time for reasons[117] including health,[118] domestic duties,[119] and school.[120]

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market exists, and a reasoanble possibility of securing work); MINN. R. 3305.0501 (1988) (general rule requirement of availability for full-time work, but limited exception for disabled claimants who have previously worked part-time); UTAH ADMIN. R. 562-4c-3(1), (1)(a), & 3(3)(a) (1993) (must be available for full-time work, but if part-time work history, rebuttable presumption of availability for first four weeks of unemployment.); WIS. ADMIN. CODE § [I.L.H.R.] 128.01(2)(a) (1984) (eligible if available at least 50% of full-time). *Cf.*, Blickenstorfer v. DILHR, 12 Unempl. Ins. Rptr. (CCH) Para. 1950.845 (Wis. Cir. Ct. 1980).

[117] In several cases no reason, or a reason not included below, is specified. CLAIMANT ELIGIBLE: Caldwell v. Jones, 201 S.E.2d 823 (Ga. 1973) (cleaning woman available 6-9 a.m. Court remanded to agency to present evidence no job market for claimant under same conditions). CLAIMANT INELIGIBLE: Allen v. Crawford, 591 S.W.2d 883 (Ark. 1991) (looking for "odd jobs" constituted only minimal work search; agency rule required availability during full time hours and full work week and shifts normally worked in the industry); Hawkins v. Unemployment Compensation Bd., 390 A.2d 973 (D.C. 1978) (available for part time only due to pending court case. Court held full time availability not required, but ineligible because undue restrictions); North Miami Gen. Hosp. v. Plaza, 432 So.2d 723 (Fla. Dist. Ct. App. 1983) (worked as desired, twice turned down full-time work for employer); Horowitz v. Ross, 53 A.D.2d 949 (N.Y. 1976) (after losing job, full-charge bookkeeper moved, sought part-time employment only, but failed to make active search).

[118] CLAIMANT ELIGIBLE: Harper v. Unemployment Ins. Appeals Bd., 293 A.2d 813 (Del. Super. Ct. 1972) (hypertension, available two days a week); Rosenbaum v. Johnson, 377 N.E.2d 258 (Ill. App. Ct. 1978) (heart and lung problems, available three days a week); Shay v. Unemployment Compensation Bd., 111 A.2d 174 (Pa. Super. Ct. 1955) (arm injury). CLAIMANT INELIGIBLE: Miller v. Wiley, 230 S.W.2d 979 (Tenn. 1950) (case was not articulated as part-time issue; claimant had lost one day a week at previous job due to illness).

[119] ELIGIBLE: Myers v. Unemployment Compensation Bd., 330 A.2d 886 (Pa. Commw. Ct. 1975) (claimant available twenty hours per week). NOT ELIGIBLE: Robinson v. Employment Sec. Bd., 97 A.2d 300 (Md. 1953) (available 11 a.m. to 3 p.m.); Alvord v. Board of Review, 267 P.2d 914 (Utah 1954) (claimant available 12-5 only).

[120] ELIGIBLE: Glick v. Unemployment Ins. Appeals Bd., 591 P.2d 24 (Cal. 1979) (full-time law student not available during school hours; California statute provided that a claimant would not be disqualified solely because of student status; claimant had helped support children and put herself through college working part-time); NOT ELIGIBLE: Sonneman v. Knight, 790 P.2d 702 (Alaska 1990) (law student sought part-time work not conflicting with class); State v. Boucher, 581 P.2d 660 (Alaska 1978) (cosmetology students sought part-time work not conflicting with daytime classes); Dunn v. Department of Employment Services, 467 A.2d 966 (D.C. 1983) (classes twelve hours a week during normal business hours); Barber v. Department of Employment Services, 467 A.2d 966 (D.C. 1983) (available if not conflicting with school hours); Wood v. Unemployment Comp. Bd., 334 A.2d 188 (D.C. 1975); Halco v. Administrative Bureau of Employment Services, 325 N.E.2d 255 (Ohio Ct. App. 1974) (student avail-

Courts upholding a claimant's eligibility for benefits have ruled that a claimant seeking part-time work should be eligible so long as the claimant does not unduly restrict her availability in light of the condition of the surrounding market,[121] has a reasonable opportunity to secure employment,[122]or possesses skills for which a labor market exists.[123] Courts denying benefits have held that a claimant may not restrict her utility in the workplace,[124] may not effectively eliminate herself from the job market,[125] may not place restrictions on hours for personal reasons,[126] and must be available for generally accepted working hours.[127]

Because women comprise the majority of those seeking part-time employment, this issue is one with significant gender implications.[128] Historically, workers have been permitted to restrict their availability to full-time work,[129] but the mostly female part-time workforce has not been able to restrict its availability in a comparable fashion. Although more full-time jobs are available than part-time jobs, it is also true that more workers seek full-time than part-time employment. Thus, it is not necessarily true that one seeking part-time work has less opportunity to obtain it than one seeking full-time employment.

Thus, from a conceptual viewpoint it makes sense for states to grant eligibility to any claimant seeking part-time work if a labor market exists for the

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able week nights except Thursday and any time weekends); Callahan v. Morgan, 496 P.2d 55 (Or. Ct. App. 1972) (full-time student available if not conflicting with school); Texas Employment Comm'n v. Hays, 360 S.W.2d 525 (Tex. 1962) (full-time student, part-time grocery checker laid off from job was available after school and on Saturday, but would not accept full-time employment or quit school); Schultz v. Board of Review, 606 P.2d 254 (Utah 1980) (meter reader quit job to attend law school and sought flexible work schedule).

[121] Industrial Comm'n of Colorado v. Redmond, 514 P.2d 623 (Colo. 1973).

[122] Myers v. Unemployment Compensation Bd., 330 A.2d 886 (Pa. Commw. Ct. 1975).

[123] Glick v. Unemployment Ins. Appeals Bd., 591 P.2d 24 (Cal. 1979); Rosenbaum v. Johnson, 377 N.E.2d 258 (Ill. App. Ct. 1978).

[124] Robinson v. Employment Sec. Bd., 97 A.2d 300 (Md. 1953) (available 11 a.m. to 3 p.m.).

[125] *In re* Diamond, 209 N.Y.S.2d 562 (N.Y. App. Div. 1961) (available 9:30 a.m. to 2:00 p.m.; claimant was restricting herself to hours other than customary hours for part-time employment in her occupation).

[126] Texas Employment Comm'n v. Hays, 360 S.W.2d 525 (Tex. 1962) (full-time student, part-time grocery sacker and checker laid off from job was available after school and on Saturday but would not accept full-time employment or quit school).

[127] Schultz v. Board of Review, 606 P.2d 254 (Utah 1980) (meter reader quit job to attend law school and sought flexible work schedule).

[128] *See* Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081 (1992).

[129] *But see infra* notes 149-54 and accompanying text (part-time jobs as available work).

part-time services offered.[130] However, because most claimants are not represented by counsel at unemployment compensation hearings, this approach will benefit claimants only if the claimant is not required to provide the labor market information. The claimant must be able to satisfy the initial burden of proof by establishing the types of part-time work for which she is qualified. The agency or the employer, which have more ready access to job market information, should then be required to demonstrate the lack of a market for such work.

Advocates arguing part-time cases may not wish to rely on the agency's data and should be careful to establish a record detailing the local labor market, the extent of their client's search for work, and the various types of work for which their client is qualified.

2. Workers with shift, weekend or other restrictions

As women continue to enter the labor force in great numbers, the need to account for the caretaking responsibilities for children[131] and other family

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[130] The *Stryker* court, *supra* note 114, adopted this approach.

[131] ELIGIBLE: Arndt v. State, 583 P.2d 799 (Alaska 1978) (refused referral for evening work; remand to evaluate good cause); Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740 (Cal. 1977) (available weekdays only); Nursing Serv., Inc. v. Department of Employment Services, 512 A.2d 301 (D.C. 1986) (available swing-shift or weekends only. Remand regarding good faith effort to obtain day care, whether employment available in claimant's field); Yordamlis v. Industrial Comm'n, 158 So. 2d 791 (Fla. Dist. Ct. App. 1963) (refused job with rotating and occasional night-time hours); Martin v. Review Bd., 421 N.E.2d f 653 (Ind. App. 1980) (refused swing shift); Conlon v. Director of Employment Sec., 413 N.E.2d 727 (Mass. 1980) (available only for 7 a.m. to 3 p.m. shift. Remanded for finding whether limits made claimant unavailable for work); Tung-Sol Electric, Inc. v. Board of Review, 114 A.2d 285 (N.J. Sup. Ct. 1955) (evening shift only); Erie Resistor Corp. v Unemployment Compensation Bd., 94 A.2d 367 (Pa. Super. 1953) (laid off third shift, refused recall to first shift, but available second or third shift); Shufelt v. Department of Employment and Training, 531 A.2d 894 (R.I. 1987) (refused third shift, unwilling to leave three teenage daughters alone at night in light of threats by ex-husband); Huntley v. Department of Employment Sec., 397 A.2d 902 (R.I. 1979) (refused first shift beginning 7:00 a.m. Remanded for additional findings regarding effect on labor market attachment). INELIGIBLE: Leclerc v. Administrator, 78 A.2d 550 (Conn. 1951) (evenings only); Richardson v. Review Bd., 467 N.E.2d 770 (Ind. Ct. App. 1984) (claimant originally raised wage and transportation concerns); Pohlman v. Ertl Co., 374 N.W.2d 253 (Iowa 1985) (refused second shift, lack of effort to find babysitter, and likely return to original schedule after a few weeks); Ford Motor Co. v. Appeal Bd., 25 N.W.2d 586 (Mich. 1947) (available 3:40 p.m to 11:40 p.m.); Swanson v. Minneapolis-Honeywell Regulator Co., 61 N.W.2d 526 (Minn. 1973) (refused shift beginning at 7:00 or 7:30 a.m.); Squires v. Unemployment Compensation Bd., 94 A.2d 172 (Penn. Super. Ct. 1953) (claimant laid off third shift, offered day shift); Doctor v. Employment Div., 711 P.2d 159, *review denied*, 716 P.2d 758 (Or. Ct. App. 1985) (refused swing shift. Good cause to refuse offer, but no good cause exception regarding availability); *In re* Dept. of

members[132] becomes increasingly pressing.[133] In the context of unemployment compensation, these issues raise questions as to how the "available for work" requirement should apply to workers in industries operating on multiple shifts, or on weekends.[134] Must an individual be "able and available" for every shift during the day or for weekend work, if such demands are standard in an industry?

Again, the state statutory and regulatory schemes vary. No states expressly prohibit all shift restrictions. Three states specifically address this issue, either by statute[135] or regulation,[136] by providing that a claimant with caretaking

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Labor, 323 N.W.2d 133 (S.D. 1982) (refused referral to job with Saturday work. No evidence indicating that it was impossible to get child care); Jacobs v. Office of Unemployment Compensation & Placement, 179 P.2d 707 (Wash. 1947) (refused three referrals due to pay, health, and in one case, rotating shift concerns. No independent contacts, available daytime only, transportation problems). *See also, In re* Morrow, Unemployment Compensation Bd. of Rev. B-89-01588-000 (Ohio 1990); *In re* Sinclair, Unemployment Compensation Bd. of Rev. 670269-BR (Ohio 1990) (third shift only) (cited in OHIO REV. CODE ANN. § 4141.299 (A)(4)(a) (Anderson 1994)).

[132] ELIGIBLE: Wiler v. Board of Review, 80 N.E.2d 190 (Ohio Ct. App. 1947) (seventy-one year old man willing to work five hours each in morning and afternoon, but wanted to be home at noon to care for invalid wife; court reversed agency denial of benefits on grounds that restriction was obstacle that could have been surmounted). INELIGIBLE: Goings v. Riley, 95 A.2d 137 (N.H. 1953) (accepted only "first shift" work because of need to care for paralyzed mother; court held ineligible, because no labor market in area for unskilled workers on first shift); Moya v. Employment Sec. Comm'n, 450 P.2d 925 (N.M. 1969) (claimant refused referral to clerk-typist 3:30 to 10:30 p.m. shift, with 3:00 a.m to 2:30 p.m on Saturday, because needed to care for grandmother during evening hours); York v. Morgan, 517 P.2d 301 (Or. Ct. App. 1973) (after mandatory retirement, LPN refused offer of work four days a week on day shift and one day a week on evening shift, because in evening needed to be with husband who had serious heart condition; substantial restriction on availability).

[133] In the vast majority of the shift restriction cases, women seek to limit their availability due to responsibility for children, although other cases involve care for other family members, health or other factors.

[134] Shift and part-time issues also arise in other contexts; *see, e.g.*, Czarlinsky v. Employment Sec. Agency, 390 P.2d 822 (Idaho 1969); St. Germain v. Adams, 377 A.2d 620 (N.H. 1977) (desire to attend church); Chaharyn v. Department of Employment Sec., 125 A.2d 241 (R.I. 1956) (required clerkship for law graduate); Hatsville Cotton Mill v. Employment Sec. Comm'n, 79 S.E.2d 381 (S.C. 1953) (unspecified domestic reasons); Moore v. Commission of Employment Sec. 273 S.W.2d 703 (Tenn. 1954) (absent medical documentation, nervousness, and past ulcer do not justify limit on availability and refusal of night shift work); Carson v. Department of Employment Sec., 376 A.2d 355 (Vt. 1977) (Saturday morning job with post office); Unemployment Compensation Comm'n v. Tomko, 65 S.E.2d 524 (Va. 1951) (after contract expired, union instructed coal miners to work three days a week).

[135] The Maine statute states that an individual must be available for full-time work "provided that no ineligibility may be found solely because the claimant is unable to accept employment on a shift, the greater part of which falls between the hours of midnight to 5 a.m. and is unavailable for that employment because of parental obliga-

responsibilities need not be available during the "third" shift, between midnight and 5:00 a.m. While these statutory provisions may be somewhat helpful, they do not fully respond to the realities of life for most Americans. Day-care for younger children during evening or late-night hours varies with locality and depending on the age and maturity of the children, the availability of other adults to assist with supervision, and the workers' own sleep patterns, the responsible adult might find the late-night shift either impossible or preferable.[137] Thus, statutory approaches focusing solely on the problems of third-shift workers fail to address fully the broader need to accommodate domestic responsibilities for all workers.

Fourteen states address the question of shift work by administrative regulation. Five states require the claimant to be available for all hours (or shifts) customary to the particular occupation,[138] but two of these permit exceptions for health reasons.[139] On the other hand, nine states permit shift restrictions in some circumstances. Four apply a "good cause" standard,[140] and each adopts

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tions, the need to care for an immediate family member, or the unavailability of a personal care attendant." ME. REV. STAT. ANN. tit 26, § 1192 (West 1993). The New Hampshire statute provides that an individual must be "ready, willing and able to accept and perform suitable work on all shifts and during all the hours for which there is a market for the services he offers." N.H. REV. STAT. ANN. § 282-A:31(I)(c) (1993). The defintion of suitable work, however, specifies that "third shift" work is not suitable if a claimant is unable to accept such work because "he is the only adult available for the care of children under the age of fifteen or for the care of an ill or infirm elderly person who is dependent on him for support." N.H. REV. STAT. ANN. § 282-A:32(I)(d)(2)(D) (1993). It is unclear whether these statutory provisions benefit claimants in light of the prior New Hampshire caselaw. *See, e.g.*, St. Germain v. Adams, 377 A.2d 620 (N.H. 1977) (if a claimant imposes time limits on availability, the issue is whether the claimant has so limited the field of work acceptable that the individual is not genuinely attached to a labor market); Goings v. Riley, 95 A.2d 137 (N.H. 1953) (claimant would accept work only on "first shift" because needed to care for paralyzed mother; not eligible because not available for work; no labor market in area during period of recession for unskilled workers on first shift).

[136] ARIZ. COMP. ADMIN. R. & REGS. 3-5240(D) & 3-5240(E) (1994) ("Claimant who excludes employment requiring night hours is unavailable only when such hours are customary in his occupation and there is not a substantial labor market during other hours.").

[137] In approximately one-third of the shift cases involving childcare obligations, the claimant would accept only evening or night work. *See supra* notes 131-32.

[138] CONN. AGENCIES REGS. §§ 31-235-10(a)-10(c) (1986); HAW. COMM'N. OF LABOR & IND. REL. R. 12-5-35(b) (1981); MINN. R. §§ 3305.0500(12), 3305.0400(2)(b) (1988); MONT. ADMIN. R. 24.11.452(2)(6) (1990); OR. ADMIN. R. 471-30-036(3)(a) (1994).

[139] CONN. AGENCIES REGS. §§ 31-235-10(a)-10(c) (1986); MINN. R. §§ 3305.0500(12), 3305.0400(2)(b) (1988) (restriction because of physical or mental condition permitted so long as a labor market still exists).

[140] CAL. CODE. REGS. tit. 22, §. 1253(c)-1(a) (1988); IDAHO EMPL. SEC. LAW R. 09.30.468 & 09.30.062 (1992)("A claimant shall have compelling reasons for refusal

a standard requiring either "reasonable" restrictions,[141] the existence of a labor market,[142] the claimant be available for 50% of full-time opportunities,[143] or at least be available on the same basis in which wage credits were earned, so long as a reasonable expectation of securing employment remains.[144]

In contrast to the part-time cases, the courts have split on this issue from the beginning, although a trend in favor of eligibility characterizes the more recent cases.[145] Courts upholding eligibility for workers with restricted availability generally hold that the claimant (1) must accept suitable work absent good cause, which includes family responsibilities and (2) must be available for work with a substantial field of employers.[146] Thus, even in jursidictions with favorable case law, advocates must carefully prepare a record supporting the need for shift restrictions which details the claimant's efforts to obtain child-care and provides proof that work is available during the claimant's hours of availability.

In a few older cases courts denying eligibility to claimants due to shift

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of shift work . . . to remain elegible for benefits."); S.D. ADMIN. R. 47.06.04.21.01 (1983) ("An individual who has earned his wage credits in an occupation that generally requires shift work shall be available to work all shifts or work schedules unless he has a compelling reason for not working more shifts or work schedules.").

[141] FLA. ADMIN. CODE ANN. r. 38b-3.021 (1992) ("free of occupational restrictions regarding . . . hours"); HAW. COMM'N. OF LABOR & IND. REL. R. 12-5-35(b) (1981).

[142] ILL. RULES OF UNEMPL. INS. ACT § 2865.110(b)(1) (1990).

[143] WIS. ADMIN. CODE § [I.L.H.R.] 128.01(2)(a) (1984) (unavailable only if availability restricted to less than 50% of full-time opportunities).

[144] IOWA ADMIN. CODE r. 345-4.22(2)(a) (1994).

[145] Although the Indiana, Iowa, Minnesota, Oregon and South Dakota courts all ruled adversely to the individual claimant in cases during the 1970's and 1980's, *supra* note 131, under different facts a shift restriction might be permissible in Indiana, Iowa and South Dakota. *See* Richardson v. Review Bd., 467 N.E.2d 770 (Ind. App. Ct. 1984) (rejecting claimant's claim that she quit due to childcare obligations, where she originally raised wage and transportation concerns); Pohlman v. Ertl Co., 374 N.W.2d 253 (Iowa 1985) (claimant worked first shift for fifteen months, was laid off for lack of work and received unemployment insurance; she refused offer of second shift work with same employer because older daughter was no longer available to babysit; court affirmed denial of benefits, noting lack of effort to find babysitter and likelihood of returning to original schedule after a few weeks); *In re* Department of Labor, 323 N.W.2d 133 (S.D. 1982) (single parent of infant was laid off from first shift assembly line job; two weeks later refused referral to cashier/prep worker job at cafe because job required Saturday work; court held parental duties can be good cause, but no evidence indicated that it was impossible to get child care on Saturday).

[146] Arndt v. State, 583 P.2d 799 (Alaska 1978); Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740 (Cal. 1977); Nursing Services, Inc. v. Department of Employment Services, 512 A.2d 301 (D.C. 1986); Martin v. Review Bd., 421 N.E.2d 653 (Ind. App. Ct. 1980); Huntley v. Department of Employment Sec., 397 A.2d 902 (R.I. 1979); Shufelt v. Department of Employment and Training, 531 A.2d 894 (Vt. 1987).

restrictions have held that claimants must be available during the hours of their most recent employment,[147] or must be available for the hours standard to the position.[148] In the latter situation, advocates may succeed in close cases by presenting detailed labor market information. A frontal challenge to the existing standard will more often be required, either through legislative or judicial avenues.

3. Temporary or part-time work as an available job

The "able and available for work" requirement raises a fundamental issue regarding both temporary and part-time work. In an economy where "permanent" employment seems increasingly transitory, and full-time work increasingly hard to find, it is necessary to confront the issue of whether individuals should be required to be available for temporary or part-time work in order to claim unemployment benefits.

a. Temporary employment

The goal of the unemployment system often is viewed as returning people to work at permanent jobs. Thus, two states have not required a claimant to accept temporary employment in order to qualify for benefits.[149] Other states take a more restrictive approach, at least where a claimant has been unemployed at length or has performed temporary assignments in the past.[150]

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[147] Hartsville Cotton Mill v. Employment Sec. Comm'n, 79 S.E.2d 381 (S.C. 1953).

[148] Swanson v. Minneapolis-Honeywell Regulator Co., 61 N.W.2d 526 (Minn. 1973); Thompson v. Schraiber, 90 N.W.2d 915 (Minn. 1958).

[149] Toston v. Industrial Commission, 417 P.2d. 1 (Colo. 1966); Kuether v. Personnel Pool, 394 N.W.2d 259 (Minn. Ct. App. 1986).

[150] Wacaster v. Daniels, 603 S.W.2d 907 (Ark. 1980) (claimant had worked for library part-time; after applying for unemployment, refused offer of temporary work at library, including Saturdays and part of evening. Court held ineligible, because claimant has duty to accept available and suitable work regardless whether work is permanent); Smith v. The Placers, Inc., 1993 LEXIS 483 (Del. Super. Ct. Nov. 17, 1993) (claimant receiving unemployment, registered with temporary agency and accepted assignments, resigned because not satisfied with assignments; court held claimant ineligible stating that she had right to refuse offer and not be disqualified but once she registered with the agency, "they became her employer and she had the burden of showing good cause for terminating the relationship"); Wright v. Western Temporary Services, 1989 LEXIS 41 (Del. Super. Ct. Feb. 10, 1989) (claimant was employed through a temporary agency, completed one assignment and refused another because of car problems; court held ineligible because refused suitable work, where performed similar jobs in past and public transportation available); Howard v. Department of Employment, 597 P.2d 37 (Idaho 1979) (claimant refused offer of work in temporary, part-time telephone solicitation sales; court held ineligible, because work suitable in light of claimant's work history); Norland v. Department of Job Serv., 412 N.W.2d 904 (Iowa 1987) (claimant ineligible because refused offer of temporary work from former employer at same wage and duties after four months of unemployment due to

In addition, claimants typically are permitted to restrict their job search to "suitable" work which is comparable in pay to their formerly held job. Temporary employees are attractive to employers, in part, because they earn less than permanent employees. Thus, many temporary jobs now fail the "suitable" work test not only on account of their temporary nature, but also because the pay and fringe benefits are significantly lower than those the claimant received at her previous work.[151] On the other hand, several states find that temporary work is always suitable,[152] and several courts have ruled that a claimant must be available for temporary work at least when the claimant is pregnant[153] or laid off from a job to which she expects to return.[154]

b. Part-time work

Courts have focused less attention on the question of whether a worker must be available for part-time work. Two recent cases answered that question affirmatively, though each might be confined to its particular facts.[155]

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medical problems); Johnson v. Unemployment Compensation Bd., 408 A.2d 79 (D.C. 1979) (at least after four month period of unemployment, claimant ineligible because refused suitable temporary work); Winterle v. Unemployment Compensation Bd., 442 A.2d 1211 (Pa. Commw. 1982) (employee worked two temporary assignments for employer, but refused a third because wanted permanent position. Court held ineligible without discussing suitability).

[151] Simpson v. Adia Temporary Serv., 1992 LEXIS 3329 (Ohio Ct. App. June 19, 1992) (claimant lost job, accepted assignments with temporary agency, then refused assignment; court held not refusal of suitable work, because job did not meet statutory requirement that a job must be 80% of previous wages to be suitable); Cornwall Personnel Ass'n v. LIRC, 499 N.W.2d 705 (Wis. Ct. App. 1993) (under Wisconsin statute claimant had good cause for refusing employment where new assignments offered by a temporary agency were at rates substantially lower than prevailing rates for similar work, and were lower, but more than two-thirds the wage of previous assignment lasting two years).

[152] *See supra*, note 89.

[153] *In re* Weiss, 276 N.Y.S.2d 708 (N.Y. App. Div. 1975).

[154] Morgan v. Anchor Motor Freight, Inc., 506 A.2d 185 (Del. Super. Ct. 1986) (claimant on temporary layoff required to accept work at lower pay than regular job; temporary work more suitable); *Cf.* Yancy v. Idaho Department of Employment, 455 P.2d 679 (1969) (claimant laid off from permanent employment and available only for temporary employment is eligible for benefits.); Galarza v. Illinois Department of Labor, 520 N.E.2d 672 (Ill. App. Ct. 1987).

[155] Wacaster v. Daniels, 603 S.W.2d 907 (Ark. 1980) (claimant worked less than full-time for city library, was laid off in budget cuts, then offered similar position at same pay for 3-½ hours more per week); Massey v. Unemployment Appeals Comm'n, 478 So.2d 1140 (Fla. Dist. Ct. App. 1985) (claimant lost full-time job, continued to be available for part-time on-call bus driving, but refused one assignment because she had appointment at unemployment office; no discussion of whether work was "suitable"; court reversed agency decision disqualifying claimant from benefits, but held that the amount of her potential earnings should be deducted from her benefits).

4. Independent contractors and employee leasing agencies

As is true under many other labor and employment statutes, the unemployment compensation system is designed to protect "employees."[156] Thus, employers have a financial incentive to characterize their workers as independent contractors in order to avoid paying unemployment compensation taxes.[157] These issues are likely to arise with greater frequency as employers rely increasingly on contract workers.

Employee leasing agencies present a complex new twist on the independent contractor issue, under which employees are transferred to the leasing agency, which handles all the personnel functions, and leases the employees back to the original employer.[158] Four major incentives exist for such arrangements. First, in an increasingly complex regulatory environment, the arrangement allows leasing agencies to specialize in personnel matters, thereby lowering costs for those functions through the development of expertise and economies of scale. Moreover, it allows small businesses in particular to devote more of their attention to their product or service.[159] Second, by using leased employ-

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[156] An early summary of the approach taken to the definition of employee under unemployment insurance programs can be found in Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition,* 55 YALE L.J. 76 (1945). Some states have adhered to a common law "master-servant" definition; others adopted a three-part "ABC" definition patterned after the Wisconsin Statute (1935 Wis. Laws, 192 § 5). *Id.* at 83.

[157] Washington State has rejected the common law definition of "employee" in favor of an interpretation of the ABC approach that includes most contract workers. *See* WASH. REV. CODE §§ 50.04.100, 50.04.140 (1990). Yet the incentive to fudge appears to be strong enough to seduce those who should know better. On March 9, 1994, I spoke with a lawyer acquaintance who does contract work with a medium sized Seattle law firm. My acquaintance noted that her firm does not pay taxes into the unemployment compensation fund on her behalf. She was quite aware of the questionable legality of their practice, but felt she had very limited leverage in changing the firm's approach if she wished to retain her job. Compare the state of Washington, which, not uniquely, operates a "chore services" program under which the state pays aged and disabled individuals money for wages to "chore services" workers who perform chores in the individual's home. In order to avoid having such workers become state employees, the state pays the money for wages to the aged or disabled individual who then pays the worker. Initially, the state tried to characterize the workers as independent contractors in order to avoid the need for either the state, or the aged or disabled person to handle the paperwork for paying the relevant payroll taxes. Personal communication with Sean Bleck, Evergreen Legal Services (November 14, 1994).

[158] *See* Barbara McIntosh, *Employee Leasing Issues: Employer Determination and Liability Considerations*, 38 LAB. L.J. 11 (Jan. 1987); John V. Jansonius, *Use and Misuse of Employee Leasing*, 36 LAB. L.J. 35 (Jan. 1985); Joe Ross Edelheit, *Did You Hear About the Industry That's Asking to Be Regulated?* NEWSDAY, August 22, 1993, at 76; Eric Jay Selter, *Leasing Employees May Ease Benefit Compliance*, TAXATION FOR LAWYERS (Mar.-Apr. 1992).

[159] *See* Edelheit, *supra* note 158, at 76.

ees, employers can avoid pension plan restrictions under ERISA on account of statutory changes enacted in the early 1980's.[160]

Third, leasing agencies in some circumstances can obtain lower tax rates than the original employer. For instance, by "pooling" the employees of a variety of businesses, leasing agencies can circumvent taxation schemes for benefits programs linked to industry accident rates or individual employer or industry unemployment rates. Similarly, in most states new businesses pay a tax rate that is based on the average for all businesses. Yet as compared to a business with a high experience rating, a leasing agency will pay lower taxes.[161] Therefore, transferring a business's employees to a leasing agency may at least temporarily generate a lower tax rate.

The final and most serious consequence for employees is that a leasing arrangement may be used to lower employee wages and benefits if the leasing agency's terms of employment are less favorable than those provided by the original employer. As a result, many labor advocates oppose leasing agencies, fearing that employers will use them as a bargaining tool to decrease wages.[162]

Leasing agencies challenge the traditional conceptual frameworks for thinking about workers. Should the original employer, the leasing agency, or both parties be treated as the "employer" in this situation? Should the definition of employer remain consistent for all purposes? Should the state encourage employee leasing, or restructure its unemployment and worker's compensation programs to remove incentives for the process? At least four states have imposed regulatory requirements making the original employer/lessee and the leasing agency jointly liable for unemployment compensation taxes, at least in the absence of compliance with bonding requirements.[163] Other states have imposed licensing requirements on leasing agencies in response to their failure to comply with unemployment tax obligations.[164] The potential implications of employee leasing agencies for claimants have only begun to surface.

III. WELFARE/UNEMPLOYMENT COMPENSATION OVERLAYS

Changes in the role of women and the structure of the American work force have combined to increase interest in the relationship between unemployment compensation and means-tested welfare programs, most notably Aid to Families with Dependent Children (AFDC). Three issues are particularly relevant

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[160] *See* Selter, McIntosh, *supra* note 158.

[161] *See, e.g.*, ALASKA STAT. § 23.20.170 (1994).

[162] *See* John V. Jansonius, *Use and Misuse of Employee Leasing*, 36 LAB. L.J. 35 (1985).

[163] ARK. CODE ANN. § 11-10-717(e) (Michie 1994); FLA. STAT., ch. 468 (1994); ME. REV. STAT. ANN. tit. 26, § 1222 (West 1994); 1994 Mo. Sen. Bill 559 AMENDING MO. REV. STAT. § 288.032; NEB. REV. STAT. § 48-648 (1994). The California statute provides that the "leasing employer" is the employer for unemployment insurance purposes. CAL. UNEMP. INS. CODE § 606.5 (West 1994).

[164] GA. CODE ANN. §§ 34-8-32, 34-8-34 (1994); TEX. REV. CIV. STAT. ANN. art. 9104 (West 1994); UTAH CODE ANN. § 59 (1994).

for advocates of low-income workers.

A. *The Role of Unemployment Benefits in an Anti-Poverty Strategy*

Recent public attention on anti-poverty issues has focused on conservative claims that the generous availability of welfare benefits creates a disincentive to work and is thus the primary cause of poverty among inner-city blacks.[165] This argument draws upon and reinforces the entrenched stereotype of the welfare recipient: a young, black, single mother of several children who lives in the inner-city, is a second (or third) generation AFDC recipient and has never held meaningful employment.

Efforts to challenge this perception of the welfare recipient can draw on an extensive body of conventional empirical, social science research. This research demonstrates that poverty is as much a rural as an inner-city phenomenon; that most recipients of AFDC are not black, and most have only one or two children; and that many welfare recipients have engaged in paid employment during the previous twenty-four months prior to receiving benefits.[166] In addition, a wealth of contemporary feminist literature exists,[167] seriously challenging the racist[168] and sexist assumptions underlying discussions of the welfare system.[169]

Research conducted by the Institute for Women's Policy provides a particularly relevant source of information. The Institute's 1994 report on the effects of combining work and welfare on poor women's lives demonstrates that even though a substantial portion of women who receive AFDC also engage in paid employment, few receive any unemployment compensation benefits if they lose their jobs.[170] The Institute's preliminary research suggests that women who

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[165] *E.g.*, CHARLES MURRAY, LOSING GROUND: AMERICAN POLICY 1950-1980 (1984); LAWRENCE MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1985).

[166] *See, e.g.*, FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T (Sheldon Danziger & Daniel Weinberg eds.) (1986); GREG DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY (1984); DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY (1988); IRWIN GARFINKEL & SARA MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN (1986); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED (1987).

[167] *See, e.g.*, Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28 (Winter/Spring 1978).

[168] *See, e.g.*, Kimberle Crenshaw, *Race, Reform & Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); BARBARA OMOLADE, IT'S A FAMILY AFFAIR: THE REAL LIVES OF BLACK SINGLE MOTHERS (1987).

[169] *See, e.g.*, MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT (1989); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994); LINDA GORDON (ED.), WOMEN, THE STATE, AND WELFARE (1990).

[170] Of "single mothers who received AFDC for at least two months out of 24 . . . 43% also worked over the 24-month study period." *See also*, Roberta Spalter-Roth,

combine unemployment compensation with their income from work and welfare ("cyclers") have slightly higher income over the long-term than those who combine only work and AFDC ("combiners").[171] Yet the total work effort of cyclers is not significantly greater than the work effort of women who receive no unemployment compensation benefits. Rather "cyclers" tend to work more intensively while they work, often at multiple jobs, and at higher average wages, while "combiners" work more weeks, but average fewer hours per week.[172]

These data highlight two important policy concerns. First, because AFDC functions as a substitute for unemployment compensation, current proposals to limit AFDC eligibility to two years again illustrate how the gendered structure of our social welfare system disadvantages women. Second, while the income advantage for cyclers is small, the data reinforce the argument in favor of reducing those barriers that prevent women from receiving unemployment insurance. The attachment to the labor force requirements, the voluntary quit disqualification, and the availability requirement discussed in the previous section all undoubtedly exclude many AFDC recipients from receiving unemployment benefits.

B. *Proposals to Replace Unemployment Benefits, Welfare and Food Stamps*

As political attacks on the welfare system intensified, conservatives began to include unemployment compensation benefits in many welfare reform proposals. Beginning in 1990, Dick Wendt, CEO of Jeld-Wen, a non-union wood processing company based in Klamath Falls, Oregon, and his consultant Chuck Hobbs, a former Reagan Administration domestic policy advisor, began promoting a welfare reform proposal that would fully subsidize employers for hiring AFDC recipients at subminimum wage.[173] The original proposal also applied to recipients of unemployment compensation if the individual earned less than $10,000 during the base year used for computing eligibility for benefits.[174] The program planned to generate funding by substituting

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Heidi Hartmann, and Beverly Burr, *Income Insecurity: The Failure of Unemployment Insurance to Reach Out to Working AFDC Mothers*, PAPER PRESENTED AT THE SECOND ANNUAL EMPLOYMENT TASK FORCE CONFERENCE (March 20-22, 1994).

[171] Unpublished data provided by Beverly Burr in telephone conversation July 25, 1994.

[172] *Id.*

[173] *See, Dim Future Predicted for Measure 7's "Workfare" Project*, THE OREGONIAN, Nov. 9, 1990, at E10. The final version of the proposal required that employers "not pay a wage that is substantially less than the wage paid for similar jobs in the local economy with appropriate adjustments for experience and training." 1993 OREGON LAWS Ch. 739 (HB 2459-C) § 16(2)(d).

[174] 1993 OREGON LAWS Ch. 739 § 16(5)(c). Note that the $10,000 base year wages criterion means that individuals potentially capable of earning much more than minimum wage could be required to participate in the program. An individual could have only $10,000 in base year earnings for numerous reasons other than low hourly pay.

("cashing out") appropriations originally earmarked for AFDC, food stamps and, where applicable, unemployment compensation benefits.[175]

By including recipients of unemployment compensation benefits, the original Jeld-Wen proposal continued the trend of viewing unemployment insurance as simply another social welfare program, rather than as an earned entitlement. From that vantage point, the proposal imposed minimum wage work requirements on workers with limited base year earnings, even though such workers might have accumulated the base year earnings at well above the minimum wage.[176] Though the Oregon legislature ultimately deleted those provisions aimed at recipients of unemployment benefits, the proposal highlights the extent to which the purposes of unemployment insurance are contested. Given that disagreement, policy debates involving both unemployment compensation and welfare seem likely to arise with increasing frequency.

C. *Earned Benefits v. Welfare: The Job Training Example*

The distinction between benefits obtained through attachment to the labor force ("earned benefits") and benefits obtained on the basis of need ("welfare") is central to the public perception of the American social welfare sys-

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Individuals who work part-time; who return to the workforce after a hiatus, but are then laid off; or whose work effort is partially in uncovered employment, such as, in Oregon domestic or farmwork for smaller employers under ORE. REV. STAT. §§ 657.0545, 657.050 (1993).

[175] The proposal was originally adopted through the initiative process in Oregon in 1990. Interestingly, Proposition 7 was passed overwhelmingly by the Oregon voters in 1990, carrying 35 of 36 counties, but the one county in which it failed was Klamath Falls County, the headquarters of corporate proponent Jeld-Wen. *See, Dim Future Predicted for Measure 7's "Workfare" Project*, THE OREGONIAN, Nov. 9, 1990, at E10. The original initiative was complex and internally inconsistent and was subject to obtaining federal waivers from otherwise applicable requirements for use of AFDC, food stamp and unemployment compensation funds. After waivers were denied, a revised proposal was introduced in the state legislature. Lengthy political infighting eventually produced a revised bill, 1993 OR. LAWS ch. 739, and federal waivers were finally approved mid-1994. Personal communication with Charles Sheketoff of the Multnomah County Legal Aid Service. My thanks to Mr. Sheketoff for providing background materials concerning the evolution of the "JOBS PLUS" program.

Similar proposals were introduced in other states with less success. The Mississippi version was passed by both houses of the Mississippi legislature, but died in conference; it also omitted the unemployment insurance provisions. 1994 Miss. S. B. 3032, § 3, creating the Mississippi Full Employment Program. The Washington version went nowhere. Note that a recent Ninth Circuit case appears to impose limitations on the federal government's ability to grant broad waivers, which could affect the evolution of the program. Beno v. Shalala, 1994 U.S. Adv. LEXIS 17043 (1994). For a critique of the use of waivers see Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard*, 12 YALE L. & POLICY REV. 8 (1994).

[176] A full critique of the Jeld-Wen proposal is beyond the scope of this article.

tem.[177] This distinction also marks the difference between the programs with firm public support[178] and those that fall under less-popular ambit of "welfare."

Historically, unemployment compensation programs remained securely in the "earned benefits" camp. However, this notion may soon need reconsideration in light of recently adopted federal regulations which require states to engage in "worker profiling"[179] as a precondition to receiving funds for their unemployment insurance programs. "Worker profiling" involves identifying claimants who are particularly appropriate candidates for retraining because of their liklihood to remain unemployed for long periods and "exhaust"[180] their benefits.[181] The process raises three important concerns: First, what criteria will be used to identify likely candidates for retraining? Second, will the retraining opportunities offered to workers identified through profiling be desirable, or will they merely create additional barriers to overcome in order to remain eligible for benefits? Third, if the training opportunities are desirable, will worker profiling result in a two-tiered training system with the best assistance available only to those identified through profiling?

The rise of "worker profiling" has led some advocates to foresee one of two shifts in the future character of the unemployment insurance system. Under one view, need concepts, as well as more stringent conditions on eligibility, will gradually take over the unemployment compensation system. In the alternative, a two-tiered system will develop for unemployment insurance replicating

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[177] To the extent that the payout from "earned benefits" to beneficiaries is more than the employee and employer contributions, plus interest, as is the case with Social Security, the notion that such benefits are earned is seriously misleading. *See* O'Connell, *supra* note 6, at 1517-21. Nonetheless, the distinction persists.

[178] An article of faith among the original proponents of Social Security (as well as modern liberals) is that broad public support could be ensured by spreading the benefits universally without regard to need. *See, e.g.*, DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 23-25 (1988); THEODORE R. MARMOR, JERRY L. MASHAW & PHILIP L. HARVEY, AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES (1990). The cost of that decision has been that the middle class arguably receives much more in government subsidies than the poor, despite public anger at "freeloading welfare recipients." For a challenge to this article of faith, see William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986).

[179] Unemployment Compensation Amendments of 1993 § 4, Pub. L. 103-152, 107 Stat. 1517.

[180] Unlike both Social Security and most means-tested welfare programs, receipt of unemployment insurance is subject to time limits. Typically "regular" benefits are available up to a maximum of twenty-six weeks, and additional "extended" benefits are available during periods of high unemployment. The many variations are described in U.S. DEPARTMENT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS, § 335 (August 1994). Workers who remain unemployed and claim the maximum number of benefits are said to have "exhausted" their unemployment benefits.

[181] *Id.*

the inequities that characterize our social welfare system as a whole. Under this scenerio, the most generous benefits will wind up going to the "ideal male" workers in the form of funding for training and education, while other workers will receive only minimal, time-limited cash payments and routine job-search assistance.

1. Criteria used in worker profiling

Research on the characteristics of the long-term unemployed has identified two major, and quite different, groups who risk exhausting their unemployment insurance. The first group consists of less-educated workers permanently laid off from a long-term job. These workers, consisting disproportionately of male union-members accustomed to earning above-average wages, are unlikely to return to the same industry or occupation due to structural changes in the economy. The second group, composed disproportionately of white women, and men and women of color, includes workers with limited education who have held a series of short-term jobs with different employers.[182] Recent Labor Department directives provide that workers identified through profiling should automatically qualify as "dislocated" workers as defined by the Economic Dislocated Worker Adjustment Assistance Act.[183] The directives also adopt a profiling methodology that seeks to identify the former group exclusively.[184]

2. Job training: hoop or help?

Low-income workers and their advocates will become concerned about the fairness of the worker profiling system only if the job training opportunities provided to profiled workers are attractive. However, three factors exist to cast doubt on the prospective quality of those opportunities. First, job training is meaningful only if jobs are available when training is complete. Many observers are skeptical about the Clinton Administration's emphasis on job training precisely because of doubts that high quality jobs will be available for those who undergo training.[185]

Second, quality job training is expensive. Federally funded job training opportunities have been available for at least three decades through programs

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[182] Marc Baldwin, Research Report. WHO BENEFITS: THE IMPACT OF ALTERNATIVE ELIGIBILITY REQUIREMENTS FOR TRAINING STIPENDS IN THE REEMPLOYMENT ACT OF 1994, NATIONAL COMMISSION FOR EMPLOYMENT POLICY (1994); WALTER CORSON AND MARK DYNARSKI. A STUDY OF UNEMPLOYMENT INSURANCE RECIPIENTS AND EXHAUSTEES: FINDINGS FROM A NATIONAL SURVEY, Table II.1 (October 1992).

[183] 29 U.S.C. § 1651(a), Pub. L. 100-418, Title VI, Subtitle D, § 6301, 102 Stat. 1524 (enacted August 23, 1988).

[184] *See, e.g.*, U.S. DEPT. OF LABOR FIELD MEMORANDUM No. 35-94 (March 22, 1994), No. 35-94, Change 2 (June 9, 1994).

[185] *See, e.g.*, Statement by the AFL-CIO Executive Council on Jobs and the Economy (February 21, 1994), BNA DAILY LABOR REPORT. No. 35, F-1 (February 23, 1994).

such as the Jobs Training Partnership Act,[186] its predecessor, the much maligned Comprehensive Employment Training Act,[187] and the Aid to Families with Dependent Children Work JOBS program,[188] which superceded the Work Incentive Program (WIN).[189] However, funding limitations have consistently created pressure to engage in "creaming" — serving those individuals who are easiest to place and least in need of services — and to target short-term vocational training for low-skilled jobs.[190]

Finally, experience with AFDC, the primary program which conditions eligibility for benefits on employment training, suggests that job training opportunities are often limited, and that participation requirements often function as barriers to eligibility, without providing significant opportunities to most recipients.

3. Reproducing class, race and gender inequities?

As federal job training programs begin to use worker profiling as a "gatekeeper" for entry into employment and training programs,[191] the implications for workers extend beyond the confines of the unemployment compensation program. A distinct possibility exists that a two-tier job training system will emerge which provides quality services to profiled workers but nothing for the rest. In this scenerio, the criteria relied on for worker profiling becomes crucial. If less educated workers accustomed to intermittent employment are excluded from quality training programs, then the economic, racial, and gender-based inequities characterizing our current social welfare system will be reproduced in the employment training context.

IV. CONCLUSION

Changes in the basic structure of the economy, combined with increased participation by women in the paid workforce, present numerous issues regarding unemployment compensation benefits for members of the "contingent workforce," a group composed disporportionately of low-wage workers. In order to address these issues effectively, advocates will need to engage in multi-forum advocacy and be alert to developments outside the narrow confines of the unemployment insurance system. Which efforts will be most fruit-

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[186] 29 U.S.C. §§ 1501 et seq. (1982).

[187] 29 U.S.C. § 801 (1982).

[188] Family Support Act of 1988, 42 U.S.C. §§ 681 et seq.

[189] Formerly located at 42 U.S.C. § 630 et seq. (1982).

[190] *See, e.g.*, Irv Ackelsberg, et al., *Opportunitites for Legal Services Advocacy on Jobs, Employment, Education, and Training Issues*, 27 CLEARINGHOUSE REV. 983 (Jan. 1994); R.P. Anderson, *WIN: From Both Sides Now*, 13 CLEARINGHOUSE REVIEW 584 (Dec. 1979); *WIN Program: Implications for Welfare Reform and Jobs Organizing*, 13 CLEARINGHOUSE. REV. 272 (Aug. 1979).

[191] *See, e.g.*, Reemployment Act of 1994, Titles I and II, H.R. 4040, 103rd Cong., 2d Sess. (1994).

ful will vary by issue.

To ensure that attachment to the labor force requirements do not exclude "contingent workers," advocates will need to rely on legislation at both the state and federal levels, adminstrative rulemaking efforts, and major law reform litigation. The definition of "good cause" in voluntary quit cases, as well as the definition of "availability" can be expanded through individual casework in states having only broad statutory provisions. However, efforts at the legislative and agency level will be needed in states with restrictive statutes, and may both affect more claimants and be necessary in order to preserve gains achieved through individual case work. Major efforts to reform the job training and welfare systems are likely to take place primarily in Congress, but the administrative agencies and the states will also play a critical role, and advocates concerned with unemployment insurance must not overlook developments in those areas.

As this article has noted, fiscal concerns in the 1980s were the driving force behind program changes that reduced the percentage of the unemployed receiving unemployment benefits. A key factor in demonstrating the viability of the types of changes proposed in this article will be addressing those fiscal concerns. Thus, advocates must not restrict their concerns to the eligibility provisions of the unemployment insurance system, but must also become experts on the tax matters. Though on the surface many of the issues addressed in this article may appear narrowly technical, underlying all of them are contested visions of the role of unemployment insurance and our expectations of workers in a postindustrial economy. The greatest challenge for academics, as well as advocactes, will be articulating a vision of unemployment insurance that can address the needs of the "contingent workforce."