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Danielle D. van Jaarsveld
University of British Columbia, Sauder School of Business

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OVERCOMING OBSTACLES TO WORKER REPRESENTATION: INSIGHTS FROM THE TEMPORARY AGENCY WORKFORCE

DANIELLE D. VAN JAARSVELD*

I. INTRODUCTION

The proliferation of contingent employment arrangements, in which workers “do not have an implicit or explicit contract for ongoing employment,”¹ in the past decade is well documented.² Firms in the United States use contingent workers, including temporary agency workers,³ for several reasons. The most common reasons employers cite for their use include enhancing labor flexibility to address changes in demand; covering for absences; and reducing costs associated with the hiring, training, and compensation

* Assistant Professor of Organizational Behaviour and Human Resources, University of British Columbia, Sauder School of Business, A.B. 1995 Princeton University; M.S. 2000, Ph.D. 2004, Cornell University. The author thanks Lee H. Adler, Senior Extension Associate, Cornell University ILR, for helpful suggestions and comments.

1. Debate about the definition of contingent employment arrangement has yielded variation in estimates about the size of the contingent workforce in the United States. While most definitions of “contingent” include temporary (agency and direct-hired) and on-call workers, whether or not part-timers and independent contractors should also be considered “contingent workers” is a matter of debate. The U.S. Department of Labor’s Bureau of Labor Statistics (BLS) collects data on contingent work with supplements to the Current Population Survey and defines contingent work as workers who do not have an expectation of continuing employment, and based on that definition, estimates that 5.7 million workers are in contingent employment arrangements, representing about 4% of total employment. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, FEBRUARY 2005 3 (July 27, 2005), *available at* <http://www.bls.gov/news.release/conemp.nr0.htm> [hereinafter BLS, CONTINGENT ARRANGEMENTS]; *see also* Richard S. Belous, *The Rise of the Contingent Workforce: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 868 (1995); Sharon R. Cohany, *Workers in Alternative Employment Arrangements: A Second Look*, 121 MONTHLY LAB. REV. 3 (1998); Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541 (2001); Susan N. Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey*, 55 INDUS. & LAB. REL. REV. 149 (2001).

2. BLS, CONTINGENT ARRANGEMENTS, *supra* note 1; Cohany, *supra* note 1; Forster, *supra* note 1; Belous, *supra* note 1.

3. The term “temporary agency worker” refers to an employment arrangement that involves a temporary employment agency. Independent contractor arrangements are also a type of contingent employment.

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of permanent employees.⁴ From the perspective of the workforce, some benefits of contingent work arrangements include flexibility in the choice of when to work and in the type of assignments to take on, and the opportunity to have some control over one's career.⁵ These benefits, however, can be outweighed by the significant disadvantages that stem from the absence of a long-term attachment to a firm, which in turn can translate into reduced access to health and pension benefits, fewer opportunities for firm-subsidized training, lower wages, and a lack of job security. Moreover, the presence of a temporary staffing agency in the employment relationship complicates a temporary agency worker's access to protections available through the National Labor Relations Act (NLRA).⁶ As a result, these workers can be left without a voice to represent them in negotiations with their employers.

In March 1998, a group of dissatisfied high-tech⁷ contingent workers at Microsoft Corp. formed an advocacy organization, the Washington Alliance of Technology Workers/Communication Workers of America (WashTech/CWA), to improve their working conditions. WashTech/CWA successfully pursued non-traditional methods of organizing this workforce, which suggests a possible di-

4. W. GILMORE MCKIE & LAURENCE LIPSETT, *THE CONTINGENT WORKER: A HUMAN RESOURCES PERSPECTIVE* (1995); Houseman, *supra* note 1. Many scholars use the term "full-time" employee to refer to non-contingent employees. However, the National Labor Relations Board uses the term "permanent" employee to refer to non-contingent employees. See *Church Homes, Inc.*, 343 N.L.R.B. 128 (2004). Although all employment in the United States is considered "at-will," and therefore no employment is truly permanent, the term is used to indicate an understanding that the employer and employee intend the employment to be for a steady job, rather than a temporary or casual one. 4 LABOR AND EMPLOYMENT LAW § 130.02 (Matthew Bender & Co. 2005). This article will refer to non-contingent employees as "permanent" employees, rather than "full-time" employees, out of recognition of the fact that contingent employees often work full-time as well as over-time hours.

5. Stephen R. Barley et al., *Why Do Contractors Contract? The Experience Of Highly Skilled Technical Professionals in a Contingent Labor Market*, 55 INDUS. & LAB. REL. REV. 234 (2002); Forster, *supra* note 1; Rick Melchionno, *The Changing Temporary Work Force: Managerial, Professional, and Technical Workers in the Personnel Supply Services Industry*, OCCUPATIONAL OUTLOOK Q., Mar. 22, 1999, at 24.

6. Forster, *supra* note 1, at 541.

7. For purposes of this paper, "high-tech" refers to the "design, development, and introduction of new products and innovative manufacturing processes, or both, through the systematic application of scientific and technical knowledge." Daniel Hecker, *High-technology Employment: A Broader View*, 122 MONTHLY LAB. REV., June 1999, at 18.

rection for similar organizing efforts in other industries that depend on contingent workers.

Part II of this article reviews the legal obstacles that temporary agency workers encounter in trying to gain representation under current labor law. Part III examines Microsoft and its contingent employment arrangements as an illustration of the relationship between temporary agency workers, the temporary employment agency, and the client firm,⁸ and addresses the implications of such employment arrangements for contingent workers. Part IV analyzes the formation and growth of WashTech/CWA and the strategies it uses to represent temporary workers in order to gain insight into the future of contingent workforce representation. Finally, Part V concludes by arguing that in the absence of further legal reform, organizations such as WashTech/CWA are not only necessary to protect contingent workers, but will also become increasingly important in the next-wave labor movement generally.⁹

II. THE LABOR LAW CONTEXT

Private-sector labor law in the United States reflects the traditional New Deal definition of “employee,” which presumes a long-term attachment to a firm.¹⁰ Temporary agency workers fall outside of the NLRA definition of employee in two primary ways. First, temporary agency workers generally lack a long-term relation-

8. The term “client firm” refers to the employer that obtains workers from a temporary employment agency.

9. This article draws on three primary sources of information to consider strategies that are suitable for the representation of high-tech contingent workers: interviews, Internet-based information, and survey data. See Danielle D. van Jaarsveld, *Collective Representation Among High-Tech Workers at Microsoft and Beyond: Lessons from Wash Tech/CWA*, 43 *INDUS. REL.* 364, 365-66 (2004).

10. The NLRA, a key component of the private-sector collective bargaining system, is consistent with this approach. Although the NLRA does not expressly define “employee,” it does so implicitly by defining instead the types of workers who are *not* considered employees under the Act and includes independent contractors among them. See 29 U.S.C. § 152(3) (2000). See also Annette Bernhardt & Thomas Bailey, *Improving Worker Welfare in the Age of Flexibility*, 41 *CHALLENGE* 16 (1998); Françoise J. Carré et al., *Representing the Part-Time and Contingent Workforce: Challenges for Unions and Public Policy*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 314 (Sheldon Friedman et al. eds., 1994) [hereinafter *RESTORING THE PROMISE*]; Stewart Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 *WASH. & LEE L. REV.* 915 (1995).

ship with an employer at a single worksite. Second, the involvement of the temporary staffing agency as a labor-market intermediary in the employment relationship between a temporary worker and a client firm further complicates the situation by creating a triangular employment relationship that is inconsistent with the traditional NLRA model.¹¹ For example, temporary agency workers can form a bargaining unit and enter into a bargaining relationship with their temporary employment agency¹² However, given the nature of temporary work, and that a temporary agency generally includes workers who may experience very different employment conditions based on the client firm where their work is located, this option is unrealistic. A client firm can also terminate its relationship with a temporary employment agency and do so without repercussions.¹³ Thus, a client firm could potentially avoid an organizing drive of temporary workers by simply severing its relationship with the temporary employment agency.¹⁴ The client firm can do so without punishment so long as the client firm does not inform workers or the temporary employment agency of the reason for termination if it is related to the organizing drive.¹⁵ While the NLRA does not prohibit temporary agency workers from organizing and bargaining collectively, these workers in practice nevertheless face a number of obstacles in gaining representation and encounter significant difficulties accessing these remedies under labor and employment laws such as the NLRA.¹⁶ Temporary agency workers therefore have limited access to collective bargaining, which is an important channel through which workers generally challenge as-

11. See George Gonos, *Fee-splitting Revisited: Concealing Surplus Value in the Temporary Employment Relationship*, 29 POL. & SOC'Y 589 (2001).

12. See, e.g., *All-work, Inc.*, 193 N.L.R.B. 910, 919 (1971); see Bitu Rahebi, *Rethinking the National Labor Relations Board Treatment of Temporary Workers: Granting Access to Unionization*, 47 UCLA L. REV. 1105 (2000); Robert B. Moberly, *Temporary, Part Time, and Other Atypical Employment Relationships in the United States*, 38 LAB. L.J. 689 (1987).

13. See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1548-49 (1996).

14. See *id.*; Rahebi, *supra* note 12.

15. See *id.*

16. See Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301 (1999); RESTORING THE PROMISE, *supra* note 10; H. Lane Dennard, Jr. & Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 GA. L. REV. 683 (1994); Schwab, *supra* note 10; Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 STETSON L. REV. 1 (1996).

pects of their working conditions.¹⁷ While it is true that a few temporary agencies in the United States have collective bargaining agreements, these agencies are exceptions to the rule.¹⁸

A. *Legal Requirements for Obtaining Representation*

In circumstances when temporary agency workers seek to gain collective representation under the NLRA and negotiate with the temporary agency and the client firm, a series of legal requirements must be satisfied. These requirements differ based on whether the temporary workers seek to form their own bargaining unit, comprised solely of temporary workers, or whether they seek to join an existing bargaining unit comprised of the client firm's permanent employees. The legal analysis for each of these situations will be discussed in turn.

1. Requirements for Temporary Workers Seeking to Form a Bargaining Unit

In order for temporary workers to organize and form a collective bargaining unit comprised only of temporary workers, the National Labor Relations Board (NLRB) must find that two elements are satisfied: 1) a community of interest exists among the temporary workers themselves; and 2) the client firm and the temporary employment agency are joint employers.

First, the NLRB must find that the temporary workers seeking to form the bargaining unit share a sufficient "community of interest."¹⁹ To establish that a community of interest exists, temporary

17. See Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557 (1996); Rahebi, *supra* note 12.

18. The fact that union representation for such workers is not readily accessible explains, in part, why union representation of temporary agency workers is limited. See Moberly, *supra* note 12; Rahebi, *supra* note 12.

19. Section 9(b) of the NLRA requires that a bargaining unit be "appropriate" for collective bargaining purposes and applies to *all* workers who wish to form a bargaining unit, not only temporary workers wishing to form a bargaining unit. 29 U.S.C. § 159(b). The determination of whether a bargaining unit is "appropriate" under the NLRA in any situation is based on the community of interest test. See *ARMCO, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir. 1987).

workers must demonstrate that they share similar skills, wage levels, hours, and working conditions.²⁰

Second, in order to avail themselves of their legal right to collective bargaining representation under the NLRA, temporary agency workers must establish that a joint employer relationship exists between the temporary staffing agency and the client firm.²¹ Joint employers are "independent legal entities that have merely historically chosen to handle, jointly, important aspects of their employer-employee relationship."²² If "two or more employers exert significant control over [the] same employees, where from evidence it can be shown that they share or codetermine those matters governing essential terms and conditions of employment, they are 'joint employers' within the meaning of National Labor Relations Act."²³ The NLRB applies the "right to control" test to determine whether a joint employer relationship exists.²⁴ The right to control test evaluates who has control over the "essential terms and conditions of employment" such as hiring, firing, discipline, supervision, and control of employees.²⁵ The central factor influencing whether or not the NLRB will recognize a client firm and a temporary employment agency as joint employers is who has control over the "means and manner of the worker's performance."²⁶ This determination involves more than the mere appearance of supervision; there must be a showing that each employer has significant involvement in the terms and conditions of employment.²⁷ Upon a finding of a joint employer relationship, the client firm is obligated

20. See *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962); Rahebi, *supra* note 12.

21. See *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3d Cir. 1982). See also Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future*, Paper Presented to the American Bar Association, Section of Labor and Employment Law (Aug. 10, 1993), reprinted in *DAILY LAB. REP.* (BNA) No. 154, at E-1 (Aug. 12, 1993).

22. *Browning-Ferris Indus.*, 691 F.2d at 1122 (citing *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966)).

23. *Id.* at 1124 (citing *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)).

24. *Laerco Transp. & Warehouse*, 269 N.L.R.B. 324, 325-26 (1984).

25. *Id.*

26. *Magnuson v. Peak Technical Servs.*, 808 F. Supp. 500, 509 (E.D. Va. 1992). See also Kenneth A. Jenero & Mark A. Spognardi, *Temporary Employment Relationships: Review of the Joint Employer Doctrine under the NLRA*, 21 *EMPL. REL. L.J.* 127 (1995).

27. *Laerco Transp.*, 269 N.L.R.B. at 325.

to negotiate with the temporary workers' representative.²⁸ If, however, the NLRB finds that the two firms are not joint employers, the client firm will not be legally required to bargain with temporary workers.

2. Requirements for Temporary Workers Seeking to Join an Existing Bargaining Unit Alongside Permanent Employees

When temporary workers seek to join an existing bargaining unit comprised not only of temporary workers, but also of the client firm's permanent employees, the requirements differ slightly. The NLRB still must find that the community of interest and joint employer relationship elements exist. In this situation, however, an additional requirement must be satisfied: the temporary agency and the client firm must consent to the temporary workers' inclusion in the bargaining unit.²⁹

First, the NLRB must not only find that the temporary workers themselves share a community of interest with one another, but must also find that the temporary workers share a community of interest with the permanent employees who are already in the bargaining unit.³⁰ Determining whether a community of interest exists involves consideration of the same factors discussed above — similarity in skill, wage level, hours, and working conditions.³¹ It is, however, unnecessary for temporary workers and permanent employees to be identical in terms of their working experience.³²

Second, a joint employer relationship must exist between the temporary agency and the client firm. The joint employer analysis in this situation is the same as when temporary workers seek to form their own bargaining unit.³³

The third and final element that must exist before temporary agency workers may join an existing bargaining unit with perma-

28. See *Browning-Ferris Indus.*, 691 F.2d 1117.

29. *Lee Hospital*, 300 N.L.R.B. 947 (1990).

30. See 9 U.S.C. § 159(b); sources cited *supra* note 21.

31. See *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134; Rahebi, *supra* note 12.

32. *Ameritech Commc'ns, Inc.*, 297 N.L.R.B. 654, 656 (1990).

33. See discussion *supra* Part II.A.1.

ment employees is the dual-consent requirement.³⁴ The temporary employment agency and client firm must both consent to the temporary workers joining the bargaining unit.³⁵ Therefore, even if the NLRB finds that a community of interest among the temporary and permanent employees exists and that the two firms are joint employers, the door to representation does not necessarily swing open to temporary workers.

B. Obstacles to Obtaining Representation

The right of temporary agency workers to gain representation under the NLRA must be considered in terms of the practical implications of the legal requirements that they must satisfy in order to exercise that right.³⁶ The inherent nature of temporary work fails to conform easily to the requirements of the NLRA, set forth above, because it is characterized by multiple worksites, short-term assignments, high levels of mobility, and the presence of an intermediary in the employment relationship.³⁷ These characteristics make it difficult for temporary agency workers to overcome the hurdles of establishing a community of interest and a joint employer relationship, and of obtaining the consent of the employers.

Temporary agency workers who wish to join a pre-existing bargaining unit will have difficulty meeting the community of interest requirement because they often move from job to job and might be assigned to multiple worksites. Establishing that a joint employer relationship exists can also be difficult because the analysis focuses on who controls the work (in the case of temporary workers, usually the client firm) as opposed to who controls the economic factors of the relationship (typically the temporary staffing agency).³⁸

34. *Lee Hospital*, 300 N.L.R.B. 947. In 2000, the NLRB briefly removed the dual consent requirement, in *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), only to reinstate it in 2004. *H.S. Care L.L.C., d/b/a Oakwood Care Center*, 2004 N.L.R.B. LEXIS 673 (N.L.R.B. Nov. 19, 2004).

35. *H.S. Care L.L.C.*, 2004 N.L.R.B. LEXIS 673, at *2. For a discussion of the policy rationale for the consent requirement, see *id.* at *20-*23.

36. Rahebi, *supra* note 12; Gonos, *supra* note 11.

37. RESTORING THE PROMISE, *supra* note 10; Hiatt & Rhinehart, *supra* note 21; Middleton, *supra* note 17; Moberly, *supra* note 12.

38. See *Laerco Transp. & Warehouse*, 269 N.L.R.B. at 325; Rahebi, *supra* note 12; Hiatt & Rhinehart, *supra* note 21; RESTORING THE PROMISE, *supra* note 10.

Further complicating the establishment of a joint employer relationship is the fact that a client firm might wish to avoid being identified as a joint employer.³⁹ In those situations, the firm will often either structure the relationship with the agency in a way that avoids a joint employer relationship or sever the employment relationship altogether. As more firms have developed close relationships with temporary employment agencies, they have also begun to carefully structure these relationships in a way that would preclude a determination that they are joint employers under the NLRA. Without the recognition that a joint employer relationship exists, a client firm is also protected from union efforts to express dissatisfaction with working conditions through economic pressure.

The characteristics of this employment relationship hamper organizing efforts and, as a result, temporary agency workers lack clear access to some of the labor and employment protections that permanent employees enjoy under the NLRA.⁴⁰ In addition, temporary workers must obtain consent from both the temporary agency and the client firm before they may join the existing bargaining unit in cases where a joint employer relationship is found to exist.⁴¹ Because neither the agency nor the client firm is likely to provide consent, this channel to representation is difficult to access. Thus, temporary agency workers are in a vulnerable position in the workplace.

III. A CASE STUDY OF HIGH-TECH TEMPORARY AGENCY WORKERS AT MICROSOFT

A. *Why Microsoft Uses Temporary Agency Workers*

During the 1990s, Microsoft encountered ongoing legal difficulties with its contingent workforce. Microsoft relied on a sizable

39. See Rahebi, *supra* note 12 (noting that William Gould, former Chairman of the NLRB, could not recall a case in which a client firm had not wanted to avoid a finding of a joint employer relationship).

40. See RESTORING THE PROMISE, *supra* note 10; Hiatt & Rhinehart, *supra* note 21; Middleton, *supra* note 17. For a full review of the application of labor and employment laws to contingent workers, see Lisa Mills, *Contingent Employees Gain Access to Union Representation: National Labor Relations Board Grants Contingent Employees the Right to Join Same Collective Bargaining Unit as User Employer's Regular Employees*, 26 S. ILL. U. L. J. 81 (2001); Schwab, *supra* note 10.

41. See *H.S. Care L.L.C.*, 2004 N.L.R.B. LEXIS 673.

workforce that was classified as independent contractors, a practice that was common among many companies during the early 1990s. At Microsoft's request, its independent contractors signed documents whereby they explicitly agreed to be classified as such.⁴² In 1992, the Internal Revenue Service (IRS) audited Microsoft's employment practices and found that these individuals were in fact common law employees.⁴³ Based on a twenty-factor test, the IRS determined that the degree of control and direction Microsoft exercised over these workers suggested that these workers were Microsoft employees and that they were misclassified as independent contractors. Following the IRS determination, Microsoft converted some of the independent contractors to permanent status and shifted others to the payrolls of temporary employment agencies.⁴⁴

Incorporating temporary employment agencies into its staffing strategy provided Microsoft with access to a flexible source of labor. The use of temporary employment agencies also brought Microsoft into compliance with IRS regulations, allowing the company to avoid the risk that its contingent workers would again be deemed *de facto* employees.⁴⁵ Microsoft referred to its workers who were hired through temporary employment agencies and assigned to temporary positions at Microsoft as "agency contractors." The agency contractors' job assignments were concentrated in Internet content creation,⁴⁶ and the length of these assignments was not

42. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1190 (9th Cir. 1996) (discussing the documents that the plaintiff, an independent contractor employed by Microsoft, signed, including a document entitled "Microsoft Corporation Independent Contractor Copyright Assignment and Non-Disclosure Agreements," as well as several other company documents entitled "Independent Contractor/Freelancer Information").

43. *Vizcaino*, 97 F.3d at 1190. For a more detailed description of this case see *infra* note 70.

44. Eight independent contractors who were transferred to temporary employment agencies as a result of the IRS audit challenged their exclusion from Microsoft's Savings Plus Plan and Microsoft's Employee Stock Purchase Plan. See *infra* note 70 (discussing the litigation and its resolution).

45. U.S. DEP'T OF LABOR, ADVISORY COUNCIL ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS, REPORT OF THE WORKING GROUP ON THE BENEFIT IMPLICATIONS OF THE GROWTH OF A CONTINGENT WORKFORCE (testimony by David Stoubaugh, Bendich, Stoubaugh & Strong) (Sept. 8, 1999).

46. WashTech/CWA gathered this information through the Microsoft Conversion Survey administered by WashTech/CWA in September 1999. Their job titles — including 3D artists, content coordinators, graphic designers, programmers/writers, technical

necessarily short. In fact, many Microsoft agency contractors referred to themselves as “permatemps” because their assignments lasted for years. By the year 2000, approximately 35% of Microsoft’s high-skilled workforce — a total of 6800 workers nationwide — consisted of agency contractors. Roughly 5326 of those workers were located in the Seattle area.⁴⁷

B. The Triangular Relationship at Microsoft

Three actors existed in the temporary employment arrangement: Microsoft, the agency contractor (or temporary agency worker), and the temporary employment agency. Agency contractors were hired for assignments at Microsoft in one of two ways. In the first scenario, a worker submitted an application with a temporary employment agency. In response to a request from Microsoft for applicants, a temporary employment agency forwarded information on qualified applicants to Microsoft. Once Microsoft selected an applicant, the temporary employment agency began wage negotiations with the worker. In the second scenario, a worker submitted an application directly to Microsoft. A Microsoft manager then interviewed the applicant and, if the manager decided that the applicant was qualified to fill an open position, Microsoft directed the applicant to sign on with a particular temporary employment agency. Once the applicant joined an agency, Microsoft hired the worker via the agency. Under this scenario, even contractors who found positions at Microsoft through their own efforts were nevertheless required to sign up with a temporary employment agency in order to work at Microsoft. In both scenarios, after the temporary employment agency received approval from Microsoft and agreed to an acceptable wage with a Microsoft representative, a representative from the temporary employment agency negotiated the terms of the contract with the worker. The temporary agency, and not Microsoft, was the source of benefits available to the temporary

writers and web developers — reflected a variety of skill sets. van Jaarsveld, *supra*, note 9, at 365.

47. Microsoft’s Washington State workforce consists of approximately 19,400 workers. The number of agency contractors has decreased since Microsoft converted several agency contractor positions to permanent ones, a policy that started in September 1999. See Dan Richman, *Microsoft Ends Its Permatemp Era*, SEATTLE TIMES, June 30, 2000, at C1.

agency worker, such as health benefits and training stipends. In exchange for these benefits, temporary employment agencies charge each worker a fee that is deducted from the worker's paycheck.⁴⁸

Once a temporary employment agency found an assignment for a worker, the temporary employment agency assumed primary employer responsibilities for the worker and became responsible for the administration of wages and benefits to that worker. Despite this formal division of responsibilities, however, an examination of how temporary employment agencies operate reveals that client firms can nevertheless retain a significant amount of influence over the terms and conditions of the employment relationship between the temporary employment agency and the temporary worker. Considering the relationship between the client firm and the temporary employment agency, it would not be unreasonable to presume that agencies favor the client firm's interests over those of the temporary agency workers.

C. *The Working Conditions at Microsoft*

1. Wage and Benefits Disparity

A wide disparity existed between the wages and benefits of the agency contractors and those of permanent Microsoft employees.⁴⁹ Many agency contractors became frustrated by the wages and benefits they received for doing what they perceived as the same work performed by the permanent Microsoft employees they worked alongside. This issue drew the most support from agency contractors with the longest tenure at Microsoft. The benefits that accompanied a permanent position at Microsoft, in particular the stock options, convinced many contractors to remain with Microsoft for extended periods of time in the hope that they would eventually be hired into permanent positions. According to one Microsoft manager, the conversion rate of agency contractor status to permanent employment status was 35%.

When agency contractors complained to their temporary employment agencies about the disparities in benefits packages, the

48. Gonos, *supra* note 11.

49. Cynthia Flash, *Permanently Temporary and Not Pleased at the Prospect*, TACOMA NEWS TRIB., Feb. 21, 1999, at G1.

agencies did not respond until Microsoft intervened on the agency contractors' behalf and required that temporary employment agencies offer a minimum level of benefits to agency contractors. In April 1999, Microsoft established a formal policy that required agencies to improve the benefits coverage offered to contractors.⁵⁰ To be considered a "preferred supplier" by Microsoft, a temporary employment agency was required to provide its workers with the following benefits: thirteen paid days off per year (including sick leave, holidays, and vacation); medical and dental insurance, for which the agency was required to contribute at least half of the cost; a minimum training stipend of \$500 per year; and a retirement savings program with some matching by the agency.⁵¹ The benefits available, however, excluded stock options.⁵²

2. Lack of Mobility

Temporary staffing agencies describe flexibility as one of the advantages of being a temporary worker. Yet these agencies, at the same time, discouraged some workers from moving to other agencies by including non-compete clauses in their employment agreements.⁵³ A typical non-compete clause used by agencies that employed Microsoft agency contractors was structured as follows: if a worker left a temporary employment agency and moved to another temporary agency within six months, the employment agreement required the worker to pay the first agency 35% of the actual amount the new agency billed to the client firm. Such non-compete clauses discourage the mobility of agency contractors by deterring movement across agencies, thereby eliminating a key benefit of these flexible employment arrangements for workers.

One contractor explained the problem this way:

50. Keith Ervin, *Microsoft Changes Temp Benefits*, SEATTLE TIMES, Apr. 3, 1999, at C8.

51. Richman, *supra* note 47.

52. *Id.*

53. Danielle D. van Jaarsveld, *Nascent Organizing Initiatives Among High-Skilled Contingent Workers: The Microsoft-WashTech/CWA Case (2000)* (unpublished M.S. Thesis, Cornell Univ.) (on file with author). Non-compete clauses are included in contracts when a temporary employment agency actively assists the applicant in finding an assignment. *Id.* According to one agency informant, the agency contract does not include non-compete language when applicants find their own positions.

Because of the non-compete clause with [this agency], I would have to leave Microsoft for six months in order to change [agencies]. Were it not for that clause, I would have left this [agency] long ago. It is probably not in their powere [sic] but it would be of great benefit if [Microsoft] could assert some pressure to allow agency temps more freedom to move from [agency] to [agency] — not on just a whim but for legitimate reasons. My tenure here at [Microsoft] is limited because of the [agency] relationship. I may have to leave [Microsoft] just to get their hooks out of me.⁵⁴

If these workers tried to move to a different agency that offered a better set of benefits, they would risk incurring a monetary penalty under the terms of the non-compete clauses in their contracts.

3. Secrecy of Bill Rates

Whether an agency contractor approached a temporary employment agency on his own volition or was directed by Microsoft to sign up with one, a representative from the temporary employment agency negotiated the terms of the contract with the worker after the agency and a Microsoft representative agreed to an acceptable bill rate — the amount an agency charges a client firm for a worker's services. The agency seeks to maximize its profits by increasing the difference between the bill rate and the pay rate — the portion of the bill rate that the worker actually receives as gross pay. The result of this practice is two-fold: some contractors who engage in similar job activities receive different wages; and a substantial difference may exist between the bill rate and the pay rate.

During wage negotiations between an agency and a temporary worker, the agency representative does not disclose the bill rate.⁵⁵ The difference between the bill rate and the pay rate is information that temporary employment agencies fight to keep secret.⁵⁶ Nevertheless, Microsoft's agency contractors often learned about the differentials. One worker commented, "I've also noticed . . .

54. *Id.*

55. It should be noted that Microsoft cannot be held solely responsible for this less-than-open negotiation process. This practice originated with the agencies and exists among temporary agencies that supply workers to companies in other industries.

56. Gonos, *supra* note 11.

disparities, even between contractors in the same group. In my group at [Microsoft], we were being paid widely disparate rates, ranging from \$10 to \$21/hr, and we were all doing the same work.”⁵⁷ Another contractor explained the importance of bill rate disclosure:

Contractors need to know this info. I think it will force agencies to tell the truth. We hear all the time how they don't make that much of a profit. If we find out exactly what the mark up is, we can then DEMAND better benefits. This will hiefully [sic] create a healthy competetion [sic] among agencies. If they are losing all of their employees to another agency, then they need to change their benefits/pay package.⁵⁸

The secrecy surrounding bill rates, along with the frustration over non-compete clauses, generated dissatisfaction among agency contractors at Microsoft and eventually generated support for a collective initiative among agency contractors.

4. Break-in-Service Policy

In June 1998, Microsoft introduced a thirty-one-day “break-in-service” policy, which required new agency contractors, as well as those who had already worked for Microsoft for twelve consecutive months, to leave the company for thirty-one consecutive days upon completing an assignment.⁵⁹ Company representatives explained that this policy was necessary to differentiate between permanent and contingent workers in order to remain in compliance with IRS guidelines.⁶⁰ To ensure that contractors could not avoid the thirty-one day requirement by switching agencies, Microsoft informed agencies that it would investigate the consecutive assignment history of workers.⁶¹ For agency contractors who were paid only for the hours they worked, and who were accustomed to starting a new

57. van Jaarsveld, *supra* note 53.

58. *Id.*

59. Peter Lewis, *Microsoft Makes Its Temps More Temporary*, SEATTLE TIMES, Feb. 19, 2000, at B1; Mike Blain, *Supreme Court Refuses to Hear Appeal of Microsoft 'Permatemp' Settlement*, WASHTECH NEWS, Nov. 13, 2002, http://www.washtech.org/news/courts/display.php?ID_Content=381.

60. *See* sources cited *supra* note 59.

61. Blain, *supra* note 59.

assignment immediately upon completion of a previous assignment, the introduction of this policy was particularly difficult, and thereby convinced some of them of the need for collective representation.

5. Lack of Voice for Workers

In December 1997, the Washington State Department of Labor and Industries (L&I) enacted the Computer Overtime Exemption to the Washington Minimum Wage Act, which no longer made it mandatory to pay overtime to "computer professionals" who earn more than \$27.63 per hour, and created consistency with federal law.⁶² Those computer professionals who were covered by a collective bargaining agreement were unaffected by this change.

Many high-tech professionals were affected by this rule. During the comment period, L&I received 750 letters and e-mails regarding the rule change.⁶³ High-tech contingent workers were the most vocal opponents of the new rule. Some of the excerpts from the protest letters sent to L&I provide insight into the precarious and vulnerable position of this workforce, which had no one to represent the workers' collective interests:

I've worked as a computer systems professional all of my adult life. I have never done anything else. In recent years, I have had the opportunity to contract for several major companies (the largest and most well-known) in the area. My one, single, only protection against abuse, exploitation and professional burnout is overtime pay.⁶⁴

Another contractor wrote:

Microsoft is famous for working its employees long hours. Like the rest of the software industry, it tends to manage its projects in crisis mode. Not long ago a developer in

62. WASH. ADMIN. CODE 296-128-535 (2006). See WASH. ST. DEP'T OF LAB. & INDUS., STATE ADOPTS RULE EXEMPTING COMPUTER PROFESSIONAL OVERTIME PAY RATE (Dec. 31, 1997), <http://www.lni.wa.gov/news/1997/pr971231a.asp> [hereinafter WASH. L&I, STATE ADOPTS RULE] (explaining the reasoning behind adopting the overtime exemption for computer professionals).

63. WASH. L&I, STATE ADOPTS RULE, *supra* note 62.

64. Letter from Contractor to Mr. Greg Mowat, Program Manager, Employment Standards, Wash. St. Dep't of Lab. & Indus., in WASH. L&I, STATE ADOPTS RULE, *supra* note 62.

my building was found dead at his desk. The ambulance wasn't called immediately, because his co-workers just thought he was asleep. It's not unusual for somebody to be asleep in their offices, having worked all night trying to make some milestone or other. The entire company deliberately operates in a mode of critical high stress. In this atmosphere, is it reasonable to remove the brakes? What is going to prevent the inevitable abuse?⁶⁵

Despite the strong worker opposition evident in many letters and e-mails, L&I enacted the Computer Overtime Exemption to the Washington Minimum Wage Act.⁶⁶ The fury generated by this issue highlighted the absence of a voice for these workers. After recognizing that their individual efforts failed to prevent the Act from being enacted, contingent high-tech workers in Washington State were convinced of the need for an advocacy group to represent their interests. The Computer Overtime Exemption would prove to have effects beyond just eliminating overtime for a specific segment of the workforce: it later spurred the workers to take collective action.

6. Second-class Status

Non-economic factors also contributed to the frustration of Microsoft's agency contractors. Microsoft distinguished between its permanent employees and its contingent workers in several ways that created a divide within its workforce. Microsoft assigned colored identification badges according to employment classification: blue badges for permanent employees and orange ones for contingent workers.⁶⁷ In addition, Microsoft assigned its agency contractors e-mail addresses that began with an 'a' and a 'dash,'

65. Letter from Contractor to Mr. Greg Mowat, Program Manager, Employment Standards, Wash. St. Dep't of Lab. & Indus. (on file with author).

66. Interestingly, after the L&I ruled that Microsoft was a co-employer of its contingent staff, Washington State Senator Darlene Fairley (D-Shoreline) presented Senate Bill 6165 to repeal the overtime exemption. See Justin Hopkins, *High-Tech Workers Would Benefit from Bill*, SEATTLE TIMES, Jan. 11, 2000, at B1.

67. See Steven Greenhouse, *Equal Work, Less-Equal Perks; Microsoft Leads the Way in Filling Jobs with 'Permatemps'*, N.Y. TIMES, Mar. 30, 1998, at D1; Posting of pitr256 to Orange Badges: Contracting at Microsoft, <http://orangebadges.com/toast.asp?sub=show&action=posts&fid=4&tid=3> (Dec. 30, 2005, 15:32).

fueling the nickname “dash-trash.”⁶⁸ Microsoft also restricted contingent workers from shopping at the company store for discounted products, participating in activities on Microsoft sports fields, and attending morale-building events without special permission.⁶⁹ While access to the company store or sports fields might sound like a frivolous request, agency contractors were passionate about such benefits.

These devices and restrictions symbolized agency contractors’ second-class status, incited anger and resentment, and contributed to a general sense of disrespect and alienation that agency contractors experienced in the Microsoft workplace. Microsoft justified these measures as necessary to comply with IRS regulations that require a clear delineation between permanent and contingent workers.

D. Summary

Although agency contractors at Microsoft might not be “employees” under the NLRA, they still have labor relations issues, opinions about working conditions, and an interest in policy changes that affect their employment. Yet, as temporary agency workers, they have limited access to legal remedies. In addition, without access to collective bargaining, the problems they faced in their working environment were not addressed. The temporary employment agencies, arguably well situated to represent these workers, generally remained silent on the many issues affecting the high-tech contingent workforce, leaving them with four options: 1) remain on assignment at Microsoft and silently accept the terms of the employment arrangement; 2) leave Microsoft altogether and find assignments elsewhere; 3) challenge their working conditions in the courts;⁷⁰ or 4) join together in collective action to improve their working conditions.

68. For example, an agency contractor’s e-mail address would be a-john-smith@microsoft.com, whereas a permanent employee’s e-mail address would be john-smith@microsoft.com. Greenhouse, *supra* note 67.

69. van Jaarsveld, *supra* note 9, at 372.

70. The problem with litigation as a strategy, however, is that the courts can be slow in resolving claims. It can take years to achieve results and litigation does not necessarily address all of the issues that might be of interest to contingent workers. The former independent contractors who filed suit against Microsoft sought to claim their

In March 1998, a group of Microsoft agency contractors chose the fourth option and formed WashTech/CWA. This workers' advocacy group aimed at establishing an independent voice for contractors in their relationships with temporary employment agencies and Microsoft, and improving the working conditions for agency contractors at Microsoft. WashTech/CWA's membership consists of workers who see the fourth option as the most effective strategy to acquire some countervailing power. Today, WashTech/CWA actively advocates on behalf of these agency contractors and others by providing them with representation.

IV. WASHTECH/CWA: A COLLECTIVE ACTION MODEL FOR TEMPORARY AGENCY WORKERS

A. *Advocacy for Temporary Agency Workers*

The temporary agency workforce at Microsoft lacked the traditional weapons of collective bargaining agreements and work stoppage, and, therefore, sought representation beyond the NLRA framework.⁷¹ In March 1998, a fledgling advocacy group emerged from the overtime exemption debacle and evolved into the Washington Alliance of Technology Workers (WashTech). The name WashTech was selected to combine its geographic locale with a reference to technology — the workers' chosen profession. To shield itself from the negative union image held by many professional workers, WashTech defined itself as an "alliance" rather than as a union. Soon after its formation, WashTech affiliated with the Communication Workers of America (CWA) through the Newspaper Guild (TNG-CWA) to harness additional resources with which to

share of the benefits — specifically, their exclusion from Microsoft's Savings Plus Plan and Microsoft's Employee Stock Purchase Plan. They believed these benefits were owed to them based on the IRS determination that they were common-law employees as opposed to independent contractors. See *Vizcaino*, 97 F.3d 1187, modified en banc, 120 F.3d 1006 (9th Cir. 1997), and enforced by mandamus, *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9th Cir. 1999). In December 2001, *Vizcaino* ended when Microsoft agreed to a \$97-million settlement award to some Microsoft workers involved in the lawsuit. Richman, *supra* note 47; see van Jaarsveld, *supra* note 53.

71. While all of the issues discussed above generated anger among some agency contractors, the decision to eliminate overtime for computer professionals provided a direct catalyst for the formation of WashTech/CWA. van Jaarsveld, *supra* note 9, at 371.

challenge Microsoft and the temporary employment agencies.⁷² WashTech became WashTech/CWA Local 37083 (WashTech/CWA).⁷³

WashTech/CWA has provided support for contingent workers and has effectively bypassed the obstacles to temporary agency worker representation imposed by the NLRA. In so doing, WashTech/CWA has achieved some success in addressing the needs of these workers, including in the areas of benefits and wages, training opportunities, and representation in the workplace outside of NLRA-defined procedures. WashTech/CWA has found another channel for pressuring client firms by joining a coalition of advocacy groups that represent a variety of contingent workers across industries. For example, WashTech/CWA joined the North Alliance for Fair Employment (NAFFE), an umbrella organization that includes forty advocacy groups.⁷⁴ By joining a coalition of advocacy groups that represents a variety of contingent workers across industries, WashTech/CWA has found another channel for pressuring employers and pushing for changes in public policy.

WashTech/CWA targets a highly skilled, high-wage workforce in relation to other contingent workforces outside of the technology industry. Given the wide range of skills and job titles within its membership, WashTech/CWA's members are organized along broad occupational lines and might work in the same workplace, e.g., at Microsoft or Amazon.com. WashTech/CWA's membership is drawn from technology firms that are concentrated in the Puget Sound region. WashTech/CWA also advocates on behalf of a group that is fairly young in comparison to other occupations. Although WashTech has only about 450 dues-paying members, 15,000 temporary agency workers subscribe to the organization's e-mail list. WashTech/CWA's progress on its efforts to represent the high-tech contingent workforce is limited, mainly by the fact that employers still refuse to recognize them or bargain with them. Since its formation, WashTech/CWA has expanded its membership to in-

72. TNG-CWA seemed a logical partner because of similarities between content creators for newspapers and content creators for computers, who comprised WashTech/CWA's constituency.

73. For further discussion, see van Jaarsveld, *supra* note 53.

74. David Moberg, *Temp Slave Revolt; Contingent Workers of the World Unite*, IN THESE TIMES (Institute for Public Affairs), July 10, 2000, at 11.

clude permanent workers who have clear access to collective bargaining.

B. The Traditional Representation Model: A Failed Attempt

WashTech/CWA's first effort on behalf of agency contractors at Microsoft was an attempt at a traditional form of collective representation. In April 1999, a group of eighteen Microsoft agency contractors declared themselves a "bargaining unit" in response to the refusal of their temporary employment agencies' to improve their benefits. The workers were discouraged from changing agencies due to the non-compete clauses in their employment contracts and the unspoken agreement among temporary employment agencies not to talk to workers employed by competitor agencies. The workers sought help from newly-formed WashTech/CWA.

WashTech/CWA representatives met with the agency contractors who were representing the so-called bargaining unit to discuss the situation. WashTech/CWA informed them of the legal obstacles they faced in gaining collective representation under the NLRA because of their temporary employment status. The majority of the group joined WashTech/CWA and decided to formalize their demands, despite understanding that the NLRA does not require Microsoft or the temporary employment agencies to negotiate with them. WashTech/CWA assisted them in writing a mission statement outlining their bargaining unit's goals, including: equitable pay, better benefits, and improved job classifications.⁷⁵ In addition, the workers objected to policies that constrained contractors' ability to move from project to project, such as the non-compete clause. Representatives of the bargaining unit met with the temporary employment agencies that had contracts with group members and discussed the agency contractors' concerns, but the temporary employment agencies were unwilling to negotiate.

While this first effort at collective action was unsuccessful in getting the temporary employment agencies to directly address the

75. The hierarchy at Microsoft is based on job classification. These workers wanted their code-writing abilities reflected in their job classification because that would translate into higher status at Microsoft. This particular workgroup, unlike other workgroups at Microsoft, possessed significant bargaining leverage because they had a rare combination of skills — a fusion of financial accounting experience and code-writing skills.

workers' concerns, it nevertheless had some effect and resulted in improved working conditions. Eventually, Microsoft addressed the benefits issue and the disparities in pay rates across the group. Although there must have been some communication between Microsoft and the agencies regarding the enactment of these changes, neither the agency contractors nor WashTech/CWA were invited to the "bargaining table."

Still unwilling to give up on gaining the ability to choose employment agencies, the agency contractors devised their own self-help techniques. The group developed a method by which they recruited potential agency contractors for work at Microsoft and then advised the new recruits about the best temporary employment agencies with which to contract. WashTech/CWA was able to help these workers win some concessions from Microsoft without the assistance of their primary employers, the temporary employment agencies.⁷⁶

C. *Success Through Alternative Strategies*

Having encountered difficulties in pursuing traditional approaches, such as collective bargaining units, to bring the temporary employment agencies to the table, WashTech/CWA pursued alternative strategies to represent this workforce, including a combination of technology, publicity, training programs, and advocacy for legislative reform.⁷⁷ WashTech/CWA used these strategies to effectively bypass the NLRA requirements for collective representation and to avoid the legal complications that hampered its initial attempts to represent temporary agency workers. In addition, the assortment of strategies and tactics that WashTech/CWA uses to advocate on behalf of contingent workers draws attention to the issues facing contingent workers.⁷⁸ These strategies, which are implemented through the Internet and the media, enable WashTech/CWA to pressure employers like Microsoft and temporary employ-

76. Interview with a Microsoft agency contractor, Seattle, Wash. (July 14, 1999).

77. van Jaarsveld, *supra* note 9.

78. WashTech/CWA recently received a grant from the Ford Foundation to conduct a labor market study of the Puget Sound area to help shape the organization's direction.

ment agencies on multiple levels and from several different directions.⁷⁹

1. Using Technology to Build Community

“We are using Microsoft’s technology to organize Microsoft’s workers.”⁸⁰

WashTech/CWA’s technology strategy consists of two elements: e-mail and the WashTech/CWA website. E-mail is primarily useful as a means of ongoing communication among activists and temporary agency workers. WashTech/CWA maintains an e-mail list of 15,000 registered members to disseminate information about legislative issues affecting contingent and high-tech workers, Microsoft policy changes, general industry news, and meetings about the industry. Through the use of e-mail, WashTech/CWA organizers are able to remain in contact with their members and to keep workers informed about labor and employment developments that could affect them. While such reliance on e-mail might be unsuitable for organizing campaigns among workforces that lack a high level of computer access, this strategy suits the high-tech workforce perfectly, given the easy and widespread access to and usage of computers among this group.

WashTech/CWA’s website allows the organization to maintain a digital bulletin board where workers can not only discuss issues they are facing, but also inform WashTech/CWA about developments in their workplaces.⁸¹ WashTech/CWA also uses its website to collect information from workers through web-based surveys.⁸² Its website has gained a reputation among high-tech workers as a source of reliable, current information on Microsoft’s policies, and has also gained legitimacy with the public at large.

79. The use of multiple strategies is consistent with one of the fundamental principles underlying the associational unionism model and the citizenship unionism model, which recommends the use of boycotts, political involvement, and publicity campaigns to draw public attention to work-related issues.

80. WashTech/CWA uses e-mail and its website, which utilize Microsoft technology, for communicating with workers.

81. WashTech News, <http://www.washtech.org/news/> (last visited Jan. 21, 2006). Non-members may view the published material without registering.

82. WashTech Reports, <http://www.washtech.org/reports/> (last visited Jan. 21, 2006).

2. Publicity

Because WashTech/CWA represents contingent workers who may not have clear access to collective bargaining rights, it must rely on other sources of leverage. One critical source of leverage was large-scale national attention on contingent work — in particular the press accounts of the situation at Microsoft, including coverage of *Vizcaino*, the lawsuit initiated by former independent contractors at Microsoft to claim lost benefits following the IRS determination that they were common law employees.⁸³ Through this and other newsworthy stories, WashTech/CWA has been able to draw attention to Microsoft's treatment of contingent workers by using the pre-existing public interest in Microsoft as not only the most successful software company in history, but also one whose anti-competitive practices have angered consumers. In several cases, WashTech/CWA broke stories about policy changes at Microsoft by publishing information on its website, even before Microsoft and the temporary employment agencies announced the policy changes.⁸⁴

WashTech/CWA's discovery that Microsoft kept secret personnel files on agency contractors proved to be the most damaging to Microsoft as the story played out in the media. In October 1999, WashTech/CWA acquired evidence confirming that Microsoft had maintained a set of secret personnel files since 1995 which documented the performance of its agency contractors. Although Microsoft's permanent employees could access their personnel files on the internal Microsoft network, the agency contractors could not.⁸⁵ Upon learning about the secret files, WashTech/CWA agency contractors requested that Microsoft permit them to see their files. At first Microsoft refused, claiming that the files did not exist. Representatives from Microsoft were quoted by *The Seattle Times* as saying, “[w]e do not keep personnel files on employees of other companies.”⁸⁶ According to Washington state law, “[e]very employer shall, at least annually, upon the request of an employee,

83. See *Vizcaino*, 120 F.3d at 1006.

84. *Id.*

85. *Microsoft Keeps Secret Personnel Files on Contractors*, WASHTECH NEWS, Oct. 26, 1999, <http://www.washtech.org/news/industry>.

86. Jay Greene, *Microsoft Kept Files On Temps — Company Contends They Weren't Personnel Records*, SEATTLE TIMES, Oct. 27, 1999, at C1.

permit that employee to inspect any or all of his or her own personnel file(s).”⁸⁷ Although temporary employment agencies claimed to have no previous knowledge about the personnel files, an e-mail posted to WashTech/CWA’s Electronic Bulletin Board by a former agency recruiter suggests that the opposite was true.⁸⁸ The discovery generated an uproar among Microsoft agency contractors, who were outraged at Microsoft’s actions.

In response, several agency contractors filed complaints with the wage and hour division of the L&I based on Microsoft’s refusal to let them see their files. In January 2000, L&I issued a decision in favor of the contractors, finding that Microsoft violated the law by denying agency contractors the right to view the contents of their files. In making its determination, L&I stated, “Microsoft is a co-employer of the contingent or temporary staff workers and that in view of Microsoft’s co-employer status, these temporary or contingent workers have a right to review performance evaluations and supervisory comments as bona fide personnel information as provided for in accordance with Washington State law.”⁸⁹

The discovery that Microsoft maintained personnel files tracking the performance of agency contractors is an example of how WashTech/CWA played a pivotal role in publicizing Microsoft’s policies toward contingent workers. WashTech/CWA orchestrated a public relations nightmare for Microsoft by posting on its website an excerpt from the applicable Washington state law and links to both Microsoft’s Contingent Staffing Group (so that workers could request access to their files) and to L&I (so that they could file a complaint if Microsoft denied them access). This action is one example of how WashTech/CWA provided contingent workers with current information about the legal implications of their employment status, while at the same time enhancing the workers’ leverage in the labor market and the organization’s own reputation.

Once again, representatives from the temporary employment agencies did not challenge Microsoft’s practice. WashTech/CWA has considered starting a worker-run temporary employment

87. WASH. REV. CODE § 49.12.240 (2005).

88. van Jaarsveld, *supra* note 53.

89. Nan Netherton, *Washington State Agency Sees Microsoft as Co-Employer of Temporary Employees*, 19 Daily Lab. Rep. (BNA) at A-8 (2000).

agency as a way to compete with temporary employment agencies in the labor market and to evolve into an alternative labor market intermediary. This idea, however, has not yet reached fruition.

3. Training Programs

Highly-skilled contingent workers need to upgrade their skills frequently to remain competitive in this rapidly changing industry and to gain access to better paying positions. For these reasons, access to training opportunities is crucial in order to remain competitive in the labor market. One WashTech/CWA organizer explained that “[t]he idea of latching onto an organization that will continue to elevate [workers’] skills is really important.”⁹⁰

The importance of training to this workforce motivated WashTech/CWA to establish a regional training center for high-tech workers in the Seattle area.⁹¹ The purpose of the center, which opened in April 2001, is to provide workers with access to low-cost technology training on state-of-the-art equipment from qualified instructors. WashTech/CWA members receive training at a discounted rate, whereas non-members pay full price.⁹² The training center also supports the CWA’s national training partnership with Cisco Systems, Inc., which provides both computer skills training and employment referrals. As a result of the CWA-Cisco partnership, seven other training facilities now exist throughout the United States.

4. Legislative Reform

WashTech/CWA has been successful in linking its issues to legislative reform and, as a result, politicians in Washington State are now paying attention to the issues facing temporary workers. WashTech/CWA’s first legislative victory was passage of the Contingent Workforce Study Bill by the Washington State Senate.⁹³ The

90. Interview with a WashTech/CWA member, Seattle, Wash. (July 15, 1999)

91. WashTech/CWA to Open New Training Center, Mar. 19, 2001, http://www.washtech.org/training/031901_announce.php3.

92. The cost of a three-credit course is \$1,084 for non-members and \$929 for members. A non-credit course costs \$505 for non-members and \$350 for members. WashTech, Training Classes, <http://www.washtech.org/training/current.php> (last visited Feb. 3, 2006).

93. S. J. Res. 8402, 56th Leg., Reg. Sess. (Wash. 1999).

bill created “a bipartisan task force to study Washington’s growing contingent economy.”⁹⁴ WashTech/CWA and the Washington Labor Council worked together to generate support for the bill. WashTech/CWA cultivated community support through a letter writing campaign, phone banks, e-mail, and electronic media.

Efforts by WashTech/CWA organizers to educate legislators about the issues confronting technology workers have generated several legislative initiatives. In January 2000, Washington State Senator Darlene Fairley revisited the overtime exemption issue,⁹⁵ which was, in part, the result of efforts by WashTech/CWA organizers to educate legislators about the issues confronting technology workers. Senator Fairley also sponsored a bill that would reinstate overtime for computer professionals.⁹⁶ In addition, a bill requiring temporary employment agencies to disclose their bill rates to workers is under consideration by the state legislature. More recently, WashTech/CWA has received national attention in the debate about the off-shoring of IT jobs. Its efforts helped to motivate the U.S. General Accounting Office to study this phenomenon.

WashTech/CWA has demonstrated an ability to gain a broader political base of support by engaging in legislative and public policy battles and advocating on behalf of high-tech, contingent workers at the state and federal level.⁹⁷

D. Challenges Facing WashTech/CWA

Despite its efforts to represent this workforce, WashTech/CWA now faces the challenge of sustaining an organization with a

94. *Id.*

95. *See Overtime Law Jolts Tech Firms*, SEATTLE POST INTELLIGENCER, Mar. 3, 2000, at E2. *See also* discussion *supra* Part III.C.5.

96. H.R. 6165, 56th Leg., 2nd Sess. (Wash. 1999).

97. While proposals have been submitted at both the federal and state level for new legislation to address the vulnerability of contingent workers, state-level efforts have been more successful. *See* Middleton, *supra* note 17. For example, in 2004 Rhode Island passed the Temporary Workforce Protection Act requiring that temporary workers be given the same benefits as permanent employees and that the temporary workers must be provided with an accurate estimate of the assignment’s length. *See* R.I. GEN. LAWS §§ 28-6.10-1, 28-6.10-3 (2005); Bruce Goldstein, et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

broader membership base. Major challenges include: 1) increasing their dues-paying membership; 2) Microsoft policy changes aimed at reducing its vulnerability to WashTech/CWA attacks; 3) a high level of resistance from high-tech firms; and 4) a high level of resistance to unionization from high-tech workers.

Low membership numbers are related, in part, to a free-rider problem. Due to WashTech/CWA's extensive use of the Internet, a great deal of the organization's information is available for free. WashTech/CWA, therefore, encountered reluctance among workers who frequently visit the WashTech/CWA website to become dues-paying members. The organization currently has 451 dues-paying members, while roughly 15,000 workers subscribe to its e-mail list.

WashTech/CWA also continues to face resistance to representation among both high-tech firms and workers. In contrast to blue-collar workers, high-tech workers have several characteristics that suggest they lack both economic and non-economic reasons for collective action.⁹⁸ For example, they have higher levels of respect resulting from professional and technical status, a higher degree of individualism and anti-union sentiment, increased levels of mobility, satisfactory working conditions, and a more significant amount of individual economic power.

High-tech firms' resistance to workers seeking collective action is also a major problem. High-tech firms have a reputation for being "one of the most union resistant segments of the American economy."⁹⁹ Microsoft, for example, has initiated policies to reduce the number of agency contractors on staff, which suggests that it does not want unionization to become a common trend among its contingent workforce. Amazon.com reacted to a WashTech/CWA campaign to organize its customer service representatives by ejecting workers from the lunchroom for distributing WashTech/CWA literature, distributing information to supervisors about how to spot organizing activities among workers, and creating an internal website to describe the firm's opinion about the impact of col-

98. J. Gregg Robinson & Judith S. McIlwee, *Obstacles to Unionization in High-Tech Industries*, 16 WORK & OCCUPATIONS 115 (May 1989).

99. *Id.*

lective bargaining on the Amazon.com workforce.¹⁰⁰ The organizing campaign ended abruptly when Amazon laid-off the majority of the customer service representatives.

V. CONCLUSION

The formation of WashTech/CWA began as an initiative to challenge employment practices of Microsoft and temporary employment agencies. Since then, the organization has evolved, and today it receives national attention for its efforts to advocate on behalf of the contingent and IT workforce, regardless of employment status.

The experiences of agency contractors described in this article reveal the obstacles that temporary workers encounter, and will continue to encounter, without clear access to NLRA protections or the presence of an independent voice representing their interests in the workplace. For some unions, such as those in the film and entertainment industries, representing contingent workers is part of their reality.¹⁰¹ Other unions, however, have viewed the growth of the contingent workforce as a threat to their permanent employee membership.

In the meantime, WashTech/CWA and other union and non-union organizations across the nation will continue to support and represent the interests of contingent workers who lack clear access to collective bargaining.¹⁰² The efforts of these organizations suggest that traditional unions need to consider ways to represent such workers outside of the traditional collective bargaining model. WashTech/CWA provides a model of some success that challenges prevailing notions of high-tech workers as impervious to organizing efforts.¹⁰³

In the absence of further legal reform, organizations such as WashTech/CWA are not only necessary to protect contingent work-

100. Interview with Marcus Courtney, President of WashTech/CWA, Ithaca, NY (Apr. 2001).

101. John Amman, *Union and the New Economy: Motion Picture and Television Unions Offer a Model for New Media Professionals*, 6 WORKING USA J. LAB. & SOC'Y 111 (2002).

102. Middleton, *supra* note 17.

103. Hervey A. Juris & Myron Roomkin, *Unions and Collective Bargaining in Manufacturing*, in THE SHRINKING PERIMETER 197 (Hervey A. Juris & Myron Roomkin eds., 1980); see also Robinson & McIlwee, *supra* note 98, at 115-36.

ers who find it difficult to access workplace protections under current U.S. labor and employment laws, but also will become an increasingly important part of the labor movement.