

The Rights of Nonstandard Workers: A North American Guide

Commission for Labor Cooperation

Acknowledgments

This guide was prepared by a team of researchers led by Kevin Banks, then Senior Labor Law Advisor, and also comprising Tequila Brooks, Labor Law Advisor, Marcelle Saint-Arnaud, then Research Documentation Coordinator, and Jorge Bracero and Emily LaBarbera Twarog, Labor Research Interns. Administrative support was provided by Melisa Gadi and María Dolores Cox. The report was drafted by Kevin Banks.

Research assistance was provided by Sara Slinn, Jack Walker, and Elias Aoun. Valuable comments on earlier drafts of the report were received from Michael McDermott, then Interim Executive Director, and Sandra Polaski, then Director of Labor Law and Economic Research.

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For additional copies, contact the Secretariat of the Commission for Labor Cooperation at:

1211 Connecticut Ave. N.W.
Suite 200
Washington, D.C. 20036
USA

e-mail: clcpubs@naalc.org
website: www.naalc.org

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INTRODUCTION

Over the last fifteen years or more, nonstandard employment has grown in North America. The last decade has also witnessed a substantial increase in the size of the informal sector in Mexico. The economic condition of nonstandard and informal sector workers is affected not only by the labor market, but also by their access to or exclusion from labor and employment law protections and social insurance and income support programs. Low-income workers in particular may be affected by the applicability of such protections. Moreover, concerns have been expressed that nonstandard and informal sector workers may have limited or no access to many of the protections afforded to other workers by labor and employment laws and income support programs.

This guide provides a comparative profile of the access to such rights and protections of workers who fall outside standard employment relationships. It is intended to complement the statistical portraits of nonstandard and informal sector work provided in the second edition of the Secretariat's report entitled *North American Labor Markets*.

The guide is organized around the definitions of nonstandard work and the informal sector adopted for the purposes of comparative statistical analysis in the second edition of *North American Labor Markets*. To understand the coverage and availability of labor and employment laws and social programs, however, one must translate such statistical concepts into the legal terms used to determine who holds rights and entitlements. The statistical concepts do not correspond exactly to the legal ones: a certain amount of approximation is thus an inevitable by-product of the translation.

With respect to Canada and the United States, the guide focuses on three key groups of workers: (1) the self-employed; (2) temporary employees; and (3) part-time employees. In addition, since in both countries nonstandard workers are disproportionately concentrated in certain occupations or industries (such as retail sales, clerical, domestic and farm work, on the one hand, and in highly paid professions such as information technology, medicine, accounting and law on the other), the exclusion of such occupations or industries from the coverage of the relevant laws or programs will also be noted. The Mexican informal sector is discussed separately. Informal sector workers are divided into the following groups: (1) persons working in

small establishments; (2) self-employed nonprofessionals (i.e., nonprofessional persons working outside an employment relationship); (3) domestic workers; and (4) persons who do unremunerated work.

The legal and statistical definitions of contingent or nonstandard work and of the informal sector are of course subject to debate. This guide does not purport to resolve such controversies. The key legal categories used are quite general. As a result, they avoid a number of questions about the inclusion or exclusion of subcategories of workers, which impede comparability and generate debate at the level of economic statistics. Nonetheless, it should be noted that key terms such as "employee" and "worker" have different meanings in different countries, and thus comparisons should still be approached with some caution.

Following this introduction, the guide is divided into four parts. The first provides a comparative synopsis of the results, including brief summary overviews of national legal regimes, general similarities and differences across borders, and brief analyses of the rights of nonstandard workers in Canada and the United States and of informal sector workers in Mexico.

The remaining three parts provide more detailed surveys of the relevant laws and programs, as well as their coverage and eligibility requirements, for each of Canada, Mexico, and the United States. Each country part is divided into sections. Separate sections address labor and employment laws relating to: (1) collective labor rights (such as the right to organize a union); (2) rights protecting employment security (such as rights to continue in employment unless the employment is terminated for just cause); (3) protection against employment discrimination; (4) occupational health and safety laws; and (5) minimum employment standards. The following types of social insurance and income support programs are also discussed: (1) public health insurance; (2) public retirement pensions; (3) unemployment insurance; (4) disability pensions; and (5) direct income support programs.

Each country part is organized according to a similar analytical framework. This will allow readers to easily make international comparisons with respect to specific legal rights and entitlements, notwithstanding that the countries have very different labor and employment laws, social insurance, and income support programs.

1. COMPARATIVE SYNOPSIS

OUTLINE OF LABOR AND EMPLOYMENT LAW PROTECTIONS, SOCIAL INSURANCE, AND INCOME SUPPORT

Canada

In Canada, jurisdiction over labor and employment law resides in the provinces, except in certain industries that fall within federal jurisdiction, such as shipping, railway transportation and banking. The federal government has jurisdiction over unemployment insurance. The federal government and provinces both have powers to establish public pension programs.

Labor relations statutes in each jurisdiction give employees the right to organize unions, to bargain collectively, and to strike. All Canadian jurisdictions have antidiscrimination statutes, which prohibit a wide range of types of employment discrimination. Minimum employment standards laws provide for minimum wages, maximum weekly and daily hours after which overtime must be paid, regulation of deductions from pay, daily rest and meal periods, statutory holidays, minimum annual vacations, minimum notice of termination of employment, maternity and parental leave, and other matters. In the federal jurisdiction, Quebec, and Nova Scotia, employment standards laws also provide many employees with the right to reinstatement in the event that they are dismissed from employment without just cause. In Ontario, relatively large employers and those that terminate the employment of a large number of employees due to a permanent discontinuance of all or part of their business are required to make severance payments to employees with at least five years of service. In the federal jurisdiction, such payments must be made upon termination of an employee with twelve months of continuous service. Common law rules require that an employee who is dismissed without just cause be given reasonable notice of termination of employment or pay in lieu of such notice. Prohibitions against many types of child labor are found in employment and education laws. Occupational health and safety laws place general and specific duties upon employers to ensure that workplaces are safe. Pension benefits laws seek to ensure that private pension plans meet minimum standards for funding, safe investment, and accessibility to and portability by employees.

Each jurisdiction has a comprehensive public health insurance program that covers most health services provided by hospitals and medical practitioners. Public pension plan systems provide retirement and disability pension benefits to qualified recipients. The federal Employment Insurance program provides income replacement benefits in the event of involuntary job loss or sickness and maternity or

parental leave to qualified applicants. Workers' compensation programs in each jurisdiction provide workers with compensation for injuries and accidents arising out of or in the course of employment. Federal and provincial direct income support programs provide modest financial assistance to persons with low incomes and few or no assets.

Mexico

In Mexico, the power to establish labor laws and programs generally belongs to the federal government, whereas responsibility for labor law enforcement generally rests with state authorities (except in some industries and activities for which the federal authorities are responsible).

The key legal relationship around which Mexican labor and social security laws are generally organized is the labor relationship (*relación de trabajo*) between a worker and an employer. A labor relationship exists whenever a worker performs subordinate work for another person in exchange for remuneration. The concept of a labor relationship is a wide one, covering many relationships in which one person provides services to another that might not be treated as employment in Canada or the United States. It generally does not extend, however, to the provision of services by professionals (such as medical doctors or accountants) under a temporary contract for services, because in such arrangements the element of subordination is not present.

Article 123 of the Mexican Constitution gives workers the rights to freely associate, to organize unions, and to strike. It also provides for a range of employment standards regarding minimum wages, protection against dismissal unless it is for just cause, equal pay for equal work, maternity leave, severance pay, hours of work, days of rest, prohibitions on child labor, profit sharing, housing standards, training and skills development, and other matters. It establishes a general employer duty to protect the health and safety of employees. It gives workers a general entitlement to a wage indemnity in the event of occupational injury or illness. The labor rights in the Constitution extend to all workers in Mexico regardless of occupation or status.

The Federal Labor Law (*Ley Federal del Trabajo, LFT*) provides the same rights. In addition, it establishes legal rules for collective bargaining between unions and employers, prohibits certain forms of employment discrimination, provides specific employer obligations to compensate workers in the event of occupational injury or illness, and generally provides for more detailed and comprehensive standards than those set out in Article 123 of the Constitution. A series of Official Mexican Standards provide detailed occupational safety and health norms applying to all workplaces.

The Social Security Law (*Ley del Seguro Social*, LSS) provides a range of social benefits to qualified participants, including disability and death benefits, retirement and old age pensions, maternity benefits, and medical and financial benefits for short-term and long-term disability due to ill health and work-related diseases and accidents. Dependent family members of covered workers are eligible for health care benefits and, if the workers dies, a pension. Benefits are funded by a combination of employer, worker, and government contributions.

It should also be noted that Mexico's federal government operates a number of direct income support programs aimed primarily at groups in extreme poverty. Eligibility for this assistance is based on an index of marginalization that takes into account a range of local development variables. A person's eligibility for benefits under these programs is not directly affected by whether he or she works in the informal sector.

United States

In the United States, most labor and employment laws, social security and income support programs are federal. Workers' compensation laws, unemployment insurance programs, for the most part, and some welfare programs, however, are administered by states. Some states have also exercised their power to provide protections that supplement federal laws (such as labor relations laws applying to agricultural workers).

The National Labor Relations Act gives most private-sector employees the right to organize a union, to bargain collectively, and to strike. Federal civil rights statutes prohibit a wide range of types of employment discrimination and cover most U.S. workplaces. The federal Fair Labor Standards Act sets a minimum wage rate, requires that overtime be paid to employees if they work in excess of a 40-hour workweek, and limits or prohibits the use of child labor. The federal Employee Retirement Income Security Act (known as ERISA) creates minimum standards and transparency in the administration of employee benefit plans. It also imposes minimum participation, vesting and accrual requirements on many pension plans. The Consolidated Omnibus Budget Reconciliation Act of 1985 (or COBRA) provides employees with a right to continue coverage under an employer-sponsored health insurance plan in the event of termination of employment. The Worker Adjustment and Retraining Notification Act requires relatively large employers to give sixty days advance notice to employees and their unions of impending mass layoffs. The Family and Medical Leave Act allows eligible employees to take twelve weeks of unpaid leave for medical reasons, the birth or adoption of a child, or the care of a child, spouse or parent who has a serious health condition. The Occupational Safety and Health Act imposes general and specific obligations on employers to maintain a safe working environment for their employees.

Each state has a compulsory or, in the case of Texas,

voluntary program designed to ensure that workers have access to compensation for injuries and accidents arising out of or in the course of employment. Each state also has an unemployment insurance program, which provides some protection for eligible workers against loss of income in the event of involuntary job loss. Public health insurance is available only to the elderly (the Medicare program) and the poor (the Medicaid program). The federal Social Security program provides disability and retirement pensions for qualified workers. A range of federal and state programs provide modest direct income support for some persons with very low incomes and few or no assets, often on condition that program beneficiaries engage in some remunerative work or education program. Access to benefits under these programs is not related in any proximate way to whether a person has held nonstandard work. With the exception of the Earned Income Tax Credit,¹ these programs most often benefit mainly or only the aged, the severely disabled, and parents of very young children.

GENERAL COMPARISONS

It is difficult to draw detailed comparisons among the three countries, given the differences between the concepts of nonstandard work and the informal sector, differences between the levels of protection provided under national legal systems, and the different legal definitions that determine who has access to entitlements under those systems. Nonetheless, some general similarities and differences can be noted.

The Self-Employed

In each country there is a class of worker providing services to others and falling outside the employment relationship (in Canada or the United States) or labor relationship (in Mexico). Under Mexican law, the legal definition of this group is narrower, since the Mexican legal concept of a labor relationship appears to be broader than the concept of employment found in Canadian or U.S. law.

These workers are generally not covered by labor and employment law protections. In addition, they generally have access to fewer social security or income support programs, or have access to such programs at higher cost than do those who are legally considered to be employees (or "workers" in Mexico). The major difference between the countries lies in the fact that Canada makes public health insurance universally available to all residents and makes public pension programs available to the self-employed on the same terms as to the employed.

Temporary and Part-Time Work in Canada and the United States

Temporary and part-time employees/workers in Canada and the United States are generally afforded many of the

same labor and employment law protections as those with more permanent status. There are, however, some important exceptions to this rule.

First, Canadian laws providing rights to severance pay, pay in lieu of notice of termination, or protection against unjust dismissal do not apply to temporary employees/workers upon the termination of a limited-term employment contract or labor relationship. (U.S. law generally does not provide such rights to employees, whether temporary or permanent.)

Second, in both countries, eligibility requirements based on length of service operate to exclude many temporary workers from access to certain individual rights under labor and employment law. In the United States, such requirements effectively exclude many temporary workers from family and medical leave benefits, as well as from unemployment compensation. In Canada, such requirements apply to many minimum employment standards (vacation, notice of termination, maternity and parental leave, severance pay, just cause protection and paid holidays), with the result that many temporary employees in Canada find themselves in a legal position similar to that of their U.S. counterparts.

Third, provided that they meet minimum employment standards, employers are in most respects permitted, under the labor and employment laws of both countries, to treat temporary or part-time employees/workers differently from those with permanent or indefinite relationships with the employer. For example, employers are not generally prohibited from paying temporary or part-time employees or workers less than permanent ones for equal work (except in the Canadian province of Quebec, where part-time and full-time employees generally must be treated equally).

Finally, it should be noted that, in both countries, many temporary or part-time workers with intermittent work histories will not meet the eligibility requirements for key income security and social insurance programs.

NONSTANDARD WORK IN CANADA AND THE UNITED STATES

Self-Employed Workers

The concept of self-employment used in U.S. official statistical surveys is best approximated by the legal category of “independent contractors.” Most Canadian collective labor relations laws distinguish between independent contractors and dependent contractors. Dependent contractors are workers who, while not employees, are nonetheless in a position of economic dependence on the party with which they contract to perform work. Under U.S. law such workers would likely fall within the category of independent contractors. In Canada, both dependent and independent contractors can be included in the more general legal category of “contractors for service,” which best approximates

the notion of self-employment used in official Canadian statistical surveys.²

Rights under Employment and Labor Laws

Canadian labor and employment laws generally do not protect contractors for service. In some jurisdictions, however, some or all such contractors have access to certain key protections. Under many labor relations statutes, dependent contractors may join a union and bargain collectively. The occupational health and safety statutes in a majority of jurisdictions cover self-employed persons working at an employer’s work site. Moreover, in interpreting antidiscrimination statutes, courts and tribunals have sometimes used a wide definition of employment, thus covering some workers who would otherwise have been treated as independent contractors.

In the United States, independent contractors are in general excluded from labor and employment law protections. The scope of coverage of U.S. labor and employment laws is not uniform, however. Some laws use a “common law agency test” to separate independent contractors from employees, while others use an “economic realities” test. Still others use a “hybrid test” that combines elements of both. Generally, the economic realities test is thought to cover more workers because it places greater emphasis on economic dependence in determining who is an employee. Thus, some workers who would be classified as independent contractors under the common law agency test may be treated as employees where an economic realities test is used. The federal Fair Labor Standards Act (which provides minimum employment standards) and the Occupational Safety and Health Act both use an economic realities test, whereas other labor and employment laws generally do not.

Other U.S. statutes also provide independent contractors with some protections. Actions under 42 U.S.C § 1981 protect all employees against discrimination based on race. In addition, where an employer chooses to include them in a medical benefits plan, independent contractors can claim the right to continuation of those benefits provided under the Consolidated Omnibus Budget Reconciliation Act of 1985.

Social Insurance and Income Support Programs

Canada’s social insurance and income support programs generally cover both contractors for service (the self-employed) and employed workers. Canada’s comprehensive public health insurance programs generally cover all residents; access does not depend on employment status. Employed and self-employed workers have access to public retirement and disability pension programs on the same terms. Access to direct income support programs for the poor is not related in any proximate way to a person’s status as self-employed.

There are important exceptions to universal coverage, however. Self-employed workers do not have access to Canada’s unemployment insurance program (called Employment Insurance). Self-employed workers may ap-

ply to be covered under provincial workers' compensation insurance programs; however, they must do so at their own expense. (Employers pay the insurance premiums for coverage of their employees.)

The United States has limited programs that are available on the same terms to both independent contractors (self-employed workers) and employed workers. In other cases, independent contractors either must personally pay substantially higher contributions than employees to be eligible for benefits or are excluded from benefits entirely.

Independent contractors may access the health insurance benefits for the aged and the severely disabled provided by the Medicare program and the health insurance benefits for the poor provided by Medicaid. Similarly, access to direct income support programs is not affected by nonstandard worker status.

Independent contractors have access to the Social Security retirement and disability pension programs but are required to pay a higher percentage of net income than employees are required to pay as Social Security contributions. A similar situation prevails under many workers' compensation programs: independent contractors have a right to obtain workers' compensation insurance as sole proprietors but are required to pay the premiums for such insurance. By contrast, employers are typically required to purchase workers' compensation insurance for their employees.

Independent contractors in the United States do not have access to unemployment insurance benefits. In a few cases, however, the use of relatively broad definitions of employment under many state workers' compensation and unemployment insurance laws may provide workers with access to those benefits notwithstanding that they would be considered independent contractors for the purposes of some other labor and employment laws.

Temporary Employees

Rights under Employment and Labor Laws

Temporary employees are generally covered by labor and employment laws in Canada. This coverage is subject to certain exceptions, however, most notably in laws relating to employment security. Moreover, there are no laws preventing employers from treating temporary employees less advantageously than nontemporary ones, provided that employers meet the minimum standards applying to all employees. Finally, temporary agency workers may face some uncertainty over which entity, the agency or its client, is their employer for certain legal purposes, a determination which can have important consequences.

Temporary employees in Canada are covered by collective labor relations law protections. In some jurisdictions (such as British Columbia and the federal jurisdiction), however, many temporary workers have been excluded from collective bargaining units made up of employees with "relative permanence." In such cases, temporary workers may have greater difficulty organizing themselves to achieve union representation and, where they do so, they are likely to have

less bargaining power than they would if they could bargain collectively with their more permanent coworkers.

Canadian occupational health and safety statutes and antidiscrimination statutes apply equally to temporary and nontemporary employees. Similarly, statutory minimum wages, hours of work, overtime rules, rest periods and, usually, bereavement leave also apply to temporary workers.

Temporary employees generally do not benefit from legal employment security protections, however. Thus statutory just cause requirements for dismissal in the federal jurisdiction, Quebec, and Nova Scotia protect only employees with a minimum length of service (one, three and ten years respectively). The Quebec protections do not apply to an employee whose fixed-term employment contract has expired. Statutory rules requiring minimum notice periods for individual termination of employment require that employees have worked a minimum period for the employer, which ranges from one to six months depending on the jurisdiction. Common law rules requiring notice of termination of employment generally offer little protection to workers with less than three months of service with an employer. Eligibility for maternity and parental leave under employment statutes also depends upon completing a qualifying period of continuous service, ranging between thirteen weeks and twelve months depending on the jurisdiction, although a few jurisdictions have no such requirements. Rights of reinstatement under workers' compensation law generally apply only to workers with two years or more of continuous service.

Other minimum employment standards also have eligibility requirements based on the length of employment that many temporary employees will not be able to meet.³ These include general holidays with pay, vacation leave (although all employees are usually entitled to vacation pay), notice of termination and rights to severance pay (rights provided only in Ontario and the federal jurisdiction). Pension benefits laws require private pension plans to vest benefits in employee plan members only after a stipulated maximum time, which is most often two years. As a result, many temporary employees are not legally protected against the loss of pension benefits upon the termination of their employment.

Determinations of which entity, the temporary agency or its client, is the true employer of agency workers carrying out work for the client depend upon the facts of each case and the policy goals served by the legislation in question. Unlike the United States, there is no joint employer doctrine in Canada that would allow for the treatment of both the agency and the client as simultaneous employers.

The determination of which entity is the employer can have important implications for workers. For example, employees will often benefit from having the agency treated as the employer for the purposes of length-of-employment based rights such as vacation pay or pension benefits. On the other hand, employees will probably have easier access to collective bargaining if they can participate in a bargaining unit of permanent employees at a client of the agency.

A leading Supreme Court of Canada case has held that the client of a temporary help agency may be treated as the employer of temporary agency workers for the purposes of labor relations legislation in Quebec. This decision may have important implications outside that province as well.

In those Canadian jurisdictions where independent contractors are covered by occupational health and safety legislation (see “Self-Employed Workers,” above), temporary agency workers would be protected by obligations placed on their agency’s clients regardless of whether the clients were considered to be the employers of those workers.

In the United States, temporary employees are generally covered by labor and employment laws. Provided that it meets minimum standards and laws applying to all employees, however, an employer is free to treat temporary and permanent employees differently. Temporary workers may be paid differently for equal work and may be excluded from employer-sponsored employee benefit programs, as is frequently the case in practice.

Temporary employees in the U.S. are generally covered by collective labor relations laws. In some cases, however, they may find themselves excluded from bargaining collectively together with other (relatively permanent) employees because of the way the boundaries of collective bargaining units are drawn. Temporary employees excluded in this manner may find organizing a union more difficult and may have less bargaining power when they do so. The temporary status of an employee generally does not affect his or her rights to the protection of antidiscrimination laws, the Occupational Safety and Health Act, and minimum employment standards legislation (the Fair Labor Standards Act). Such an employee, however, will often fail to meet length-of-employment based eligibility requirements for the protections of the Family and Medical Leave Act. Similarly, many temporary employees will fail to meet the length-of-service requirements for pension vesting rights under the Employee Retirement Income Security Act.

Employees in multilateral work arrangements in the U.S. have the same rights as any other employee in their relationship with the entity that is considered to be their employer. What distinguishes employees in multilateral situations from other employees is that two or more entities may exert influence or control over different facets of the terms and conditions under which they work. If an entity that exerts such influence is not treated as an employer of the worker, the worker may effectively be left without many of the legal protections that could regulate that influence.

Where two entities codetermine matters governing the essential terms and conditions of employment of the supplied workers, the two organizations can be treated as “joint employers” of those workers. The joint employer doctrine can be used under employment laws to hold the clients of temporary agencies, employee leasing services and the like responsible as employers of leased or agency employees.⁴ Joint employment doctrines have, for example, been applied under antidiscrimination laws, occupational safety and health laws, and the Fair Labor Standards Act. Temporary employees

supplied to a client organization by another employer (such as a temporary employment agency) may be included in a bargaining unit with the client’s regular employees.

Social Insurance and Income Support

While temporary workers are covered by Canadian social insurance and income support programs, qualifying requirements under public retirement and disability plans and the national Employment Insurance program effectively exclude many temporary workers from benefits entitlement.

Like all residents, temporary employees have access to comprehensive public health insurance. Temporary employees are also covered by workers’ compensation laws. Those with very low incomes and few assets have access to direct income support programs.

Public retirement and disability pension plans also generally cover temporary workers. To receive a disability pension, however, a worker who became disabled on or after January 1, 1998, must have contributed to the Canada Pension Plan in four of the last six years on the basis of earnings above a minimum threshold. This rule will exclude some workers who have highly intermittent work patterns. Moreover, since retirement pension earnings are directly dependent upon the value of pension contributions, workers with low wages or very intermittent work histories are unlikely to receive substantial pension benefits. Finally, employment for cash remuneration under \$250 or for a period of less than twenty-five days in agriculture, forestry, fishing, hunting, trapping, forestry and logging is excluded from earnings that can give rise to pension entitlements.

The Employment Insurance program covers temporary workers. However, its eligibility requirements that workers have completed a minimum number of hours of insurable work operate to prevent many temporary workers from receiving unemployment, maternity, parental or sickness benefits, except where temporary workers accumulate the required number of hours (e.g., by working long hours in seasonal industries or by holding multiple jobs).

In the United States, although temporary workers are covered by social insurance and income support programs, qualifying requirements under public retirement and disability plans and state unemployment insurance programs and state workers’ compensation laws effectively exclude many temporary workers from benefits entitlement.

Temporary employees may access the health insurance benefits for the aged and the severely disabled provided by the Medicare program and the health insurance benefits for the poor provided by Medicaid. As noted above, access to direct income support programs for the poor is not affected by employment status.

Temporary employees in the U.S. also have access to Social Security Retirement and Disability benefits. Low-wage workers with intermittent work histories may not meet contribution thresholds to access these benefits, however, or may receive very low benefits under Social Security programs.

Temporary employees have access to benefits under state unemployment insurance programs. However, sea-

sonal employees, casual employees, temporary nonresident aliens, workers who are unable to take full-time permanent employment, workers with very intermittent work histories, particularly those earning low wages, and workers who are not eligible for family or medical leave will often find themselves ineligible for benefits because they do not meet the qualifying requirements.

Workers' compensation laws in the U.S. generally cover temporary workers, but in many states exclude casual workers from mandatory coverage.

Part-Time Employees

Rights under Labor Law

Subject to a few important exceptions (noted below), most labor and employment laws in Canada apply equally to full-time and part-time employees. On the other hand, provided that they meet the standards provided in those laws, employers are free to treat part-time employees less advantageously than full-time employees (with some exceptions in the provinces of Quebec and Saskatchewan). The one general exception to this rule is found in the area of pension benefits law. In all jurisdictions except Newfoundland, pension benefits laws provide that part-time employees must be entitled to participate in pension plans, subject to eligibility requirements.⁵ Part-time employees are not, however, entitled to the same pension benefits as full-time employees, prorated, except in Saskatchewan.

In some jurisdictions part-time employees are excluded from the benefits of certain labor and employment laws, either directly or by the operation of qualifying requirements based on total work time. Part-time domestic servants are not covered by minimum employment standards in some jurisdictions. In Newfoundland, vacation entitlements depend upon having worked a defined number of regular working hours in a year, and as a result part-time workers will often have insufficient hours to claim vacation leave (although they can still earn vacation pay). In the province of Ontario, part-time employees have often been separated from full-time employees for the purpose of establishing collective bargaining units. For a number of reasons, part-time workers are often more difficult to organize into unions than full-time workers. Their separation from the bargaining units of full-time employees can thus make it more difficult for them to achieve union representation. It may in many cases also weaken their bargaining power in negotiations with their employer.

In general, the observations made above concerning the labor and employment law rights of temporary workers in the U.S. also apply to part-time workers, although there may be some differences in what constitutes an appropriate collective bargaining unit. However, U.S. tax authorities provide a significant tax disincentive to an employer's outright exclusion of part-time employees from pension benefit plans available to full-time counterparts doing similar work.

Social Insurance and Income Support

For both Canada and the United States, the observations made above concerning the access of temporary employees to social insurance and income support program benefits also apply to part-time employees.

Occupational and Industry Exclusions

Rights under Labor and Employment Law

In a number of Canadian jurisdictions, agricultural workers, certain domestic workers (particularly part-time domestic workers), qualified members of certain professions (such as law, accounting, medicine), managers and/or some other groups are not covered by minimum employment standards legislation. A minority of collective labor relations statutes also exclude such employees from the ambit of their protection.

In the United States, agricultural and domestic workers are generally excluded from federal collective bargaining rights and many minimum labor standards. Many professionals (such as computer programmers, lawyers, and physicians) and commission salespersons are excluded from the wage and hour provisions of the Fair Labor Standards Act. There may, however, be coverage under state law.

Social Insurance and Income Support Programs

In Canada, eligibility for unemployment, maternity, parental and sickness benefits under the Employment Insurance program cannot be accrued through employment of less than seven days in a year by an employer or when remuneration is not paid in cash. Similarly, as noted above (see "Temporary Employees"), certain temporary agricultural, fishing, hunting, trapping, forestry and logging work does not count toward public pension eligibility.

In a majority of Canadian jurisdictions, some or all domestic workers are excluded from the mandatory coverage of workers' compensation insurance programs. In a number of jurisdictions those who work in farming, professional workers, casual workers, and fishers are also excluded. A number of jurisdictions also exclude "outworkers," generally defined as a person "to whom articles or materials are given in order to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his or her own home or on other premises not under the control or management of the person who gave out the articles or materials."

In the U.S., many farmworkers (particularly those working on small or family farms) and domestic workers are excluded from access to workers' compensation and unemployment insurance benefits.

INFORMAL SECTOR WORKERS IN MEXICO

Persons Working in Small Establishments

Rights under Labor Law

With few exceptions (noted below), workers employed in small establishments have the same rights under Mexican labor laws as all other workers. Those rights do not apply to working owners of small establishments (unless they are in fact in a labor relationship with another person or organization to whom they provide services). Enterprises in which capital and labor generate annual income, as declared for income tax purposes, of less than 300,000 pesos are exempted from the LFT's profit sharing requirements. Workers in family enterprises employing only relatively immediate family members are not covered by most LFT standards. However, occupational safety and health provisions found in the LFT and in other laws generally cover all workers.

Social Insurance and Income Security Programs

Benefits coverage under the LSS extends to workers in a formal labor relationship, whether permanent or temporary, and to the self-employed, including working owners of enterprises. Self-employed persons may voluntarily register for social security coverage. However, the enrollment of self-employed persons is still not widespread.

Wage-earners and nonsalaried workers must be registered with the Mexican Institute of Social Security (Instituto Mexicano del Seguro Social, IMSS) to be eligible for benefits provided by the Institute. Under the compulsory regime of the LSS, employers are obligated among other things to register their workers, to make employer contributions, and to make proper withholdings from worker salaries to pay worker contributions to the IMSS. If an employer fails to make contributions or makes partial contributions to the IMSS on behalf of a registered worker, the IMSS will indemnify the covered worker and hold the employer responsible for reimbursement and possibly additional fines.

The registration process sometimes creates a number of difficulties. For example, most seasonal workers in rural areas are indigenous people who do not speak Spanish and often lack official identity documents. This makes communication difficult, both in terms of registration and as regards information concerning their rights and responsibilities, particularly for those workers and employers who are located far from a registration center.⁶

Persons with intermittent work histories (often the case in the informal sector) may not meet eligibility requirements for some benefits. The LSS requires a minimum of 1,250 weeks of contributions before a worker becomes entitled to both pension and medical retirement benefits. For workers with intermittent work patterns, reaching this threshold may take considerably longer than twenty-five years. The LSS requires a minimum of 750 weeks of contributions for eligibility to receive retirement medical benefits without a pension.

Under LSS eligibility rules, workers who have been dismissed from their job may voluntarily continue IMSS life insurance and retirement and old-age insurance, provided that they have contributed to the IMSS for at least fifty-two weeks prior to the termination of their employment. If they fail to make contributions for six months, the voluntary affiliation is deemed to have ended.

Insured workers who lose their jobs preserve their accrued rights to life insurance and retirement and old-age benefits for a period of one-fourth of the time covered by their weekly contributions, or one year, whichever is greater. Those rights will be recognized as soon as a worker returns to work, provided that their contributions have not been interrupted for more than three years. A worker who does not make contributions for a period of over three years will face a twenty-six-week waiting period upon resumption of contributions. After six years, the waiting period becomes one year.

Self-employed persons, such as working owners of small enterprises, must pay both the worker and employer contributions required by the LSS in order to be eligible for benefits (see below). This is because they have a dual employment status, being simultaneously both employer and worker.

Self-Employed Nonprofessionals

As noted above, an agreement to perform services for remuneration in which the element of subordination is present constitutes a labor relationship. As a result, many short-term agreements to provide nonprofessional services are temporary labor relationships. Moreover, an enterprise that makes use of workers supplied by a labor-contracting agent⁷ is jointly and severally liable for all obligations to those workers under the LFT. In such cases workers are entitled to the same employment conditions and the same rights as workers carrying out similar work for the enterprise. Any person who gives out home work, irrespective of whether he or she provides the tools or the materials for the work and irrespective of the form of remuneration, is considered to be the employer of those to whom the work is given. On the other hand, a small retailer operating independently of his or her suppliers would not be in a labor relationship and thus could be considered self-employed.

Since those who are self-employed are not in a labor relationship, they are not covered by labor and employment law protections. Self-employed persons may register voluntarily for IMSS coverage. This means that they are responsible for both employee and employer premiums in order to acquire coverage under the social security plan. The result is that self-employed persons pay higher premiums than do employees. Additionally, they must pay contributions a year in advance unless they have voluntarily continued in the obligatory regime after terminating a labor relationship.

Domestic Workers

Rights under labor and employment law and social insurance and income security programs cover domestic workers. The LFT contains some specific limitations on their labor law rights, however, as well as some specific protections that do not apply to other workers. For example, domestic workers do not have the right to claim reinstatement in the event that they are dismissed without cause. Similarly, domestic workers who have been employed by an employer for less than three months cannot claim severance pay in that event. Nevertheless, the LSS provides that domestic workers may enroll voluntarily, with the full range of benefits.

Persons Doing Unremunerated Work

Since remuneration is necessary to legally constitute a labor relationship, those who work without remuneration are not covered by labor laws. They may have access to IMSS social insurance on the same terms as the self-employed, provided that they have independent means with which to pay their contributions or are covered by health care benefits as dependent family members. They are covered by general income support programs.

Notes

- 1 The Earned Income Tax Credit is a refundable federal tax credit available to relatively low-income workers.
- 2 Under U.S. Social Security legislation, the term “self-employed” is often used, as it is under Canada’s public pension and unemployment insurance legislation.
- 3 Some jurisdictions mitigate the effects of these rules for certain employment standards provisions (e.g., notice of termination, vacation leave entitlement) by deeming successive periods of employment with the same employer to be continuous, provided that the hiatus between periods of employment is sufficiently short.
- 4 However, to the extent that a main enterprise or business assigns to a subcontractor relatively complete direct control over the manner and means by which workers accomplish their tasks, that enterprise also may avoid responsibility and liability as an employer, leaving these to the subcontractor. If the subcontractor is near to insolvent, its employees may be left without an effective legal remedy. This is the case even if the main contractor reaps most of the economic gains generated by the worker’s work or closely specifies the work to be done under the contract. Legally, the employees of the subcontractor are situated no differently from the employees of any other financially precarious enterprise.
- 5 In most cases the employee must have completed twenty-four months of continuous service and earned at least 35 percent of the Year’s Maximum Pensionable Earnings under the Canada and Quebec Pension Plans (\$38,300 in 2001).
- 6 The Mexican Secretariat of Labor and Social Welfare, with the assistance of the Universidad Iberoamericana, has produced a guide to labor rights and obligations for indigenous peoples, translated into Nahuatl, Mayan, Mixtec and Zapotec.
- 7 A labor contracting agent is defined as a person or corporation that contracts or intervenes in contracting for the services of a person or other persons for the performance of work for an employer, without carrying out such work with the resources of its/his/her own enterprise (LFT, Art. 12 and 13).

2. CANADA

DEFINITIONS AND JURISDICTION

Legal Definition of Contingent or Nonstandard Work

For the purposes of this guide, nonstandard workers¹ include: (1) contractors for service (including those legally defined as “independent contractors” or “dependent contractors”) who do not employ any other workers; (2) temporary employees;² and (3) part-time employees who usually work fewer than 30 hours per week at their main or only job.

Legal Definition of Employee

Canadian courts have developed a number of tests to distinguish between employees and other workers. Most labor statutes do not provide a detailed definition of the term employee, leaving this task to the courts and tribunals. In defining employee under different statutes, courts and tribunals have specifically considered the purpose that the law was designed to serve. In general, whether a worker is considered an employee will depend upon whether the worker is carrying on business on his or her own account or on behalf of another. Courts and tribunals will often consider such factors as (1) control over when and how the work is done; (2) ownership of the tools; (3) chance of profit; and (4) risk of loss.³ Courts and tribunals will specifically consider the remedial purpose that a law was designed to serve. They increasingly look at the economic realities of the relationship and, where a relationship of economic dependence and subordination is present, find an employment relationship.⁴ Nonetheless, most courts and tribunals consider that a sufficient degree of control by the employer over the manner and means by which work is carried out is an essential element of the employment relationship. Generally speaking, neither ownership of tools, nor risk of profit or loss (for example, through performance pay), nor labeling a worker an “independent contractor” in a contract, nor the fact that a worker works through his or her own corporation or an employment agency or works at home or in more than one workplace or part-time or on a casual basis is sufficient in itself to establish that the worker is not an employee.

Temporary Agency Workers: Who is the Employer?

Canadian courts and tribunals have considered the purpose of the statute being applied in determining whether the temporary agency or its client should be treated as

the employer of a particular worker. Relevant factors in making this determination include: which entity exercises control and direction over the work carried out by agency workers; who bears the ultimate burden of remuneration (as opposed to who signs the paycheck); who has effective authority to hire, fire, and discipline employees; who the workers perceive their employer to be; and whether the agency or client has a bona fide intention of becoming a real employer. A leading Supreme Court of Canada case has held that the client of a temporary help agency may be treated as the employer of temporary agency workers for the purposes of labor relations legislation in Quebec. In such cases, temporary agency workers will often be covered by the collective agreement applying to the nontemporary workers employed by agency’s client.⁵

Jurisdiction

In Canada, federal and provincial labor and employment laws apply in parallel across different jurisdictions, and federal and provincial labor authorities have equal capacity to decide matters in their respective jurisdictions. The provincial governments have authority over property and civil rights within their provincial borders, giving them a general jurisdiction over employment and labor relations. The federal government has jurisdiction over the labor and employment relations of federal government employees and employees in certain industries specified in section 91 of the Constitution Act, 1867. The territorial governments also legislate in most employment law areas, one exception being private-sector collective bargaining. Jurisdiction over social programs is divided differently. Some social insurance and income support programs applying to workers across the country are funded and administered by the federal government. Section 91(2A) of the Constitution gives the federal government jurisdiction over unemployment insurance. Section 94A of the Constitution Act, 1867 gives the federal government the power to make laws in relation to old age pensions and supplementary benefits, including survivor benefits and disability benefits regardless of age, while recognizing that provinces may also legislate with respect to such matters.

LABOR AND EMPLOYMENT LAW

Labor Relations Law – Collective Labor Rights

Labor relations statutes in each jurisdiction give workers the right to organize unions, to bargain collectively, and to

strike. Labor relations statutes apply to employees but not to independent contractors. Under many labor relations statutes, however, dependent contractors may join a union and bargain collectively, because the law either expressly gives such rights to dependent contractors or expands the definition of employee to cover them.

In some jurisdictions (such as British Columbia and the federal jurisdiction), many temporary workers have been excluded from collective bargaining units made up of employees with “relative permanence.” In such cases temporary workers may have greater difficulty organizing themselves to achieve union representation. In other places, most notably in the province of Ontario, part-time employees have often been separated from full-time employees for the purpose of establishing collective bargaining units. For a number of reasons, part-time workers are often more difficult to organize into unions than full-time workers. Their separation from the bargaining units of full-time employees can thus make it more difficult for them to achieve union representation. It may in many cases also weaken their bargaining power in negotiations.

A minority of labor relations statutes exclude certain occupations, most notably members of specified professions (such as architecture, dentistry, accounting), domestic workers, and/or agricultural workers.

Employment Security Protections

Rights to Continuation of Employment

Unless they are protected by an individual contract or collective agreement, employees in most jurisdictions can be dismissed for any reason upon “reasonable notice” of the termination of their employment (see below). Most unionized workers have a clause in their collective agreement that provides greater employment security protection.

Employment statutes in the federal jurisdiction, Quebec and Nova Scotia protect most employees in those jurisdictions with a minimum length of service (one, three and ten years respectively) against dismissal that is not for just cause, providing reinstatement as a remedy. The Quebec protections do not apply to employees whose fixed-term contract has expired or to workers who provide caregiving services in a dwelling and are not employed for profit, to construction workers, or to students in a job induction program. An employer in Quebec cannot be ordered to reinstate a domestic worker dismissed without just cause but can be required to pay an indemnity equivalent to up to three months in wages and benefits. The Nova Scotia provisions specifically exclude a number of occupations, including part-time domestic servants, construction workers, certain commission salespersons, workers on fishing vessels, and qualified practitioners and students of a number of professions (such as law, dentistry, architecture, and medicine). The federal provisions apply to all employees within the federal jurisdiction.

Collective bargaining statutes in each jurisdiction forbid dismissing or disciplining employees for being involved in

trade union activities. Similarly, in all jurisdictions, employees cannot be dismissed or suffer other penalties for participating in accident prevention activities in their workplace, refusing to perform dangerous work, or seeking to enforce occupational health and safety statutes and/or regulations in accordance with those statutes and regulations.

Human rights statutes in each jurisdiction also provide protection against discrimination in employment by reason of race, sex, religion, disability, and other human rights grounds. Workers whose employment is terminated in violation of these protections may seek reinstatement. The coverage of these statutes is discussed below.

Finally, a number of workers’ compensation statutes in Canada provide injured workers with a right to return to preinjury employment upon medical recovery if that recovery takes place within two years of the injury. These rights generally do not apply in the construction industry, to employees who have been employed less than twelve months at the time of the injury, or to small employers. (The coverage of workers’ compensation statutes is discussed below.)

Minimum Notice Periods for Termination of Employment

Common law “reasonable notice” requirements. Under a doctrine developed by Canadian courts, employers in Canada must give “reasonable notice” of termination of employment, unless the employment relationship is terminated for just cause, that is, for sufficiently serious misconduct. Without either just cause or reasonable notice, employers must provide pay in lieu of notice, usually equal to about one month’s salary for each year of employment. Reasonable notice requirements generally apply to all employees except where a collective agreement applies (in which case just cause protection will generally be provided by the collective agreement), or in some situations where they can be limited by contract. Some courts have recognized a special intermediate status for workers whose relationships place them just beyond the normal boundaries of employee status. This intermediate status entitles workers to reasonable notice of termination. It may not apply to statutory notice requirements (see below), which are generally available only to “employees.”⁶

Statutory notice requirements. All provinces and the federal jurisdiction have legislated minimum notice periods for the termination of employment. Employers who fail to provide the required minimum notice must generally provide pay in lieu of notice equal to the pay that the employee would have received during the specified notice period. (Note that complying with the “reasonable notice” doctrine described in the paragraph above will generally also cover these statutory obligations.) The length of the required notice period for individual termination ranges between one and eight weeks, depending on the jurisdiction and, generally, on the length of employment with the particular employer.

Most jurisdictions require longer periods of notice when an employer with a minimum number of employees⁷ intends to terminate the employment of a sufficient number

of employees at the same time. Most of these jurisdictions increase the length of the notice period as the number of affected employees increases. Notice periods generally range between four and sixteen weeks, depending on the jurisdiction and the number of employees affected.

Coverage. In several jurisdictions, notice need not be given in industries of a seasonal or highly cyclical nature, such as construction. Employees who are hired to complete a specified task or who are hired for a fixed term are generally not entitled to notice. In a majority of provinces, however, this exclusion does not apply if the task or term exceeds 12 months duration. In several provinces the exclusion does not apply if the work in fact extends for a specified period beyond the completion of the task or term.

Most jurisdictions exclude one or more occupational groups from statutory notice requirements. Typical exclusions include farmworkers employed by small or family farms; real estate and automobile salespersons; certain professions (such as law, medicine, and architecture); caregivers for children, the aged or the infirm; and part-time domestic servants.

Eligibility requirements. Employees must work a certain number of months before being entitled to the first week of notice. This period generally ranges between one and six months, depending on the jurisdiction, and is most often three months. In some jurisdictions these eligibility requirements apply to the notice for group terminations, while in others they do not.

In a number of jurisdictions, successive periods of employment with the same employer can be deemed continuous for the purposes of certain statutory protections (most frequently, notice of termination provisions), provided that the hiatus between periods of employment is sufficiently short. The maximum hiatus varies by jurisdiction, ranging from fourteen consecutive days to three months. In Newfoundland, special provisions preserve the employment continuity of seasonal workers who work for at least five months in each season for the same employer.

Rights to Leave and Reinstatement for Medical, Work-Related Illness or Injury, or Family Reasons

Various types of leave are provided in Canadian employment standards legislation, from general leave for family reasons to more specific leaves pertaining to the birth or adoption of a child, bereavement, or illness.

General leave for family reasons. A majority of jurisdictions do not provide a legal guarantee of leave for general family-related purposes. However, three provinces provide a short period of unpaid family leave to employees (five days in Quebec and British Columbia; three days in New Brunswick). In Quebec, leave is for the care, health, or education of the employee's minor child where the employee's presence is required due to unforeseeable circumstances beyond his or her control. In British Columbia and New Brunswick, leave is for the care or health of any member of the employee's immediate family. Moreover, new legislation in Ontario provides for up to ten days of emergency leave

per year to employees working for employers with fifty or more employees. This leave may be used for personal or family health reasons, bereavement, or for other emergency matters involving close relatives.

Maternity leave. All jurisdictions provide for unpaid maternity leave. The length of the leave is generally seventeen or eighteen weeks. In some jurisdictions this leave can be extended if the woman's medical condition renders her unfit to resume work. Maternity leave may also sometimes be extended in cases of late birth in order to ensure that the mother has at least six weeks of leave after giving birth.

All jurisdictions except New Brunswick, Quebec, and British Columbia require a minimum period of continuous employment with the employer before an employee is entitled to maternity leave. The qualifying period ranges from thirteen weeks to twelve months. Saskatchewan requires twenty weeks employment with the employer within the previous fifty-two weeks.

In a number of jurisdictions, farmworkers, certain domestic workers, and/or qualified members or students of certain professions (such as law, accounting, and medicine) are not covered by statutory maternity leave rights.

Parental leave. In all jurisdictions, an employee is entitled to unpaid parental leave upon the birth of a child. An employee who has given birth can combine parental leave with her maternity leave. All jurisdictions provide for unpaid leave to adoptive parents, most often in the form of a parental leave. In Newfoundland and Saskatchewan, however, adoptive parents may be entitled to both an adoption leave (17 or 18 weeks, unpaid) and a parental leave, taken consecutively. Maximum parental leave duration usually varies between 34 and 37 weeks (52 weeks in Quebec), depending on the jurisdiction and, sometimes, on whether maternity or adoption leave was also taken. The coverage and eligibility requirements for parental leave are generally the same as those for maternity leave.

Bereavement leave. Most jurisdictions provide a right to bereavement leave in case of the death of specified close relatives. The maximum length of such leave ranges between one and five days, depending on the jurisdiction and the relationship of the deceased to the employee. Such leave is unpaid (except in the federal jurisdiction, Quebec, and Newfoundland, where part of the leave is paid if eligibility requirements are met). In most cases there is no minimum length of employment required to establish eligibility for unpaid bereavement leave. In a number of jurisdictions, farmworkers, certain domestic workers, and/or qualified members of certain professions (such as law, accounting, and medicine) are not covered by statutory bereavement leave rights.

Sick leave. Provisions in the employment standards legislation of seven jurisdictions allow eligible employees to take a leave of absence in case of illness. Dismissal of an employee for his or her illness would in many cases violate just cause protections (see above). In addition, human rights legislation (see below) generally protects employees against dismissal on the grounds of disability. The term "disability"

generally includes most illnesses, although an ailment that is of short duration, affects nearly everyone, and does not have lasting effects may not be considered a disability.

Antidiscrimination Laws

All Canadian jurisdictions have antidiscrimination statutes, referred to as “human rights codes” or “human rights acts.” Antidiscrimination laws in every Canadian jurisdiction expressly prohibit employment discrimination based on race, color, national or ethnic origin, religion, age, sex, and mental and physical disability. In most Canadian jurisdictions, discrimination on the basis of national or ethnic origin, pregnancy or childbirth, marital status, ancestry, family status, creed, and sexual orientation are also expressly prohibited. Case law has established that protection against discrimination on the basis of disability includes protection against discrimination on the basis of illness, including dependence on drugs or alcohol. The Supreme Court has held that protection against sex discrimination includes protection against pregnancy discrimination.⁸ The Supreme Court has also ruled that protection against discrimination on the basis of sexual orientation must be read into human rights statutes that do not expressly provide it.⁹ British Columbia, Prince Edward Island, Newfoundland, Manitoba, and Quebec expressly protect against discrimination on the basis of political belief or conviction. These statutes generally cover all employees of all employers within the jurisdiction. In interpreting antidiscrimination statutes, courts and tribunals have often used a broad definition of employment. A number of authoritative decisions have held that the word “employment” in these statutes covers any arrangement in which one person agrees to execute work on behalf of another.¹⁰

Occupational Safety and Health Laws

In all jurisdictions, statutes establish minimum standards for occupational health and safety. These laws place a general obligation on employers to ensure the health and safety of every employee, as well as specific duties to provide specified safety protections and to notify workers of hazards. All statutes also provide for joint employee-employer committees with a mandate to, among other things, ensure compliance with safety standards. These statutes also give workers the right to refuse dangerous work, as defined in each statute and according to the procedure it specifies.

Occupational health and safety statutes in each Canadian jurisdiction cover all employees, with some exceptions such as agricultural workers and domestic servants in Ontario and Alberta. A majority of jurisdictions cover self-employed persons working at a work site. In those jurisdictions, temporary agency workers would arguably be protected by obligations placed on their agency’s clients regardless of whether the clients were considered to be the employers of those workers.

Other Minimum Employment Standards

Employment Standards Acts

All jurisdictions have minimum employment standards legislation. These laws generally provide for minimum wages, maximum weekly and daily work hours after which overtime must be paid, regulation of the mode and interval of wage payments, permissible deductions from pay, daily rest and meal periods, weekly rest, statutory holidays, minimum annual vacations and vacation pay, minimum notice of termination of employment, and similar matters. Subject to statutory minimum standards, these laws do not usually prevent employers from treating part-time workers less advantageously than full-time colleagues doing the same work. The exceptions are Quebec, where an employer must pay a part-time employee the same wage rate as a full-time employee performing the same work (unless the part-time employee’s wage rate is already more than twice the minimum wage rate), and Saskatchewan, where legislation requires that employers provide part-time employees who meet eligibility requirements the same benefits, prorated, as are available to full-time employees.

In a number of jurisdictions, farmworkers, certain domestic workers (particularly part-time domestic workers), and/or qualified members of certain professions (such as law, accounting, medicine) are not covered by these statutory rights. In the province of Newfoundland, employees must work a minimum percentage of a year’s normal work hours to be entitled to vacation leave. As a result, many part-time employees there would not accumulate enough hours to qualify for leave (but would still be entitled to vacation pay). Conditions attached to notice of termination, just cause protection, and maternity, parental and bereavement leave have been noted above.

Ontario and the federal jurisdiction provide for statutory severance pay in addition to the notice requirements described above. In Ontario severance pay ranges between five and twenty-six weeks’ pay, depending upon the worker’s length of employment with the particular employer. In the federal jurisdiction, severance pay is two days’ pay for every year of service with the employer, subject to a five-day minimum.

In Ontario, the severance pay provisions apply only to employees with at least five years of service whose employment is terminated by an employer with a payroll of \$2.5 million or more, or who are part of a group of at least 50 employees who have had their employment severed in a six-month period because of the permanent discontinuance of part or all of their employer’s business. In the federal jurisdiction, every employee with twelve months of continuous employment with an employer is entitled to severance pay upon termination of employment. In both jurisdictions, the exclusions from coverage applying to notice of termination generally also apply to severance pay.

Pension Benefits Legislation

In each jurisdiction, special legislation seeks to ensure that

private employee pension plans meet certain minimum standards. It does not require that such plans be established. These laws generally require that: (1) employers pay for at least 50 percent of the accrued vested pension in defined benefit plans; (2) pension benefits vest after no more than a stipulated maximum period of service (which varies but is most often two years); (3) employees may upon leaving employment transfer their vested benefits either to a new employer's pension plan or to an individual retirement savings plan (known as an RRSP) or a deferred life annuity; (4) plans are adequately funded and safely invested; (5) plans provide for surviving spouse benefits; and (6) plans permit early retirement, subject to actuarial reductions in benefit levels, ten years prior to the plan's normal retirement date.

In all jurisdictions except Newfoundland, the law provides that part-time employees must be entitled to participate in pension plans, subject to eligibility requirements. In most cases the employee must have completed twenty-four months of continuous service and earned at least 35 percent of the Year's Maximum Pensionable Earnings under the Canada and Quebec Pension Plans (\$38,300 in 2001). Many part-time workers with relatively low wages and/or relatively short workweeks will not meet this threshold. Part-time employees are not entitled by law to the same pension benefits, prorated, as full-time employees, except in Saskatchewan.

SOCIAL INSURANCE AND OTHER INCOME SUPPORT PROGRAMS

Public Health Insurance

Each jurisdiction has a comprehensive public health insurance plan that covers most health services provided by hospitals and medical practitioners. Each health insurance plan is jointly funded by the federal government and the province in which it applies. National legislation ensures that those who move between provinces remain covered by at least one plan.

Subject to minor exceptions, all residents of each province are covered by that province's health insurance plan. Generally, a resident is a Canadian citizen or lawful permanent resident who makes his or her home in the province and is present in the province for a portion of the year (generally six months). In Manitoba, persons from outside Canada with work authorizations for less than one year are not eligible for coverage.

In general, there are no eligibility requirements. In Ontario, however, most new or returning residents are subject to a three-month waiting period before they are entitled to coverage.

Public Retirement Pensions

Canada Pension Plan

The Canada Pension Plan (CPP) and the Quebec Pension Plan (QPP) provide retirement pension benefits based upon worker contributions. Pension benefits are equal to 25 percent of the worker's "average monthly pensionable earnings" during the worker's "contributory period,"¹¹ subject to a maximum set at 25 percent of the average wage in Canada in recent years.¹²

The CPP and QPP cover most employed and self-employed workers. Earnings from certain types of employment are excluded from pensionable earnings, however. Important exceptions include: (1) employment by an agricultural, fishing, hunting, trapping, forestry or logging employer who either pays the employee less than \$250 in cash remuneration in a year or employs the employee on terms providing for payment of cash remuneration for a period of fewer than twenty-five working days in a year; and (2) employment of a casual nature otherwise than for the purpose of the employer's trade or business.

To be eligible for a retirement pension, a worker must have contributed to the plan in one calendar year. Subject to a yearly maximum for pensionable earnings, contributions are made on all pensionable earnings above \$3,500. Thus most Canadian workers are eligible. Note, however, that the value of a retirement pension is directly dependent upon a worker's rate of earnings and the length of time that he or she spends in the workforce.¹³

Old Age Security Pension

The Old Age Security (OAS) program provides a modest taxable monthly benefit to all persons aged 65 and over who meet residency-based eligibility requirements. The pension is earned at a rate of one-fortieth of the maximum pension for each year of residence in Canada after the age of 18, up to a maximum of 40 years.

Eligibility is not connected to employment history. To qualify for an OAS pension, a person must have a minimum of ten years' residence in Canada. He or she must also be a Canadian citizen or legal resident of Canada on the day preceding the approval of his or her application for benefits or, if no longer living in Canada, must have been a Canadian citizen or a legal resident of Canada on the day preceding the day he or she stopped living in Canada.

Unemployment Insurance

Employment Insurance Program – Regular Benefits

The federal Employment Insurance Act provides eligible workers with some protection against an interruption of earnings from employment due to involuntary layoff or termination of employment. The Employment Insurance program replaces a portion of the worker's salary for a period of time. There is a two-week waiting period before any benefits become payable. For most workers the basic benefit rate is 55 percent of the worker's average weekly

insured earnings,¹⁴ up to a maximum of \$413 per week. A worker is eligible to receive benefits for between fourteen and forty-five weeks, depending upon the local unemployment rate and the number of hours that he or she worked in insurable employment in the previous fifty-two weeks or since his or her last previous benefits claim.¹⁵ If a worker receives severance pay, his or her eligibility for unemployment benefits will be delayed by the number of weeks' pay he or she receives as a severance payment.

The Employment Insurance program includes most forms of employment within its definition of insurable earnings. Important exceptions include: (1) employment of a casual nature other than for the purpose of the employer's trade or business; (2) employment of a person by a corporation if the person controls more than 40 percent of the voting shares of the corporation; (3) employment that constitutes an exchange of work or services; (4) employment if the employer and employee are not dealing with each other at arm's length; (5) agricultural employment by an employer for fewer than seven days in a year; and (6) agricultural employment for which the employee receives noncash remuneration in whole or in part. Although self-employed workers are therefore generally excluded, there are special provisions providing benefits for self-employed fishers.

To qualify for regular benefits, a worker must have worked between 420 and 700 hours of insurable employment, depending on the local unemployment rate, during the previous 52 weeks or since his or her last benefits claim, whichever is shorter. However, where the claimant has not worked at least 490 hours in the 52-week period before the 52-week qualifying period, he or she will require 910 insured hours. Once these requirements are met, a worker must be available for suitable employment.

Since the Employment Insurance program insures only against involuntary job loss, a worker will not be covered if he or she voluntarily quits employment, unless he or she quits for just cause. Just cause can include being required to provide care for a child or another member of the worker's immediate family or to work excessive overtime.

Employment Insurance Maternity and Parental Benefits

An eligible worker is entitled to Employment Insurance (EI) benefits if he or she suffers a reduction in earnings that is at least 40 percent of his or her normal weekly earnings because he or she ceases to work due to pregnancy or the need to care for a recently born or adopted child. Such workers are entitled to: (1) a maximum of fifteen weeks of maternity benefits payable only to the natural mother during the period around the birth of the child; (2) a maximum of thirty-five weeks of parental benefits payable to natural and adoptive mothers and/or fathers. There is a two-week waiting period before benefits become payable. However, only one waiting period needs to be served when a claimant receives both maternity and parental benefits for the same birth or adoption, or when two parents share parental benefits.

The coverage of EI maternity and parental benefits is the same as that of regular benefits, described above. Eligibility

requirements differ, however. In particular, the rule requiring reentrants to the labor market to have worked 910 hours does not apply. In addition, all workers need to have worked 600 hours in their 52-week qualifying period.

Disability Insurance

Work-Related Accident or Injuries: Workers' Compensation Laws

Workers' compensation statutes applying in each jurisdiction establish a system through which workers can seek compensation for injuries or illnesses arising out of or in the course of employment. Compensation benefits are tax-free and are based upon earnings at the time of the accident or illness. Provincial programs insure between 75 and 90 percent of net earnings, up to a maximum annual amount varying between \$38,300 and \$60,600 (the latter in Ontario in 2001). The level of compensation will depend upon the degree of disability that the injury or illness causes. On this basis, workers' compensation systems replace income lost due to both temporary and permanent occupational injuries and illnesses.

There are generally no eligibility requirements to receive benefits if the worker is covered by the workers' compensation system. Most employers are required to participate in the workers' compensation program of their jurisdiction. Generally, employers that are excluded or exempted from this mandatory coverage may join the plan voluntarily. Similarly, independent contractors may apply to be covered voluntarily under the workers' compensation system, at their own expense.

In a majority of jurisdictions, some or all domestic workers are excluded from mandatory coverage. In a number of jurisdictions those who work in farming, professional workers, casual workers (those employed otherwise than for the purposes of the employer's business), and fishers are excluded. A number of jurisdictions also exclude "outworkers," generally defined as a person "to whom articles or materials are given in order to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his or her own home or on other premises not under the control or management of the person who gave out the articles or materials."

Other Disabilities

Injured or ill workers who are not covered by a workers' compensation program may be covered by Employment Insurance program sickness benefits. An eligible worker is entitled to up to fifteen weeks of EI benefits if he or she ceases to work due to illness, injury, or quarantine. If his or her income is reduced by more than 40 percent of normal weekly earnings, he or she is considered to have had an interruption of earnings. There is a two-week waiting period before benefits become payable. The coverage of EI sickness benefits is the same as that of regular benefits, described above. Eligibility requirements differ, however. In order to qualify for sickness benefits, the claimant must have worked

600 hours in the 52-week qualifying period (or since the start of the last claim) regardless of the unemployment rate in the area where he or she resides. Sickness benefits are not subject to the new entrant provisions.

Disability Pensions

The Canada Pension Plan (CPP), which applies in all of Canada except Quebec, and the Quebec Pension Plan (QPP), which largely parallels the CPP, provide disability benefits to persons up to the age of 65 who are unable to work due to a severe¹⁶ and prolonged disability. The QPP also provides benefits to those between the ages of 60 and 65 who cannot perform their usual gainful occupation. The CPP/QPP disability pension consists of a basic flat-rate amount plus an earnings-related component equal to 75 percent of a retirement pension calculated as if the person were retiring at age 65 (see above), subject to a maximum benefit amount¹⁷ per month. Those who have dependents are eligible for a child supplement, and the children of disabled contributors may also be eligible to receive a flat-rate benefit. There is a three-month waiting period before benefits become payable.

The CPP and QPP cover most employed and self-employed workers. Earnings from certain types of employment are excluded from pensionable earnings, however. Important exceptions include: (1) employment by an agricultural, fishing, hunting, trapping, forestry, or logging employer who either pays the employee less than \$250 in cash remuneration in a year or employs the employee, on terms providing for payment of cash remuneration, for a period of fewer than twenty-five working days in a year; and (2) employment of a casual nature otherwise than for the purpose of the employer's trade or business.

Prior to January 1, 1998, to receive disability benefits a worker must have contributed to the plan for at least two of the three years or five of the ten years prior to making the claim. Contributions are made on the basis of annual income above \$3,500 per year, and thus if a person does not earn that amount in a year, that year will not count toward eligibility. If a person became disabled after December 31, 1997, he or she must have contributed to the CPP in four of the last six years and have earned at least 10 percent of each Year's Maximum Pensionable Earnings (YMPE). The YMPE for 2001 was \$38,300. The QPP also provides benefits to those who have made contributions to the plan during at least half of their contributory period (subject to a two-year minimum).

Direct Income Support

The main direct income support programs for low-income workers and the poor are briefly described below. In general, access to benefits under these programs is not related in any proximate way to whether a person has held non-standard work.

Social Assistance

Each province and territory has a social assistance program, partially funded by federal transfer payments, designed to provide modest financial assistance to low-income individuals and families with few or no assets. Benefits are intended to cover basic needs such as food, clothing, shelter, utilities, and basic personal and household needs. In some cases special assistance is available to assist with school expenses or the special needs of disabled persons.

Old Age Security Program

The Guaranteed Income Supplement (GIS) is a modest, nontaxable monthly benefit paid to residents of Canada who receive an OAS pension and have little or no other income. Recipients must reapply annually for GIS benefits. To receive the GIS benefit, a person must be receiving an OAS pension (see above).¹⁸

A modest monthly allowance is paid to the 60 to 64-year-old spouse or common-law partner of an OAS pensioner if the couple has a very low income and few assets.¹⁹ A slightly higher survivors' allowance is paid to a person of similar age and financial position whose spouse or common-law partner has died.

Tax Benefits for Low Income Earners

Provincial and federal income tax laws provide a number of tax breaks (deductions and nonrefundable tax credits) to low-income Canadians. Such programs include the Canada Child Tax Benefit (to assist families), the federal child care expense deduction, the federal Equivalent to Spouse Credit (designed to reduce the financial burden on single parents who are raising children alone), various provincial programs also designed to assist families, the federal Medical Expense Tax Credit, the federal Disability Tax Credit, and the federal Goods and Services Tax Credit (designed to offset some of the regressive effects of a value added tax). These tax breaks are generally available to all taxable residents of the relevant jurisdiction.

Notes

- 1 For Canada, the statistical definition of a nonstandard worker used in the second edition of *North American Labor Markets* is based upon definitions used in Statistics Canada's Survey of Working Arrangements, 1995, contained in that year's *Labour Force Survey*. The definition includes self-employed workers without paid help, temporary employees, and part-time employees.
- 2 Official statistical definitions include as temporary employees only those: a) who are employed on a seasonal basis; b) who are employed on an on-call basis; c) who are employed under a contract determined by the employer prior to hiring to be for a fixed term or defined task or project; or d) whose work is arranged and paid for by a temporary help agency.
- 3 *Montreal v. Montreal Locomotive Works* [1947] 1 D.L.R. 161 (P.C.).
- 4 See, for example, *Wiebe Door Services v. M.N.R.*, [1986] 5 W.W.R. 450 (F.C.A.).
- 5 See, for example, *Pointe Claire (City) v. Quebec (Labour*

- Court) [1997] 1 S.C.R. 1015.
- 6 England, Christie and Christie, *Employment Law in Canada*, 3rd Ed. (Toronto: Butterworths, 1998) at 2.32.
 - 7 The minimum number of affected employees required to trigger advance notice provisions generally ranges between 10 and 100.
 - 8 Brooks v. Canada Safeway Ltd. [1989] 1 S.C.R., 1219 26 C.C.E.L.1.
 - 9 Egan v. Canada, *supra*.
 - 10 See generally, England, Christie and Christie, *Employment Law in Canada* (3rd Ed.) (Toronto: Butterworths, 1998) at 2.5.
 - 11 Average monthly pensionable earnings are equal to the total pensionable earnings divided by the total number of months in the contributory period, or by 120 months minus any months excluded by reason of disability, whichever is greater. The contributory period is the period commencing January 1, 1966, or when the worker reaches 18 years of age, whichever is later, and ending when he or she reaches age 65 (before the end of 1986) or begins receiving a retirement pension or reaches age 70 (after 1986). Periods of low or zero earnings, up to 15 percent of the worker's contributory period, may be excluded from the calculation of average monthly pensionable earnings, as may low earnings periods while caring for a child under the age of seven. Workers can opt to begin receiving retirement pension benefits at any time between the ages of 60 and 70. Those choosing to begin receiving benefits before age 65 receive reduced benefits, while those delaying benefits receive increased benefits.
 - 12 For 2000, the maximum was set at \$762.92 per month.
 - 13 See note 11 above.
 - 14 Average weekly insured earnings are calculated by dividing the worker's total earnings during the previous 26-week period by the greater of the total number of weeks that he or she worked during that period or a divisor which ranges between 14 and 22, increasing with the local unemployment rate.
 - 15 For example, where the local unemployment rate is between 9 and 10 percent, a worker must have 560 hours of insurable employment to be entitled to twenty weeks of benefits. With fewer than 560 hours, he or she is entitled to no benefits. As his or her hours increase, the number of weeks of benefits to which he or she is entitled will increase, up to 1820 hours, at which point benefits may continue for up to forty-four weeks.
 - 16 To be "severe," a condition must prevent a worker from working regularly at any job.
 - 17 This amount is adjusted annually. For 2000, it was \$917.43.
 - 18 Some immigrants may not be eligible. A sponsored immigrant from a country with which Canada has a social security agreement is not eligible for GIS during his or her sponsorship period (up to a maximum of ten years) unless he or she: (1) has ten years of residence in Canada after the age of 18; (2) resided in Canada as a Canadian citizen or permanent resident on or prior to March 6, 1996, and will become eligible for benefits on or before January 1, 2001; or (3) was receiving benefits under the Old Age Security Act for the month of March 1996 or earlier. Nonsponsored immigrants with less than ten years of residence in Canada who qualify for OAS under a social security agreement receive reduced benefits, prorated according to the fraction of ten years that they have spent as residents of Canada.
 - 19 Not all immigrants are eligible. Benefits are paid only to persons who: (1) have resided in Canada for at least ten years after turning 18; and (2) were Canadian citizens or legal residents on the day preceding the approval of their application for benefits. A sponsored spouse of an OAS pensioner with less than ten years of residence in Canada is not eligible for the benefit for the period of his or her sponsorship, up to a maximum of ten years, unless he or she: (1) was receiving a pension in March 1996 or before; or (2) was residing in Canada or had resided in Canada as a Canadian citizen or permanent resident before March 7, 1996, and will receive a pension in January 2001 or before. The benefit is prorated in the case of a person who has not resided in Canada for ten years after reaching age 18 and (1) was not residing or had not resided in Canada before March 7, 1996, as a Canadian citizen or permanent resident; or (2) was residing in Canada on that date or had resided in Canada prior to that date as a Canadian citizen or permanent resident but will not receive a pension in January 2001 or before. Entitlement is established at the rate of one-tenth of the benefit for each year of residence in Canada after reaching age 18 and is built up by an additional one-tenth for each additional year of residence in Canada.

3. MEXICO

DEFINITIONS AND JURISDICTION

The Labor Relationship

The key legal relationship around which Mexican labor and social security laws are generally organized is the labor relationship (*relación de trabajo*). This is the relationship between a worker and an employer. A labor relationship exists when, regardless of the origin of the relationship, a worker performs subordinate work for another person in exchange for remuneration. No formalized contract of employment is necessary to constitute the relationship. A “worker” is thus an individual person who performs subordinate work for another person in exchange for remuneration.

Subordinate work is work carried out by an individual obligated to obey the directions, instructions, or orders of the person for whom it is done. A person who provides temporary services to another (such as yard work or home maintenance) may thus be in a labor relationship. Some agreements to provide services will not be considered a labor relationship, since they do not involve subordinate work. For example, the relationship between a professional (such as a physician, architect, or lawyer) and a client is often excluded from this category.

Legal Definition of Informal Sector Work

In order to describe the legal situation of informal sector workers, components of key statistical definitions can be combined into a single list of legally defined groups:¹

- Persons working in small establishments; i.e., all workers and other individual persons (such as the employer) who carry out work in a small establishment (except persons working in specified industries).
- Self-employed nonprofessionals; i.e., independent business persons who do not employ others, except professionals as defined in the Mexican Classification of Occupations, 1980.
- Domestic workers.
- Persons doing unremunerated work.

Contracting and Home Work: Who Assumes the Obligations of an Employer?

An enterprise that makes use of workers supplied by a labor contracting agent² is jointly and severally liable for all obligations to those workers under the Federal Labor Law (*Ley Federal del Trabajo*, LFT). In such cases workers are entitled to the same employment conditions and rights as workers carrying out similar work for the enterprise.

Similarly, if an enterprise performing labor or services

exclusively or principally for another enterprise does not have sufficient resources to meet its obligations toward its workers, the enterprise for which the labor or services are performed will be jointly and severally liable in respect of those obligations (Art. 13 and 15). In such situations, workers are entitled to terms of employment proportional to those enjoyed by workers performing similar tasks in the enterprise for which the work is being done.

Any person who gives out home work, irrespective of whether he or she provides the tools or the materials for the work, and irrespective of the form of remuneration, is considered to be the employer of those to whom the work is given (Art. 314). A home worker has the rights and obligations of a worker in respect of each of two or more employers for whom he or she works (Art. 315). The use of intermediaries or agents to distribute home work is prohibited (Art. 316). Home workers are to be paid at the same rate as workers performing similar work in the enterprise or establishment of the employer carrying out such work (Art. 323).

Jurisdiction

The most important labor and employment law protections, social security, and income support programs for private sector workers in Mexico are established by federal legislation. The LFT and Article 123, Part A, of the federal Constitution govern both the worker-employer relationship and collective labor relations for private-sector workers in Mexico.

LABOR AND EMPLOYMENT LAWS

In general, the labor rights contained in the Constitution extend to all workers within the national territory regardless of occupation or status. The provisions of the LFT generally apply to all workers and employers, except to family businesses in which a husband and wife, parents, or ascendants and descendants and wards are employed exclusively. The occupational health and safety standards of the LFT apply to all employers. The few specific exceptions to coverage and qualifying requirements under the LFT are noted below.

Labor Relations Law – Collective Labor Rights

The Mexican Constitution provides workers the right to freely associate, to organize unions, and to strike. The LFT also provides these rights and establishes legal rules for collective bargaining between unions and employers. The LFT provides these collective labor rights to all workers except

family members employed in a family enterprise. Workers whose jobs are legally classified as “confidential,” such as managers, general supervisors, or workers in a position of trust, are legally prevented from joining other workers’ unions and in practice rarely form unions (Art. 363).

Employment Security Protections

Rights to Continuation of Employment

The Constitution provides that a worker may not be dismissed without just cause and may claim reinstatement or compensation to remedy unjust dismissal, subject to certain exceptions to the right to reinstatement provided by legislation.

The LFT also provides that a worker may not be dismissed without just cause and may claim reinstatement or compensation. Under the LFT, a worker who enters into employment has a contract of employment for an indefinite term unless the parties agree at the time of hiring to a specific contract duration. A contract for a specific duration can be made only in situations stipulated in the LFT, such as when the work to be done is of a temporary nature or when the contract is to provide a temporary substitute for another employee. In the agricultural, livestock raising, or forestry industries, workers must remain in the service of the same employer for three months before they are presumed to be permanent employees (Art. 280).

Under Article 49 of the LFT, an employer is exempted from the obligation to reinstate certain types of worker even if the worker is dismissed without just cause. These include workers employed in the enterprise for less than one year, confidential employees, domestic service workers, and casual workers. In such cases (except in the case of a domestic worker employed for less than three months) the employer is required to give the worker compensation consisting of a payment of three months’ wages, a payment of twenty days’ wages per year of seniority, the statutory seniority allowance (twelve days’ pay per year of service), and arrears of wages from the date of discharge to the date on which compensation is paid.

The labor relationship may be terminated in cases of insolvency or unforeseen disaster (Art. 53, 434-438). In such cases workers are entitled to severance pay (see below), and layoffs must take place in reverse seniority order.

Rights to Leave and Reinstatement for Medical, Work-Related Illness or Injury, or Family Reasons

In general, absence from work constitutes just cause for dismissal only if a worker is absent more than three times in a period of thirty days without the employer’s permission or without sufficient reason. Illness certified by a doctor’s note is sufficient reason (Art. 47(X)).

Nonetheless, where a worker’s physical or mental incapacity or obvious disability make it impossible for him or her to perform his or her job, the labor relationship may be terminated (Art. 53). On the other hand, Article 498 of the LFT requires an employer to reinstate a worker who

has suffered an employment-related injury or illness if the worker is able to resume work and reports for work within one year of the commencement of his or her incapacity. Article 499 requires the employer to provide a different job to an injured worker unable to perform his or her normal job, in accordance with the provisions of any collective contract that may be in place between the employer and a union representing its workers.

Article 123(A)(V) of the Constitution and Article 170 of the LFT entitle women workers to maternity leave at full pay during the six weeks preceding and the six weeks following confinement for delivery of a child. Under the LFT, this leave may be extended, at half pay for a maximum of sixty days, by the time necessary if it is impossible for the woman to return to work on account of her pregnancy or confinement. LFT Article 170 also gives a woman worker the right to return to the job that she held prior to her maternity leave, as long as she returns to work within one year of the birth. The LFT does not exclude any group of workers from these provisions. Article 101 of the Social Security Law (Ley del Seguro Social, LSS) entitles insured women workers to full pay forty-two days prior to and forty-two days following childbirth. Article 102 of the LSS restricts recipients of this benefit to women for whom at least thirty weekly contributions have been made during the previous twelve-month period. Article 103 of the LSS stipulates that the employer shall be responsible for payment of the woman worker’s wages in the event that a woman worker does not have the requisite contributions.

Antidiscrimination Protections

LFT Article 3 prohibits discrimination in employment on the basis of race, sex, age, religious or political beliefs, or social condition. LFT Article 133 prohibits employers from refusing to employ workers on the basis of age or the worker’s sex. Article 164 provides that “women enjoy the same rights and have the same obligations as men.”

Article 123(A) (VII) of the Constitution provides that equal wages shall be paid for equal work, regardless of sex or nationality. The LFT provides more specific guarantees of equal pay for equal work.³

Article 170 guarantees the right of women workers: to light work during the period of pregnancy; to pregnancy leave (see above); to two extra break periods each day for nursing an infant; and to maintain all seniority for the period of maternity leave.

In addition to general protections for women workers in the LFT, the LSS recognizes that lack of child care is a factor that inhibits women workers from thriving in the workplace by providing child care insurance. The child care insurance program provides parents with child care while they work. This insurance is available to workers in the formal and informal sectors.

Occupational Safety and Health Protections

Article 123 (A) (XV) of the Constitution establishes a general employer duty to protect the health and safety of employees. Various laws, including the LFT and the LSS, require employers to obey safety standards, maintain compliance and compliance verification systems, ensure proper equipment and hazardous substance controls, facilitate the operation of joint health and safety committees, provide worker training and information about risks, and protect pregnant and lactating women. Detailed health and safety requirements included in Official Mexican Standards apply to particular hazards and particular types of work. Health and safety provisions apply to all employers.

Other Minimum Employment Standards

General

The Mexican Constitution contains provisions regarding minimum wages, hours of work and work shifts, overtime pay, days of rest, child labor, profit sharing, housing standards, training and skills development, and other labor standards. The LFT contains more detailed provisions. Title 3 of the LFT provides minimum standards for working hours, days of rest, minimum wages, payment of salaries, year-end bonuses, limits on salary deductions, profit sharing, and status and seniority in job assignments and promotions. Title 4 addresses such matters as provision of tools, seats and lockers to workers, leaves of absence for elections or holding a public or union office, worker housing standards, worker housing benefits, and training and skills development. Articles 5 and 22 and Title 5 Bis cover child labor, prohibiting employment of children under 14, prohibiting work by children under 16 or under 18 in certain industries, and establishing special protective conditions for workers between 14 and 18 years of age.

Severance Pay and Other Payments on Termination of the Labor Relationship

Article 123(A)(XXII) of the Constitution provides that an employer who dismisses a worker without just cause, for joining an association or a union, or for taking part in a legal strike may be required, at the election of the worker, either to fulfill the contract or to pay the worker the amount of three months' wages.

The LFT entitles workers to various payments upon the termination of a labor relationship. A worker who claims to have been unjustly dismissed may elect to claim either reinstatement or a severance payment of three months' wages. On the basis of these rights such workers often negotiate enhanced severance payments.

A worker whose labor relationship is terminated due to insolvency or unforeseen disaster is entitled to three months' severance pay and to the corresponding seniority allowance (Art. 436 and 162).

In addition to any severance pay to which he or she may be entitled, a worker is entitled to a statutory seniority allow-

ance equivalent to twelve days' pay per year of service and a prorated amount for a partial year. Workers who resign voluntarily are eligible for this allowance only if they have at least fifteen years of service.⁴

Finally, the LFT specifies nine reasons for a worker to terminate employment without liability and still receive statutory severance pay (*indemnización*), which is normally three months' pay plus twenty days' pay for each year of service (Art. 51).

The expiry of a limited term specified in advance for a labor relationship does not give rise to a right to any payment under the LFT (Art. 53) or the Constitution.

Qualifying Requirements

A worker must have been in the service of an employer for more than one year to be entitled to vacation leave under the LFT (Art. 76). In addition, casual and temporary workers are entitled to an annual vacation period in proportion to the number of days worked in a given year (Art. 77).

On December 20 of each year, workers are entitled to an annual bonus equal to fifteen days' wages. Workers who have not completed one year of service are entitled to payment of their bonus in proportion to the time that they worked during the year (LFT Art. 87).

Similarly, the profit sharing provisions of the LFT require that part of the profits of an enterprise be divided according to the number of days in the year worked by each worker. Casual workers are entitled to profit sharing, however, only if they have worked for the enterprise for more than sixty days in the year (Art. 127).

Special Provisions for Domestic Workers

The remuneration of domestic workers includes their room and board, deemed equivalent to 50 percent of the cash wage, unless the worker and the employer agree to the contrary (Art. 334). Employers of domestic workers are required, in the case of the illness of the worker (other than an occupational illness, discussed below), to pay the worker's wages for up to one month and to provide him or her with proper medical care. In cases of chronic illness, the employer is required to provide up to three months' medical service if the worker has been in the employer's service for more than six months (Art. 338). In the event of the worker's death the employer is required to pay his or her funeral expenses (Art. 339). Employers are not required to make contributions to the National Housing Fund on behalf of domestic workers (Art. 146).

Special Exemptions

Enterprises whose capital and labor generate an annual declared income tax no greater than a threshold amount determined by the federal labor ministry (*Secretaría del Trabajo y Previsión Social*, STPS) after consultation with the federal finance ministry (*Secretaría de Economía*), and in any event no greater than six million pesos, are exempted from the profit sharing requirements of the LFT (Art. 126).

SOCIAL INSURANCE AND INCOME SUPPORT PROGRAMS

The LSS provides a range of social benefits to qualified participants, including retirement and old age pensions, short-term and long-term disability benefits, health care benefits, maternity benefits, and workers' compensation insurance, among others.⁵

Benefits coverage is either compulsory or voluntary. Benefits coverage is compulsory for all workers who are in a labor relationship, whether permanent or temporary. Others may obtain coverage on a voluntary basis (see below). Through voluntary enrollment, workers can therefore benefit from the social security system, irrespective of whether they are considered to be part of the formal or the informal sector.

Benefits are funded by a combination of employer, worker, and government contributions. Contribution rates vary by type of benefit. Under the compulsory regime of the LSS, employers are obligated to register workers with the Mexican Institute of Social Security (Instituto Mexicano del Seguro Social, IMSS); keep records of worker salaries, wages, and days worked; determine and pay employer contributions to the IMSS; and make proper withholdings from worker salaries to pay worker contributions to the IMSS. If an employer fails to make contributions to the IMSS or makes partial contributions, the IMSS will indemnify the covered worker and hold the employer liable for reimbursement and possibly additional fines.

In 1997, the LSS was amended to provide coverage for workers who are not in a labor relationship. Workers who are not in a labor relationship and workers whose labor relationship ends may seek voluntary coverage under the LSS. Under the voluntary regime, workers pay into their own IMSS accounts. All workers with voluntary coverage must pay contributions to the IMSS equal to the total contributions that both the employer and worker would make under the compulsory regime. This is a substantially higher amount than workers pay under the compulsory regime. A person who voluntarily affiliates with the IMSS who has not previously accumulated 52 weeks of IMSS contributions under the compulsory regime must pay contributions in annual installments in advance. If he or she fails to pay the contribution, his or her voluntary affiliation is deemed to have ended. Workers who are not in a labor relationship may form groups to obtain group coverage under the voluntary regime.

A person who was previously in a labor relationship and who contributed to the IMSS for at least fifty-two weeks may voluntarily continue coverage for disability and life insurance as well as retirement and old age benefits under special terms. Under those terms, he or she may pay contributions in advance on a monthly basis. If he or she fails to make contributions for six months, the voluntary affiliation is deemed to have ended.

Insured workers who are no longer part of the compulsory regime preserve the rights they acquired to disability

and life insurance for a period equal to one-fourth of the time covered by their weekly contributions. This period must be at least twelve months. The rights of a worker who reenrolls in the IMSS are determined by how long contributions to the worker's account were interrupted. If the worker's contributions were interrupted for less than three years, all the preserved contributions are recognized immediately at the time of enrollment. If the interruption was between three and six years, all of the previous contributions are recognized after the worker makes twenty-six weeks of contributions. If the interruption was more than six years, the worker must make a year's worth of contributions following reenrollment before the previous contributions are recognized. Contributions made to a worker's accounts for retirement and cessation of employment due to old or advanced age are registered under the worker's affiliation registration number, so contributions made by different employers during the worker's lifetime accumulate under that registration number.

Health Insurance

Article 487 of the LFT requires employers to provide workers with medical assistance, rehabilitation treatment, hospitalization, medication, and orthopedic and prosthetic appliances required in the event of a work-related accident or illness. Employers who register their employees with the IMSS are in compliance with this requirement, and IMSS assumes the responsibility for providing health care for injured workers.

In addition to being entitled to health care for work-related injuries and illnesses under the LFT and the LSS, workers in a labor relationship and their dependents are entitled to comprehensive health care coverage for nonwork-related illnesses and accidents under the compulsory regime of the LSS. This coverage includes preventive health care, rehabilitation, etc. Payment for coverage is made to the IMSS, which provides medical care itself or through hospitals and clinics contracted by it. Workers who retire due to old or advanced age with at least 750 weeks of covered work are entitled to continuing health care coverage.

Individuals with low incomes who are not covered by the social security system are provided with medical assistance by public hospitals and medical centers such as those of the federal Secretariat of Health (Secretaría de Salud), Government of the Federal District (Gobierno del Distrito Federal), and IMSS-Solidaridad (Social Security Institute). Additionally, Article 240 of the LSS establishes a Family Health Insurance program whereby persons who work in the informal sector have access to medical and hospital assistance.

Public Retirement Pensions

The LSS provides for retirement pensions, pensions for cessation of employment due to advanced age or old age, and retirement medical benefits. The LSS requires a minimum

of 1,250 weeks of contributions before a worker becomes entitled to both pension and medical retirement benefits. For workers with intermittent work histories, reaching this threshold may take considerably longer than twenty-five years. The LSS requires a minimum of 750 weeks of contributions for eligibility to receive medical benefits without a pension.

Disability Insurance

Work-Related Accidents or Injuries

Article 123(A)(XIV) of the Constitution and Title IX of the LFT entitle workers to wage indemnity in the event of occupational injury or illness. The LFT places on the employer the obligation to pay these amounts. Under the LFT, workers with a temporary total disability are eligible to receive the daily occupational or regional minimum wage (whichever applies to them), plus all other remuneration (except overtime) such as commissions or in-kind benefits, subject to an upper limit of twice the applicable minimum wage. Benefits are payable on the first day of injury. If a worker is permanently and totally disabled, he or she is entitled to a payment equal to three years' salary. In the case of permanent partial disability, he or she is entitled to a payment equal to a percentage of the total disability amount, depending upon the extent of partial disability. In the event of death resulting from occupational injury or illness, the worker's family is eligible for death benefits equal to two years' salary plus two months' pay for funeral expenses. Article 513 defines 161 occupational diseases and the occupations considered susceptible to those diseases. To receive benefits for an occupational disease, a worker must be diagnosed with one of the 161 conditions and must have worked in an occupation stipulated in Article 513 as associated with the condition.

As noted above, the LSS requires employers to register with the IMSS and obtain workers' compensation coverage for their workers. An employer that registers its workers with the IMSS is presumed to have complied with its obligations under the LFT.⁶ The IMSS in turn assumes the responsibility for making workers' compensation payments to workers who suffer on-the-job injuries and illnesses. If a worker is injured as a result of the inexcusable fault of his or her employer, the IMSS is required to issue additional benefits to the worker, and the employer is required to reimburse the IMSS for those benefits.

Disability Pensions

The LSS provides temporary and permanent disability benefits to registered workers who meet eligibility requirements. To be eligible a worker must be disabled within the meaning of the LSS⁷ and must have made social security contributions for 250 workweeks, unless he or she suffers from a greater than 75 percent disability, in which case only 150 weeks of contributions are required. Benefits vary according to the earnings history of the worker and the number of his or her dependents but must equal, at a minimum,

the general minimum wage of the Federal District. There is no waiting period for benefits.

Direct Income Support

Most income support programs in Mexico operate within the federal Secretariat of Social Development (Secretaría de Desarrollo Social, SEDESOL). The primary income support program is the Education, Health and Nutrition Program (Programa de Educación, Salud y Alimentación, PROGRESA). PROGRESA was implemented in 1997 and was designed to augment the basic capabilities of persons living in extreme poverty, facilitating their access to goods and social services that will allow them to acquire the skills and aptitudes needed to attain self-sufficiency. Between 1997 and 1999, the number of families benefiting from PROGRESA increased from 404,000 to 3.14 million.⁸ Families that fall within the category of "extreme poverty" qualify for participation in PROGRESA.⁹ PROGRESA provides support for these families in three areas of basic need: food, health care, and education. The nutrition component consists of a monthly economic grant (145 pesos in 2001) aimed at assisting beneficiaries to increase the amount and diversity of their food consumption, as well as nutrition packets for small children and pregnant or lactating mothers.¹⁰ The health care component consists of free health care, focusing on preventive care. The education component consists of monthly grants to families for each household member under 18 years old who is enrolled between the third year of elementary school and the third year of secondary school.¹¹ Another goal of PROGRESA is to promote gender equality, which it does by paying all monetary benefits directly to women and by providing a higher grant for a girl in secondary school.¹²

SEDESOL provides subsidies for poor families to purchase tortillas through the Fund for Tortilla Subsidy Liquidation (Fideicomiso para la Liquidación de la Tortilla) as well as reduced-price milk for families with children under a certain age through the Milk Distribution Program (Programa de Abasto Social de Leche). The DICONSA (Distribuidora Conasupo, S.A.) program distributes basic foods to marginalized populations at low prices. In addition to the programs administered by SEDESOL, low-income families may receive free school breakfasts and basic food packages through the National System for Family Development (Sistema Nacional para el Desarrollo Integral de la Familia). Some of these programs are the Food Program (Programa de Raciones Alimenticias), the Food Assistance Program (Programa de Asistencia Social Alimentaria), and the Popular Kitchens Program (Programa de Cocinas Populares y Unidades de Servicios Integrales).

Finally, it is worth mentioning the Employment Training System (Sicat, previously called Probecat), which not only helps the unemployed to integrate into the formal employment sector through training courses, but at the same time provides them with an income during the training period. This income ranges from one to one and one-half

times the minimum wage.

A person's eligibility for benefits under these programs is not directly affected by whether he or she works in the formal sector.

Notes

- 1 The second edition of *North American Labor Markets* makes use of three definitions of the informal sector: (1) the ENAMIN definition (STPS/INEGI, Encuesta Nacional de Micronegocios); (2) the special definition articulated by Jusidman for STPS (Clara Jusidman, *El sector informal en México*, Cuadernos de Trabajo N. 2, Mexico, Secretaría del Trabajo y Previsión Social, México, 1993); and (3) workers who are not registered as eligible for social security benefits. This last definition is a purely empirical one and therefore will not be considered here. The ENAMIN survey defines the informal sector as establishments having six or fewer persons carrying out work, including the owner, except in manufacturing, where the limit is set at sixteen. The definition thus includes both those legally defined as "workers" and others who carry out work (such as the patron). The Jusidman/STPS methodology defines the informal sector as establishments with five or fewer persons carrying out work, plus certain groups based upon occupation or employment status, minus other groups based upon industry classifications. The groups added are (1) "domestic workers"; (2) "self-employed" workers, except "professionals" as defined in the Mexican Classification of Occupations, 1980; and (3) unpaid workers.
- 2 A labor contracting agent is defined as a person or corporation that contracts or intervenes in contracting for the services of a person or persons for the performance of work for an employer, without carrying out such work with the resources of its/his/her own enterprise (Art. 12, 13 and 14, LFT).
- 3 LFT Art. 5, Section XI prohibits any contract of employment, oral or written, that provides a salary lower than that paid to another worker in the same enterprise for work of equal efficiency, in the same class of work, or equal work day on the basis of age, sex, or nationality. Art. 56 requires that employment rights and benefits be afforded to all workers on the basis of equal pay for equal work, without distinction as to race, nationality, sex, age, or religious or political beliefs. Art. 86 repeats the equal pay for equal work principle, expressly providing that "for equal work, performed at equivalent work posts, in an equivalent work day, and in equivalent conditions of efficiency, correspondingly equal pay must be provided."
- 4 The upper limit for the daily salary amount used to calculate this payment is two times the daily minimum wage.
- 5 Public-sector employees in Mexico are covered by a different legal framework, notably by the Statute of the Institute for State Workers' Social Security Services (Ley del Instituto de Seguridad y Servicios Sociales de los Trabajadores al Servicio del Estado) at the federal level and by corresponding legislation in the case of public-sector employees at the local level.
- 6 LSS, Art. 53.
- 7 Under Art. 119 of the LSS, a worker is disabled if, owing to nonoccupational illness or accident, he or she is unable to obtain through similar work remuneration greater than 50 percent of that which he or she normally earned during his or her most recent year of work.
- 8 For more information about the program, see PROGRESA Web site, Principales características y orientaciones estratégicas, <http://www.progresas.gob.mx/>.
- 9 The selection of localities is based on an index of marginalization, which is obtained from the Encuestas de Características Socioeconómicas en los Hogares (Survey of Household Socioeconomic Characteristics). The average monthly income of families participating in PROGRESA is 963 pesos (approximately \$100 U.S.). PROGRESA, *Evaluación de resultados del Programa de Educación, Salud y Alimentación. Primeros avances, 1999*, "El impacto de Progresas en el consumo de las familias beneficiarias" (<http://www.progresas.gob.mx/>), p. 293.
- 10 All monthly economic grants fluctuate with inflation every six months so they do not lose their purchasing power.
- 11 The grants range between 80 pesos (approximately \$8 US) for a child in the third grade primary school and 305 pesos (approximately \$32 U.S.) for a girl in the third year of secondary school. The maximum monthly monetary grant one family may receive for children in school is 750 pesos (approximately \$80 U.S.). The educational component is designed to provide families with an incentive to encourage children to attend school without providing an incentive for families to have additional children.
- 12 In the last six months of 1999, the monthly supports for girls in the first year of secondary school was 250 pesos, compared to 240 pesos for boys; in the second year, 280 for girls, 250 for boys; and in the third year, 305 for girls, 265 for boys. See PROGRESA Web site, <http://www.progresas.gob.mx/>.

4. UNITED STATES

DEFINITIONS AND JURISDICTION

Legal Definition of Contingent or Nonstandard Work

For the purposes of this guide, the term nonstandard worker includes: (1) independent contractors who do not employ any other workers;¹ (2) temporary employees;² and (3) part-time employees.³

Legal Definition of Employment

U.S. labor and employment legislation often does not provide a specific definition of the terms employee and employer. Some statutes (e.g., the Labor-Management Reporting and Disclosure Act, the Fair Labor Standards Act, and the National Labor Relations Act) distinguish an “independent contractor” from an employee, but do so without defining “independent contractor.” Courts and tribunals have thus taken on the task of defining these terms. Subtle differences exist between the interpretations given to these terms under different statutes and by different courts. Only a very general overview is possible here.

A contract labeling a worker as an independent contractor is not sufficient evidence in itself to establish that the worker is not an employee. U.S. courts have elaborated three tests to distinguish employees from independent contractors: the common law agency test; the economic realities test; and the hybrid test. The Supreme Court of the United States has stated that, in general, unless a statute clearly indicates that another definition should be applied, the common law agency test should be used.⁴ Nonetheless, different tests are still used under different statutes.

In general, the three tests differ according to the extent to which they emphasize, on the one hand, the right of the employer to control the manner and means by which the worker performs his or her work (the “right of control”) or, on the other hand, other factors tending to show that the worker is otherwise economically dependent upon his or her purported employer. The common law agency test places the greatest emphasis on the right of control, while the economic realities test allows for greater consideration of other factors indicating economic dependence. The hybrid test provides a middle ground between the other two tests. Despite these differences, courts and tribunals place significant emphasis on the right of control under all three tests.⁵

Multilateral Work Relationships

Courts and tribunals have recognized that in some circumstances two legally distinct enterprises may be treated

as joint employers of a particular worker. For example, a worker who is employed by a temporary agency or employee leasing firm may perform work on a temporary basis for and under the direction of another business. That second business and the temporary agency may be found to be joint employers. In general, an entity may be found to be a joint employer of a worker if it exercises sufficient day-to-day control over that worker’s work, even though the worker remains at the same time the employee of another entity.⁶

This emphasis upon day-to-day control excludes from joint employment many workers who are otherwise economically dependent upon a business but are hired by a subcontractor who contracts directly with that business to provide work. For example, many farmworkers work directly for a farm labor contractor who supervises their work but depend economically on a grower who controls the land upon which they work and many aspects of the raising and harvesting of crops.⁷ These workers are often found to be employees only of the farm labor contractor because of the contractor’s day-to-day control.

Jurisdiction

The key labor and employment law protections in the U.S. are found in federal legislation. Under the Commerce Clause in Article I, Section 8 of the United States Constitution, federal law prevails over state laws on matters of interstate commerce – an extremely broad jurisdiction in the interconnected U.S. economy. The funding and administration of insurance and income security programs are divided between the federal and state governments and vary by program.

LABOR AND EMPLOYMENT LAWS

Labor Relations Law – Collective Labor Rights

The NLRA gives employees the right to organize unions, to bargain collectively through representatives of their own choosing, and to engage in concerted activity, including strikes, for the purposes of collective bargaining or other mutual aid or protection.

The act provides rights only to employees. The common law agency test is used to define employment. The act specifically excludes from coverage, among others, agricultural workers, domestic workers, managers, and independent contractors.

Temporary employees may be excluded from the bargaining units of permanent employees on the grounds

that they do not share a community of interest with those employees because, for example, they are not sufficiently integrated into the operations of the employer, are paid differently, or have different supervision. In such situations, temporary workers lose the potential bargaining power they would gain from bargaining jointly with other coworkers. They could unionize in their own bargaining unit, but may find it difficult to do so.

Workers supplied by one organization to another (e.g., those supplied by a temporary agency to a client) may face a number of difficulties in organizing unions.

For example, such workers may seldom if ever find themselves together, since they may work at multiple and changing work sites. This can make organizing a bargaining unit comprising the workers employed by the supplying organization very difficult. In any event, the supplying organization may not control many of the working conditions at their work sites and may have little scope to increase the price it charges for their services. Thus many terms and conditions of employment may effectively be beyond the reach of a potential collective agreement.

Where the supplier and client organization codetermine matters governing the essential terms and conditions of employment of the supplied workers, the two organizations can be treated as joint employers of those workers. A recent National Labor Relations Board decision determined that temporary employees supplied to a client organization by another employer may be included in a bargaining unit with the client's regular employees at the request of a union representing or seeking to represent the latter group of employees, and if they share community of interest.⁸

On the other hand, if under the common law control test the client organization is not the employer of the supplied workers it need not bargain collectively with them.

Employment Security Protections

Rights to Continuation of Employment

Unless they have a contract or are protected by a collective agreement to the contrary, employees in all jurisdictions except Montana are employed "at will."⁹ This means that their employment can legally be terminated at any time without notice for good reason, bad reason, or no reason at all. Most employees are employed at will.

Limited exceptions to the "at will" rule exist. Antidiscrimination laws provide the most general and important exception. Workers whose employment is terminated in contravention of these laws may seek reinstatement. The coverage of these laws is discussed below.

Minimum Notice Periods for Termination of Employment

The federal Worker Adjustment and Retraining Notification Act requires all relatively large employers¹⁰ to provide sixty days advance notice of planned plant closings and mass layoffs to affected employees or their union, if any. The act covers all employees of covered employers. It does not apply to independent contractors.

Rights to Leave and Reinstatement for Medical, Work-Related Illness or Injury, or Family Reasons

The federal Family and Medical Leave Act requires certain employers¹¹ to allow eligible employees to take up to twelve weeks of unpaid leave in a twelve-month period for medical reasons, for the birth or adoption of a child, or for the care of a child, spouse, or parent who has a serious health condition. During the leave the employer is required to provide health care benefits at the same level and under the same conditions as if the employee were actively at work.

An eligible employee is one who has been employed for at least twelve months by the employer from which leave is requested and who has been employed for at least 1,250 hours of service with that employer during the previous twelve-month period. Thus many part-time and temporary employees do not have access to the act's protections.

Under the Americans with Disabilities Act (see below), employers have a duty to accommodate employees with disabilities by, in certain instances, permitting them unpaid leave for medical reasons. However, an accommodation is not required if it creates an undue hardship for the employer. Depending upon the job, indefinite leave or leave that cannot be scheduled in advance may constitute such a hardship.

Antidiscrimination Laws

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Amendments to the act prohibit discrimination on the basis of pregnancy, childbirth, and related medical conditions. The Age Discrimination in Employment Act (ADEA) prohibits discrimination in employment against individuals over 40 years old. The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of certain disabilities.¹² These statutes do not apply to the work relations of independent contractors.

Title VII, the ADEA, and the ADA apply to all employees of employers of a minimum size falling within the federal jurisdiction.¹³ Courts increasingly apply the common law agency test to determine whether a worker is an employee under these statutes. Many courts still apply the hybrid test or the economic realities test, however. In any event, in practice the courts often evaluate the same factors under each test in antidiscrimination cases and place the greatest emphasis on the right to control the manner and means by which the work is accomplished.¹⁴

The Equal Pay Act amended the Fair Labor Standards Act (FLSA) to require equal pay for male and female employees performing equal work. An economic realities test is used in applying the act, owing in large part to the particular wording of the definition of employment used in the FLSA (see below).

Actions under 42 U.S.C. §§ 1981 and 1982 prohibit discrimination on the basis of race (including ancestry or ethnic characteristics) in the making and enforcement of contracts, including the performance, modification, and termination of contracts. The act thus applies to employees

and independent contractors. There is no statutory minimum number of employees required for the act to cover an employer.

Occupational Safety and Health Laws

The federal Occupational Safety and Health Act (OSH Act) obligates employers to maintain safe and healthful working environments for their employees. Rules issued by the Occupational Safety and Health Administration (OSHA) establish more specific standards for such matters as hearing protection, use of protective equipment, and control of hazardous energy sources.

A relatively broad economic realities test is used to distinguish between employees and independent contractors, the latter of whom are generally not protected by the OSH Act. The U.S. Congress has prohibited the use of appropriated funds for routine OSHA inspections of employers in low-hazard industries with fewer than eleven employees. A similar prohibition restricts OSHA's authority to enforce the act on small farms without temporary labor camps. OSHA regulations exempt from the requirements of the act individuals who employ in their own residences persons performing household tasks such as cleaning, cooking, and caring for children.

In joint employer situations, the employer that controls, supervises, or directs the employee is generally responsible for meeting OSHA obligations. In multiemployer work sites, where a number of employers are engaged in a common undertaking (e.g., a construction site), employers may share responsibility for protecting the health and safety of employees. Any employer that exercises control over an area, and has authority to correct safety and health hazards, is held accountable for any violations. In addition, an employer that creates a violation or exposes its own employees or others to the hazards associated with the violation may be held responsible. Specific OSHA standards allocate responsibility for protecting the health and safety of contingent workers (e.g., leased or temporary employees) to either the agency employing the worker or the employer who contracts the services.

Other Minimum Employment Standards

The Fair Labor Standards Act

The FLSA sets a minimum wage, requires that an overtime rate of one and one-half times the normal hourly rate be paid to certain employees if they work in excess of a forty-hour workweek, and limits or prohibits the use of child labor in most types of work.

The FLSA applies to employees and does not apply to other workers. The act defines "employ" as "to suffer or permit to work." The courts have interpreted this broad wording as requiring the application of the economic realities test to determine whether a worker is an employee.

The act contains a number of exemptions. Groups excluded from the minimum wage, hours of work and

overtime provisions of the act include: executive employees; administrative employees (generally, those who do work directly related to the management policies of the employer or do specialized technical work); professional employees (including lawyers, teachers, physicians, and computer programmers, among others); outside salespersons; employees in the fishing industry; agricultural workers employed by relatively small employers;¹⁵ nonmigrant piece-rate farmworkers who were employed in agriculture for less than thirteen weeks in the preceding calendar year; casually employed babysitters; and companion caregivers to the aged or infirm.

Groups excluded from the application of hours of work and overtime provisions but entitled to the minimum wage include: taxi drivers; employees who transport fruits and vegetables; domestic workers who reside in the household in which they provide service; and many forestry industry workers. Employees of retail or service establishments are not entitled to overtime if their regular rate of pay exceeds one and one-half times the minimum wage and more than half their compensation for a representative period is commissions on goods and services.

The FLSA's child labor provisions contain a number of exemptions allowing children between 10 and 14 years of age to work on family farms or small farms, subject to certain conditions.

The Employee Retirement Income Security Act

The Employee Retirement Income Security Act creates minimum standards of fairness and transparency in the administration of employee benefit plans. It does not require that employers establish such plans, nor does it require minimum benefits under such plans. The act permits employers to provide benefits to some employees but not to others, so long as the plan does not discriminate in favor of officers, shareholders, or highly paid employees of the employer. The U.S. Internal Revenue Service denies favorable tax treatment to pension plans that categorically exclude part-time employees from participating in the plan.

The act also imposes minimum participation, vesting, and accrual requirements on many pension plans. In general, the participation requirements stipulate that an employee must be allowed to participate in the plan once he or she reaches 21 years of age or completes one year of service, whichever is later. One year of service is defined as 1,000 hours of service within a twelve-month period. A plan may delay participation until an employee has completed two years of service if it provides for 100 percent vesting after two years. The vesting requirements include: (1) a rule that the employee's contributions to the plan are nonforfeitable at all times; and (2) a set maximum waiting period for vesting of rights to employer contributions to the plan. Waiting periods range between three and ten years depending upon a number of factors. These protections apply to employees only. Moreover, plans without employee participants are not covered by the act. The common law agency test for employment status is used under the act.

Consolidated Omnibus Budget Reconciliation Act of 1985

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), most employers¹⁶ that provide a group health insurance plan must offer employees participating in the plan and their spouses and dependent children the chance to continue coverage under the plan when a “qualifying event” that would otherwise cause the loss of that coverage takes place. For the employee, a qualifying event can be the loss of employment, not due to discharge for “gross misconduct,” or a reduction of work hours. For spouses and dependents, qualifying events also include the death of the employee, or divorce or legal separation from the employee. How long coverage continues may vary between eighteen and thirty-six months depending on a variety of factors.

COBRA protections apply to any employee or independent contractor who is covered by such a health insurance plan. However, COBRA does not prevent the employer plan itself from excluding independent contractors or certain classes of employee. For example, part-time workers are often excluded from coverage. Similarly, plans often require minimum job tenure before an employee becomes eligible to join.¹⁷

SOCIAL INSURANCE AND INCOME SUPPORT PROGRAMS

Public Health Insurance

Public health insurance is available to the elderly (the Medicare program) and the poor (the Medicaid program). Most workers with health insurance obtain it through a plan provided by their employer.¹⁸

Medicare

The Medicare program provides free hospitalization insurance (subject to small deductibles and user fees) and optional, low-cost medical insurance covering the cost of medically necessary physician services. The latter coverage is referred to as “medical insurance.” Eligibility for Medicare is in almost all cases¹⁹ contingent upon eligibility for Social Security retirement or disability benefits (see below).

Medicaid

Medicaid is a program jointly funded by the federal and state governments that is designed to provide medical care to the poor. The federal government requires that states receiving Medicare funds cover hospital, physician care, dental surgery, and other expenses. States have the option to provide additional services. Subject to basic federal requirements, each state determines its own eligibility standards. Eligibility depends upon a person having a low income and few assets, and on his or her medical condition, and not upon employment status. Thus, whether a worker has or had nonstandard work will not directly affect his or her eligibility for Medicaid.

Workers' Compensation Laws

Under workers' compensation laws, an employer or its insurance company is required to pay for medical treatment required by an employee who suffers an injury or illness arising out of or in the course of his or her employment. Medical coverage includes the cost of doctors, hospitals, nursing (including home care), physical therapy, dentists, chiropractors, and prosthetic devices. Eligibility for workers' compensation benefits is discussed below.

Public Retirement Pensions

The federal Social Security program provides the main public source of retirement income in the United States. It is funded by payroll taxes imposed equally upon employers and employees. Generally, workers may retire with full Social Security benefits at age 65. Such workers may also choose to begin receiving reduced early retirement benefits as early as age 62. The amount a worker may receive in benefits is based upon that worker's earnings averaged over most of his or her working career. Higher lifetime earnings thus result in higher benefits.

The Social Security Act covers both employees and self-employed workers. Self-employed workers pay both the employer and employee share of Social Security payroll taxes. Self-employed workers are therefore taxed at twice the rate at which employees are taxed, but only on net income after allowable deductions for business expenses. The act covers nearly all forms of work, either as employment or as self-employment.

To receive retirement benefits, a worker must have earned a Social Security “credit” in each of a sufficient number of calendar quarters. A worker earns a credit when he or she pays social security taxes on a stipulated minimum amount of quarterly employment or self-employment earnings. For 2002, the minimum quarterly earnings needed to earn a credit is \$870. Most workers must have at least forty credits to receive retirement benefits.

Low-wage workers who work on a very intermittent or part-time basis may have difficulty reaching the quarterly minimum earnings threshold. Workers with intermittent work histories may not reach the forty-credit threshold for entitlement. Workers with low earnings histories will of course receive low benefit levels. Contingency of work arrangements may thus have an indirect effect on a worker's entitlements under Social Security by influencing average income levels and earnings history through increased spells of unemployment.

Unemployment Insurance

Unemployment insurance in the U.S. is designed to protect workers against loss of income due to job loss by replacing a portion of the worker's salary for a period of time following that loss.²⁰ Unemployment insurance generally does not provide income support to women who leave work for maternity reasons. All fifty states, as well as the District of

Columbia, Puerto Rico, and the Virgin Islands, have compulsory unemployment insurance systems financed by a payroll tax on most employers.²¹

The majority of states cover all workers providing “service for remuneration” and define an employer as anyone receiving such service, subject to certain exceptions. A common general exception arises when the employer can demonstrate three things: (a) that the worker has been and will continue to be free from control or direction over the performance of such service; (b) that such service is either outside the usual course of the employer’s business or is performed outside the employer’s place of business; and (c) that the worker is customarily engaged in an independently established trade, occupation, profession, or business. This definition of employment is nevertheless broader than the common law definition of the term since it includes many workers who are not subject to the employer’s direct control, provided that they are working inside the usual course of the employer’s business. Some states use the narrower common law definition of employment to determine coverage.

Certain types of employment and workers are expressly excluded from unemployment insurance coverage in most states, including: (1) some temporary, nonresident alien workers; (2) insurance agents and real estate agents working solely on commission; (3) agricultural labor, unless it is done for a person who has employed ten or more agricultural workers in twenty weeks during the current or preceding calendar year or has paid \$20,000 to agricultural workers during any calendar quarter in the current or preceding calendar year; (4) domestic service, unless performed for a person who has paid \$1,000 or more for such work in any calendar quarter in the current or preceding calendar year; and (5) casual labor not in the course of the employer’s business.

In addition, unemployment insurance programs impose certain monetary and nonmonetary eligibility requirements. These effectively deny access to benefits to some contingent or nonstandard workers.

To be eligible to receive unemployment insurance benefits, an unemployed worker must have earned a specified amount of wages (referred to as “qualifying wages”) or worked for a certain period of time within a “base period.”²² In addition, all states impose additional earnings and work time requirements on workers seeking benefits for a second time, though these are typically substantially lower than initial qualifying requirements. Because monetary eligibility is generally based on earnings, a low-wage worker generally needs more work to qualify for benefits than a high-wage worker does. Monetary eligibility requirements often effectively exclude many workers who move in and out of the workforce for relatively short periods or who work part-time at or near the minimum wage.

In addition to meeting monetary eligibility requirements, a worker must not have “voluntarily quit” his or her previous employment, unless he or she quit for “good cause.” In most jurisdictions “good cause” is restricted to reasons “attributable to employment.” In many states work-

ers who quit because family obligations make them unable to comply with work schedules are generally found to have quit voluntarily.²³ In a number of states workers who quit because of illness are also found to have quit voluntarily. Thus workers who do not have access to a family and medical leave program or rights under the Family and Medical Leave Act are more likely to quit and render themselves ineligible for benefits. As noted above, many part-time or temporary workers are less likely to have access to such leave. On the other hand, in many states a worker may refuse a new assignment from a temporary agency without being found to have voluntarily quit.

Workers must also be able and available to work in order to receive benefits. In many states, availability for work generally means availability for full-time work on a year-round basis.²⁴ Thus contingent or nonstandard workers who for personal or health reasons are unable to accept full-time work may find themselves ineligible for benefits.

Finally, a number of states preclude workers in seasonal industries from collecting unemployment insurance benefits except during the season in which work is normally done within the industry. In addition, most of these states disallow seasonal workers’ earnings from being counted toward their minimum earnings requirement, even if the individual subsequently works in a nonseasonal job.²⁵

Disability Insurance

Work-Related Accidents or Injuries: Workers’ Compensation Laws

In all states except Texas, employers are required to provide workers’ compensation coverage to their part-time and full-time employees.²⁶ This coverage requires the employer or its insurer to provide an employee with disability compensation for loss of earnings due to an injury or illness arising out of or in the course of employment²⁷ and for permanent partial or total loss of earnings capacity due to occupational injury or illness. The latter payments vary greatly depending on the nature and extent of the injuries or illness.²⁸

Mandatory coverage is restricted to employees. On the other hand, the majority of states also allow sole proprietors to purchase workers’ compensation coverage for themselves as though they were employees. In most states, a multifactor test is used to determine whether a worker is an employee or an independent contractor. The factors generally closely resemble those included in the common law agency test for employment. However, many courts will resolve close cases in favor of coverage, interpreting the multifactor test in light of the economic realities faced by the worker or workers in question.

Many workers’ compensation statutes specifically exclude certain types of employer or worker. These exclusions vary by state and affect a wide range of occupations. The more common exclusions include the following:

- Agricultural enterprises and/or employers of domestic servants.
- Workers who perform domestic service work. In addi-

tion, some state laws provide such coverage only where domestic workers work a minimum number of hours per week.

- Agricultural workers, commission real estate agents, and casual workers.²⁹

Other Disabilities

The Social Security Act provides monthly cash payments, vocational rehabilitation services, and medical insurance to those who are so severely disabled that they cannot engage in gainful work.³⁰ The amount of cash payments depends upon the amount of earnings upon which the worker has paid Social Security taxes and the number of dependents the worker has. Cash payments do not begin until the sixth month of disability. The coverage of the Social Security disability benefits program is generally the same as that of the Social Security retirement benefits program (see above).

In order to receive disability benefits a worker must have earned a Social Security “credit” in each of a sufficient number of calendar quarters. A worker earns a credit when he or she pays social security taxes on a stipulated minimum amount of quarterly employment or self-employment earnings. Workers over the age of 31 must have 20 to 40 credits, depending on the worker’s age, of which at least 20 must have been earned during the 40 quarters immediately preceding the quarter in which the disability began. A worker who is disabled before age 31 will generally be eligible for benefits if he or she has earned credits in half of the quarters between the time he or she turned 21 and the quarter in which he or she became disabled. If a worker becomes disabled before age 24, he or she must have not fewer than six credits earned in the 12 quarters immediately preceding disability. As with Social Security retirement benefits, low-wage and part-time or casual workers will receive lower benefits and may in some cases not be eligible for benefits.

Direct Income Support Programs

The main direct income support programs for low-income workers and the poor are briefly described below. Access to benefits under these programs is not related in any proximate way to whether a person has held nonstandard work.

Supplemental Security Income

The Supplemental Security Income (SSI) program provides modest monthly payments to most severely disabled or elderly individuals with very limited incomes and financial resources. To receive SSI payments, a person must be over 65 years old or blind or “disabled” within the meaning of the Social Security Act (see above).

Temporary Assistance to Needy Families

Under the TANF program, the federal government provides financing to states that establish a program that provides cash aid to certain needy families with or expecting children and provides parents with job preparation, work, and support services such as child care services for workers seek-

ing employment. These programs provide modest financial support to families meeting eligibility requirements and often require that, to receive benefits, employable workers must be able to engage in remunerative work or participate in an education program. A majority of states also provide child assistance for twelve months to help workers move off TANF assistance.

Food Stamps

The federally funded Food Stamps program provides certain low-income persons with vouchers that can be used to purchase food. Aid to able-bodied adults without dependent children is time limited.³¹ State and local welfare agencies administer the program under standards established by the federal government.

State General Assistance

Thirty-five states have programs that provide cash and in-kind assistance designed to meet the needs of certain low-income persons who are ineligible for or are awaiting federally funded assistance such as TANF or SSI benefits (see above). General Assistance benefits are most often not available to employable adults without children. Benefits are generally very modest and are lower than benefits under comparable federally funded programs.

Earned Income Tax Credit

The Earned Income Tax Credit is a refundable federal tax credit available to relatively low-income workers. The value of the credit increases with the worker’s income and the number of dependents he or she has. It is available to both employees and other workers (including the self-employed).

Notes

- 1 The U.S. Bureau of Labor Statistics includes among “self-employed” workers those who identify themselves as independent contractors, independent consultants, and freelance workers. At law there is generally no distinction between an independent contractor, an independent consultant, and a freelance worker. Legally, these workers are generally referred to as independent contractors. However, the statistical sample may also include some who are legally employees, owing mainly to the control exerted over their work by the person or organization for whom it is performed, but who do not identify themselves as such.
- 2 The relevant statistical definition covers “wage and salary workers who expect their jobs will last for an additional year or less and who had worked at their jobs for one year or less.” The concept of wage and salary work is best understood in legal terms as employment. Workers’ expectations about whether their employment will continue have no necessary legal effect.
- 3 In the U.S. Current Population Survey, part-time employment is employment for usually less than thirty-five hours per week. However, this figure includes hours worked in all jobs. While some entitlements, such as social security and unemployment insurance, depend upon total hours worked, labor and employment laws tend to consider only

- hours worked with a particular employer.
- 4 Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992).
 - 5 In Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992), the U.S. Supreme Court identified the following nonexclusive list of factors to be considered under the common law agency test: (1) the hiring party's right to control the manner and means by which the work is accomplished; (2) the skill required; (3) the source of the instrumentalities or tools; (4) the location of work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party (as an employee or a self-employed worker). The leading formulations of the factors to be considered under each economic test are reasonably similar. See *United States v. Silk*, 331 U.S. 704 (1947), listing (1) degree of control; (2) opportunities for profit and loss; (3) investment in facilities; (4) permanency of the relation; and (5) skill required, and often cited for the factors to be considered under the economic realities test. See also *Spirides v. Reinhardt* 613 F.2d. 831 (D.C. Cir., 1979), listing 11 factors to be considered under the hybrid test.
 - 6 Factors that indicate joint employer status include control over hiring, transfer, promotion, discipline, or discharge of the worker; control over work schedules and work assignments; and the obligation to train or to pay such employees.
 - 7 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).
 - 8 M.B. Sturgis Inc., 331 NLRB No. 173, 165 LRRM 1017 (August 25, 2000).
 - 9 Montana's Wrongful Discharge from Employment Act (WDEA) guarantees "at will" employment with specific exceptions. The WDEA sets out three separate bases for a wrongful discharge action. It also sets limits on damages that can be recovered and attempts to preempt all other common law remedies that were previously sought.
 - 10 The act covers companies that employ 100 full-time employees or 100 or more full-time and "part-time" employees who work an aggregate of at least 4,000 hours per week, exclusive of overtime. "Part-time" employees include workers who average fewer than 24 hours per week and workers who have been employed for fewer than six of the twelve preceding months.
 - 11 The act covers federal public employers and private employers that maintain fifty or more employees on their payroll during twenty or more calendar workweeks (not necessarily consecutive) in the current or preceding calendar year.
 - 12 For the purposes of the act, a disability exists only if an impairment substantially limits a major life activity, or if the individual has a record of such an impairment or is perceived as having such an impairment. In determining whether an impairment poses a substantial limitation on a major life activity, mitigating measures (such as use of eyeglasses) are to be considered. See *Sutton v. United Airlines*, 527 U.S. 471 (1999).
 - 13 Title VII of the Civil Rights Act and the ADA cover employers having at least fifteen employees. The ADEA covers all employers having at least twenty employees.
 - 14 See W. Carl Jordan, *Employment Discrimination Law* 1998, 3rd Ed., Supplement (Washington D.C.: B.N.A., 1998) at 423; and L. Maltby and D. Yamada, "Beyond 'Economic Realities': The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors," *Boston College Law Review*, 38, 239 (1997).
 - 15 Employers that did not, during any calendar quarter during the preceding calendar year, use more than 500 person-days of agricultural labor.
 - 16 COBRA applies to group health plans maintained by all employers except churches, most public employers, and employers that "normally employed fewer than 20 employees on a typical business day during the preceding calendar year."
 - 17 See Employee Benefits Research Institute, *Databook on Employee Benefits*, 4th Ed. (Washington, D.C.: EBRI - ERF Publications, 1997).
 - 18 Not all employers provide health insurance. Approximately 17 percent of nonelderly U.S. residents do not have access to either employer-based or public health insurance plans. Employer-provided plans tend to cover most hospital and physician services, but frequently do not to cover the cost of prescription drugs or mental health and substance abuse treatment. Workers employed by larger firms are much more likely to have access to an employer-based health insurance plan. Similarly, full-time workers and workers in government, finance, and professional services are more likely to have access to such a plan than part-time workers and agricultural, personal services, and construction workers. See Employee Benefits Research Institute, *Databook on Employee Benefits*, 4th Ed. (Washington, D.C.: EBRI - ERF Publications, 1997).
 - 19 Subject to certain restrictions on the eligibility of immigrants, a U.S. resident is eligible for Medicare hospitalization insurance if he or she is: (a) 65 or older and eligible for Social Security retirement benefits; or (b) under 65 and has received Social Security disability benefits for twenty-four months; or (c) a kidney dialysis or kidney transplant patient. Medicare medical insurance is available to those who are eligible for Medicare hospitalization insurance and to U.S. citizens and permanent residents 65 or older, again subject to certain restrictions on the eligibility of immigrants.
 - 20 Usually, jobless workers receive about 50 percent of their average weekly gross wage over the last fifty-two weeks. The maximum benefit ranges between about \$180 and \$360 per week, depending on the state. Most states limit the duration of payments to a maximum of twenty-six weeks, although in some states benefits may continue for as long as thirty weeks. There is generally a waiting period of one week during which no unemployment insurance benefits are payable.
 - 21 The federal-state unemployment compensation program is a partnership in which federal law establishes minimum requirements for participation. States pass conforming legislation and have considerable leeway in tailoring their unemployment compensation programs to fit local needs. For a survey of state unemployment insurance programs, see U.S. Department of Labor, *Comparison of State Unemployment Insurance Laws* (Washington, D.C., 1999). Most states' unemployment insurance systems generally cover employ-

- ers having a quarterly payroll of \$1,500 or more during the current or preceding calendar year or employing at least one worker in each of twenty weeks during the current or preceding calendar year. States among the remaining minority have broader coverage of employers.
- 22 In most jurisdictions the “base period” is defined to include the first four calendar quarters within the last five completed calendar quarters preceding the filing of a claim for benefits. In many states, qualifying wages amount to a multiple of the “weekly benefit amount,” which in turn is most often about half the average wage earned by the worker during the highest earnings quarter of the base period. The multiple ranges between 26 and 40, but is most often 30. Most such states add a specific requirement that wages be earned in at least two quarters in the qualifying period. Other states require that a worker have earned a multiple of total high earnings quarter wages. That multiple is generally between $1\frac{1}{4}$ and $1\frac{1}{2}$. Many states using qualifying wage requirements add minimum earnings thresholds. Most of the latter range between \$400 and \$2,200 per quarter. Earnings thresholds generally set minimums for the high earnings quarter or apply in each of two or more quarters. Still other states use a flat qualifying amount or require that a worker have worked a minimum number of weeks (generally 18-20 weeks) and have earned a minimum amount during each week (generally ranging between \$20 and \$150).
- 23 Advisory Council on Unemployment Compensation, *Unemployment Insurance in the United States: Benefits, Financing, Coverage – A Report to the President and Congress* (Washington, D.C.: ACUC, 1995).
- 24 Ibid.
- 25 Ibid.
- 26 For a survey of state workers’ compensation laws, see U.S. Department of Labor, *State Workers’ Compensation Laws* (Washington, D.C.: U.S. Department of Labor, January 1999).
- 27 These temporary disability benefits vary from state to state. They are generally 66.7 percent of an injured worker’s earnings, tax-free, paid weekly. Payments are limited to a minimum and a maximum, usually a percentage of the state’s average weekly wage. The duration of payments also varies among states; in some states payments are made for the duration of disability, while others limit either the number of weeks paid or the total amount of benefits paid.
- 28 Some states specify benefits for defined injuries. Others convert benefits to a lump sum based on a calculation of the degree of the disability, usually with a specified maximum number of weeks’ wages or a maximum benefit amount. In most states, compensation for permanent total disability will be equal to 66 percent of the worker’s previous earnings, subject to time limits (most often 300 weeks) on the duration of the benefits. If a worker dies as a result of a job-related injury or illness, his or her spouse will be entitled to receive a survivor’s benefit that ranges between 35 and 70 percent of his or her earnings. There are also payments to cover families’ funeral expenses. These payments vary among the states; half of the states pay \$3,000 or more.
- 29 The term “casual worker” is defined differently in different states. In some states it refers to workers whose work is not in the usual course of the employer’s business but rather is merely incidental to it. In others, casual work is defined in relation to specific numbers of working days, salary, or total labor cost. In still others, casual work is employment in connection with an employer’s business arising by chance or by accident, or employment that is not in connection with any business of the employer and not regular, periodic, or recurring.
- 30 “Disability” is defined by the Social Security Act as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” A worker is considered disabled only if his or her impairments are so severe that he or she cannot, considering his or her age, education, and work experience, engage in any other kind of substantial gainful work that exists in significant numbers in the region where he or she lives or exists in several regions of the country.
- 31 An able-bodied adult between the ages of 18 and 50 who does not have any dependent children can receive food stamps for no more than three months in a thirty-six-month period unless after that three-month period he or she is working at least half-time or is engaged in an employment training program. This requirement may be waived in high-unemployment regions.