Regulating the Telecommuter Workforce: Implications for Employment Law in the '90s

Janice R. Bellace

Columbia Institute for Tele-Information
Graduate School of Business
809 Uris Hall
Columbia University
New York, New York 10027
(212) 854-4222

INTRODUCTION

Since the dawn of the Industrial Revolution, people have come together for work, drawn by the need to congregate at a place where the source of power for work chores was to be found. Those drafting laws which regulate the employment relationship have accepted this physical phenomenon as a given factor. It is a factor which has made much of our regulatory law feasible. We are on the verge of a post-industrial revolution where advances in technology may mean that many persons will no longer have to come to the work; rather, the work will come to them.

The collective immobility of most of today's workforce is the stage upon which many employment laws are set. Thus, the dispersal of the workforce into isolated units away from the employer's location will have a profound impact on the enforceability of many of our employment laws. If employees come together, they can be observed -- by employers, other employees and government agents. This simple fact is critical to the successful implementation of most of our employment laws. For example, workplaces can be readily identified and inspections of a workplace can easily be undertaken. Employers, through their supervisors, can visually observe workers, can take note of their identities, can monitor their comings and goings. Employers, then, can be held responsible for the accurate recordkeeping which is the basis for ensuring compli-

ance with a variety of laws. Employees themselves can observe each other. They can casually talk to co-workers and compare approaches to work, supervision, and working conditions. As such, employees can be expected to organize together if they conclude that their terms and conditions are unsatisfactory. Alternatively, they might complain to a government agency if they detect that their rights are being violated. When work is performed in homes, these preconditions for the effective implementation of employment law guarantees are removed.

PROTECTION: THE GOAL OF EMPLOYMENT LAW

Effective implementation of employment law guarantees are not a source of great personal concern to many in the labor force. Historically, employment laws in this country have sought to protect persons who, for varying reasons, have been unable to protect themselves. This may seem a self-evident proposition but it bears explicit statement for it explains much of what is unique about American employment law. For the most part, our employment laws merely aim to help those for cannot protect themselves in employment. Unlike many European countries, we have never attempted by law to set normative standards which apply to the entire labor force.[1] Furthermore, even for the groups targeted by the legislation, we have attempted to provide only a modicum of protection, not a comprehensive code of regulation.[2]

Types of Protective Labor Laws

As a body, our employment laws can be divided into three categories of protection as discussed below.

The first category consists of laws which have sought to protect the chronically exploited. From the turn of this century, some states had sought to intervene in the employment relationship on the grounds that persons belonging to certain groups were not capable of protecting themselves satisfactorily through individual bargaining. Although some states did enact child labor laws and protective legislation for women,[3] the major advances in this area did not occur until the New Deal when a more comprehensive approach to "cheap labor" was taken. The primary piece of federal legislation in this category is the 1938 Fair Labor Standards Act[4] which was enacted to set minimium standards of employment below which employees would not be permitted to fall. A minimum hourly wage was set, and compensation at time and half an employee's hourly rate was dictated. As a result of these standards, industrial homework in seven industries was completely banned because effective enforcement of the FLSA was deemed impossible.[5] For the most part, this affected the employment of mothers working in the home at submininum wages.[6] In addition, the employment of children under fourteen was totally banned and strict restrictions were placed on the employment of children fourteen to

sixteen year old.

The second category of laws also applies to individuals who, once again, were deemed incapable of surmounting barriers to fair employment on their own. These workers were incapable of achieving satisfactory terms and conditions of employment through individual bargaining because employers simply did not want to hire them for certain jobs regardless of the terms offered by the prospective employee. Beginning in the 1940s, some states began to enact fair employment practices legislation. The primary piece of legislation in this category is Title VII of the Civil Rights Act of 1964, a broadranging statute banning discrimination in employment because of race, color, sex, national origin or religion.[7] Subsequent statutes have sought to protect older workers and handicapped persons.[8]

The third category of employment laws applies to persons who might be able to arrange satisfactory terms and conditions of employment through bargaining if they could bargain collectively. Since as individuals, they possessed weak bargaining power, the resulting employment contract decidedly favored the employer. Rather than dictate substantive minimum standards for terms and conditions of employment, Congress simply protected these workers by recognizing their right to bargain collectively through an agent of their own choosing.[9] Thus, if these workers wished to get together and form or join a union for the purpose of collective bargaining, they were granted

federal protection.

THE TELECOMMUTER AND THE NEED FOR PROTECTION

Images of the telecommuter of the 1990s glimpsed through a perusal of popular magazines are glamorous. For the most part, we see highly-educated, white, upper middle-class persons engaged in creative, challenging work.[10] Most of these persons have a great deal of discretion and control over their work product. The magazine articles tend to depict an equal number of men and women, nearly all of whom left confining 40-hour a week jobs to become flexible telecommuters. Even while they were office-bound, these employees were exempt from the Fair Labor Standards Act. Moreover, they were highly unlikely to be unionized even if they were within the protection of the National Labor Relations Act, and for the most part, they did not confront discrimination in employment. Thus, their need for the protection of employment laws has always been minimal and there is no reason to think their need will increase now that they telecommute.

The Rank and File Telecommuter

The picture, however, is not so rosy for the rank and file telecommuter of the next decade. Those who speculate on the size of the telecommuter workforce estimate that as many as ten million persons may be telecommuting ten years from now.[11] An analysis of available information indicates that the majority

of these telecommuters may well be clerical workers, especially those who process insurance claims, transcribe dictation from automated banks of tape recorders, handle catalogue sales, and process billing formsfor banks and credit card companies. Like their office-bound counterparts, the vast majority of these telecommuters will be women. For most of the telecommuter clericals, the great appeal of working at home will be the opportunity to be available to their children.

It is not unrealistic to predict that such telecommuters will be low paid. At the present time, the median salary for a full-time employed woman is $13,100 or, in hourly terms, approximately $6.30/hour.[12] For many clerical jobs, especially those outside large cities, the salary range is $10,000 - $12,000/year or $5 - $6./hour. Moreover, it is likely that a full-time employed clerical employee working at home would earn less than this. In deciding whether to trade off money for the convenience of working at home, most working mothers with young children would find the trade off attractive in light of the money saved on commuting and child care expenses. From some case studies, it appears that benefit levels for telecommuter clericals are often low.[13] Furthermore, many telecommuter clericals work part-time and, as a result, receive no fringe benefits whatsoever. While those accepting telecommuter work may be happy to do so in light of non-monetary benefits,[14] it cannot be denied that from a compensation standpoint, this is hardly a privileged group.

The startling trend in telecommuter compensation is the return to piecework. Compared to office clericals who are usually paid according to an hourly rate, telecommuter clericals are often paid according to some piecework formula; for instance, so many cents per form processed.[15] Although the new technology which makes working at home possible has futuristic overtones, telecommuter clerical work actually resembles more closely industrial homework outlawed nearly a half century ago. It is here that we encounter a major implication for existing employment law: how to enforce fair labor standards among telecommuters.

ENFORCING FAIR LABOR STANDARDS

The Fair Labor Standards Act of 1938 sets certain minimum standards below which employees are not legally permitted to fall. In general, employees must receive at least the minimum wage which is currently $3.35/hour. If more than forty hours are worked in one week, employees must be compensated at time and one-half their hourly rate. Employers in covered industries are required to keep and make available records of employees' wages and hours. At first glance, these standards appear to have little relevance to telecommuting clerical workers. But it is important to consider why industrial homework was banned in the early 1940s.

Congress did not ban industrial homework in the Fair Labor Standards Act when the statute was passed in 1938, even though problems inherent in homework had been recognized since the turn of the century.[16] Shortly after the passage of the FLSA, the Wage and Hour Administrator, responsible for the enforcement of the Act, took the view that homeworkers were covered by the statute. All employers of homeworkers were required to keep special records indicating the identity of homeworkers and the time worked and piece rates paid with respect to each lot issued to the workers. Employers were also required to distribute special record books to the homeworkers so that the homeworkers could keep their own records of hours worked and rates paid. Responding to pressure from the states, the Wage and Hour Division of the Department of Labor conducted a series of hearings and investigations into homework[17] between 1941 and 1943. The conclusion reached was the same as that reached by states who had studied the problem: "Effective regulation of homework is impossible."[18] Accordingly, homework was banned completely in seven industries[19] in which the practice was common. Without specific knowledge, one might speculate that it was the production process which created the problems studied in the 1940s and argue that such problems would not be found among computer homeworkers. An analysis of the problems does not provide such an optimistic view.

Minimum Wage and Piece Rates

The Fair Labor Standards Act and its implementing legisla-

tion states the minimum wage in terms of a rate per hour. For those paid on a piece rate system, it is necessary to convert the piece rate into an hourly rate. Current regulations[20] state that the regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total number of hours worked in the same week. For example, if an employee works 45 hours in a week and earns $162., the regular pay rate is $162 divided by 45, or $3.60/hour. This simple division result in the straight time pay rate. If the employee works more than 40 hours in a given week, the employee is entitled to an additional one-half times the regular rate for work done in the period over 40 hours.

Employees who are required to rent or pay for supplies and equipment must be compensated at a rate which brings them to or above the minimum wage once the charges to the employee are subtracted form overall earnings. As such, a piece work rate which appears to translate into an hourly rate safely above the minimum wage may be hauled down perilously close to the legal minimum once rental charges for a computer terminal are considered.

In his 1942 findings on industrial homework, the Wage and Hour Administrator found that:

> It is obvious, however, that the employer can have no certain knowledge of the number of hours spent by the home worker. Even with the best of intentions the home worker has many interruptions and is frequently unable to keep an accurate record of hours worked.

> Fear that work will be withdrawn if the home worker is unable to make the minimum is a strong incentive to falsify records.[21]

There is no reason to believe that the telecommuter clerical will not confront the same interruptions. Laundry must be transferred from the washing machine to the dryer, dinner must be started, a child must be fed. For those with pre-school children at home, constant interruptions will be the rule rather than the exception.

The problem will be the same as that faced by homeworkers in prior eras: how should work time be recorded? Inevitably, telecommuter clericals will be influenced by whatever figure is suggested as the quota, regardless of whether a given employee ever does process that many forms in one hour. It might be argued that employee deception can be detected by monitoring devices now available. For instance, the employer will be able to tell whether the computer terminal is on-line. It may even by possible to monitor keystrokes. Yet, even this monitoring creates problems aside from the stress to the worker brought on by such intrusive and intensive monitoring. Since the employer cannot see the worker, how will the employer count periods of time when the computer terminal is on-line but there are no keystrokes? Will there be some standard, such as there must be some keystrokes within a five-minute period for that segment to count as work time? Office workers are paid for the time when they stand up and stretch, when they take a coffee break, go to the bathroom, etc. Will telecommuters fare as well or will

they revert to a prior era and be paid only for the time their hands are moving?

Calculation of Overtime

Prior to the 1940s, industrial homeworkers often worked more than forty hours per week in order to finish the work allotted to them. In the 1942 Findings on industrial homework, the Wage and Hour Administrator noted that persons engaged in the enforcement of the Fair Labor Standards Act were "of the opinion that there is almost universal violation of the record-keeping requirements" of the Wage and Hour Division wit regard to homeworkers.[22] Investigations of employers and interviews with homeworkers supported this conclusion. Investigators determined that if homeworkers were told that a certain number of items could be done in an hour and then were left with eight times that number, the homeworkers would do the work necessary to complete their "daily" allotment regardless of how long it took to do so. In part, they felt pressured to meet the quota. In addition, the piece rate was such that the amount earned would be very meager unless the entire allotment was completed. If the women took more than forty hours to complete the week's work, they were loathe to report it for fear they would receive no more work if they attempted to claim overtime pay.

For telecommuter clericals working full-time, the problems may be much the same. Aware of what their quota is, they will most likely feel pressured to meet it. If it takes more than

forty hours to do so, they may well attempt to disguise the fact since they will most certainly be sensitive to the fact that the employer does not want to pay overtime rates for work which should be able to be done within forty hours. They may also believe, as did their predecessors, that interruptions break their rhythm resulting in a lower turnout per hour than would otherwise be the case. Hence, they may feel they should not charge their employer for overtime work when the work could have been done on straight-time hours if they had only worked faster.

Child Labor

The Fair Labor Standards Act banned the employment of children under fourteen years of age and severely restricted the number of hours and the times at which children between fourteen and sixteen could work. In the 1942 Findings, the Wage and Hour Administrator observed: "there is no means of ascertaining how many persons in the family may have been actually engaged in the work."[23] On this same point, the Administrator quoted the findings of a New York Commission: "Home work means unregulated manufacturing carried on beyond the possibility of control as to hours of women's work, child labor, night work of minors or cleanliness ... of work places. From the point of view of the community the greatest objection to home work is its essential lawlessness."[24] Without doubt, one of the overriding reasons why industrial homework was

banned was the inability of enforcement agents to stamp out the practice of children doing some of the work left for their mother.

To speak of child labor today harkens back to the industrial dark ages. Yet, the danger of child labor is perhaps greater today than it was fifty years ago. Consider whether it is more likely that a thirteen year old boy will sew buttons on a coat or sit down at a computer terminal and process an insurance form. If anything, mothers may find it acceptable to have children working at computers, something the children do at school, notwithstanding the fact that the work is neither educational nor creative. It should be emphasized that fifty years ago, mothers did not want to exploit their children. Children often "helped out" their mothers who were busy doing household chores. Likewise, it would seem that today many mothers would have no objection to their child helping out by processing forms while mother gets dinner ready or does the ironing.

The public's abhorrence of child labor is greatly reduced once the work is performed in the home, even though the wages may be low and the time spent inappropriate for someone attending school the next day. Perhaps this is because work done in the home becomes the business of the entire family and it is viewed as normal for family members to help out each other for the good of the family. Because of this, it is likely that

telecommuter clericals would routinely violate the child labor provisions of the Fair Labor Standards Act. Enforcement today would be no easier than in the past for even sophisticated computer monitoring systems can only tell that someone's hands are making keystrokes, not whose hands are at the keyboard.

THE HOMEWORKER AS INDEPENDENT CONTRACTOR

The distinction between working for oneself and working for another is not easily made in many cases. If a person is compelled to go to a worksite owned by another in order to work, if the person works there on equipment owned by another, and if that person is under the physical supervision of another during the work day, it can be concluded that the person is an employee. If, however, the person remains at home, works on rented equipment, and simply turns in the finished product to another entity for a set fee, it is conceivable that the person is an independent contractor in business for him or her self. The advantages of workers having independent contractor status are enormous to a company which wants work done. The company simply pays the independent contractor a fee for the work done. Since the company is not an employer of these workers, there is no obligation to pay the employer's Social Security contribution. There are substantial savings on fringe benefits costs as independent contractors are responsible for paying their own medical, dental, legal and life insurance premiums. Since the

persons working are not employees, they are not covered by employment laws such as the Fair Labor Standards Act, the National Labor Relations Act, Title VII of the Civil Rights Act, and the Occupational Safety and Health Act.

Since the advantages to a company of transferring persons from employee to independent contractor status are obvious, and since homeworkers are in a position susceptible to such a transfer, it is important to determine whether the employment laws will recognize telecommuters as independent contractors.

The FLSA and Independent Contractors

The Fair Labor Standards Act defines an "employee" simply as "any individual employed by an employer."[25] To "employ" is defined as "to suffer or permit to work."[26] One court has observed that the term "employee" is used "in the broadest sense every ... included in any act."[27] This characterization is apt. As a generalization, it can be said that those interpreting the Fair Labor Standards Act presume that a person is an employee unless it can be affirmatively shown that the person is an independent contractor.

An employee is not permitted to waive employee status. As such, the mere fact that a person calls himself an independent contractor is not dispositive of the issue. Common law concepts regarding employees and independent contractors have been specifically rejected by the courts. All judicial tests have

focused on whether the alleged employees, "as a matter of economic reality, are dependent upon the business to which they render service."[28] If the alleged employees exhibit some economic independence from the alleged employer, five factors are examined to gauge the workers' dependence on the alleged employer: the skill required; the permanency of the relationship; the employee's investment in equipment and facilities; the employer's degree of control; and the degree to which the opportunity for profit or loss is determined by the employer.[29] A determination as to employee status is made on all the circumstances as a whole. No one of the five listed factors is controlling.

Although the test does not paint a bright line, courts tend to repeat that the "focal inquiry in the characterization process is ... whether the individual is or is not, as a matter of economic reality, in business for himself."[30] The emphasis on economic reality should not lead one to suspect that the courts are applying some test favored by economists. Rather, the courts seem to be indicating that they will not be content to restrict themselves to legal forms in making the determination but will probe to determine whether, in reality, there are two businesses dealing with each other or one business employing people.

It should be noted that some factors thought by many to be important when considering independent contractor status are

not determinative in a Fair Labor Standards case. For instance, in Robicheaux v. Radcliff Material, Inc.,[31] a 1983 Fifth Circuit case, the plaintiffs were five welders whom the defendant contended were independent contractors. Prior to working for Radcliff, the plaintiffs had held themselves out to be independent contractors, and had used their own business cards, letterhead stationery and advertising. The plaintiffs each signed a contract with Radcliff describing themselves as independent contractors and they received payment according to an hourly wage scale which was higher than that accorded welders who were deemed to be employees. They provided their own insurance and workmen's compensation coverage. The plaintiffs also furnished their own welding equipment at a cost of more than $5000. Throughout their time with Radcliff, the plaintiffs filed federal income tax forms as self-employed individuals. Notwithstanding this, the court in Robicheaux held that the plaintiffs were employees on the basis of the following factors: the plaintiffs were required to report to work at 7:00 a.m. and the standard work day lasted until 5:00 p.m.; they were given daily work assignments by a supervisor and were told what to work on, where, and how long the assignment should take; and except for insignificant occasions, the plaintiffs worked exclusively for the defendant for very substantial periods of time.

On the basis of the Robicheaux case, it can be said with confidence that the rank and file telecommuter clerical, who

works for one company and is paid on an hourly or piece work basis, will not qualify as an independent contractor under the Fair Labor Standards Act. This will be so even if the clericals buy or lease the computer terminal and call themselves independent contractors. Of course, if the company for which they work considers them independent contractors, it is unlikely that the telecommuter clericals themselves will police compliance with the Fair Labor Standards Act. This will add to the myriad of enforcement problems already enumerated above.

The NLRA and Independent Contractors

In contrast to the broad coverage encompassed by the term "employee" in the Fair Labor Standards Act, the National Labor Relations Act's protection of "employees" has been defined more narrowly. Thus, it is conceivable that the same person could be an employee for purposes of the Fair Labor Standards Act and be an independent contractor for purposes of the National Labor Relations Act.

Most labor law students are familiar with NLRB v. Hearst Publications, Inc.,[32] a 1944 Supreme Court case in which the respondent employer refused to bargain with a union of newsboys on the grounds that the persons who distributed their newspapers on street corners were independent contractors. Noting that Congress had not explicitly defined the term "employee" in the Wagner Act, the Supreme Court indicated that use of common

law concepts was not adequate if only because different determinations based on how the common law had evolved in different states might result. Consequently, the Court held that the term "employee" must be defined primarily in light of the history, terms and purposes of the legislation. The Court observed that the "question comes down therefore to how much was included of the itermediate region between what is clearly and unequivocally 'employment', by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment."[33] The Court concluded that "in doubtful situations," the applicability of the term employee should be determined broadly "by underlying economic facts rather than technically and exclusively by previously established legal classifications."[34] In the Hearst case itself, the Court held that reviewing courts should defer to the expertise of the National Labor Relations Board in making such judgments unless the Board's determination was clearly erroneous.

The Supreme Court in the Hearst case held that the standard for determining an employee as opposed to an independent contractor was one of economic and policy considerations within he labor field. Such a stance is consonant with the approach taken under the Fair Labor Standards Act. Congress, however, disagreed with the Court's construction of the NLRA. In the 1947 Taft-Hartley amendments, Congress passed an amendment specifically excluding "any individual having the status of an independent contractor"[35] from the definition of "employee"

contained in the Act, and only employees are protected by the National Labor Relations Act. One court has noted that the obvious purpose of this amnemnet was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the NLRA.[36]

Some courts can be found who ask whether the alleged employees operate their own independent businesses as opposed to performing functions that are an essential part of the company's normal operations.[37] Nonetheless, it is generally accepted that in reaching a decision under agency law, who has the right to control and direct the work if the foremost consideration. Furthermore, the question is whether the alleged employer has the right to control the manner and means by which the result is to be accomplished.[38] If such control is retained, the relationship is one of employment. If control is reserved only as to the result sought, the relationship is that of an independent contractor. The agency test of right of control is strictly applied. Courts have found independent contractor status even in situations where the employer converted employees into independent contractors and where the former "employees" sought unionization as a response to the unsatisfactory state of affairs.[39]

Whether the rank and file telecommuter clerical will qualify for independent contractor status under the National Labor Relations Act is unclear. If the clerical rents or owns the

computer terminal and if there is little supervision of how the work is actually done, the person may be deemed to be outside the protection of the National Labor Relations Act. This question, however, may be academic for as noted at the outset to this paper, workers form or join unions by coming together to do something about their terms and conditions of employment. Persons whose work isolates them from co-workers rarely join unions because the essential elements of organization and formation of group identity are missing. Industrial homeworkers did not unionize in the 1930s, a period when industrial unions were growing rapidly. It is unlikely that the computer homeworkers of the 1990s will unionize, even if they are deemed to be employees.

NEW AREAS OF PROTECTION

A recent British study[40] into the contractual arrangements between employers and homeworkers provides interesting insight into possible legal problems. Six types of businesses were studied, including firms and agencies in the computer industry who worked at home, agencies for temporary work, especially office work and insurance companies. The researchers found that employment legislation had not directly influenced employer's decision to engage this type of labor. Rather, business factors and the impact of the recession had been far more important influences persuading employers to explore engaging persons for work away from the employer's location. Notwith-

standing this, the employers studied had considered their relationships with the homeworkers very carefully and had taken steps to avoid any unwanted consequences of a particular contractual agreement. Employers typically structured relationships to avoid or minimize the impact of employment protection legislation.[41]

The British study findings indicate that employer descriptions of workers as employees or self-employed persons were not accurate in light of relevant legal tests. Those doing the interviewing had to probe to ferret out reliable information which could be used to make an accurate determination. The study found that regardless of this, employers were able to draft contracts and/or devise procedures for exercising a large degree of control over workers whose work was carried out primarily or solely away from the main workplace, both for employees and independent contractors.

The findings of this British study illustrate a point which needs to be remembered in this litigious society of ours: law is a secondary force in employee relations. The primary force is economic. Present technological advances and labor market forces make it possible to have work done at home at a cost to the employer which is less than having the work done at the workplace. The technological advances, however, are a double-edged sword. For the first time, clerical workers have to concern themselves with foreign competition.[42] For many

types of clerical work, foreign competition will be a force keeping telecommuter wage rates low. An American telecommuter processing credit card billing forms must receive at least $3.35/hour; the telecommuter at home in Barbados working for the same company is paid substantially less than that.

Protecting Part-Time and Temporary Workers

As noted earlier, American employment law has never set substantive terms and conditions of employment. Nonetheless, certain standards have emerged, at least for full-time workers in the primary labor force. We do expect that these workers will receive some paid holidays, and some paid vacation. We do assume that some paid sick days will be granted and that some medical insurance will be provided. If mainstream companies deviated from this standards, we would be greatly surprised. Yet, companies do deviate from these standards and escape public condemnation by relatively simple devices, such as using outside contractors and hiring part-time and/or temporary workers. A Fortune 100 company may routinely grant certain benefits to hourly-paid employees. Assume that it contracts with an outside contractor we will call Diversified Telecommuter Services, Inc. for the processing of its insurance forms on a fixed fee basis. The Fortune 100 company is well aware that the outside contractor cannot possibly be supplying the requisite number of telecommuters clericals at this fee while paying them mainstream wages and benefits. This, however, is no

longer seen as concern of the Fortune 100 company. And the public, for some reason, does not expect these small outfits to pay wages and benefits levels accorded those in the primary labor force.

This reality can hardly escape the notice of companies seeking to remain competitive. Predictably, certain types of clerical work will be "outsourced" because it is possible to do so and effectively remain in control by telecommunications advances. Many rank and file telecommuters will be viewed by the companies for which they work as not having a strong or permanent attachment to the company. Thus, they will be labelled "temporary" workers and their terms and conditions of employment will be far inferior to those accorded permanent workers. Finally, telecommuters regularly working a substantial number of hours per week will be labelled part-time. As a consequence, their pay rates and benefits levels will usually be much less favorable than those accorded full-time workers.

It may be that a normative change will occur when a vast influx of formerly office-bound clerical workers joins the telecommuter ranks. If so, there will be no need for legislation. But if such a change does not occur, the challenge for employment law will be to devise a regulatory framework which prevents the rank and file telecommuter from slipping into an inferior tier of the labor market. Whether this is possible depends on public sentiment in support of such protection.

Whether it is feasible to draft such legislation is another question. Since the favored status of the workers deemed permanent and full-time is not protected by statute, it is difficult to predict what course a statute protecting part-time and temporary workers would chart.

The question of protecting part-time and temporary workers has arisen in Europe. For instance, in the European Community, there is a proposed directive on part-time workers which would ensure that part-timers do not receive less favorable treatment in various employment rights.[43] In Europe, there are also proposals to restrict the temporary worker category to those who stay with a particular employer is truly of short duration.[44] Of course, legislative drafting difficulties in Europe are minimized because there are already legal guarantees granting various substantive rights to permanent, full-time workers.[45]

A case has already arisen in Britain challenging the lower hourly pay rate accorded part-time workers compared to full-time workers doing the same work.[46] In considering this issue, the European Court of Justice indicated that the unequal pay for part-time workers might be but was not necessarily a manifestation of sex discrimination.[47] One group in Britain has proposed that existing legislation be amended to so that a part-timer could claim equal pay with a full-timer on a pro rata basis.[48]

CONCLUSION

The protection of all of our employment laws hinges on the employee status of the persons to be protected. If telecommuters are deemed to be independent contractors, they will fall outside the protection of the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act, and the various equal employment opportunity and equal pay laws. Although the upper echelons of the telecommuting workforce may not need the protections offered by these statutes, one cannot confidently predict that the rank and file telecommuter is capable of negotiating and maintaining mainstream wage and benefit levels.

Even if the telecommuter is deemed to be an employee, the isolation of the work in the home, out of the sight of a monitoring government and employer raises problems which have not been examined for fifty years. Child labor, night work for adolescents, and evasion of federal minimum wage and overtime provisions cannot glibly be assumed to belong to times past. The age of telecommuting is upon us. We must ensure that telecommuters do not become a disadvantaged class of workers.

FOOTNOTES

1. Examples are numerous. For instance, in most European countries, workers are entitled by law to time off with pay on public holidays. Workers are often entitled to a minimum number of vacation days and to a set amount of severance pay if the worker is made redundant. The results of industrywide collective bargaining may legally bind all employers in the industry, regardless of whether their employees are unionized. Statutes may state what terms must be contained in a written contract of employment which must be given to an employee. Employment legislation in Europe usually applies to all employees, regardless of their level in a given company and regardless of whether they are in the private or public sector.

2. An example would be low paid workers. In the United States, there is a minimum hourly wage. There is, however, no regulation of the other terms and conditions of employment accorded these employees. In contrast, some European countries attempt more comprehensive regulation of industries such as textiles and garmentmaking where large numbers of low paid workers are found.

3.

4. 29 U.S.C. §§ 201 et seq. (1976 & Supp. V 1981).

5. The ban did not occur until 1942. The industries were jewelry, knitted outerwear, gloves and mittens, button and buckle, embroidery, handkerchief and women's apparel. All employed substantial numbers of female homeworkers. It appears that adult male homeworkers were rare. Recently, the Secretary of Labor's decision to rescind restrictions on homework in the knitted outerwear industry in Vermont has received media attention.

6. Mary Skinner, "Prohibition of Industrial Home Work in Selected Industries Under the National Recovery Administration," U.S. Dept. of Labor, Bureau Publication No. 244 (USGPO: Washington, 1938), p. 23. The report specifically considered "family problems" arising from the prohibition of homework because opponents of the ban had predicted that the results would be harsh. The author of the report noted that the actual impact was nowhere as dire as predicted. Interviews with former homeworkers had revealed that most had been able to

adapt to factory employment without undue difficulty.

7. The passage of the Civil Rights Act was clearly motivated by a desire to eliminate the near total exclusion of blacks from many areas of American life, including employment. Until recently, most Title VII complaints related to an employer's rejection of an applicant for a job.

8. In both cases, it was felt that persons capable of performing satisfactorily in a given job were simply not being considered because of their age or physical condition. Since they were incapable, on their own, of convincing employers to hire them, Congress stepped in to assist them in their quest for employment.

9. Congress enacted the National Labor Relations Act, popularly called the Wagner Act, in 1935. Employees' rights are found in section 7.

10. See, e.g, "Computers Open Way to Work at Home," U.S. News & World Report, June 18, 1984, vol. 96, pages 76-77; "A job with a view," Forbes, September 12, 1983, vol. 132, pages 143-150; "When Your Employees Work from Home," Working Woman, March 1985, pages 27-29; "It's Rush Hour for 'Telecommuting'," Business Week, January 23, 1984, pages 99, 102.

11. Estimates vary widely, not among of how many people will telecommute in the future but also of how many telecommute now. A high estimate is given by Marcia Kelly, president of Electronic Services, who predicts that 18 million persons will telecommute within a decade. Business Week, id. at 99. Lower estimates seem more realistic.

12. The median annual salary statistic is supplied by the Department of Labor, Bureau of Labor Statistics for the fourth quarter of 1984. The hourly rate is the author's estimate based on a person working forty hours per week for a full year.

13. For example, Blue Cross/Blue Shield in Massachusetts, Washington, D.C., South Carolina and California has shift certain processing work from its offices to the homes of telecommuters who are paid on a piece work basis and who receive no fringe benefits. See, "Office Computerization Creates Opportunities, Obstacles for White Collar Union Organizing," BNA Daily Labor

Report, November 28, 1984, page A6-9.

14.

15. For example, it has been reported that Blue Cross/Blue Shield in the Washington, D.C. area pays telecommuters $.16 per form processed. The processors pay Blue Cross $95. every two weeks for the rental of the computer terminals. Bill Keller, "At the Center of New Fight: Home Work," New York Times, May 20, 1984, pages 1 and 32.

16. The criticism was usually voiced by groups supporting protecting legislation. Most states in the Northeast had a Women's Bureau or a labor department branch charged with the welfare of female and child workers. Many of these produced reports highly critical of industrial homework.

17. Many of these findings are reported in Wage and Hour Division, U.S. Dept. of Labor, In the Matter of the Recommendation of Industry Committee No. 32 for a Minimum Wage Rate in the Knitted Outerwear Industry and Industrial Home Work in the Knitted Outerwear Industry, Findings and Opinion of the Administrator (1942)(hereinafter referred to as 1942 Findings). Hearings were held between 1941 and 1943 concerning the proposed ban on industrial homework in the seven industries.

18.

19.

20. The regulations concerning piece rate workers is quite complex. What is stated here merely gives some idea of what is required.

21. 1942 Findings, at 26.

22. Id. at 22.

23. Id. at 26.

24. Quote printed in 1942 Findings, at 13.

25. 33 U.S.C. § 203(e)(1).

26. 33 U.S.C. § 203(g).

27. Donovan v. American Airlines, Inc., 686 F.2d 267, 271 (5th Cir. 1982).

28. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

29. Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1311 (5th Cir.), cert. denied, 429 U.S. 826 (1976).

30. Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981).

31. 697 F.2d 662 (5th Cir. 1983).

32. 322 U.S. 111 (1944).

33. Id. at 124-125.

34. Id. at 129.

35. Section 2(3)