
Dead End Jobs or a Path to Economic Well Being? The Consequences of Non-Standard Work among People with Disabilities

Lisa A. Schur, Ph.D., J.D.*

How do non-standard jobs affect the economic well-being of workers with disabilities, and what happens when non-standard workers use disability lawsuits to challenge discrimination and improve their economic opportunities? This study uses data from the Current Population Survey, the Survey of Income and Program Participation, and a Lexis search of legal cases to help answer these questions. Temporary employment, independent contracting, and part-time employment are almost twice as likely among workers with disabilities as among those without disabilities. Non-standard workers with disabilities receive lower pay and fewer benefits due both to the types of job they hold, and disability gaps within job types, which contribute to their high poverty rates. They would continue to have high poverty rates even if these pay gaps were eliminated, however, because they work fewer hours than non-standard workers without disabilities and are concentrated in lower-paying occupations. In attempting to improve their opportunities through disability lawsuits, non-standard workers prevail in only a small minority of cases. Several policy implications of the lawsuits and survey data are discussed. Copyright © 2002 John Wiley & Sons, Ltd.

What is the best way to improve employment opportunities for people with disabilities? Increasing their employment levels has been a major focus of policy and research over the past 15 years but little attention has been paid to the role of non-standard jobs. Such jobs, which include part-time work, temporary employment, and independent contracting, may be especially attractive for many people

*Correspondence to: Lisa A. Schur, Ph.D., J.D., Assistant Professor of Labor Studies and Employment Relations, Rutgers University, 50 Labor Center Way, New Brunswick, NJ 08903, U.S.A.
E-mail: LSchur@rci.rutgers.edu

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with disabilities who have health problems that make standard full-time work difficult. Prior research has shown, in fact, that health problems are a major reason why many people with disabilities are working in non-standard jobs (Schur, 2002). There are, however, a number of drawbacks associated with such jobs. In particular, they tend to pay less and provide fewer benefits than traditional full-time jobs, and a large number of non-standard workers would prefer to be working in standard jobs.

This study looks at the consequences of non-standard work for people with disabilities, addressing two basic issues. First, how do non-standard jobs affect their economic well-being? This is examined by looking at pay and benefit levels, and whether such jobs lift people with disabilities out of poverty or help them make the transition to full-time traditional work. Second, what happens when non-standard workers file disability lawsuits? What issues are raised in such cases, and do non-standard workers face specific legal obstacles? This is addressed by examining disability discrimination lawsuits filed by non-standard workers.

LITERATURE REVIEW

Non-standard work arrangements have received growing attention over the past decade (see, e.g., Barker & Christensen, 1998; Belous, 1998; Carre, Ferber, Golden, & Herzenberg, 2001). Over 12 million American workers (9.3% of the workforce) are temporary employees or independent contractors (DiNatale, 2001). The Bureau of Labor Statistics classifies 2.4–5.6 million Americans (1.9–4.3% of the workforce) as contingent workers, defined as those in jobs that are structured to be short term or temporary (Hipple, 2001). Temporary agency employment grew even in the tight labor markets of the late 1990s, allowing employers to avoid raising wages for regular workers in high-skilled occupations, and facilitating the use of more “risky” workers in low-skilled occupations (Houseman, 2001; Houseman, Kalleberg, & Erickcek, 2001). Part-time work (involving fewer than 35 hours per week) has generally increased among men over the past three decades (from about 9 to 12% of male workers), and stayed stable among women (at around 27–28% of female workers) (Blank, 1998, p. 265). Overall there are 23.9 million part-time workers in the U.S. economy (DiNatale, 2001). While non-standard work is attractive to some people, contingent and part-time workers receive lower average pay and benefits, and a majority of contingent workers would prefer more permanent employment (Blank, 1998; Hipple, 2001).

Another issue that has received increased attention is the employment of people with disabilities (see, e.g., Blanck, 2000; Blanck & Schartz, 2001; Mashaw, Reno, Burkhauser, & Berkowitz, 1996; Thomason, Burton, & Hyatt, 1998; West, 1996). Like contingent and part-time workers, people with disabilities tend to receive low average pay and few benefits. Among those who are employed, a variety of studies have estimated that people with disabilities earn 10–25% less on average than otherwise-comparable people without disabilities (summarized in Baldwin & Johnson, 1998). They are also much less likely to be employed than non-disabled Americans. Among working-age people, only one-third of those reporting a work disability are employed in the course of a year, while only one-half of those fitting a broader definition of disability (based on activity limitations or functional impairments, more closely reflecting the ADA’s definition) are employed in a given month

(Burkhauser, Daly, Houtenville, & Nargis, 2001; McNeil, 2000). The figure is much lower among those with severe disabilities, of whom only one-fourth are employed in a given month. The low employment rates contribute to lower levels of household income and much higher poverty rates among people with disabilities (Kruse, 1998).

While some people with disabilities may have lower productivity levels that contribute to lower earnings, prejudice and discrimination also appear to play a role, as suggested by the finding that wage gaps are higher for people who have disabilities that elicit the most negative social attitudes (Baldwin & Johnson, 1998, 2000). In addition, the work disincentives provided by government disability income programs appear to contribute to the low employment rates of people with disabilities (Bound & Waidmann, 2000).

The employment and earnings gaps associated with disability have been a major impetus for anti-discrimination legislation, such as the Rehabilitation Act and the Americans with Disabilities Act (ADA). Plaintiffs who file disability lawsuits, however, win in only a very small minority of cases (Colker, 1999; Lee, 2001; Parry, 2000). This is due in part to judicial interpretations of the ADA that have created greater barriers for plaintiffs and made it increasingly difficult for them to prevail in lawsuits against employers (Burgdorf, 1997; Lee, forthcoming; Mayerson, 1997).

Are non-standard jobs good employment options for people with disabilities? Such jobs may be especially appropriate for many, providing flexibility to deal with fatigue and other health problems that make it difficult to work in standard full-time jobs. For people who have never been employed or who have not worked recently, non-standard work can help them test their abilities and interests and make a transition to standard full-time jobs. People with disabilities may, however, be channeled into such jobs by employer discrimination or earnings limits in government disability income programs. If employers are reluctant to hire people with disabilities into traditional full-time jobs, those who want to work may be forced to take non-standard jobs. In addition, recipients of Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) risk losing some or all of their benefits if they exceed specific earnings thresholds, which may cause them to limit the number of hours they work.¹

There has been very little research on non-standard workers with disabilities. A 1998 Harris poll found that 48% of part-time workers with disabilities said they would prefer a full-time job (N.O.D./Harris, 1998). As noted, a prior study found that health problems are a major reason for non-standard work arrangements among people with disabilities, given that such arrangements are strongly tied to several health measures and people with disabilities tend to have more sick days and hospital and doctor visits, and worse self-reported health (Schur, 2002). Disability program earnings limits appear to be a relatively minor factor, because most

¹SSI provides means-tested income for those in poverty who have a work-limiting disability, and SSDI provides income based on pre-disability earnings (not limited to people in poverty). SSI recipients lose \$1 of benefits for every \$2 they earn, up to the point where they have earned enough to no longer receive cash benefits. SSDI recipients generally lose all benefits if they earn at or above the standard for "substantial gainful activity" (although the 1999 Ticket to Work and Work Incentives Improvement Act removes some of the work disincentives for SSDI recipients).

non-standard workers with disabilities do not receive disability income, and only a small number of recipients increased their earnings when the SSDI standard for substantial gainful activity was raised in July, 1999 (Schur, 2002). In addition, some evidence suggests that employer discrimination may not be a major factor. Non-standard jobs increased more than standard jobs among people with disabilities as labor markets tightened in the late 1990s, when employers became increasingly unable to indulge discriminatory views and more people with disabilities would have been able to work in standard full-time jobs if they so chose (Schur, 2002).

Other evidence on non-standard work among people with disabilities comes from Blanck (1998), who reports case studies of 10 employees with disabilities working through the large temporary agency, Manpower Inc. He finds that they had generally positive experiences with their training and temporary employment arrangements, and that six of the ten moved to permanent employment. In addition, Blanck, Sandler, Schmeling, and Schartz (2000) examine self-employment among people with disabilities, finding that both the desire for flexibility and experiences of discrimination led individuals with disabilities to participate in an entrepreneurship program. Over one-third of the businesses that were started through the program remained stable and showed a trend toward profitability two years later.

DATA

The data for this manuscript come from three sources. The first is the 1997 disability supplement of the Survey of Income and Program Participation (SIPP). This has a wide range of data on impairments, functional limitations, and limitations in activities of daily living, allowing a number of measures of disability (McNeil, 2000). The hours and occupation codes allow for identification of part-time and temporary agency employees.

The second data source is the Current Population Survey (CPS), where the only disability measure is work disability, based on the March question "Does . . . have a health condition that limits the kind or amount of work . . . can do?"² This study uses two datasets drawn from the CPS, the first from the 1992–2001 March files and the second from the 1995–2001 contingent work supplements. The March datasets provide measures of part-time and temporary agency employment both currently and in the major job held last year, along with income and poverty data for the prior year. Half of the records in each March can be matched to records in the preceding March, providing longitudinal data to track employment and income changes. The contingent work supplements were conducted in February of 1995, 1997, 1999, and

²The work disability measure has been criticized in part for confounding a measure with labor market outcomes being studied (Kirchner, 1996). It is especially problematic in assessing the impact of the ADA on the employment of people with disabilities (Schwochau & Blanck, 2000, 2003). In the current study, defining disability as a limitation in the kind or amount of work one can do may lead to an overestimate of the percentage of people with disabilities who are in non-standard jobs due to health limitations. The estimated rates of non-standard work may be inflated under this measure of disability, since traditional full-time workers may be less likely than non-standard workers with similar impairments to say that they have a work disability (in part because underemployed people may tend to rationalize their status by citing a work disability). This makes it important to also analyze results using a broader measure of disability, as done in this manuscript using SIPP data.

2001, asking a variety of questions about work arrangements (overall results are presented by DiNatale, 2001, & Hipple, 2001). In addition to identifying temporary agency employees, these questions identify other temporary employees (contract workers, on-call and day laborers, and other employees expecting the job to end soon) and independent contractors. For this study the February records were matched to work disability data recorded in the March CPS files.³ Non-standard workers are defined as temporary employees, independent contractors, and part-time workers. All results are limited to working-age individuals (18–64).

Data on legal outcomes and issues were gathered through a Lexis search of all federal district court and appellate cases involving temporary employees, independent contractors, and part-time employees who sued under the ADA, the Rehabilitation Act, or state statutes prohibiting disability discrimination. There were 88 disability lawsuits brought by non-standard workers that have been the subject of federal court opinions through April, 2002.⁴

FINDINGS

Prevalence of Non-Standard Work Arrangements

Consistent with previous evidence, these data show that people with disabilities are much less likely than non-disabled people to be working at all. As seen in Table 1, less than half of people with disabilities are employed under a broad definition of disability from SIPP. Employment rates are especially low among those with severe disabilities, particularly those who have difficulty going outside alone or need help with daily activities. Among people with work disabilities in the CPS data, only one-fourth were employed in the previous week and only one-third were employed in the previous year.

Among employed people, those with disabilities are more likely than non-disabled workers to be in non-standard jobs. They are more likely to be part-time employees and temporary agency employees in both the SIPP and CPS comparisons. Just as people with severe disabilities and those needing help with daily activities have very low employment rates, those who are employed are more likely to be part-time employees. The CPS contingent work supplement data also show that workers with disabilities are more likely to be temporary employees, and independent contractors. Overall, 44% of workers with disabilities are in some type of non-standard work arrangement, compared with 22% of workers without disabilities (Table 1, column (6)).⁵

³Households are interviewed in the CPS for four consecutive months, so that three-fourths of the households interviewed in February are also interviewed in March. Records were matched by household identification number and person line number, and records were discarded if sex and race did not match between the two months.

⁴These cases reveal only some of the issues and obstacles facing non-standard workers with disabilities: many discrimination claims get resolved through informal or formal procedures at work (e.g., grievance procedures, mediation, arbitration), or are settled after a claim has been filed with the EEOC but before the case comes to trial.

⁵Further analysis shows that non-standard work varies by other demographic characteristics, but workers with disabilities are more likely to be in non-standard jobs across the demographic categories (Schur & Kruse, 2001).

Table 1. Non-standard employment among workers with and without disabilities

| | Employment rate (1) | Temporary employees | | | | If employed | | Sample size (8) |
|---------------------------------|------------------------|----------------------------|--------------------------|---|--------------------------------|-------------------------------------|--------------------------------------|--------------------|
| | | Part-time employees (2) | Temp agcy workers (3) | Other temp. employees ^a (4) | Independent contractors (5) | All contingent and part-time (6) | Full-time non-temp. employees (7) | |
| SIPP: employment last month | | | | | | | | |
| No disability | 82.6% | 13.4% | 1.1% | | | | 76.3% | 40,835 |
| Any disability | 49.1%** | 20.6%** | 1.9%** | | | | 66.8%** | 8,595 |
| Severe disability | 22.9%** | 25.2%** | 1.3% | | | | 63.3%** | 4,411 |
| Sensory impairment | 53.1%** | 16.4%** | 1.6% | | | | 71.5%** | 2,108 |
| Mobility impairment | 39.3%** | 20.7%** | 1.5% | | | | 66.1%** | 4,353 |
| Mental impairment | 39.2%** | 29.0%** | 2.2%** | | | | 60.4%** | 2,137 |
| Difficulty going outside alone | 15.7%** | 28.9%** | 0.0% | | | | 55.3%** | 1,108 |
| Need help with daily activities | 20.9%** | 34.4%** | 0.8% | | | | 53.3%** | 1,142 |
| CPS: employment last year | | | | | | | | |
| No work disability | 86.3% | 14.0% | 0.9% | | | | 76.5% | 43,360 |
| Work disability | 32.4%** | 27.9%** | 2.2%** | | | | 60.2%** | 3,725 |
| CPS: employment last week | | | | | | | | |
| No work disability | 79.8% | 13.0% | 0.8% | 4.2% | 6.0% | 21.9% | 74.0% | 43,360 |
| Work disability | 23.5%** | 29.8%** | 2.0%** | 8.5%** | 10.3%** | 44.4%** | 50.9%** | 3,725 |

*Difference from non-disability figure is significant at $p < 0.05$; ** $p < 0.01$. Limited to those aged 18–64.

CPS: Current Population Survey data, February–March 2001.

SIPP: Survey of Income and Program Participation data, 1997. “Any disability” refers to those who have any functional or activity limitation, use mobility devices, receive SSI or SSDI, or have a mental or emotional condition (McNeil, 2000).

“Severe disability” includes any inability to perform functional activities, need for help with daily activities, inability to work, use of mobility devices, or receipt of SSI or SSDI.

^aOn-call and day laborers, workers provided by contract firms, and workers expecting job to last for “limited time.”

The category of self-employed (apart from independent contractors) is not presented, so columns (2)–(7) do not sum to 100%.

Pay, Benefits, and Other Job Characteristics

What are the consequences of non-standard jobs for the economic well-being for workers with disabilities? These data confirm that non-standard workers earn less than standard workers, and people with disabilities earn less than non-disabled workers. As shown in Table 2, workers with disabilities earn lower weekly pay whether they are in standard or non-standard jobs. This is partly due to fewer hours worked per week, but the pay gaps remain when looking at hourly pay levels. The disability gaps range from \$1.15 per hour among both part-time employees and temporary employees to \$6.20 among independent contractors.

These pay gaps remain when using a regression to control for standard pay determinants (including demographic, skill, occupation, and industry variables, with full results available on request). The summary results in Table 2 first show the adjusted hourly pay gaps by job type: among non-disabled workers, temporary employees earn 10.1% less than permanent full-time employees, while independent contractors earn 5.7% less, and part-time employees earn 8.9% less. Within each job type, people with disabilities earn less than people without disabilities, ranging from 4.5% less among temporary employees to 17.2% less among independent contractors. Combining the disability and job type gaps, temporary employees with disabilities earn 14.1% less, independent contractors with disabilities earn 21.9% less, and part-time employees with disabilities earn 21.6% less than permanent full-time employees without disabilities.

Mirroring these pay gaps, non-standard workers are less likely to receive employer-sponsored health insurance and pensions (consistent with the results of DiNatale, 2001). Moreover, non-standard workers with disabilities are the least likely to receive these benefits. Health insurance is a particularly important issue given that health problems often accompany many disabilities. The lack of employer-sponsored health insurance is often cited as a reason why many people with disabilities remain on SSI and SSDI programs, since these provide health insurance through Medicaid and Medicare. Table 2 shows that people with disabilities are not only less likely to receive employer-sponsored health insurance within each of the job arrangements, they are less likely to have any health insurance at all.

The data also show that workers with disabilities are more likely to be service and blue-collar workers in each of the job types. They are equally likely to be union members, and have similar job tenure on average.⁶

Do non-standard workers want to stay in these jobs? Over half of temporary employees say they would prefer permanent employment, while less than one-third of part-time employees would prefer full-time work, and less than one-sixth of independent contractors would prefer to work as employees. Workers with disabilities in each of these arrangements are significantly more likely than their non-disabled counterparts to prefer standard jobs. This difference may reflect more limited access to standard jobs due to employer discrimination, and/or a desire to be free of the health problems that limit employment options for many people

⁶The high average tenure of workers with disabilities partly reflects their higher average age (43.3 compared with 38.4 among workers without disabilities). When workers of the same age are compared, those with disabilities have average tenure levels that are 1–1.5 years lower than for their non-disabled counterparts.

Table 2. Pay, job characteristics, and desire for standard jobs

| | Permanent full-time employees | | Temporary employees | | Independent contractors | | Part-time employees | |
|--|-------------------------------|------------------------|---------------------|------------------------|-------------------------|------------------------|---------------------|------------------------|
| | With disability (1) | Without disability (2) | With disability (3) | Without disability (4) | With disability (5) | Without disability (6) | With disability (7) | Without disability (8) |
| Pay and hours | | | | | | | | |
| Weekly pay (mean) | \$579** | \$704 | \$299** | \$460 | \$459** | \$830 | \$229** | \$273 |
| Hours worked per week (mean) | 38.9** | 42.1 | 27.8** | 32.8 | 31.7** | 40.6 | 23.0** | 24.9 |
| Hourly pay (mean) | \$14.02** | \$16.25 | \$11.81** | \$12.96 | \$13.60** | \$20.00 | \$10.01** | \$11.16 |
| Adjusted pay gap associated with ^a : | | | | | | | | |
| Job type (relative to perm. full-time employees) | | | | | | | | |
| Disability status (within job type) | -10.6%** | | -4.5% | -10.1%** | -17.2%** | -5.7%** | -13.9%** | -8.9%** |
| Disability and job type (relative to perm. full-time employees without disabilities) | -10.6%** | | -14.1%** | | -21.9%** | | -21.6%** | |
| Benefits | | | | | | | | |
| Participate in employer health insurance | 64.9%** | 74.2% | 8.7%** | 24.1% | 1.8% | 2.8% | 15.2%* | 18.3% |
| Have other health insurance | 19.1%* | 14.4% | 49.0% | 42.2% | 62.6%** | 71.5% | 56.5% | 56.3% |
| No health insurance | 15.9%** | 11.4% | 42.3%** | 33.7% | 35.5%** | 25.8% | 28.3% | 25.4% |
| Participate in employer pension | 51.0%** | 59.3% | 10.0%** | 17.3% | 1.3%* | 2.5% | 12.9%** | 18.1% |
| Occupation | | | | | | | | |
| White-collar | 52.4%** | 61.3% | 46.7%** | 53.9% | 49.6%** | 59.4% | 44.2%** | 59.8% |
| Service | 13.8%** | 10.1% | 27.5%** | 16.4% | 14.6%** | 9.3% | 29.7% | 27.1% |
| Blue-collar | 33.8%** | 28.6% | 25.8% | 29.7% | 35.9% | 31.3% | 26.0%** | 13.1% |
| Union member | 18.3% | 16.8% | 9.3% | 10.6% | | | 6.2% | 8.2% |
| Years with employer (mean ^b) | 7.65 | 7.72 | 2.81 | 2.66 | 9.41 | 9.35 | 4.09 | 3.76 |
| Prefer standard/full-time job | | | 64.5%** | 56.4% | 15.3%** | 9.3% | 29.3%** | 24.5% |
| Previously worked for current employer as contractor or temp. worker | | | | | | | | |
| Sample size | 7.9%** 1,913 | 4.1% 101,405 | 341 | 7,560 | 395 | 9,127 | 1,083 | 19,175 |

*Difference is significant at $p < 0.05$; ** $p < 0.01$. Limited to those aged 18–64.

Source: Current Population Survey February–March matched data, combined for 1995, 1997, 1999, 2001. Pay figures adjusted to 2001 values.

^aThe adjusted pay gap is based on a regression that controls for differences in pay that are attributable to gender, race, marital status, education, occupation, industry, labor market experience, geographical region, and metropolitan status. See results in Appendix Table A.1, column (1).^bTenure is calculated with the client firm for temporary agency and contract employees in columns (3)–(6).

with disabilities. The question of whether they in fact have similar access to standard jobs will be taken up following an examination of poverty levels and disability income.

How much does lower pay contribute to higher poverty levels among non-standard workers with disabilities? Not surprisingly, poverty rates are lowest among full-time permanent employees and highest among the non-employed. People with disabilities who are not employed are especially likely to be poor (as shown in Table 3, over one-third are living below the poverty line, compared to fewer than one-fourth of the non-employed people without disabilities). Within each of the employment categories people with disabilities are more likely to be in poverty. The disability gap in poverty rates is 10–12 percentage points among non-standard workers, but only two percentage points among traditional full-time employees. Close to one-fifth of non-standard workers with disabilities live in poverty, which is about twice the rate of non-standard workers without disabilities (columns (3)–(8)). Table 3 examines how much the poverty rates would change if the adjusted pay gaps presented in Table 2 were eliminated. Raising the hourly pay of non-standard workers to that of standard employees and eliminating the pay gap associated with disability would decrease the poverty rates of non-standard workers with disabilities by several percentage points (down to 15–17% from close to 20%), but they would remain substantially more likely than their non-disabled peers to live in poverty. This reflects the low pay of workers with disabilities due to their higher concentration in lower-paying service and blue-collar jobs, their fewer hours worked per week on average, and their lower average education levels.

Many people with disabilities who live in poverty are eligible for SSI. As shown in Table 3, between 5 and 18% of non-standard workers with disabilities received SSI in the previous year, which is similar to the percentages who received SSDI. A majority of non-employed people with disabilities received either SSDI or SSI, but only about one-fourth of part-time workers with disabilities, one-sixth of temporary employees, and less than one-tenth of independent contractors did so. As noted earlier, these programs provide full benefits only to those earning less than a specific threshold, but work disincentives appear to play a relatively minor role in the higher rates of non-standard work among people with disabilities (Schur, 2002).

Job Transitions, Disability Income, and Poverty

Do non-standard jobs often lead to traditional full-time jobs for people with disabilities, and help them become financially independent? Table 4 presents results from matched March CPS files over the 1992–2001 period. This enables analysis of changes over the course of one year in job status, disability income reciprocity, and poverty rates.

Just under half of temporary agency employees, and about one-third of part-time employees, made the transition to standard full-time employment in the following year. Among part-time employees, but not temporary agency employees, people with disabilities were significantly less likely to move to standard jobs. Nonetheless the difference is not large, suggesting that non-standard workers with disabilities may not face much greater barriers in moving to standard jobs. While this is

Table 3. Disability income and poverty levels by job type

| | Permanent full-time employees | | Temporary employees | | Independent contractors | | Part-time employees | | Not employed | |
|--|-------------------------------|------------------------|---------------------|------------------------|-------------------------|------------------------|---------------------|------------------------|---------------------|-------------------------|
| | With disability (1) | Without disability (2) | With disability (3) | Without disability (4) | With disability (5) | Without disability (6) | With disability (7) | Without disability (8) | With disability (9) | Without disability (10) |
| Family income/poverty level | | | | | | | | | | |
| <100% | 5.4%*** | 3.3% | 19.5%*** | 9.5% | 19.8%*** | 7.1% | 19.9%*** | 10.6% | 34.0%*** | 23.8% |
| 100–199% | 17.0%*** | 11.7% | 28.8%*** | 19.1% | 21.7%*** | 12.5% | 23.2%*** | 16.9% | 27.2%*** | 19.7% |
| 200%+ | 77.6%*** | 85.1% | 51.8%*** | 71.4% | 58.5%*** | 80.4% | 56.9%*** | 72.5% | 38.8%*** | 56.5% |
| Poverty rate | | | | | | | | | | |
| Actual | 5.4%*** | 3.3% | 19.5%*** | 9.5% | 19.8%*** | 7.1% | 19.9%*** | 10.6% | 34.0%*** | 23.8% |
| If eliminate pay gap due to: | | | | | | | | | | |
| Job type (relative to perm. full-time employees) | 5.4%*** | 3.3% | 14.7%* | 8.6% | 19.8%*** | 6.7% | 17.7%*** | 9.8% | | |
| Disability (within job type) | 4.5% | 3.3% | 17.4%* | 9.5% | 17.3%*** | 7.1% | 17.1%*** | 10.6% | | |
| Disability and job type | 4.5% | 3.3% | 14.7%* | 8.6% | 17.3%*** | 6.7% | 15.5%*** | 9.8% | | |
| Disability income | | | | | | | | | | |
| SSI or SSDI | 4.1%*** | 0.6% | 17.1%*** | 0.8% | 7.9%*** | 0.5% | 27.2%*** | 1.9% | 55.5%*** | 5.8% |
| SSI | 3.1%*** | 0.5% | 10.7%*** | 0.7% | 5.4%*** | 0.4% | 17.9%*** | 1.4% | 35.2%*** | 4.0% |
| SSDI | 1.9%*** | 0.1% | 10.2%*** | 0.2% | 4.1%*** | 0.1% | 15.6%*** | 0.5% | 27.7%*** | 2.2% |
| Sample size | 1,463 | 87,955 | 199 | 5,025 | 277 | 7,353 | 791 | 14,595 | 10,716 | 26,408 |

*Difference between disability and non-disability samples is significant at $p < 0.05$; ** $p < 0.01$.

Income data are available for previous year, so figures in columns (1)–(8) are limited to those who had the same job in the previous year.

Source: Current Population Survey February–March matched data, combined for 1995, 1997, 1999, 2001. Limited to age 18–64.

Disability is measured as work disability.

Table 4. Transitions in job types, disability income, and poverty status

| | Temporary agency employees in base year | | Part-time employees in base year | | Full-time, non-temp-agcy employees in base year | |
|---|--|----------------------|-------------------------------------|----------------------|--|----------------------|
| | Disability (1) | No disability (2) | Disability (3) | No disability (4) | Disability (5) | No disability (6) |
| Total | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% |
| Percent who in following year were | | | | | | |
| Part-time employees | 15.5% | 14.6% | 38.7%** | 50.8% | 8.6%** | 5.3% |
| Temp. agcy employees | 12.1%* | 24.4% | 1.6% | 1.0% | 1.1% | 0.5% |
| Full-time, non-temp-agcy employees | 48.8% | 50.7% | 27.9%** | 33.4% | 65.2%** | 86.5% |
| Self-employed | 0.1%** | 3.4% | 4.3% | 3.6% | 3.1% | 3.0% |
| Not employed | 27.0%* | 11.7% | 28.0%** | 11.8% | 22.4%** | 4.7% |
| Change in percentage receiving SSDI/SSI | | | | | | |
| Between prior and base year | -15.5% [†] | -0.3% | -11.0% [†] | 0.3% | -14.6% [†] | -0.1% [†] |
| Between base and following year | 5.1% | -1.4% | -2.8% | 0.4% | 2.4% [†] | 0.5% [†] |
| Change in percentage in poverty | | | | | | |
| Between prior and base year | -11.2% | -0.4% | -1.4% | 0.8% [†] | -10.4% [†] | -1.9% [†] |
| Between base and following year | -11.2% | 0.6% | -1.4% | -2.2% [†] | 2.4% [†] | 1.2% [†] |
| Sample size | 125 | 1,408 | 2,157 | 29,450 | 4,058 | 148,608 |

[†]Change is statistically significant at $p < 0.05$; [‡] $p < 0.01$. Limited to those aged 18–64.
*Difference between disability and non-disability figures is significant at $p < 0.05$; ** $p < 0.01$.
Source: March CPS supplements, 1992–2001, matched to prior March datasets to create longitudinal data.
Disability status is measured as work disability in base year.

encouraging, it must also be noted that among each of the employment categories workers with disabilities are more likely than non-disabled workers to not be employed at all in the following year. This may be due to more severe health problems experienced by many people with disabilities, but could also reflect difficulties encountered at work, such as lack of accommodations or employer discrimination.

To what extent are non-standard jobs part of a transition off of disability income and out of poverty? Table 4 compares changes in disability income reciprocity and poverty rates over time among different types of workers, by comparing the base year (when their job type is recorded) to the previous year and the following year. One finding is that receipt of SSDI or SSI fell significantly from the previous to the base year among all categories of workers with disabilities. The drop in reciprocity among non-standard workers is similar to the drop among full-time non-temporary-agency workers. The drop in poverty rates, however, was only significant among full-time non-temporary-agency employees, indicating that such work is the best route out of poverty. In fact, the decrease in poverty is larger among full-time non-temporary workers with disabilities than among their non-disabled counterparts, indicating the particularly important role that standard jobs can play in alleviating poverty among people with disabilities. While the sample is too small to establish statistical significance, the decreases in poverty rates among temporary agency workers with disabilities suggest that such jobs also may help many people with disabilities make the transition out of poverty.

In short, while non-standard jobs often provide needed flexibility for people with disabilities and can help them make the transition to standard work, they also provide lower pay and fewer benefits. Non-standard workers with disabilities have higher job turnover, and are more likely than their non-disabled counterparts to remain in poverty and to desire full-time standard work. Given these disparities, it is valuable to examine how non-standard workers with disabilities have tried to improve their job opportunities by filing disability lawsuits.

Legal Outcomes and Issues in Disability Lawsuits

Are non-standard workers more or less likely to file disability lawsuits against employers, and what are the outcomes of these cases? The first finding is that non-standard workers appear less likely than other workers to pursue disability lawsuits. Of the 88 federal court decisions in disability lawsuits, 11 were appellate-level ADA cases decided by July 1998, representing just 4.1% of the appellate ADA cases identified by Lee (2001) and 2.3% of the cases identified by Colker (1999) in their studies. These percentages are much lower than the 44% of workers with disabilities who are in non-standard jobs (Table 1), indicating that they are less likely than traditional full-time workers to pursue ADA lawsuits (either by filing or by appealing if they lose at a lower level). This is likely due to the lower average pay and fewer benefits in non-standard employment, which decreases the value of gaining or preserving such jobs (while the costs of a lawsuit are just as high as for other workers).

Employers have prevailed in the large majority of the disability lawsuits filed by non-standard workers. As shown in Table 5, plaintiffs won final victories in only

Table 5. Disposition of disability lawsuits

| | All cases involving non-standard workers | | Circuit court cases | |
|---|---|---------|-------------------------|------------------------------|
| | Number | Percent | Non-standard workers | All ADA cases (Lee, 2001) |
| | (1) | (2) | (3) | (4) |
| Total number of cases | 88 | | 29 | 268 |
| | | 100.0% | 100.0% | 100.0% |
| Judgment for plaintiff | 3 | 3.4% | 0.0% | 3.7% |
| Summary judgment | 3 | 3.4% | | |
| Judgment for employer | 66 | 75.0% | 75.8% | 78.7% |
| Summary judgment | 40 | 45.5% | | |
| Summary judgment affirmed | 16 | 18.2% | | |
| Directed verdict for employer | 2 | 2.3% | | |
| Affirmed judgment for employer | 1 | 1.1% | | |
| Judgment for plaintiff reversed | 2 | 2.3% | | |
| Plaintiff's case dismissed | 5 | 5.7% | | |
| Interim judgment for plaintiff | 18 | 20.5% | 24.1% | 17.5% |
| Denied summary judgment | 7 | 8.0% | | |
| Reversed summary judgment | 6 | 6.8% | | |
| Denied dismissal | 2 | 2.3% | | |
| Reversed dismissal | 3 | 3.4% | | |
| Denied some employer affirmative defenses | 1 | 1.1% | | |
| Total rulings favoring plaintiff | 22 | 25.0% | 24.1% | 21.3% |

three cases (3.4%), while employers prevailed in 66 cases (75%). In 18 additional cases the courts gave intermediate victories to the plaintiff by allowing the case to proceed (denying or reversing dismissals, or denying or reversing summary judgment for the employer). Overall, decisions were favorable to plaintiffs in 22 (25%) of the cases. These results are similar to the pattern of outcomes of ADA cases in general: in both the cases analyzed here and the appellate cases for all ADA plaintiffs analyzed by Lee (2001), over three-fourths of the cases were decided in favor of the employer (Table 5, columns (3) and (4)). Table 6 shows that favorable outcomes were least likely for part-time employees (20%, compared with 26.6% for temporary employees and 33.3% for independent contractors) (column (3)).

The most common issue was whether the plaintiff had a legally recognized disability, followed by whether the employer engaged in discrimination, whether the plaintiff was qualified for the employment position, whether the employer provided reasonable accommodations, and whether the plaintiff was an employee or independent contractor (Table 6). Among these five issues, plaintiffs were most likely to win when discrimination was the contested issue (47.6%), while no plaintiffs prevailed in establishing that they were qualified for the desired position or that their desired accommodations were reasonable.

While several of these issues are common in disability lawsuits in general, four deserve discussion here because of their special relevance for non-standard workers.

Whether the Plaintiff Is "Otherwise Qualified"

Plaintiffs who establish that they have legally recognized disabilities must then prove they are qualified for the desired position, with or without reasonable accommoda-

Table 6. Disability lawsuits involving non-standard workers

| | Number of cases (1) | Pct. of cases (2) | Favorable outcome for plaintiff (3) |
|---|---------------------------|-------------------------|---|
| Total | 88 | 100.0% | 25.8% |
| Type of non-standard worker | | | |
| Temporary employee | 30 | 34.1% | 26.6% |
| Independent contractor | 15 | 17.0% | 33.3% |
| Part-time employee | 45 | 51.1% | 20.0% |
| Non-standard worker desired standard employment | 14 | 15.9% | 28.6% |
| Court | | | |
| U.S. District Court | 57 | 64.8% | 24.6% |
| U.S. Court of Appeals | 31 | 35.2% | 25.8% |
| Law | | | |
| ADA | 69 | 78.4% | 24.6% |
| Rehabilitation Act | 21 | 23.9% | 23.8% |
| State law | 4 | 4.5% | 25.0% |
| Issue | | | |
| Plaintiff has disability | 28 | 31.8% | 14.3% |
| Defendant engaged in discrimination | 21 | 23.9% | 47.6% |
| Plaintiff is otherwise qualified | 14 | 15.9% | 0.0% |
| Defendant has provided reasonable accoms. | 12 | 13.6% | 0.0% |
| Plaintiff is employee or indep. contractor | 8 | 9.1% | 12.5% |
| Procedural issue ^a | 8 | 9.1% | 50.0% |
| Defendant is an integrated or joint employer | 3 | 3.4% | 66.7% |
| Defendant can be sued under Titles II or III of ADA | 3 | 3.4% | 100.0% |

^aThe procedural issue in six of the cases was whether the plaintiff's claim is time barred.

The issue in another case was whether the union grievance system had been properly exhausted, and the issue in the remaining case was whether it should be heard in federal or state court (since a state statute also applied).

tions.⁷ As noted by scholars such as Mayerson (1997), this places many plaintiffs in a "catch-22" situation because evidence of disability or the need for accommodations can be used to show that they are not qualified. On the other hand, the more a plaintiff is seen as being able to perform a job, the more likely he or she will not be viewed as "disabled enough" to be protected by the ADA.

Health limitations draw many workers with disabilities to flexible, contingent work arrangements, but their need for flexibility may make it especially hard for them to prove that they are qualified. In fact, as noted, none of the plaintiffs prevailed in the 14 cases where their employment qualifications were disputed. Difficulty with regular attendance and fixed work schedules was an issue in several of these cases. Courts have been virtually unanimous in holding that regular, fixed attendance is an essential job function and that the need for unpredictable absences automatically makes one unqualified. An important opinion in this area is *Jackson v.*

⁷The Supreme Court recently made it harder for plaintiffs to establish that they are "otherwise qualified" in *Chevron v. Echazabal*, 122 S.Ct. 2045; 2002 U.S. LEXIS 4202. The plaintiff had worked as a contract employee in a Chevron refinery for many years and was denied a job when he applied to work as a regular employee. Chevron raised the "direct threat" defense, arguing that Echazabal was unqualified for the job because his liver condition could be exacerbated by exposure to toxins at the refinery. A unanimous Supreme Court ruled in favor of the employer.

Veterans Administration,⁸ in which the plaintiff, a temporary janitor, was fired for excessive disability-related absences. Although he had not exhausted his sick leave at the time he was fired, the 11th Circuit held as a matter of law that he was not qualified because regular attendance was a necessary function of the job. Courts have followed the lead of the *Jackson* majority in subsequent cases involving part-time and temporary workers.⁹

The dissent in *Jackson* argued that the reasonableness of accommodating unpredictable absences should be decided on a case-by-case basis—what might pose an undue hardship for an employer in one situation might be reasonable in another. All employees can have unscheduled health-related absences (as recognized by employer provisions for sick leave), and employers often develop methods to accommodate such absences (such as multi-skilling and job rotation plans to ensure that other employees are able to step in and cover the work). Harlan and Robert (1998) found that employers were least likely to grant accommodations involving flexible schedules, which they interpret as based on the desire to maintain control of the work process. Given that contingent and part-time workers are more likely to have severe disabilities and related health problems, it would appear especially important that they find employers who are willing to work with them on devising flexible work arrangements.

Coverage of Independent Contractors

The Rehabilitation Act and Title I of the ADA clearly apply to temporary and part-time workers but do not protect independent contractors with disabilities because they are not considered employees. A threshold issue in many discrimination cases is whether the plaintiff is an independent contractor or an employee. Traditionally, courts have used the common law agency test to decide this, where the most important question is who has the right to control the manner and means in which the work is done.¹⁰ Some courts, however, have used the more recent “economic realities” test, which reflects the economic dependence of the worker on the employment relationship; this test is more likely to find that the worker is an employee.¹¹

As Table 6 shows, only one plaintiff was successful among the eight who tried to prove that they were employees. Several courts, however, have ruled that indepen-

⁸*Jackson v. Veterans Administration*, 22 F.3d 277 (11th Cir. 1994).

⁹*Gore v. GTE South*, 1996 U.S. Dist. LEXIS 3292, 917 F. Supp. 1564; *Deal v. Candid Color Systems* 1998 U.S. App. LEXIS 15018; *Tyndall v. National Education Centers*, 1993 U.S. Dist. LEXIS 20208; *Soto-Ocasio v. Federal Express Corporation*, 977 F. Supp. 106; 1997 U.S. Dist. LEXIS 14088.

¹⁰Other considerations are the skill required, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular work of the employer, and the provision of employee benefits (*Dykes v. Depuy*, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–752).

¹¹The “economic realities” test focuses on (i) the extent of the employer's control and supervision over the worker; (ii) the kind of occupation and nature of skill required, including whether the skills are obtained in the workplace; (iii) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations; (iv) method and form of payment and benefits; and (v) length of job commitment and/or expectations (*Hollingsworth-Hanlan v. Alliance Francaise*, 1998 NDLR (LRP) LEXIS 412, citing *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 (7th Cir. 1996)). See Carnevale, Jennings, and Eisenmann (1998) for further discussion.

dent contractors may be covered by other sections of the ADA. For example, some courts have held that independent contractors who are hired by states or municipalities are protected by Title II, which prohibits public entities from excluding an individual with a disability from receiving the benefits of the services, programs, or activities they provide. Circuit courts are split, however, on whether Title II can apply to employment, and the Supreme Court's *Garrett* decision raises the possibility that the scope of Title II will be substantially restricted.¹² In addition, in one case the court held that an independent contractor was entitled to protection from employment discrimination under Title III's mandate that public accommodations be accessible to people with disabilities, although such broad interpretations of Title III are by no means universal.¹³

While some independent contractors may therefore be able to pursue claims based on Titles II or III of the ADA, most are not protected by the ADA, and the success rate is low among plaintiffs seeking coverage by establishing employee status.

Employer Coverage

The definition of employer is another issue that is important for non-standard workers with disabilities, particularly for temporary help agency employees who may wish to pursue discrimination claims against both the temporary agency and the client firm. While temporary agency employees are clearly covered by the ADA, it is sometimes unclear whether their employer is the temporary agency, the client firm, or both.¹⁴ The only decision in a disability case involving this issue held that the client employer could be named as a joint employer with the temporary employment agency, since it provided the plaintiff with equipment and a place of employment and maintained control over her work.¹⁵

A related issue is whether firms might use contingent and part-time workers to decrease their employee count below the 15-employee minimum for ADA coverage. A 1997 Supreme Court ruling established the "payroll method" for determining statutory coverage, based on how many employees appear on the payroll in a given calendar week (no matter the number of hours worked).¹⁶ Independent contractors

¹²*Johnson v. Saline*, 151 F.3d 564; 1998 U.S.App. LEXIS 18155. As an example of the split among the circuits, the 9th Circuit ruled that the words "services, programs, or activities" in Title II apply only to "outputs" of a public agency, not to "inputs" such as employment (*Zimmerman v. Oregon*, 170 F.3d 1169, 1173, 1999 U.S.App. LEXIS 4359, 11). The Supreme Court ruled that state and local governments cannot be sued for money damages under Title I of the ADA and a similar argument may be used to restrict the scope of Title II (*University of Alabama v. Garrett*, 531 U.S. 356, 2001; 121 S. Ct. 955; 148 L. Ed. 2d 866).

¹³*Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113; 1998 U.S.App. LEXIS 20720. Title III was held not to cover independent contractors in *Elbrecht v. HCA Health Services*, 1994 U.S. Dist. LEXIS 1887 (ND Fla.).

¹⁴EEOC Guidelines stipulate that the staffing firm and/or its client qualify as the employer if one or both businesses have the right to exercise control over the worker's employment, and they are "joint employers" if both have the right to control the work of the employee and each has at least 15 employees (EEOC, 2000). Plaintiffs are entitled to sue both the staffing firm and the client employer in a single cause of action under the ADA, as illustrated in *Johnson v. American Chamber of Commerce Publishers Co.*, 108 F.3d 818; 1997 U.S.App. LEXIS 5213.

¹⁵*Redd v. Rubin*, U.S. District Court, District of Columbia, 34 F.Supp.2d 1; 1998 U.S. Dist. LEXIS 20738.

¹⁶*Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202; 117 S.Ct. 660; 1997 U.S. LEXIS 462. This was a Title VII case but would presumably apply to the ADA.

are not counted. According to EEOC guidance, temporary agency employees are counted as employees of the client firm if it exercises control over their work, although no cases have dealt with the issue of whether the use of temporary agency employees allows a firm to avoid ADA coverage (EEOC, 2000). It may be possible, in short, for employers to avoid coverage by the ADA and other employment statutes by using independent contractors and (in certain conditions) temporary agency employees, but there is no evidence on how many firms may be trying to do this.

Reasonable Accommodations

The ADA does not require employers to make accommodations for workers with disabilities if these would impose an “undue hardship”.¹⁷ While Congress has rejected the use of cost-benefit analysis in accommodation decisions, employers may be more reluctant to make accommodations for non-standard workers. Temporary or leased employees may have a particularly difficult time in this regard as client firms may hesitate to modify offices, purchase equipment, or invest in other accommodations for workers who will be there for only a limited time. As shown in Table 6, plaintiffs lost in all of the 12 cases involving the issue of reasonable accommodations. No cases, however, have explicitly cited the temporary or part-time nature of the work in deciding whether an accommodation was an undue hardship.

Policy implications of the issues raised in these cases are discussed in the final section.

CONCLUSION

Contingent and part-time work is the best employment option for many people with disabilities who have health problems that make it difficult to work in traditional full-time jobs. Non-standard employment also helps many people with disabilities make the transition to traditional full-time jobs. Non-standard workers with disabilities face large pay and benefit gaps, however, and one-fifth live below the poverty line. Eliminating the hourly pay gaps associated with disability and non-standard work would do relatively little to reduce poverty rates among non-standard workers with disabilities because of their lower average work hours and education levels, and their concentration in the lowest paying occupations. While non-standard workers with disabilities face the greatest disparities, they are less likely than other workers to pursue disability lawsuits, and those who do sue employers have favorable intermediate or final judgments in only one-fourth of the cases.

What policy implications can be drawn from the legal cases and survey data? While the 1999 Ticket to Work and Work Incentives Improvement Act (TWWIIA) will benefit many disability income recipients, it will have a limited impact on

¹⁷The Act does not define the term “undue hardship” but, according to the *EEOC Technical Assistance Manual*, this is “an action that requires significant difficulty or expense” in relation to the size of the employer, the resources available, and the nature of the operation (*ADA Technical Assistance Manual*, Sect. 1–3.9).

current non-standard workers with disabilities since so few receive disability income. Because of their concentration in non-standard jobs, workers with disabilities would be helped if conditions were improved for non-standard workers in general (such as by increasing health insurance availability, extending the protections of employment law, and revising labor law to make it easier for these workers to unionize) (Carnevale et al., 1998; DuRivage, Carre, & Tilly, 1998; Shine, 1996). As noted earlier, however, raising pay and benefit levels for non-standard workers in general would not fully address the disparities faced by those with disabilities. What types of policies are needed to address their particular problems?

One important policy goal should be to increase their health insurance coverage. Only small minorities of non-standard workers with disabilities receive employer-provided health insurance, and many have no health insurance. The TWWIIA is an encouraging development as it provides extended Medicare coverage for disability income recipients who return to work, and allows states to implement a Medicaid buy-in option (which provides coverage for services such as personal assistance and adaptive equipment). TWWIIA also has a pilot program offering Medicaid coverage to people with disabilities who are still working and not receiving SSI, where the expectation is that they may have to leave work due to lack of medical coverage. It would be valuable to consider expanding Medicare and Medicaid availability to non-recipients with disabilities who are currently uninsured (perhaps on a cost-sharing basis with a sliding scale).

As discussed, the pay disparities faced by non-standard workers with disabilities are due in part to their lower levels of education and their concentration in low-paying occupations. This highlights the importance of continuing efforts to improve the educational attainment of people with disabilities. To further address skills gaps, employers and unions should be encouraged to ensure that workers with disabilities have full access to training programs. They should also be encouraged to develop programs that use non-standard jobs as a means to help more people with disabilities make the transition to traditional full-time work.

The prevalence of non-standard jobs among people with disabilities reveals the importance of flexibility. Increasing employment for people with disabilities—in both standard and non-standard jobs—will depend in part on whether jobs can include flexible schedules to accommodate unexpected health-related absences. Since courts have ruled that employers are not required to accommodate the need for unexpected absences, increasing flexibility will depend on voluntary employer policies. As noted earlier, sick leave policies are common and show that most employers expect to accommodate some unscheduled absences. Additional sick leave—taken either as unpaid leave or as “flextime” to be made up later—could be a reasonable accommodation for some workers with disabilities, and could be encouraged by public policy (e.g. tax credits for more generous sick leave policies). Job rotation and multi-skilling may also increase flexibility and help reduce the disruption that absences can cause. Unions and disability organizations should be encouraged to work with employers to design such policies to accommodate workers with disabilities while protecting the interests of non-disabled workers.

Another issue concerns protection for independent contractors, who are excluded from coverage under Title I of the ADA. More workers could be counted as employees rather than independent contractors if the “economic realities test” is used rather than the “right of control” test (Carnevale et al., 1998, p. 293).

Currently the best prospect for ensuring that independent contractors with disabilities are protected from discrimination would appear to be coverage by state anti-discrimination laws (such as the one that exists in California).

Employers may be particularly reluctant to hire non-standard workers who require accommodations for their disabilities, due to the fewer hours worked per week or shorter expected tenure of such workers. A variety of low-cost accommodations (such as job rotation in combination with extended sick leave, as suggested above) should continue to be developed and promoted by policy makers and disability organizations. Employers should be made aware that many accommodations for non-standard workers (e.g. ramps, voice-activated computer programs) can have wider benefits for other current and future employees and customers.

Finally, there is the issue of who—if anyone—can be sued when discrimination occurs. Under the common law agency test (based on the right to control how the work is performed), temporary employees often can sue only the temporary agency or the client firm even though both may have engaged in discrimination. A more expansive definition of joint employer (using the economic realities test) would help prevent discriminatory behavior by increasing the likelihood that both parties could be held liable.

Non-standard work plays a major role in the employment of people with disabilities and has important consequences for their economic well-being. While such work is often the best employment option for many people with disabilities, there are a number of drawbacks associated with contingent and part-time jobs. A variety of policies should be considered to improve the economic well-being of non-standard workers with disabilities and help them move toward economic parity with non-disabled Americans.

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