Realizing the Need for and Logic of an Equal Pay Act for Temporary Workers

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I. INTRODUCTION

The National Labor Relations Board's ("NLRB" or "Board") recent decision in Oakwood Care Center¹ has focused attention again on the remarkable rise of employment through temporary agencies. The dissent, particularly, highlights a growing shift from permanent to temporary employment. It points out that from 1982 to 1998, the "temporary help


¹. Oakwood Care Center, 343 N.L.R.B. No. 76 (Nov. 19, 2004).
supply industry" grew by 577 percent, compared with 41 percent growth in total employment.\textsuperscript{2} The dissent also points to several indications that the extraordinary increase continues.\textsuperscript{3}

In times of uncertain demand, temporary workers provide employers a useful option for meeting and determining their employment needs.\textsuperscript{4} However, a significant percentage of employers use contingent workers on a more permanent basis to reduce wage and benefit costs.\textsuperscript{5} Meanwhile, almost half of workers from temporary help agencies would prefer to be in permanent employment.\textsuperscript{6} In their current positions, those workers are plagued by job insecurity, lack of health coverage, and substandard wages.\textsuperscript{7} This is not a positive development for the U.S. economy; it serves only to decrease lower-wage workers' spending power and push them away from an acceptable standard of living, shifting their potential income instead to their employers' profit margins.\textsuperscript{8}

\begin{itemize}
\item \textsuperscript{2} Id. at 10 (citing M. B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000) and \textit{GENERAL ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE} 16, GAO/HEHS-00-76 (2000)).
\item \textsuperscript{3} Id. at 10 & nn.14-15.
\item \textsuperscript{4} See \textit{infra} notes 145-49 and accompanying text. As some commentators point out, the flexibility that temporary workers provide employers can also be thought of as shifting the burden of uncertainty from employers to employees. See, e.g., Lonnie Golden, \textit{The Expansion of Temporary Help Employment in the US, 1982-1992: A Test of Alternative Economic Explanations}, 28 \textit{APPLIED ECON.} 1127, 1130 (1996). This Comment does not directly address that characterization of temporary employment because framing the issue one way or the other does not change analysis of equal compensation. There is also evidence that some temporary workers choose temporary employment over traditional employment, see \textit{infra} note 6 and accompanying text, so it is difficult to consider the shift of uncertainty in strictly zero-sum terms.
\item \textsuperscript{5} See \textit{infra} notes 150-51 and accompanying text.
\item \textsuperscript{6} As of February 2001, forty-five percent of temporary help agency workers would rather have been in a "traditional work arrangement." \textit{BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, FEBRUARY 2001} (2001), available at ftp://ftp.bls.gov/pub/news.release/History/conemp.05242001 .news [hereinafter \textit{EMPLOYMENT ARRANGEMENTS}]. "Temporary help agency workers" as defined by the BLS cannot be equated to the "temporary help supply industry" as defined by the GAO. \textit{GENERAL ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE} 16, GAO/HEHS-00-76 (2000). From those numbers and from a study done by Susan Houseman and the W. E. Upjohn Institute for Employment Research, it is evident there is at least a notable "mismatch" between employer and employee preferences for temporary work arrangements. Susan N. Houseman, \textit{Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Study}, 55 \textit{INDUS. \& LAB. REL. REV.} 149, 167 (2001); see also Golden, supra note 4, at 1135-36, 1138-39 (finding the explosion in temporary employment due almost entirely to variables associated with employer preferences, with employee preference variables overwhelmingly statistically insignificant, and calling it the result of "opportunistic" exploitation of an imbalance of power between management and labor). These figures do not address the significant but complicated issue of to what extent those who prefer temporary employment, particularly women, would still prefer it if the market for permanent employment were less hostile to family-oriented choices and other lifestyle choices requiring flexibility, an issue not addressed in this Comment.
\item \textsuperscript{7} See \textit{infra} notes 16-21 and accompanying text.
\item \textsuperscript{8} See \textit{infra} notes 145-50 and accompanying text.
\end{itemize}
The ultimate question this Comment addresses stems from two conflicting realities of the temporary employment market. There are benefits to be gained from employing temporary workers in an uncertain market. But the use of temporary workers to avoid compensation costs, especially those associated with employee benefits, undermines just compensation in the labor market. How, then, should the law encourage responsible use of temporary employment while discouraging uses that only serve to weaken lower-income Americans? One answer flows from the NLRB’s consideration of temporary workers’ right to organize, a discussion most recently played out in *M. B. Sturgis, Inc.* and *Oakwood.*

In *Sturgis,* the Board decided that temporary workers share the situation of the regular employees they work alongside in that their work accomplishes the same end for the same employer, and often to the point of sharing a “community of interest,” which justifies a single collective bargaining unit. If we conclude that temporary workers and their permanently employed colleagues are similarly situated and often add the same value, it seems a reasonable way to prevent misuse of temporary employment is by proscribing compensation discrimination based solely on whether the worker is temporary or permanent.

*Oakwood* came to the opposite conclusion as *Sturgis,* but continued the discussion on many of the same terms. Ultimately, I think *Oakwood* was wrongly decided. But regardless of the outcome in that case, this Comment advocates a different, farther-reaching way of dealing with the significant shift toward temporary employment highlighted in that case—a solution that stems from the Board’s consideration of the *Oakwood-Sturgis* issue. This Comment will argue that to make temporary employment a positive force in the market, the U.S. Congress should enact an equal pay act for temporary workers.

It will further argue that the extent to which demand for temporary employment would fall following enactment of an equal pay act is the extent to which temporary employment is used negatively.

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10. Id. at 1305.
11. Id. at 1305-08. A bargaining unit is a group of employees authorized to bargain collectively about their terms and conditions of employment. 29 U.S.C. § 159(a) (2000). Under the National Labor Relations Act, the NLRB is authorized to determine appropriate units. 29 U.S.C. § 159(b) (2000). The Supreme Court has legitimized broad Board discretion, stating that determination of bargaining units is “largely within the discretion of the Board, whose decision, ‘if not final, is rarely to be disturbed.’” *S. Prairie Constr. Co. v. Local 627, Int'l Union of Operating Engineers,* 425 U.S. 800, 805 (1976) (per curiam) (quoting *Packard Motor Co. v. NLRB,* 330 U.S. 485, 491 (1947)). Though the “community of interest” test is not written into the statute, it is considered to have been implicitly approved by Congress” not modifying 29 U.S.C. § 159 over the test’s long use. IBEW Local 474 v. NLRB, 814 F.2d 697, 711 (D.C. Cir. 1987). See infra notes 87-94 and accompanying text for further discussion of the “community of interest” standard.
12. See infra notes 142-60 and accompanying text.
13. See infra notes 154-60 and accompanying text.
Section II of this Comment will provide market, legal, and policy context for discussion of an equal pay act. Part II.A briefly describes the temporary employment market, Part II.B discusses the legal context before and including the Sturgis and Oakwood decisions, and Part II.C outlines potential models for an equal pay act, including the Equal Pay Act of 1963 for gender and the European Union’s proposed Temporary Workers Directive. Part III.A argues that the Sturgis-Oakwood debate suggests an equal pay act, Part III.B proposes potential provisions of an equal pay act, and Part III.C concludes that such an act would be positive policy, both economically and socially.

II.
CONTEXT

A. The Market for Temporary Employment

The 1.2 million temporary employment agency workers in the United States made up just under one percent of total employment in February 2001, a percentage that has remained fairly constant since 1995. That percentage is likely to understate the number of workers who experience temporary employment, however, because many more hold temporary jobs throughout the year than are in temporary employment at any given time. This segment of the workforce often fares poorly compared to traditional workers in pay and benefits. Only eleven percent of temporary help agency workers reported having employer-provided health insurance, compared with just over half of traditional workers. And temporary agency workers reported making only $396 per week on average. The average income for a temporary agency worker amounted to just 112% of the federal poverty threshold for a family of four in 2002, even under the unlikely assumption that the temporary employee worked every week of the year.

14. EMPLOYMENT ARRANGEMENTS, supra note 6. All figures come from the Current Population Survey. Id.
15. See Houseman, supra note 6, at 154.
16. EMPLOYMENT ARRANGEMENTS, supra note 6. Contingent workers were also less likely than noncontingent workers to have health coverage at all, with sixty-four percent reporting coverage, compared with eighty-three percent for noncontingent workers. Id. (Temporary agency workers are a subset of contingent workers, which are defined as "persons who do not expect their jobs to last or who report that their jobs are temporary." Id. If workers expect to voluntarily leave their jobs, for retirement or school, for example, they are not considered contingent. Id.) Temporary help agency workers were the least likely group of contingent workers to have any sort of health insurance, with forty-eight percent reporting coverage. Id. Similarly, about one-fifth of contingent workers were eligible for employer-provided pension plans, compared with half of noncontingent workers. Id.
17. Id.
Although directly comparable current figures are not available for traditional employees in comparable employment, research suggests a notable disparity.\textsuperscript{19} Yukako Ono and Alexei Zelenev write that "[o]n average, temporary workers in nonprofessional categories receive much lower wages than permanent workers, although they frequently perform the same tasks as permanent staff members. In addition, some temporary workers work on a permanent basis (so-called 'perma temps') without receiving the same benefits and wages as permanent workers."\textsuperscript{20} Susan Houseman of the W.E. Upjohn Institute for Employment Research found especially striking results in the context of benefits:

among establishments using agency temporaries, a relatively high percentage offered health insurance (98%) and retirement benefits (80%) to full-time workers. In the [comparable-year Current Population Survey] supplement, just 19% of workers paid by temporary help agencies (which includes the agencies' permanent staff) reported that they were eligible to receive health insurance from their employer, and only 5% reported eligibility for employer-provided retirement benefits.\textsuperscript{21}

\textbf{B. The Legal Context Leading Up To and Including Oakwood}

The logic laid out in \textit{M. B. Sturgis, Inc.} and discussed in \textit{Oakwood Care Center} provides a useful way of thinking about a policy of equal pay for temporary workers. This Part describes the context of those two decisions. \textit{Sturgis} overruled \textit{Lee Hospital}\textsuperscript{22} and clarified \textit{Greenhoot, Inc.},\textsuperscript{23} the decision on which \textit{Lee Hospital} was ostensibly based.\textsuperscript{24} Most recently, \textit{Oakwood} overruled \textit{Sturgis}, claiming to raise a statutory objection, but essentially disagreeing with \textit{Sturgis}' policy logic.

In \textit{Greenhoot}, the Board found that the company supplying temporary maintenance employees to several buildings (the "supplier employer")\textsuperscript{25} and the individual owners of those buildings ("user employers") all performed "significant employer functions."\textsuperscript{26} Specifically, while the supplier employer, \textit{Greenhoot}, was responsible for hiring, discharging, and paying the employees according to the agreement, the user employers had the right

\begin{itemize}
\item \textsuperscript{19} See Houseman, supra note 6, at 159, 161-62. Houseman's results accounted for productivity. See id. at 162.
\item \textsuperscript{20} YUKAKO ONO & ALEXEI ZELENEV, FEDERAL RESERVE BANK OF CHICAGO, TEMPORARY HELP SERVICES AND THE VOLATILITY OF INDUSTRY OUTPUT 16 (2003) (citation omitted).
\item \textsuperscript{21} Houseman, supra note 6, at 161.
\item \textsuperscript{22} Lee Hospital, 300 N.L.R.B. 947 (1990).
\item \textsuperscript{23} Greenhoot, Inc., 205 N.L.R.B. 250 (1973).
\item \textsuperscript{24} See infra notes 37-47 and accompanying text.
\item \textsuperscript{25} The terms "supplier employer" and "user employer" are used in \textit{Sturgis} to describe the roles of temporary employment agency and the company using the agency's services, and this Comment will adopt those terms.
\item \textsuperscript{26} 205 N.L.R.B. at 251.
\end{itemize}
to approve hiring and retention and were responsible for providing liability insurance.\textsuperscript{27} Also, most wage increases required approval from the user employers, and though most employees were covered by the supplier employer’s health care contract, the premiums came from individual buildings’ expense moneys.\textsuperscript{28} Therefore, the Board found that each user employer should be considered a joint employer with the supplier employer.\textsuperscript{29} The primary reason joint employer status is significant is that consent from joint employers is not necessary in order to require them to bargain jointly with a bargaining unit made up of their joint employees.\textsuperscript{30} That is in contrast with other multiple-employer bargaining units, for which consent of the employers is required.\textsuperscript{31} Ultimately, the Board in \textit{Greenhoot} held that it would be inappropriate to form a bargaining unit made up of employees working at multiple independently owned buildings without the building owners’ consent.\textsuperscript{32}

The Board in \textit{Lee Hospital} was confronted with a wholly different issue. The anesthesia department at Lee Hospital was managed by a separate corporation, Anesthesiology Associates, Inc. (AAI), which had independently contracted for that purpose.\textsuperscript{33} When the certified registered

\begin{itemize}
  \item \textsuperscript{27} \textit{Id.} at 250.
  \item \textsuperscript{28} \textit{Id.} at 251.
  \item \textsuperscript{29} The test for determining joint employers is commonly framed as whether “‘one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer.’” Redd v. Summers, 232 F.3d 933, 938 (D.C. Cir. 2000) (quoting NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1123 (3d Cir. 1982)). The Board has described the standard this way:

\begin{quote}
[Where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the [National Labor Relations Act]. Further, we find that to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.
\end{quote}


30. See TLI, Inc., 271 N.L.R.B. at 798. Joint and several liability for the other employer’s refusal to bargain in good faith is another reason joint employer status is significant. Branch Int’l Servs., Inc., 327 N.L.R.B. 209, 219.

31. See Cleveland Builders Supply Co., 90 N.L.R.B. 923, 924 (1950). (Consent need not be formal, however, and may come from “participation for a substantial period of time in joint bargaining negotiations and the uniform adoption of the” resulting agreements). Labor organizations are strictly forbidden from coercing employers into joining multiemployer units. 29 U.S.C. § 158(b)(1)(B) (2000); see also, e.g., Florida Power & Light Co. v. IBEW, 417 U.S. 790, 803 (1974) (stating the primary purpose of § 158(b)(1)(B) is to prevent such coercion). An employer is allowed to withdraw from a multiemployer bargaining unit either before bargaining is set to begin for the next contract or in “unusual circumstances.” Retail Assocs., Inc., 120 N.L.R.B. 388, 395 (1958). (One circumstance that the Board has found decidedly not “unusual” is an impasse in bargaining, see e.g., Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 413 (1982)).


nurse anesthetists (CRNAs) in that department wanted to organize a separate bargaining unit, the Board was confronted with the question of whether there was a sufficient disparity of interests between the CRNAs and other employees to justify a separate unit under the *St. Francis II* standard for health care institutions. In support of their argument for a separate unit, the nurse anesthetists contended that Lee Hospital and AAI were joint employers of the CRNAs. Because other employees were not jointly employed, they argued, there was a disparity of interests between the CRNAs and the other employees of the hospital. Ultimately the Board, without explanation, cited *Greenhoot* for the proposition that consent was required from both employers in order to form a bargaining unit mixing jointly-employed employees and employees solely employed by the user employer.

*Sturgis*, then, pointed out the gap in logic and precedent between *Greenhoot* and *Lee Hospital*. *Sturgis* consolidated two cases. In the case of *M. B. Sturgis, Inc.*, the company argued for inclusion of jointly employed temporary employees in a petitioned-for unit that included regular employees at its Maryland Heights, Missouri plant. In the case of *Jeffboat Division*, Teamster Local 89 petitioned to clarify its existing bargaining unit at Jeffboat to include jointly employed temporary workers at the site.

The Board found that the parties were joint employers in each case. Then it proceeded to debunk the *Lee Hospital* decision, pointing out that before the unexplained policy change in that case, the Board had traditionally applied its standard "community of interest" test in similar situations. Citing its responsibility to guarantee to the fullest extent employees' NLRA right to choose representation—and with a rousing cry of "[t]here is but one set of labor laws in our country"—the Board in

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34. *Id.* at 947 & n.3. In health care institutions, a "disparity of interests" test is applied, requiring "sharper than usual disparities or differences" than under the general "community of interest" standard in order to separate a bargaining unit from the larger institutional unit. *Id.* at 947 n.3; see also *St. Francis Hosp.*, 271 N.L.R.B. 948, 953 (1984).
35. *Id.* at 948.
36. *Id.* & n.12.
40. *Id.* at 1299, 1301-02.
41. *Id.* at 1305-08 (citing, e.g., *Globe City Discount*, 209 N.L.R.B. 213 (1974)). See *infra* notes 87-94 and accompanying text for in-depth discussion of the "community of interest" standard.
42. *Sturgis*, 331 N.L.R.B. at 1308; see also 29 U.S.C. § 151 (2000) (declaring the National Labor Relations Act's policy, including "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"); 29 U.S.C. § 157 (2000) (generally stating employees' "right to self-organization," etc.).
43. 331 N.L.R.B. at 1307.
Sturgis decided that units that include temporary workers constitute ordinary "employer units" rather than "multiemployer units requiring consent" of the employers involved. The Board reasoned that since all of the employees' work is benefiting one employer, and that employer at least jointly employs all of the employees, its consent is not necessary to require it to bargain with them as a unit. Whether those employees become a unit, then, depends on the Board's traditional test of whether they form a "community of interest."

In Oakwood, the temporary employees did the same sort of work as the regular employees, and Oakwood supervisors scheduled, evaluated, disciplined, and assigned work and overtime to the temporary employees along with the regular employees. The temporary employees were also identified to patients and others as Oakwood employees. However, the Board came to the opposite conclusion as in Sturgis and held that the "community of interest" test could not be applied to determine whether the temporary and regular workers belonged in the same bargaining unit.

In overruling Sturgis, Oakwood made two basic arguments. First, it argued that in Sturgis, the Board had overstepped its statutory authority to create certain types of bargaining units, including "employer" units. However, in effect it merely pointed out that the word "employer" is in the statute. More saliently, Oakwood argued that the policy logic of Sturgis was flawed, an argument that, although unpersuasive, continues the essential train of thought brought out in Sturgis.

While concluding that temporary and regular workers are similarly situated for the purposes of determining certain employment rights would not dictate that all temporary workers should be compensated the same as the regular workers in their workplace, it does point out the illogic of discriminating between those two types of workers where unwarranted and harmful. Considering temporary and regular workers' similar situation has

44. See 29 U.S.C. § 159(b) (2000) (describing the board's choices of bargaining units as "the employer unit, craft unit, plant unit, or subdivision thereof").
45. 331 N.L.R.B. at 1304. Huck Store Fixture Co. v. NLRB, 327 F.3d 528, 536-37 (7th Cir. 2003), and Tree of Life Inc., 332 N.L.R.B. No. 24, at 1 (Sept. 20, 2000), recognized the Board's conclusion in Sturgis.
46. 331 N.L.R.B. at 1304-05.
47. Id. See supra note 11 and infra notes 87-94 and accompanying text for discussion of communities of interest.
48. Oakwood Care Center, 343 N.L.R.B. No. 76 (Nov. 19, 2004).
49. Id.
50. Id. at 5.
51. Id. at 3-4.
52. See infra notes 104-06 and accompanying text.
53. 343 N.L.R.B. No. 76 at 4-5.
54. See infra notes 108-09 and accompanying text.
important policy implications, among them implications for equal pay between temporary and regular workers doing the same work.\textsuperscript{55}

\textit{C. Sources of Guidance for Temporary Workers' Equal Pay Act}

There are two current policy frameworks that, along with related legal decisions, provide useful background for a discussion of equal pay for temporary workers. The Equal Pay Act of 1963,\textsuperscript{56} which prohibits discrimination in pay based on gender, provides a useful model for enforcing equal pay between members of two groups. It is complete and practical, and it is embedded in U.S. statutory and enforcement schemes, with decades of enforcement history on which to draw. More topical but less tailored to the United States' legal framework, the Council of the European Union has proposed a Directive on temporary work ("Temporary Workers Directive" or "the Directive").\textsuperscript{57} It is stated more generally, as befits its legal context,\textsuperscript{58} but it contemplates several important questions in implementing equal pay for temporary workers.

\textit{1. The Equal Pay Act of 1963}

The Equal Pay Act (EPA) is enforced by the Equal Employment Opportunity Commission.\textsuperscript{59} The Act applies to employees who engage "in commerce or in the production of goods for commerce,"\textsuperscript{60} or who are "employed in an enterprise engaged in commerce or in the production of goods for commerce."\textsuperscript{61}

The EPA mandates "equal pay for equal work"\textsuperscript{62} and proscribes discrimination in "wages"\textsuperscript{63} paid within an "establishment."\textsuperscript{64} The Act

\begin{footnotesize}
\textsuperscript{55} See infra notes 87-115 and accompanying text.
\textsuperscript{58} The Council of the European Union, of course, does not hold the same sort of sovereign mandate as the U.S. Congress.
\textsuperscript{60} 29 U.S.C. § 206(a) (2000); see also, e.g., A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 491-93 (1945).
\textsuperscript{61} 29 U.S.C. § 206(a); see also 29 U.S.C. § 203(r)-(s) (2000) (defining "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce").
\end{footnotesize}
determines equality of work by focusing on four factors: (1) skill, (2) effort, (3) responsibility, and (4) working conditions. Skill may include many inputs—for example, education, training, experience, and ability. All factors considered within the scope of “skill” must be job-related. Effort is a question of degree of exertion. Responsibility is defined in terms of “accountability” and “importance.” Finally, courts’ discussions of working conditions have proven to be pragmatic considerations of which workplace realities significantly impact employment experiences. To make a prima facie showing of violation of the EPA, a plaintiff must show equality in each of those categories and a difference in compensation.

Following the plaintiff’s prima facie showing, the burden of proof shifts to the employer to justify the pay disparity. The EPA makes four primary affirmative defenses available to defendant employers following a plaintiff’s prima facie showing. Compensation disparities are lawful if they result from “[1] a seniority system; [2] a merit system; [3] a system which measures earnings by quantity or quality of production; or [4] a differential based on any other factor other than sex.” One difficulty for courts is the especial subjectivity of merit systems, which has resulted in narrow construction of that defense. Similarly, courts have met the “any other factor other than sex” defense with skepticism, and that defense still requires significant definition.

Common remedies available under the EPA include back wages, liquidated damages when there is a willful violation, and attorneys’ fees.

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64. 29 U.S.C. § 206(d)(1). The definition of “establishment” has often turned on physical location. See 29 C.F.R. § 1620.9(a) (2000); A.H. Phillips, Inc., 324 U.S. at 496.
66. 29 C.F.R. § 1620.15(a) (2000).
67. See, e.g., Arrington v. Cobb County, 139 F.3d 865, 876 (11th Cir. 1998) (citing Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1533 (11th Cir. 1992)).
68. 29 C.F.R. § 1620.16(a) (2000).
69. 29 C.F.R. § 1620.17(a) (2000).
70. See, e.g., Coming Glass Works, 417 U.S. at 202.
72. See, e.g., Coming Glass Works, 417 U.S. at 196.
73. Id.
74. Id.
76. See BENDER, supra note 59, § 10.04. Training programs and shift differentials are two examples of factors “other than sex” regularly considered valid justifications for pay disparity. Id.
77. See 29 C.F.R. § 1620.33(a) (2000).
79. See 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33(b).
2. Europe's Proposed Temporary Workers Directive

The Directive’s definition of workers covered by it is almost identical to the joint employer test here in the United States, ensuring a useful comparison. Its functional principle of nondiscrimination is: “The basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that enterprise to occupy the same job.” The Directive specifies that “basic working and employment conditions” include “the duration of working time, overtime, work breaks, rest periods, night work, paid holidays and public holidays[,] and pay.” In a separate article titled “Access to permanent quality employment,” the Directive further requires that “[t]emporary workers . . . be given access to the amenities or collective services of the user undertaking[,] especially canteen, child care and transport services under the same conditions as workers employed directly by the undertaking, unless there are objective reasons against this.”

In other areas, the Directive stresses the importance of flexibility for user employers. For example, it provides that the equal pay and nondiscrimination requirements will not apply to temporary workers in assignments that can be finished in not more than six weeks.

However, in the collective bargaining context, the Directive goes beyond Sturgis to suggest that member states may mandate that temporary workers be included in the bargaining units at their workplaces. It also requires that, whether temporary workers are counted in the bargaining unit or not, the provisions of the collective agreement be applied to them as if they were regular employees.

III. ARRIVING AT AN EQUAL PAY ACT FOR TEMPORARY WORKERS

This Part will argue for the policy of equal pay for temporary workers, propose various incarnations of such a policy, and discuss its possible effects.
A. Gleaning from the Sturgis-Oakwood Debate

There are broader policy implications of the considerations debated by the Board in Sturgis and Oakwood. Regardless of the particular outcome in Oakwood, it is important to heed what the Board’s discussion of temporary workers’ organizing rights suggests about a different, broader way of dealing with the explosion in temporary labor: equal pay for temporary workers. This Part will discuss the implications of Sturgis and Oakwood in that order.

To analyze what can be learned from the NLRB’s reasoning in Sturgis, it is first important to explore the meaning of a “community of interest,” which the Board in Sturgis decided could encompass both temporary and regular workers. By its own measure, determining bargaining units, and therefore applying the “community of interest” test, is the foundation of the Board’s role in facilitating collective bargaining. As such, it takes the unit determination process most seriously. A community of interest is defined as “a substantial mutuality of interests in such matters as wages, hours of work, and working conditions.” It has also been described in terms of “[u]nity of interest, common control, dependent operation, sameness in character of work and unity of labor relations.” Physical proximity, contact, and interaction among employees also suggest a community of interest.

In Sturgis, the Board made these comments to describe the communities in the cases before it:

In M. B. Sturgis, the temporaries work side-by-side with regular employees, perform the same work, and are subject to the same supervision. All employees work the same hours, although temporary employees cannot work more than 40 hours per week. The wages and benefits of the temporaries and regular employees differ, however. In Jeffboat, the [temporary] employees work alongside [the regular] employees, share

87. See supra note 11.
88. See supra notes 37-47 and accompanying text.
89. In Kalamazoo Paper Box Corp., the Board wrote:
In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered. 136 N.L.R.B. 134, 137 (1962) (citation omitted).
90. See id.
92. Id. at 978.
93. Id. at 977-78.
supervision and direction, perform similar work, and are subject to common
work and safety rules.94

When employees in those circumstances were all working in the same
way for the good of the same employer, the Board thought it nonsensical to
allow the employer to veto their forming a single bargaining unit.95

What is not apparent from that reasoning is that every temporary and
regular employee in a given workplace, or even in a given bargaining unit,
should be compensated the same. However, by arguing that temporary and
regular workers are essentially the same for the purpose of determining
t heir employment rights, the Board in Sturgis took the first of two logical
steps to enacting an equal pay act. Before Congress could arrive at the
Equal Pay Act for gender in 1963, it had to first realize that women and
men are essentially the same for the purpose of determining their
employment rights.96 If we arrive at that understanding about temporary
and regular workers, the most salient way to protect their right to equality at
work is by protecting their associated right to nondiscriminatory
compensation. While it would be ridiculous to qualitatively and historically
equate gender inequality with job-status inequality, the logic is instructively
similar.

More concretely, any potential form of an equal pay act for temporary
workers would include an equality of work requirement for triggering its
applicability.97 Where there is equality of work sufficient to satisfy that
requirement, the temporary and regular workers in question would almost

95. See id. at 1304-05.
96. The legislators were very clear about the principled nature of their discussion of women’s
equality in the workplace, often invoking fairness and justice. See HOUSE COMM. ON EDUC. & LABOR,
that he had “never heard an argument advanced which really justifies the primary inequity the bill would
eliminate.” Id. at 65. Discrimination based on sex was (and is) an “anachronism,” id. at 62, and the
kind of discrimination targeted by the EPA was clearly illegitimate, see, e.g., id. at 60 (noting that the
Act would allow “every legitimate” differentiation). Importantly, there was also a slightly different
 element, which Representative Rivers called “practical justice,. . . as well as principle.” Id. at 63. As
an example of the practicality of women’s and men’s similar situation in the employment market,
Representative Kelly reminded her colleagues of the obvious—that women “must report to their jobs at
the same hour [as men], and they often must carry out identical duties” (a realization also evidenced by
the “equal work” requirement for the Act’s applicability). Id. at 62. Although the legislators generally
recognized that there were rare jobs for which women or men were inherently better qualified,
Representative Cohelan clarified, “[t]here is, though, a great middle ground, a large number of positions
or jobs” in which women and men were similarly situated, and in which there should not be a wage
difference based on gender. Id. at 69. Although there are obvious qualitative differences between
gender discrimination and job-status discrimination, the “practical justice” line of reasoning is
particularly instructive in the job-status context.
97. See, e.g., supra notes 62-71 and accompanying text (describing the EPA’s mandate of “equal
pay for equal work”).
certainly be within a "community of interest," making the Board's observations in *Sturgis* about fairness directly applicable.

As mentioned earlier, the fact that the Board reversed the *Sturgis* outcome four years later in *Oakwood* does not undermine the insights to be gained from the Board's considerations of the issue. However, the particular holding in *Oakwood* is plagued by significant problems, which are worth mentioning at the outset. As the dissent points out, the majority continually makes every effort to rhetorically stretch the holdings in *Greenhout* and *Lee Hospital* to gain legitimacy for its asserted "return to the Board's longstanding prior precedent."

The majority in *Oakwood* also relies heavily on its contention that the *Sturgis* decision oversteps the Board's authority to establish "employer"-level and other bargaining units. However, the *Oakwood* majority finds itself essentially repeating a tautology, that in fact the words "employer unit" are in the statute, without feeling the need to justify its interpretation of "employer." In fact, in stating its point, the majority exposes the superficiality of its argument: "the Act contemplates that employees be grouped together by common interests and by a common employer." By putting such importance on employees' sharing "a common employer," the majority reminds us that an "employer unit" need not mean that all of the employees are employed by only the common employer. The dissent, on the other hand, is much more clear about the majority's assumptions about the definition of "employer":

The majority, then, insists that there is no difference between (1) two employers who enter into an arrangement with each other and who share control over certain employees at the same worksite; and (2) competing

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98. See *supra* notes 87-94 and accompanying text for a discussion of the "community of interest" standard referred to in *Sturgis*.
99. See, e.g., *supra* notes 94-95 and accompanying text.
100. It is no secret that the Board is a political body, more inclined to reverse course than courts, although some have argued that the current Board puts most other Boards to shame in that category. See, e.g., Steven Greenhouse, *Labor Board's Detractors See a Bias Against Workers*, N.Y. TIMES, Jan. 2, 2005, § 1, at 12 (mentioning the Board's decisions relating to graduate student workers, employer lockouts, nonunion workers' right to have a coworker present at disciplinary meetings, and temporary workers, among other issues).
101. The dissent is generally very effective in pointing out the problems with *Oakwood*'s particular holding, and I rely on it significantly.
102. *Oakwood Care Center*, 343 N.L.R.B. No. 76, at 1-3 (Nov. 19, 2004); see also *id.* at 7 (Liebman and Walsh, Members, dissenting).
103. See *id.* at 2-4; see also 29 U.S.C. § 159(b) (2000).
104. See *id.* at 2-4, 8.
105. *Id.* at 5.
employers who have no arrangement with each other and who employ their own workers separately, at different worksites.\textsuperscript{106}

The dissent also challenges the tautology itself by pointing out that an “employer unit” is not necessarily the most inclusive unit considered by the Act; a “plant unit” could very well include employees of multiple employers, assuming they share one employer in common.\textsuperscript{107}

Ultimately, then, the majority in \textit{Oakwood} finds itself arguing the policy points from \textit{Sturgis} that this Comment finds so interesting. It takes great pains to point out all sorts of situations in which temporary and regular workers’ interests might diverge.\textsuperscript{108} However, not only does it appear to forget that the “community of interest” test would always be applied to potential units, which would address these hypothetical bogeymen. It also supplies no empirical basis for its assumptions, apparently ignoring the facts in the case before it, in \textit{Sturgis}, and in earlier cases in which the workers had common interests.\textsuperscript{109} Though the outcome has changed, the underlying policy arguments made in \textit{Sturgis} survive this second look, strengthened by another set of facts that support them.\textsuperscript{110}

The \textit{Oakwood} dissent explicitly recognizes the larger context that drives this Comment.\textsuperscript{111} It repeatedly cites the striking increase in temporary employment\textsuperscript{112} and its role in employment insecurity.\textsuperscript{113} In fact, the dissent emphasizes that the “critical” factor is the one at the heart of this Comment; it writes that “[s]urely employees who are working side by side, for employers who have voluntarily created that arrangement,” should have the right to join together to protect their interests.\textsuperscript{114} Ultimately, the dissent points out that “at worst [the majority’s decision will accelerate] the expansion of a permanent underclass of workers.”\textsuperscript{115} The temporary worker

\textsuperscript{106.} \textit{Id.} at 7. The dissent further explains the reasoning behind multiemployer bargaining units, avoided by the majority: “As \textit{Sturgis} recognized, the Board developed the consent requirement in such cases precisely because the employers at issue were physically and economically separate from each other, their operations were not intermingled, and their employees were not jointly controlled.” \textit{Id.} at 9. Although the dissent may be overstating its case in describing the circumstances at issue as “the classic case, it appears to us, of an ‘employer-wide unit,’” the point is made. \textit{Id.} at 8.

\textsuperscript{107.} \textit{Id.} at 8.

\textsuperscript{108.} \textit{Id.} at 5.

\textsuperscript{109.} \textit{See supra} notes 48-49, 94-95 and accompanying text; \textit{see also} Gallenkamp Stores v. NLRB, 402 F.2d 525 (9th Cir. 1968); NLRB v. S.S. Kresge, 416 F.2d 1225 (6th Cir. 1969) (cases preceding \textit{Sturgis}, which the majority in \textit{Oakwood} attacked, but to its own detriment, \textit{see} 343 N.L.R.B. No. 76 at 4, 9 n.9). The majority’s concern for workers’ management of their own interests is also belied by its recognition of multiemployer bargaining units, whose only added requirement is employer consent.

\textsuperscript{110.} \textit{See supra} notes 48 and 49 and accompanying text.

\textsuperscript{111.} The dissent goes so far as to accuse the majority of abdicating the Board’s core competency and mandate by ignoring the market realities in making its decision. \textit{See id.} at 9-10.

\textsuperscript{112.} \textit{See infra} notes 2-3 and accompanying text.

\textsuperscript{113.} \textit{Oakwood} Care Center, 343 N.L.R.B. No. 76, at 6, 10 & n.16 (Nov. 19, 2004).

\textsuperscript{114.} \textit{Id.} at 9.

\textsuperscript{115.} \textit{Id.} at 10.
underclass is becoming more and more a reality in ways that extend beyond their right to organize. It is crucial, then, to look at other ways to address the situation.

B. A Proposal for an Equal Pay Act for Temporary Workers

There are many ways to approach the logistics of an equal pay act. Following are potential provisions, most taken from the Equal Pay Act of 1963 or the EU’s proposed Temporary Workers Directive. Some more clearly recommend themselves than others.

1. Learning from the Equal Pay Act of 1963

The first crucial thing to be borrowed from the EPA is its definition of equal work. Its requirements of equal skill, effort, responsibility, and working conditions\textsuperscript{117} encompass the essence of equal work. Those requirements also have the advantage of forty years of judicial interpretation and application,\textsuperscript{118} making them settled enough to be workable from the start. That history also gives reasonable notice to employers of what compliance will require. Similarly, the EPA’s affirmative defenses of pay disparities based on seniority systems, merit systems, measures of production quality or quantity, and any factor unrelated to the protected classification (in that case gender, in this case work status)\textsuperscript{119} would bring important predictability to a new equal pay act for temporary workers. They also outline broad managerial discretion. At the same time, courts have had time to define those defenses in ways that reign in the significant potential for abuse of their sweeping terms.\textsuperscript{120} While those defenses, particularly justifications based on seniority systems, would likely still leave disparities in pay between regular and temporary workers, disparities would be limited to rational levels.

Consistent with adopting the prima facie and affirmative defense structures of the EPA, an equal pay act for temporary workers should also

\textsuperscript{116} In 1999, Representative Lane Evans introduced a bill into Congress calling for equal direct pay and benefits for temporary workers, modeled closely on the Equal Pay Act of 1963. See H.R. 2298, 106th Cong. (1999). Evans’ bill broadly protected “any employee who is not permanent.” \textit{Id.} § 6(6). Also, Representative Patricia Schroeder has introduced bills mandating equal benefits for some temporary workers. \textit{See, e.g.}, H.R. 2188, 103d Cong. (1993). The need for similar legislation continues to grow, and this Comment attempts to synthesize various factors that continue to make the issue more compelling and immediate.

\textsuperscript{117} \textit{See supra} notes 62-70 and accompanying text.

\textsuperscript{118} \textit{See supra} notes 62-70 and accompanying text.

\textsuperscript{119} \textit{See supra} notes 73-76 and accompanying text.

\textsuperscript{120} \textit{See supra} notes 75-76 and accompanying text for examples. As mentioned earlier, courts are fine-tuning the meaning of some defenses, but a significant foundation has been laid.
adopt the shifting allocation of the burden of proof that stems from that structure and gives effect to each element of it.121

An equal pay act for temporary workers should also follow the EPA’s definition of equal pay. Given the centrality of benefits in the current compensation gap between temporary and regular workers,122 it is important to include benefits in the calculation of equal pay, as the EPA does.123 Another important cue to take from the EPA is structuring the new act as an amendment to the Fair Labor Standards Act to take advantage of its enforcement structure and readymade constitutionality through the commerce clause.124 Finally, other provisions that would provide important logistical backbone to a new equal pay act include a prohibition on complying with the act by lowering employees’ pay125 and a definition of remedies that addresses back pay, willful violation, and attorneys’ fees.126

2. Learning from the European Union’s Proposed Temporary Workers Directive

An initial provision to draw from the Temporary Workers Directive, and a difference from the EPA, is that a temporary workers’ equal pay act should only operate in one direction. As the Directive puts it, the terms applicable to temporary workers should be “at least” those applicable to regular workers.127 That is an important distinction because it is difficult to justify—and therefore likely economically harmful to disrupt the market in implementing—a requirement that professional workers supplied by agencies cannot be paid a premium for providing flexible services.

There are, however, several instances where the Directive goes beyond the scope of what would likely be included in an equal pay act in the United States, particularly in its requirements that many details of working conditions be equal for temporary and regular workers.128 Those provisions

121. See supra note 72.
122. See supra notes 16, 20-21 and accompanying text.
123. See supra note 63. See infra notes 137-40 and accompanying text for a discussion of basic problems faced in creating a system of equal benefits for temporary workers. This Comment does not apply the concept of comparable worth to temporary and regular workers. Market-wide disparities seem much less of a socially pressing issue in this case than they are in the gender context. Also, certain industries lend themselves more than others to temporary employment in a way that does not parallel gender differences. Generally, applying comparable worth to temporary and regular employment presents a deep muddle. There is the possibility that employers would evade an equal pay requirement by discharging all permanent workers who perform a certain function, a solution the correlate of which is banned by the EPA, see 29 C.F.R. § 1620.13(b)(3). However, the continuity benefits of retaining permanent employees may work to prevent, and should at least mitigate, use of that drastic solution.
124. See supra notes 59-61 and accompanying text.
126. See supra notes 77-79 and accompanying text.
127. See supra note 81 and accompanying text.
128. See supra notes 81-83 and accompanying text.
would complicate the determination of equal work in an act built around the EPA, making it a circular consideration.129

One problem the Directive may provide an innovative solution for is the potentially harsh impact of an equal pay requirement on small businesses. Small businesses are a concern both because changes in regulation generally amount to larger percentages of their overall budgets and because they have less bargaining power with temp agencies, meaning cost increases from the act could be disproportionately passed on to them.130 According to one interpretation, the Directive dulls the effect on small business by requiring equal pay only when there are formal pay scales or a collective bargaining agreement.131 However, in the United States’ generally more fluid employment regulation environment, that would probably be too large a loophole; pay scales could easily go into hiding. It is preferable to promote transparency by promoting formal pay scales whose legitimacy or illegitimacy can be more easily determined.132 The small business problem merits further innovation, and possibly a threshold number of employees an employer must have in order to be covered by the act, as with some other employment statutes.133 It is also possible that the FLSA’s existing monetary threshold would be sufficient.134

Another of the Directive’s solutions that might create significant enforcement trouble, but which is worth considering, is the six-week qualifying period; workers in assignments that can be completed within six

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129. See supra notes 65 & 70 and accompanying text (describing the inclusion of “working conditions” in determining equal work). The Directive is less concerned with that process, possibly because the equal pay requirement is limited to enterprises with a clear pay scale or collective bargaining agreement. See U.K. DEP’T OF TRADE & INDUS., PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON WORKING CONDITIONS FOR TEMPORARY AGENCY WORKERS—REGULATORY IMPACT ASSESSMENT 16 (2003), available at http://www.dti.gov.uk/er/agency/ria3.pdf (interpreting Article 5, Temporary Workers Directive, supra note 57, at 10-11, to limit the equal pay mandate to enterprises with “either a clear company pay scale or a collective agreement to determine pay and conditions”). Although the Department of Trade and Industry’s interpretation seems to distort the language of the Article by taking out of context the requirement that collective bargaining agreements’ antidiscrimination provisions be applied to temporary workers, see id., if that interpretation were correct, it would make more sense in the more closely regulated U.K. context than in the United States. See infra note 136 for a different interpretation of that provision of Article 5. See also infra notes 131-132 and accompanying text, discussing the merits of such a provision for protecting small businesses.

130. See U.K. DEP’T OF TRADE & INDUS., supra note 129, at 29 (noting, however, that small businesses use temporary employment at much lower rates than larger businesses).

131. See id. at 16-17.

132. See supra notes 74-75 and accompanying text; see also text accompanying note 120 supra.

133. See, e.g., 29 U.S.C. § 2611(4)(A)(i) (2000) (limiting the Family and Medical Leave Act’s application to employers who “employ[ ] 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).

weeks are not covered by the Directive. The qualifying period is likely aimed at preventing costly attention to equality of work and logistics of benefits for an employee who will be at the enterprise hardly long enough to address them. At first glance, a six-week qualifying period seems to accomplish that aim without losing effectiveness in addressing the problem of employers who employ temporary workers for long periods in order to reduce wage and benefit costs, rather than to address short-term fluctuations in demand. However, it is easy to imagine employers cycling through temporary workers, placing them in positions for durations just short of the qualifying period, then replacing them, while the positions themselves remain constant. That concern could be addressed by including a good faith determination of whether temporary workers are discharged out of business necessity or under a pretext to avoid equal pay. But that would mean trading the logistical burdens of requiring equal pay for short-term workers for the burden of litigation over good faith in discharges, a possibly unproductive trade. In the benefits context, employers’ own lag times between the time of hire and the time of coverage, as they apply to all employees, would often avoid implementing equal coverage for short-term temporary hires anyway.

3. Special Problems Associated with Equal Benefits

There are certainly logistical concerns associated with requiring equal benefits between temporary and regular workers. However, not only are benefits a significant part of the problem to be addressed, it is important to deal with wages and benefits simultaneously. Assuming perfect competition currently in the temporary employment market, addressing wages alone would cause benefits to fall further.

135. See supra note 84 and accompanying text.
136. One reason that trade would likely be unattractive is that temporary employment flexibility seems generally to be gained from adding and subtracting employees, rather than types of positions, meaning the burden of determining equality of work would not be felt every time temporary employees are added. Finally, the Directive extends general employment regulations to cover temporary workers. Temporary Workers Directive, supra note 57, at 11. Examples include protection of expectant mothers’ rights and prohibition of discrimination based on “sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation. Id. While that would address the current void in protection of temporary employees, see generally Stephen F. Befort, Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work, 24 BERKELEY J. EMP. & LAB. L. 153 (2003), protections that would not be subsumed in an equal compensation requirement are outside the reasoning provided in this Comment and outside the likely scope of an equal pay act in the United States.
137. See supra notes 16, 20-21 and accompanying text.
138. See Houseman, supra note 6, at 156.
139. Id. Though it appears bargaining power in the current market is heavily skewed, see, e.g., Golden, supra note 4, at 1135-36, 1138-39, suggesting that increased compensation in any form might increase temporary workers’ bargaining power instead of causing a perfectly corresponding drop in
The most significant logistical concerns are workability and managing temporary employment agencies' incentives. In providing equal health coverage, it is important to require that the worker be added to the user employer's plan, rather than requiring temporary agencies to provide coverage comparable to the user employer's. First, that avoids the intermediate and onerous step of creating customized coverage to match each user employer's plan. Second, it avoids creating an incentive for temporary agencies to avoid providing workers to companies with comprehensive or complicated health plans.

In providing equality in pensions, however, workability dictates that pension plans be managed by the agencies, with user employers contributing appropriately, either directly or indirectly through agency fees.140

C. Anticipated Effects141

For those employers using temporary workers in the face of uncertain labor needs, an equal pay requirement should affect their use of temporary workers almost not at all, since the flexibility benefits are not affected by equalizing compensation. Employers using temporary workers primarily to cut costs would have little reason to continue employing them. In reality, employers' motivations for using temporary workers are currently mixed,142 and it is uncertain how many lost temporary positions would be replaced by permanent employment. But some would,143 and encouraging economically

another form of compensation, see Houseman, supra note 6, at 156, addressing wages without benefits risks causing some level of decrease in benefits.

140. In the context of pensions, it is important to note that the section of the Employee Retirement Income Security Act (ERISA) outlining time-of-service requirements, 29 U.S.C. § 1052 (2000), would necessarily be amended by an equal pay act for temporary workers.

141. One of several potential indirect effects of an equal pay act not dealt with here is the effect on union organizing. Temporary workers are difficult to unite because of their generally passing identification with the enterprise. See, e.g., Stephen F. Befort, Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment, 43 B.C. L. REV. 351, 370-71 (2002). While employers are well aware of that and some plan accordingly, id., an act that takes away some incentive to use temporary workers—and therefore likely shifts some temporary jobs to permanent ones—may have implications for workers' right to choose union representation. Also, like the minimum wage, equal compensation for temporary workers would raise the floor on which the labor movement builds—or rather would take away one method employers have of punching through that floor. That is especially true in terms of benefits, which constantly grow in importance. Another possibility not explored in this Comment are potential implications for racial and gender equality. Contingent workers are generally more likely to be women and racial minorities than noncontingent workers. EMPLOYMENT ARRANGEMENTS, supra note 6.

142. See, e.g., Houseman, supra note 6, at 162.

143. See infra notes 150-151 and accompanying text for a discussion of the significant number of employers basing their decisions to use temporary workers on per-hour wage and benefit cost savings. To assume that none of those temporary jobs will become permanent in the absence of that compensation cost incentive is to ignore the obvious benefits to employers of permanent positions. For
positive uses of temporary employment going forward will mean a net positive effect.\footnote{144}

There are clearly some reasons for employers to use temporary help agencies that can be recognized as economically positive. The most basic of those reasons is dealing with uncertain demand.\footnote{145} There are costs associated with both unmet demand due to underemployment and unnecessary inventory due to overemployment.\footnote{146} In a volatile industry or during a volatile period, those costs can be substantial. Employing temporary agency workers allows more complete adjustment to demand and minimizes costs at both ends of the spectrum.\footnote{147} Many employers in fact use temporary employment at least in part to address short-term fluctuations in demand.\footnote{148} Another economically positive reason for their use is temporary employment agencies' economies of scale in recruiting and screening employees.\footnote{149}

However, though employers seldom admit it when surveyed,\footnote{150} research strongly suggests that per-hour savings on wages and particularly on benefits significantly determine employers' use of temporary workers, especially their use of temporary agency workers.\footnote{151} That is both a socially and economically unproductive use of temporary employment. At best it increases the burden on the state of health coverage and later-life income; at worst it leaves working Americans without health coverage or an acceptable standard of living in retirement. In strict market terms, it has important implications for consumption. Low-income workers are more reliable

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\footnote{144}{See infra notes 150-60 and accompanying text.}
\footnote{145}{See Golden, supra note 4, at 1132.}
\footnote{146}{See id.}
\footnote{147}{Id.; see also ONO & ZELENEV, supra note 20, at 15-16 (noting the role of temporary employment in addressing production fluctuations).}
\footnote{148}{See Golden, supra note 4, at 1136-37. (However, see supra note 4, noting Golden's skepticism about the legitimacy of shifting the uncertainty burden to workers.)}
\footnote{149}{See, e.g., Houseman, supra note 6, at 157.}
\footnote{150}{See, e.g., Houseman, supra note 6, at 159, 161-62.}
\footnote{151}{E.g., Houseman, supra note 6, at 164, 166-68. Houseman, Senior Economist at the W. E. Upjohn Institute for Employment Research, found that "savings on benefit costs [are] an important determinant" of whether employers use flexible staffing. \textit{Id.} at 164. For use of temporary agency workers, that conclusion was statistically significant at the one percent level, using a two-tailed t test. \textit{Id.} tbl.8. In a related point, she also found that "[e]mployers that offer pension and health insurance benefits to their regular full-time staff are especially likely to use various types of flexible staffing arrangements and to use them more intensively." \textit{Id.} at 167. In quoting Houseman in this context, it is important to note her concern that "any changes designed to correct this distortion and increase benefits coverage of workers in flexible staffing arrangements could reduce employment among these workers or have other adverse consequences." \textit{Id.} at 168. Benefit savings are due in part to ERISA provisions, which tend overwhelmingly to exclude temporary agency workers. See supra note 140 about ERISA and an equal pay act's likely impact on it.}
sources of spending than businesses, and if lower-paying, less secure temporary jobs replace permanent ones, "[a]ggregate consumption may suffer if the reduced compensation undermines real disposable income and the heightened variability of wages and benefit coverage threatens household income security and liquidity." All of that suggests that a way to address temporary employment's counterproductive uses without affecting its productive potential would be attractive.

In Britain, the likely effects of an equal pay directive have been hotly debated. While the Confederation of British Industry (CBI) argues that temporary jobs will be lost and not replaced, the Trades Union Congress (TUC) claims those cries of alarm are a repeat of similar forecasts over minimum wage increases, which failed to materialize. In support of their respective contentions, the CBI cites a survey of its members, while the TUC points out that temporary employment in several European countries has continued to grow at striking rates despite aggressive regulation.

Ultimately, when employers claim that they use temporary employment to address short-term fluctuations in demand, they should be called on it. An equal pay act would discourage uses of temporary employment simply to cut employees' compensation, without changing the flexibility benefits at the heart of the temporary employment industry. Employers using temporary agency employment primarily for cutting per-


153. Golden, supra note 4, at 1139 n.45. If there is no corresponding positive economic reason for the change, it is negative. There are also productivity concerns related to overuse of temporary employment because of decreased investment in training. Id.


155. Id.


158. See supra note 150 and accompanying text; see also Confederation of British Industry, supra note 156.

159. Employers would likely see some burden in determining equality of positions. However, since temporary employment flexibility seems generally to be gained from adding and subtracting employees, rather than types of positions, that occasional burden would not likely be a continuing drag on flexibility.
hour compensation costs will likely find that those workers will be interested in converting their status to permanent when the employers find that the cost advantage of temporary employment has disappeared.\textsuperscript{160}

IV.
CONCLUSION

With changing uses of temporary employment, it becomes necessary to rethink the policy context in which it is used. As many employers—instead of using it in an economically positive way—see temporary employment as a handy way to control wage and benefit costs, it is necessary to prevent the health of the labor force from being undermined on a job status technicality. As temporary agency workers give equal work, they should get equal pay.

\textsuperscript{160} See supra note 6 and accompanying text.