COMMENT

INDEPENDENT CONTRACTOR INJUSTICE: THE CASE FOR AMENDING DISCRIMINATORY DISCRIMINATION LAWS*

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I. INTRODUCTION

In order to be able to utilize the major federal statutes for protection against employment discrimination, a worker must fit the statutory definition of an "employee."[1] As a result, nontraditional workers, including independent contractors, are generally not protected by federal discrimination statutes.[2] This has led to a number of instances where independent contractors who claimed to have been discriminated against were denied any recourse.[3] The most promising solution to this problem is to amend the major federal employment discrimination statutes to expressly include independent contractors.[4]

To arrive at this conclusion, this Comment will: describe the current federal employment discrimination laws, including both well-known and lesser-known statutes; explore the distinction

1. Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239 (1997).

2. *Id.* at 239–40.

3. *See, e.g.*, Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241, 271–72 (2008) (describing the various occupations of individuals who were denied protection under the ADA).

4. Maltby, *supra* note 1, at 274.

between an "employee" and an "independent contractor" under current laws; analyze the issues caused by this distinction; and finally, examine several potential solutions to these issues.[5]

II. CURRENT LAW

When one thinks of employment discrimination law, three major statutes come to mind: Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act of 1990 ("ADA"), and the Age Discrimination in Employment Act of 1967 ("ADEA").[6] While there are a few other federal acts which speak to employment discrimination, this Comment will focus primarily on these three statutes, as well as the Civil Rights Act of 1866 ("Section 1981") and the Rehabilitation Act of 1973 ("Rehabilitation Act").[7]

A. Major Federal Statutes

Courts have long held that Title VII, Title I of the ADA, and the ADEA only apply to employees, not independent contractors.[8] The reasoning behind this distinction rests on the plain language of these statutes, which includes the term "employee" but does not mention any additional worker relationships, such as independent contractors.[9] This precedent may seem counterintuitive; however, if one assumes the purpose behind these statutes is to stop discrimination in the workplace.[10] Thus, the subsections below will explore the stated goal of each of the major statutes.

1. Title VII of the Civil Rights Act of 1964. Title VII purports to prohibit employment discrimination based on "race, color,

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5. *See infra* Parts II–VI.

6. *See generally* Maltby, *supra* note 1, at 241 (classifying Title VII, the ADA, and the ADEA as three of "the major federal discrimination laws").

7. *See infra* Sections II.A–B. Other federal discrimination acts not discussed in this Article include the Pregnancy Discrimination Act, the Equal Pay Act, the Immigration Reform and Control Act, and the Genetic Information Nondiscrimination Act. *Federal Antidiscrimination Laws*, NOLO.COM, https://www.nolo.com/legal-encyclopedia/federal-antidiscrimination-laws-29451.html [https://perma.cc/E532-EF92] (last visited Mar. 26, 2018).

8. *See infra* notes 12, 19, and 23 and accompanying text.

9. *See* 42 U.S.C. § 2000e(f) (2012); 42 U.S.C. § 12111(4) (2012); 29 U.S.C. § 621(b) (2012) and 29 U.S.C. § 630(f) (2012) (omitting the term "independent contractor"); Spirides v. Reinhardt, 613 F.2d 826, 829 (D.C. Cir. 1979) (looking first to the language of the statute to determine what workers qualify as protected "employees").

10. *See generally* Maltby, *supra* note 1, at 261 (discussing how "[i]f the broader purpose of employment discrimination law is to protect all workers from discrimination on the basis of certain protected categories, then Title VII should be an available remedy" for contractors).

religion, sex, or national origin."[11] Title VII does not, however, prohibit employment discrimination against *independent contractors*; rather, the statute only protects "employees."[12] Title VII defines an "employee" circularly as "an individual employed by an employer."[13] The Act offers no other language to clarify who qualifies as an "employee."[14]

While the Supreme Court has provided some guidance regarding the functional definition of "employee," it has not addressed the issue as to Title VII specifically.[15] Lower courts, however, have held that protected Title VII "employees" comprise only those individuals in a "conventional master-servant relationship as understood by common-law agency doctrine."[16] Courts have long held that independent contractors do not have a conventional master-servant relationship with their employers; thus, independent contractors are not protected by Title VII, in an apparent contradiction of the statute's broad goal of prohibiting employment discrimination.[17]

2. Title I of the Americans with Disabilities Act of 1990. The stated goal of Title I of the ADA is to protect qualified individuals with disabilities from employment discrimination on the basis of disability.[18] Yet, Title I of the ADA does not protect *independent contractors* with disabilities from employment discrimination; only "employees" are protected.[19] Courts "overwhelmingly agree that a plaintiff may only sue a defendant under Title I of the ADA if the plaintiff is an employee, rather than an independent contractor."[20] Like Title VII, this interpretation seems to

11. § 2000e-2(a)(1) (2012).

12. *See Spirides*, 613 F.2d at 829 (D.C. Cir. 1979). Title VII covers "only those individuals in a direct employment relationship with a government employer. Individuals who are independent contractors or those not directly employed by such an employer are unprotected." *Id.*

13. *See* § 2000e(f) (defining "employee").

14. Patricia Davidson, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 205 (1984).

15. *Id.* at 204.

16. *See id.* at 207; Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 434 (5th Cir. 2013) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992)).

17. *See supra* notes 10, 12, 16 and accompanying text.

18. *See* MARGARET C. JASPER, THE AMERICANS WITH DISABILITIES ACT 7 (2008) ("According to the U.S. Department of Justice, the purpose of Title I is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of disability. As long as the individual is qualified for an employment opportunity, that person cannot be denied that opportunity simply because he or she has a disability and must therefore be given the same consideration for employment that individuals without disabilities are given.").

19. *See* Flynn v. Distinctive Home Care, Inc., 812 F.3d 422, 427 (5th Cir. 2016).

20. *Id.*

antagonize the Act's stated purpose of protecting qualified individuals with disabilities from employment discrimination on the basis of disability.[21]

3. The Age Discrimination in Employment Act of 1967. The ADEA aims to "prohibit arbitrary age discrimination in employment."[22] But, like Title VII and the ADA, the ADEA only applies to "employees," meaning it does not protect workers without "employee" status from age discrimination in employment.[23] Although the Supreme Court has never discussed the issue of who qualifies as an "employee" under the ADEA specifically, federal circuit courts have consistently held that the ADEA is only applicable to traditional employees, with one court explicitly stating that the ADEA "provides no coverage for independent contractors."[24]

To summarize, excluding independent contractors from protection against employment discrimination seems to be at odds with the stated purposes of all three acts.[25] While this may very well seem perplexing, independent contractors may be able to look to other federal statutes for protection from employment discrimination, as explored below.

B. Other Federal Statutes

Because independent contractors are afforded no protection against employment discrimination under Title VII, Title I of the ADA, or the ADEA, these workers have started looking to other federal statutes for protection.[26] Two examples are Section 1981 and Section 504 of the Rehabilitation Act.

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21. *See* JASPER, *supra* note 18, at 7 (discussing the purpose of Title I of the ADA); *see also supra* note 10 and accompanying text (discussing how a federal discrimination statute should provide coverage to independent contractors if the purpose of the statute is to protect all workers from discrimination).

22. 29 U.S.C. § 621(b) (2012).

23. *See* Frankel v. Bally, Inc., 987 F.2d 86, 88–89 (2d Cir. 1993) (holding that the ADEA is not applicable to independent contractors); *see also* 29 U.S.C. § 630(f) (2012) (defining employee).

24. *See Frankel*, 987 F.2d at 89.

25. *See supra* note 10 and accompanying text.

26. *See, e.g.*, Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 174 (2006) (stating that Section 1981 "provides protection roughly equivalent to that of Title VII to a subset of the independent contractors whom Title VII excludes: those who suffer race-based disparate treatment discrimination"); Michael Carlin, *Discrimination Against Disabled Contractors Under the Rehabilitation Act*, 34 WHITTIER L. REV. 283, 293–94 (2013) (discussing how the Rehabilitation Act offers an alternative way to sue for discrimination on the basis of disability).

1. Section 1981. Independent contractors often bring Section 1981 claims in lieu of Title VII claims.[27] Section 1981 gives *persons* of all races an equal right "to make and enforce contracts," which includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[28] Therefore all persons, including independent contractors, can bring a claim for racial discrimination occurring within the scope of an employment contract.[29] While this seems like an attractive option, there are several obstacles to bringing Section 1981 claims in the employment discrimination context, which can make it difficult for these claims to stick.[30] For instance, liability may not be imposed under Section 1981 without proof of *intentional* discrimination.[31] Part V of this Comment addresses these hurdles more thoroughly.[32]

2. Section 504 of the Rehabilitation Act of 1973. The goal of Section 504 of the Rehabilitation Act is to prohibit discrimination against disabled persons in federally assisted programs or activities.[33] According to Section 504(d), the standards used to determine whether Section 504 has been violated are the same standards as those applied under Title I of the ADA.[34] Despite this

27. *See generally* Tarantolo, *supra* note 26, at 192 (stating that "[w]hile plaintiffs alleging discrimination most frequently invoke § 1981 in conjunction with, or as a substitute for, a valid Title VII claim, a growing number of independent contractors have brought § 1981 discrimination claims when their status has rendered them wholly outside Title VII's coverage").

28. 42 U.S.C. § 1981(a)–(b) (2012).

29. *See* Tarantolo, *supra* note 26, at 192 ("A small but not insubstantial number of independent contractors have prevailed on these claims.").

30. *See infra* note 31 and accompanying text (providing an example of some of the difficulties of bringing a Section 1981 claim).

31. *See* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 378 (1982) (holding that Section 1981 requires proof of intentional discrimination).

32. *See infra* Section V.B.

33. *See* Flynn v. Distinctive Home Care, Inc., 812 F.3d 422, 425–26 (5th Cir. 2016); s*ee also* 29 U.S.C. § 794(a) (2012) (stating that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service").

34. 29 U.S.C. § 794(d) (2012). *See* 29 U.S.C. § 791(f) (Supp. IV 2017) ("The standards used to determine whether [Section 504 of the Rehabilitation Act] has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq*.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.").

explicit parallel, circuit courts are split as to whether the ADA's exclusion of independent contractors extends to Section 504 the Rehabilitation Act.[35]

The Fifth, Ninth, and Tenth Circuits have held that Section 504(d) does not incorporate the "employee" limitation of Title I of the ADA.[36] These jurisdictions have reasoned that because Section 504 contains broad language authorizing discrimination suits, using the ADA's requirement that the plaintiff and the defendant have an employee-employer relationship would conflict with the plain language of the Rehabilitation Act.[37]

Conversely, the Eighth Circuit has held that the Rehabilitation Act *does* incorporate Title I's bar on employment discrimination suits brought by independent contractors.[38] The court reasoned that the ADA and the Rehabilitation Act are "similar in substance," such that "cases interpreting either are applicable and interchangeable."[39]

Consequently, the difficulty with relying on Section 504 of the Rehabilitation Act is that its availability is contingent on the independent contractor's location. Furthermore, even if this split is ultimately resolved in favor of allowing independent contractors to sue under the Rehabilitation Act, only federal contractors would be able to pursue this option because the Rehabilitation Act is only applicable to federally assisted programs.[40] Accordingly, Section 504 is an unreliable tool for many individuals.

To summarize, Title VII, Title I of the ADA, and the ADEA do

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35. *See* Chris Glauser, *Rehabilitation Act and ADA Discrimination Claims—Two Birds You Can't Always Kill with One Stone*, UTAH B.J., Jan.–Feb. 2013, at 24–26 (stating that "[t]he key point of disagreement among the courts is whether the Rehabilitation Act's reference to the ADA incorporates all aspects of the ADA, including the procedural requirements and definitions" and discussing the difference of opinion between circuit courts on this issue).

36. *Distinctive Home Care, Inc.*, 812 F.3d at 427 (agreeing "with the Ninth and Tenth Circuits that the Rehabilitation Act does not incorporate Title I's requirement that the defendant be the plaintiff's 'employer' as that term is defined in the ADA").

37. *Id.* at 428 ("Section 504(a) contains explicit language specifically authorizing discrimination suits against 'any program or activity receiving Federal financial assistance.' Importing Title I's requirement that the plaintiff and the defendant have an employee-employer relationship would therefore conflict with the plain language of the Rehabilitation Act, which broadly authorizes discrimination suits against a wide variety of entities, including non-employers.").

38. Wojewski v. Rapid City Reg'l Hosp., Inc., 450 F.3d 338, 345 (8th Cir. 2006) (declining "to extend coverage of the Rehabilitation Act to independent contractors").

39. *Id.* at 344 (quoting Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998)).

40. *See* Caitlin Petry, *Do Not Depend on the Rehabilitation Act: Why Independent Contractors Are Independent of Section 504*, 8 SETON HALL CIR. REV. 443, 463 (2012) (discussing how "[u]nder the Ninth Circuit's ruling, federal contractors would be able to bring discrimination claims under the Rehabilitation Act, but nonfederal contractors could not bring their claims under any statute").

not provide any protection for independent contractors. Section 1981 does provide some security but is subject to a few significant limitations.[41] Additionally, the circuit courts are split as to whether Section 504 of the Rehabilitation Act provides any protection for these workers.[42] To understand why these rulings have caused serious issues for independent contractors, it is important to clarify the difference between an "employee" and an "independent contractor."[43]

III. DISTINGUISHING AN "EMPLOYEE" FROM AN "INDEPENDENT CONTRACTOR"

A. Classification Tests

Because federal employment statutes often include circular definitions of "employer" and "employee," these definitions are not particularly helpful for distinguishing an independent contractor from an employee.[44] Thus, federal courts have instead devised several tests to determine when a worker should be classified as an employee.[45] The three most common tests are the common law test, the economic reality test (also known as the economic realities test), and the hybrid test.[46]

1. The Common Law Test. The traditional common law test, sometimes called the "right to control" test or the "master-servant" test, is primarily concerned with "how much control the employer has over the employee."[47] The more control and supervisory authority the employer holds, the more likely the individual is to be considered an employee.[48]

The common law test originates from tort case law in which courts examined employment relationships to decide whether an

41. *See supra* Section II.B.1.

42. *See supra* Section II.B.2.

43. *See generally* Maltby, *supra* note 1, at 240 (discussing the problems facing independent contractors because they are not classified as employees).

44. *See* 42 U.S.C. § 2000e (2012); 42 U.S.C. § 12111 (2012) (each defining "employee" as "an individual employed by an employer"); 29 U.S.C. § 630 (2012) ("individual employed by any employer"); *see also* Debbie Whittle Durban, *Independent Contractor or Employee? Getting it Wrong Can Be Costly*, S.C. Law., Jan. 2010, at 31–32 (describing how "[t]he determination of whether a worker is an independent contractor, or an employee is very fact intensive and subjective" due to the fact that the statutory definitions of "employer" and "employee" are "not very useful").

45. Durban, *supra* note 44, at 34–35.

46. *Id.* (stating that these tests are the "three main tests that have been traditionally used by federal courts and federal agencies").

47. *Id.* at 34; Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 458 (1999).

48. Barron, *supra* note 47, at 458.

employer should be held liable for a worker's tort damages, the rationale being that an employer should be liable when he has control over his workers' actions.[49] Courts determine the degree of control employers have over employees by examining multiple factors, including:

> (1) the extent of control which it is agreed that the employer may exercise over the details of the work; (2) whether or not the worker is engaged in a distinct business or occupation; (3) the kind of occupation, and whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the worker supplies the instrumentalities, tools, and the workplace; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time worked or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating an employer-employee relationship; and (10) whether or not the worker does business with others.[50]

2. The Economic Reality Test. Under the economic reality test, "a worker is deemed to be an employee if the worker is economically dependent upon the employer for continued employment."[51] This test assumes that an independent contractor typically works for many different employers and does not solely rely on any particular one.[52] Additionally, this test is premised on the idea that it is important for an employer to protect those who wholly depend on the employer for financial security.[53] In applying this test, courts typically consider:

> (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.[54]

3. The Hybrid Test. The hybrid test combines these two approaches, considering "the economic realities of the work relationship as a critical factor in determination but focus[ing] on

49. *Id.* at 459.
50. *Id.*
51. Durban, *supra* note 44, at 35.
52. *Id.*
53. Barron, *supra* note 47, at 460.
54. Durban, *supra* note 44, at 35.

the employer's right to control the work process as the determinative factor."[55] This method is useful to this discussion because it is often the approach used for interpreting antidiscrimination statutes [56]

B. Which Test Do Courts Use?

The classification test which a court uses in a given case depends on the statute under which the plaintiff brings his claim. The Fifth Circuit has held that the economic reality test should guide the analysis of whether a worker is an "employee" under Title VII.[57] It should be noted, however, that the economic reality test described by the court more closely resembles a hybrid test.[58] The economic reality test is also commonly applied in cases brought under the ADEA.[59] Yet, like the economic reality test used in cases brought under Title VII, the test used in many ADEA cases more closely resembles a hybrid test.[60]

As for claims brought under Title I of the ADA, the Supreme Court has held that the common law test is proper.[61] Because the standards applied to claims brought under Section 504 of the Rehabilitation Act are the same as those applied under Title I of the ADA, the common law test is also used to determine if a worker is an "employee" for purposes of a Section 504 suit.[62]

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55. Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., Jan. 2002, at 3, 10.

56. Barron, *supra* note 47, at 460.

57. *See* Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985); Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (holding that the economic realities test identified in Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) should be used in Title VII cases).

58. *See Spirides*, 613 F.2d at 831 (The economic reality test identified in *Spirides* calls for "[c]onsideration of all of the circumstances surrounding the work relationship" and says that "no one factor is determinative. Nevertheless, the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review . . . .").

59. *See* Durban, *supra* note 44, at 35.

60. *See* Garrett v. Phillips Mills, Inc., 721 F.2d 979, 982 (4th Cir. 1983) (applying the *Spirides* economic realities test to an ADEA claim).

61. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 588 U.S. 440, 447 (2003) (extending the use of the common law test adopted in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992) to discern an "employee" for purposes of the Employment Retirement Income Security Act of 1974 to the ADA).

62. *See* 29 U.S.C. § 794(d) (2012). Section 504(d) states that "[t]he standards used to determine whether [Section 504 of the Rehabilitation Act] has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment." *Id.*; *see also* Wojewski v. Rapid City Reg'l Hosp., Inc., 450 F.3d 338, 342–45 (8th Cir. 2006) (applying a common law test for the purposes of an ADA claim and then using the result of

No classification test is necessary for claims brought under Section 1981, because the plaintiff's status as either an "employee" or an "independent contractor" has no bearing on a Section 1981 action; all persons, including independent contractors, can bring a claim under Section 1981.[63]

With this background as to the status of current employment discrimination law, both in terms of the general exclusion of independent contractors from protection under the major federal statutes as well as the classification tests used to determine who exactly is deemed to be an independent contractor under these statutes, the next Part will explore how the current laws pose significant issues for independent contractors and why they need to be addressed sooner rather than later.

IV. ISSUES WITH THE CURRENT LAWS

Given the state of the current law, it is important to determine if independent contractors are actually being harmed by the lack of protection, and if so, whether any compelling policy considerations justify maintaining the status quo regardless of its negative consequences.[64] To accomplish this, this Part will first analyze the demographics of the independent contractor workforce for any possible trends related to women, minorities, people with disabilities, and the elderly.[65] Next, to determine if independent contractors even seek judicial redress, this Part will explore case law in which independent contractors attempted to sue for employment discrimination.[66] Then, assuming the current law is harming independent contractors, this Part will investigate whether this problem is growing, indicating a need to promptly address the current law before more and more people are negatively affected. Finally, this Part will weigh various policy considerations to determine whether the current law is justified.[67]

A. Evidence of Under-Representation

The 2015 U.S. Government Accountability Office (GAO) report *Contingent Workforce: Size, Characteristics, Earnings, and Benefits* revealed that men are considerably more likely to be

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that test for the purposes of a Rehabilitation Act claim as well).

63. *See supra* Section II.B.1.

64. *See generally* Maltby, *supra* note 1, at 242 (indicating that there "has been a growing consensus" that it is important to examine the status of independent contractors).

65. *See infra* Section IV.A.

66. *See infra* Section IV.B.

67. *See infra* Section IV.D.

independent contractors than women.[68] Additionally, "White, non-Hispanic[s]" are significantly more likely to be independent contractors than "Black, non-Hispanic[s]," "Hispanic[s]," and "Other non-Hispanic[s]."[69]

It is difficult to draw any definitive conclusions from these demographics regarding how the lack of employment discrimination protection is affecting independent contractors.[70] Those who support the exclusion of independent contractors from federal discrimination statutes may argue that because mostly white males comprise the independent contractor workforce, these workers do not have the same need for protection from employment discrimination as traditional employees.[71]

On the other hand, these demographics could alternatively suggest a need to address the under-representation of protected groups within the independent contractor workforce.[72] While these demographics may merely reflect worker preferences (e.g., women and minorities may prefer traditional employment over alternative work arrangements and are therefore not seeking as many independent contractor positions as white males), the demographics do, at the very least, raise concerns that the current laws are permitting discrimination against women and minorities in the independent contractor workforce.[73] Perhaps if federal discrimination laws were available to women and minorities in the independent contractor workforce, these groups would be able to sustain employment as independent contractors and grow to comprise a more proportionate percentage of the independent contractor workforce.

It should be noted that there is no evidence of under-representation of the elderly in the independent contractor workforce; in fact, the opposite appears to be the case.[74] The 2010 General Social Survey ("GSS") found that while only 2% of

68. *See Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE 68 (Apr. 20, 2015), https://www.gao.gov/assets/670/669766.pdf [https://perma.cc/F5KC-MME4] (showing that the 2010 General Social Survey found that men comprise 66% of independent contractors).

69. *Id.* (showing that the 2010 General Social Survey found that White, non-Hispanics comprise 75.3% of independent contractors).

70. *See* Maltby, *supra* note 1, at 244.

71. *Id.* at 244–45.

72. *Id.* at 245.

73. *See generally* Maltby, *supra* note 1, at 245 (indicating that the under-representation of protected groups may be evidence of discrimination within the independent contractor workforce); SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 3:17 (2d ed. 2016) (stating that in equal protection cases "statistical evidence of underrepresentation is admitted as circumstantial proof of discriminatory purpose").

74. *See* Contingent Workforce, *supra* note 68, at 68.

standard full-time workers are 65 years of age or older, 16.4% of independent contractors are 65 or older.[75] Likewise, over 38% of independent contractors are age 55 or older, whereas less than 18% of regular full-time workers are 55 or older.[76]

Again, these demographics are ambiguous.[77] These statistics could mean that older independent contractors have been able to maintain a relatively high percentage of the independent contractor workforce despite insufficient protection against discrimination and that, therefore, older independent contractors may not need federal discrimination protection.[78] However, this argument cannot be entirely true as there have been several lawsuits brought under the ADEA that were dismissed because the worker was deemed to be an independent contractor.[79] Consequently, it is more likely that this data means that because a significant portion of the independent contractor workforce is older, a great number of independent contractors are vulnerable to discrimination on the basis of age and are thus in need of protection.

B. Numerous Cases of Denial of Protection

Although the data on independent contractor demographics is somewhat ambiguous, it is clear from case law that independent contractors are being injured due to their exclusion from current laws. The current laws have led to a lack of discrimination protection for individuals in a wide array of occupations, including a surgeon, musician, anesthesiologist, auctioneer, insurance agent, sales representative, telemarketer, physical therapist, temporary worker, and others.[80] The denial of this protection left many independent contractors who were allegedly terminated on the basis of racial minority status, disability, or age without any recourse, as explored below.

1. Title VII of the Civil Rights Act of 1964. In *Johnson v. Crown Enterprises, Inc.*, Johnny Johnson, an African-American truck driver who worked as a seasonal independent contractor hauling sugar cane for a trucking company, was barred from

75. *Id.*

76. *Id.*

77. *See* Maltby, *supra* note 1, at 244 (stating it is difficult to draw any firm conclusions from independent contractor demographics).

78. *See supra* notes 75–76 and accompanying text (showing the percentages of older workers who were considered independent contractors).

79. *See infra* Section IV.B.3 (explaining cases in which independent contractors were denied protection from discrimination due to age).

80. *See* Burgdorf, Jr., *supra* note 3, at 271–72.

bringing a race discrimination claim under Title VII after he heard the hiring manager at the trucking company use racial slurs.[81] His contract, along with those of sixteen other African-American truckers, was not renewed for the 2000–01 season, during which time the trucking company hired thirteen new truckers, all of whom were white.[82] Yet, because Mr. Johnson was an independent contractor, the court held he could not establish a Title VII claim.[83]

In *Pisharodi v. Valley Baptist Medical Center*, Dr. Pisharodi, a neurosurgeon, brought a lawsuit for discrimination on the basis of his Indian ethnicity under Title VII after the medical center ignored Dr. Pisharodi's complaints that a prominent doctor at the medical center was using racial slurs towards him.[84] Dr. Pisharodi contended that the hospital had "engaged in a pattern of discriminatory behavior for years" and that he was not awarded as much success as other similarly skilled physicians.[85] Nevertheless, the court determined that Dr. Pisharodi was not entitled to Title VII protection because he "was an independent contractor and not an employee" of the medical center.[86]

These are just two examples of cases where independent contractors were barred from bringing Title VII claims.[87] Both of these plaintiffs had strong arguments to support that they were victims of racial discrimination, but neither one was allowed to have the merits of his case heard in court due to a mere loophole in the federal statute. This regime leaves worthy plaintiffs without redress.[88]

2. Title I of the Americans with Disabilities Act. In *Wojewski*

81. Johnson v. Crown Enters., Inc., 398 F.3d 339, 340–41 (5th Cir. 2005). Johnson alleges that he overheard the employee in charge of hiring telling three white men, "Man, I'm sick of these damn n******' trucks breaking down. I'm gonna stop hiring these n******." *Id.* at 340.

82. *Id.* at 340–41.

83. *Id.* at 341.

84. Pisharodi v. Valley Baptist Med. Ctr., 393 F. Supp. 2d 561, 566, 569 (S.D. Tex. 2005).

85. *Id.* at 566–67. Dr. Pisharodi alleges, among other things, that: the hospital staff "threatened to destroy his practice if he applied for privileges at VBMC or opened a practice in Harlingen"; "Dr. Six blocked him from obtaining privileges at VBMC by refusing to serve as his required backup, although Dr. Six serves as backup for others"; he "was only given provisional privileges for six months, as opposed to the one year privileges required by VBMC bylaws"; and hospital staff "openly planned to 'oust [Dr. Pisharodi] from VBMC.'" *Id.* at 567.

86. *Id.* at 571.

87. *See generally* Tarantolo, *supra* note 26, at 180 (discussing how many people fall outside of the protections of Title VII).

88. *See id.* (discussing that independent contractors are not guaranteed Title VII protection, so they are left without the ability to ensure their rights are protected through the statute).

v. Rapid City Regional Hospital, Inc., Dr. Wojewski, a cardiothoracic surgeon, "was diagnosed with bipolar disorder and took a leave of absence for treatment."[89] After treatment, Rapid City Regional Hospital reinstated Dr. Wojewski "to the active medical staff subject to certain conditions that were outlined in a Letter of Agreement," including that Dr. Wojewski:

> '[M]eet periodically with a monitoring physician; meet with [certain medical officers] upon demand.' . . . limit the time he was on call; participate in therapy; take prescribed medications and refrain from taking unprescribed medications; 'consume no more than three glasses of wine per week'; submit to 'random biological fluid collection'; 'submit to . . . mental, physical or medical competency examinations' demanded of him . . . release all medical or other personal information relevant to his impairment; [and] 'submit to review of 100% of his surgical cases for a period of six months from the date of reinstatement.'[90]

As if these restrictions were not grossly unreasonable and discriminatory in their own right, the hospital then terminated Dr. Wojewski after he displayed signs of suffering a manic episode.[91] But because Dr. Wojewski was deemed to be an independent contractor, the appeals court held that the employment discrimination provisions of Title I of the ADA were not applicable in this case.[92]

Some may argue that it is fair to fire a doctor displaying signs of a mental disorder, given the inherent safety risk of an unstable physician. However, that argument bears no weight on the distinction between an independent contractor and a regular employee. If Dr. Wojewski had been a traditional employee at the hospital, he would have been able to at least make his case for wrongful termination in court.[93] That is the issue here. Regardless of whether Dr. Wojewski's termination was justified, he should have been able to to have his voice heard. He was barred from asserting a claim solely because of his status as an independent contractor.[94]

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89. Wojewski v. Rapid City Reg'l Hosp. Inc., 450 F.3d 338, 340–41 (8th Cir. 2006).

90. *Id.* at 341.

91. *Id.*

92. *See id.* at 341–42, 345. While Dr. Wojewski's appeal from the district court's decision was pending, he passed away, forcing his widow to take over the case, only for the appeals court to affirm that Dr. Wojewski was not covered by the ADA. *Id.* at 342, 345.

93. *See id.* at 342 (discussing how the ADA protects disabled people's employment rights if they are employees but not if they are independent contractors).

94. *Id.* at 341–42.

Again, Dr. Wojewski is just one example out of many.[95] In *Johnson v. City of Saline*, a cable station operator who suffered from ankylosing spondylitis was barred from bringing an ADA claim after his contract was terminated, and he was replaced with a less trained worker who was not disabled.[96] In *Flynn v. Distinctive Home Care, Inc.*, a contract pediatrician who provided medical services at an Air Force base could not rely on Title I of the ADA to sue her employer after she was allegedly discriminated against because of her Autism Spectrum Disorder.[97]

While these are just a select few examples, even just one example of disability discrimination that is not redressed is too many.[98] How many contracted workers do we need to let this happen to before Congress does something to address the issue? And why should the protections afforded through the ADA be considered vital safeguards for traditional employees but inapplicable for a number of other hard-working individuals?

3. The Age Discrimination in Employment Act. To bring the pervasiveness of this issue home, one could also look to *Ernster v. Luxco, Inc.*[99] In that case, Barbara Ernster worked as a marketing representative for a liquor company for nearly seven years before she claimed she was wrongfully terminated at age fifty-four, due to age discrimination, and was replaced by a younger female.[100] Yet again, the court determined that Ernster was not an "employee" of the liquor company for purposes of the ADEA, and thus she had no recourse for this alleged discrimination.[101] Similarly, in *Weary v. Cochran*, an insurance agent was barred from bringing an ADEA claim after he was allegedly terminated because of his age.[102]

While one could again argue that there may have been valid reasons for these employees' terminations, that does not mean that these or similarly situated individuals should not have the right to have a court determine the merits of their claims. It appears to be a rather arbitrary distinction to exclude these

95. *See generally* Burgdorf Jr., *supra* note 3, at 271–72 (describing various instances where independent contractors were denied protection under the ADA).

96. Johnson v. City of Saline, 151 F.3d 564, 566–67, 574 (6th Cir. 1998).

97. Flynn v. Distinctive Home Care, Inc., 812 F.3d 422, 427 (2016) (stating "Flynn concedes she was an independent contractor, not an employee, of Distinctive. As a result, Flynn cannot sue Distinctive under Title I of the ADA").

98. *See generally* Burgdorf Jr., *supra* note 3, at 271–72 (describing various instances where independent contractors were denied protection under the ADA).

99. Ernster v. Luxco, Inc., 596 F.3d 1000, 1003 (8th Cir. 2010).

100. *Id.* at 1002–03.

101. *See id.* at 1003.

102. Weary v. Cochran, 377 F.3d 522, 523 (6th Cir. 2004).

seemingly robust claims solely because the plaintiffs are independent contractors and not "employees."[103] To make matters worse, with the evolution of the "on demand" economy in recent years, the independent contractor workforce has grown and continues to grow, meaning more and more workers will be left without recourse.[104]

C. Workforce Evolution

Contingent workers—defined by the U.S. government as a mixed group of (1) agency temps, (2) direct-hire temps, (3) on-call workers and day laborers, (4) contract company workers, (5) independent contractors, (6) self-employed workers, and (7) standard part-time workers—grew from comprising 30.6% of employed workers in the United States in 2005 to constituting 40.4% of employed workers in 2010.[105] By 2025, this number is expected to grow to 45% of the U.S. employed workforce.[106]

It should be noted that "most contingent workers are *not* independent contractors, but rather are employees" of either a company or a company and a staffing firm jointly.[107] A company cannot avoid liability under laws such as Title VII, Title I of the ADA, and the ADEA just by hiring a contingent worker through a staffing firm.[108] Such liability evasion only exists when a company "retains a *bona fide* independent contractor."[109] Hence, for purposes of this Comment, I am only concerned with the workforce evolution of independent contractors alone.

Although reliable data about independent workers specifically is often all too rare, the estimates that do exist are enlightening.[110] According to the GAO and the BLS estimates,

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103. *See generally* Maltby, *supra* note 1, at 261 (indicating that the distinction between an employee and an independent contractor for purposes of the federal employment discrimination statutes is arbitrary because these statutes should be available as remedies for independent contractors given "the broader purpose of employment discrimination law is to protect all workers from discrimination on the basis of certain protected categories").

104. *See infra* Section IV.C. for an explanation of the "on demand" economy.

105. *See Contingent Workforce*, *supra* note 68, at 11–12 (revealing that the GAO and the Bureau of Labor Statistics ("BLS") estimated that contingent workers comprised 30.6% of the U.S. workforce in 2005, while the General Social Survey ("GSS") estimated that they comprised 40.4% of the workforce by 2010).

106. *It's (Almost) All About Me: Workplace 2030: Built for Us*, DELOITTE 6 (July 2013), https://www2.deloitte.com/content/dam/Deloitte/au/Documents/human-capital/deloitte-au-hc-diversity-future-work-amp-2013.pdf [https://perma.cc/UL4C-AA66].

107. Mark Diana & Robin H. Rome, *Beyond Traditional Employment: The Contingent Workforce*, N.J. LAW, Apr. 1999, at 8, 9.

108. *Id.* at 10.

109. *See id.*

110. *See, e.g.*, Jody Greenstone Miller & Matt Miller, *The Rise of the Supertemp*,

independent contractors represented 6.7% of the U.S. employed labor force as of 1995, and, according to the GSS, they comprised 12.9% of the workforce by 2010.[111]

There are multiple factors that may have contributed to this large increase in the incidence of independent contractors.[112] One factor could be "that alternative work is more common among older workers and more highly educated workers, and the workforce has become older and more educated over time."[113] However, a shift-share analysis indicated that the change "in the age and education distribution of the workforce account[ed] for only about 10 percent of the increase in the percentage of workers employed in alternative work arrangements from 2005 to 2015."[114]

Another possible factor is that workers may have an increased demand for a more flexible work schedule, especially given that workers no longer need to rely on an employer for healthcare with the alternative options created by the Affordable Care Act.[115] Businesses themselves may also have a higher demand for alternative work schedules and temporary employees if they require a changing number of workers depending on the demand for their goods and services.[116]

Additionally, in the last decade, startups have begun to provide on-demand services for almost everything imaginable. [117] Services such as ridesharing, grocery delivery, and restaurant delivery are all accessible from your smartphone.[118] The large volume of human capital needed to enable these businesses has led the majority of these companies to hire workers as independent

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HARV. BUS. REV. (May 2012), https://hbr.org/2012/05/the-rise-of-the-supertemp [https://perma.cc/P6RA-3VW6] (discussing the high numbers of independent American workers today).

111. *See Contingent Workforce*, *supra* note 68, at 11–12.

112. Lawrence F. Katz & Alan B. Kruegar, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015* 17, 22 (Nat'l Bureau of Econ. Research, Working Paper No. 22667, 2016), http://www.nber.org/papers/w22667.pdf [https://perma.cc/7U6S-EK29].

113. *Id.* at 23.

114. *Id.* It should be noted that "[i]t is unlikely that supply-side factors account for the lion's share of the rise in alternative work arrangements since the rise in employees who are hired out to other firms through contract firms or temporary help agencies accounts for more than half of the overall rise in the share of employment in alternative work arrangements in the last decade." *Id.*

115. *Id.*

116. Jane Dokko, Megan Mumford, & Diane Whitmore Schanzenbach, *Workers and the Online Gig Economy*, HAMILTON PROJECT 3 (Dec. 2015), http://www.hamiltonproject .org/assets/files/workers_and_the_online_gig_economy.pdf [https://perma.cc/8C3K-7YMX].

117. Nancy Cremins, *The Rise of the On Demand Economy: The Tension Between Current Employment Laws and Modern Workforce Realities*, BOS. B.J., Winter 2016, at 27, 27.

118. *Id.*

contractors, thereby saving a substantial amount of money on employee benefits and taxes.[119] Yet, while some are quick to point to the on-demand economy (also known as the "gig economy," comprising contractors like Uber drivers) for the entire increase in independent contractor workforce expansion, the on-demand economy actually "accounts for less than 10 percent of . . . people working as independent contractors."[120] The largest independent contractor occupations are instead grounds maintenance workers; farmers, ranchers, and other agricultural managers; childcare workers; barbers, hairdressers, and cosmetologists; carpenters; and assemblers and fabricators.[121]

Lastly, another factor that potentially contributed to the growth of the independent contractor workforce was the Great Recession in 2007–2009, which may have forced many traditional employees to seek alternative work arrangements out of necessity.[122] If this was the central factor contributing to the workforce growth, one might expect the percentage of independent contractors to decline over time as the effects of the recession diminish.[123] Nonetheless, as of right now, the independent contractor workforce is alive and growing, meaning more and more people are in a position where they are barred from suing for employment discrimination.[124]

In determining if and when this problem should be addressed, however, it is important to look at the policy considerations behind the current employment discrimination statutes to understand if there are persuasive policy reasons for excluding independent contractors.

D. Policy Considerations

If there is discriminatory intent on the employer's part, it is difficult to craft a valid policy reason to preclude a discrimination lawsuit, even if the worker is classified as an independent contractor.[125] To determine if there is a valid policy reason to exclude independent contractors from being able to bring employment discrimination claims, it is necessary to look at the

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119. *Id.*

120. Laura Zulliger, *Which Industries Have the Most 1099 Workers?*, PAYABLE (Sept. 10, 2015), https://payable.com/blog/industries-most-1099-workers [https://perma.cc/9UDZ-9L3J].

121. *Id.*

122. Katz, *supra* note 112, at 25.

123. *Id.*

124. *See supra* note 111 and accompanying text (providing statistics to support the proposition that the independent contractor workforce appears to be growing).

125. *See* Maltby, *supra* note 1, at 271.

purposes behind these antidiscrimination statutes as well as the inherent differences between an employee and an independent contractor to see if these purposes or differences reveal a justification for excluding independent contractors. Additionally, it may be helpful to analyze why employers may prefer to classify their workers as independent contractors as opposed to employees, and what effect, if any, expressly changing the major federal employment discrimination statutes to include independent contractors may have on the economy.

1. Statutory Goals and the Inherent Differences Between "Employees" and Independent Contractors. As mentioned in Part II, the purpose of Title VII is to prohibit employment discrimination based on race, color, religion, sex, and national origin; the purpose of Title I of the ADA "is to ensure that qualified individuals with disabilities are protected from discrimination on the basis of [their] disability"; and the purpose of the ADEA is "to prohibit arbitrary age discrimination in employment."[126] Hence, the purpose behind these statutes—to prohibit discrimination in the workplace—begs the question: why are independent contractors any different than regular employees when it comes to discrimination protection?

One potential answer to this question is that, by definition, independent contractors *are* different than regular employees.[127] Independent contractors are neither under the complete control of their employers nor financially dependent on them.[128] Additionally, an independent contractor may have special skills, giving him significant bargaining power to negotiate a contract with his employer that he deems to be fair.[129] Hence, it seems feasible that an independent contractor could negotiate for a clause in his contract regarding wrongful termination due to discriminatory intent, which would enable him to sue for breach of contract in lieu of suing under one of the major federal employment discrimination statutes.

However, this is generally not the case.[130] Typically, workers

126. *See* U.S.C. § 2000e-2(a) (2012); JASPER, *supra* note 18, at 7; 29 U.S.C. § 621(b) (2012).

127. *See supra* Part III.

128. *See id.*

129. *See* Robert J. Dagmy, *Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067 (2015)*, 43 W. ST. L. REV. 329, 331 (2016).

130. *See* Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees when Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 80 (1997).

do not have a choice and must accept an employer's decision to classify them as independent contractors.[131] This is due to the fact that independent contractor "classification schemes are prevalent in sectors of the low-wage workforce where unskilled workers who have little bargaining power must assume contractor status in order to be employed."[132]

Additionally, there are several reasons one might prefer to sue under a federal statute rather than under a breach of contract theory. First, if an employment contract is terminable at-will, the worker often cannot recover damages.[133] Moreover, being able to sue for breach of contract assumes that a contract was actually executed.[134] If an independent contractor is denied a job due to discriminatory intent, he cannot bring a breach of contract claim as no contract has yet been formed.

Thus, the definitional difference between an "employee" and an independent contractor does not appear to shed light on the reasoning behind excluding the latter from the major federal discrimination statutes either. In continuing the attempt to try to find such a justification, the next section will examine the benefits of classifying workers as independent contractors and whether or not the aggregate effect of these benefits to employers creates a valid policy reason for the statutory distinction.

2. Benefits of Hiring Independent Contractors. First of all, many employers hire independent contractors in lieu of traditional employees to cut costs.[135] Employers can hire independent contractors without having to increase their spending on health insurance, employer-funded pension plans, or unemployment insurance.[136] Additionally, if the hired independent contractors plan and manage their own tasks, the employer can spend less money on administrative resources it would otherwise spend managing employees.[137]

A second reason many employers opt to hire independent

131. *Id.*

132. *Id.* at 81.

133. 33 TEX. JUR. 3D *Employer and Employee* § 51 (2010).

134. *See generally* James A. Zitesman, *Breach of Contract*, ZITESMAN.COM (Jan. 9, 2015), https://zitesman.com/breach-of-contract/ [https://perma.cc/TUE6-DVA7] (stating the general proposition for all breach of contract cases that "[i]f there is not a contract in the first place, there can't be a breach").

135. *See* Alison Davis-Blake & Brian Uzzi, *Determinants of Employment Externalization: A Study of Temporary Workers and Independent Contractors*, 38 ADMIN. SCI. Q. 195, 198 (1993) (stating that "externalization reduces many types of employment and administrative costs").

136. *Id.*

137. *Id.*

contractors is that these workers are hired "without the expectation of long-term employment," so letting these workers go is easier for the employer and societally more acceptable.[138] However, critics may argue this is a trivial reason given the prevalence of at-will employees, who may be fired for any reason at any time as long as the motivation behind the termination does not violate the covenant of good faith or fair dealing.[139] Hence, unless the employer is hiring a worker with the intention of firing him in bad faith, this argument holds little weight.

Third, employers may require the specialized skills that a certain independent contractor can offer only for a limited period of time, such as an engineer needed only for a specific project.[140] Therefore, hiring independent contractors offers employers a wide array of worker specialties without inflicting the expense of fixed investment in labor.[141]

With these benefits as a background, it is important to consider the effect that affording independent contractors protection under the major federal employment discrimination statutes may have on the employers who have purposefully chosen to hire independent contractors, and how this change might affect the economy in the aggregate.

3. How Affording Independent Contractors Status May Affect the Economy. Some people may argue that allowing independent contractors the same statutory protections offered to employees would increase the cost of hiring said workers and thus contravene the very cost-savings these employers are seeking in hiring independent contractors.[142] In the aggregate, this could be devastating; these employers may have to significantly cut down the number of workers they hire in order to pay for this excess expense, costing Americans a great deal of jobs.

While this reasoning seems sound, it should be noted that giving independent contractors status under the major federal employment discrimination laws would not entitle these workers to *all* of the same privileges enjoyed by traditional employees but

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138. *Id.*

139. *See* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 10 (explaining that the good faith exception does provide protection to employees; however, only a minority of states have recognized this exception).

140. Davis-Blake, *supra* note 135, at 198.

141. *Id.*

142. *See Misclassification of Employees as Independent Contractors*, DEP'T PROF. EMP. AFL-CIO 3 (June 2016), http://dpeaflcio.org/wp-content/uploads/Misclassification-of-Employees-2016.pdf [https://perma.cc/2N5Y-GUQM] (finding that employers do not have to pay social security or unemployment insurance taxes for independent contractors).

only to the privilege of being able to have one's voice heard in court if he is discriminated against.[143] Employers would still receive the cost savings of reducing their expenses on employee benefits, administrative costs, large fixed investments in labor, etc.[144] Thus, unless the majority of employers who hire independent contractors are hiring these workers solely with the intention of evading the major federal employment discrimination statutes, this change in affording independent contractors status under these statutes should not alter these employers' preference in hiring independent contractors versus traditional employees.

One may argue that including independent contractors as a separate classification of workers under the federal discrimination statutes could increase the possibility that independent contractors may sue for compensation and treatment equal to that of traditional employees, claiming that but for the fact that they are women, or people of a racial minority, or people with disabilities, or people over the age of forty, they would have been classified as "employees" and not as independent contractors.[145] However, if the employer classified the independent contractor as such for a legitimate business purpose (e.g., to cut costs), the employer would be entitled to raise a business necessity defense, which would then shift the burden of proof back to the plaintiff.[146] Alternatively, if there was in fact discriminatory intent on behalf of the employer, there does not appear to be a persuasive policy reason for prohibiting a discrimination lawsuit; therefore, this concern does not seem warranted.[147]

Critics may also contend that this change in statutory law could lead to an increased number of frivolous lawsuits.[148] Given that employers often classify workers as independent contractors

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143. *See* Maltby, *supra* note 1, at 265–66.

144. *See supra* Section IV.D.2 (describing the economic benefits of hiring independent contractors).

145. Maltby, *supra* note 1, at 270. To exemplify this phenomenon, Maltby and Yamada wrote,

> [C]onsider the possibility of a cross-classification claim under Title VII. Suppose a company decides to expand its physical plant, and to meet the needs of that new section, it contracts out part of its janitorial work. The current janitors are full-time employees, all male, earning an average of fifteen dollars per hour plus benefits. All will be retained.
>
> However, for the additional janitorial work in the new section in the plant, the company hires a contractor staffed solely by women. The women will earn an average of ten dollars per hour without benefits. Does this arrangement create a systemic disparate treatment or impact claim under Title VII?

Id.

146. *Id.* at 271.

147. *Id.*

148. *See* Tarantolo, *supra* note 26, at 182.

because they only need these workers for a certain amount of time, one may argue that when these employers do in fact let their independent contractors go, these workers will now have the power to bring a baseless discrimination claim that they could not have brought before.[149] However, it is unclear whether or not this is even a likely consequence.[150] Additionally, filing a claim that is ultimately deemed frivolous can be highly damaging to the attorney who files it, potentially triggering sanctions to be imposed.[151] Thus, again, this concern does not seem warranted.

Recalling the policies behind the federal discrimination statutes, it is very difficult to conceive of a justification for excluding independent contractors from their protection. The only consequences of affording these workers protection seem to be that employers lose the freedom to terminate these workers in bad faith. Also, amending these statutes could possibly erode employers' cost savings associated with classifying workers as independent contractors by imposing financial liability on the employers if they are found to have discriminated against these workers on the basis of sex, race, disability, or age.[152] Such justifications do not support any valid policy reasons in favor of excluding independent contractors from the protection of federal employment discrimination statutes.

In summary, there do not appear to be any valid policy considerations to justify excluding independent contractors from the protection of the major federal employment discrimination statutes. The current law is in fact flawed, and thus it is necessary to evaluate potential solutions to address the issues current law poses to independent contractors.

V. POSSIBLE SOLUTIONS

Given that the current laws are significantly harming independent contractors, that this issue is worsening due to the evolving workforce and rapid increase in the number of independent contractors, and that there do not appear to be any valid policy considerations to justify the continued exclusion of independent contractors from the major federal employment

149. *See id.* at 203.

150. *See id.*

151. *See* Cynthia Nguyen, *An Ounce of Prevention Is Worth a Pound of Cure?: Frivolous Litigation Diagnosis Under Texas Government Code Chapters 9 and 10, and Texas Rule of Civil Procedure 13*, 41 S. TEX. L. REV. 1061, 1070 (2000).

152. *See* Maltby, *supra* note 1, at 271 (stating that "[i]f there is discriminatory intent on the employer's part . . . then there is no valid policy reason for precluding a discrimination lawsuit . . .").

discrimination statutes, it is necessary to evaluate possible solutions to this issue. This Part will explore the possibility of having independent contractors look to state laws, Section 1981, and Section 504 of the Rehabilitation Act for protection from discrimination, as well as the possibility of simply amending the major federal statutes to include independent contractors.

A. State Laws

Some states have taken employment discrimination matters into their own hands and have enacted statutes to include independent contractors.[153] For example, in Illinois, the provisions of the state Public Works Employment Discrimination Act explicitly apply to all employees and independent contractors.[154] However, state-by-state legislation can be haphazard and does not provide universal, equivalent coverage. In order for *all* workers in *all* states to be protected from discrimination in employment, the proper solution should be a change at the federal level.

B. Section 1981

As mentioned in Part II, independent contractors often bring a Section 1981 claim in lieu of a Title VII claim.[155] Thus, courts are able to analyze the merits of discrimination claims they would have otherwise dismissed.[156] This has enabled "[a] small but not insubstantial number of independent contractors" to succeed on these claims.[157]

But Section 1981 is by no means a perfect solution to the coverage gaps of the major federal employment discrimination statutes.[158] One of the largest problems with relying on Section 1981 as a solution is that it only protects against discrimination on the basis of race or ethnicity; it does not serve as a solution to the lack of statutory protection regarding discrimination based on sex, religion, age, or disability.[159] Further, even within the classes protected by Section 1981, courts have held that liability may not be imposed under Section 1981 without proof of *intentional* discrimination.[160] In other words, an employer cannot be held

153. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 10/3 (LexisNexis 2010) (showing Public Works Employment Discrimination Act applies to independent contractors).

154. *See* 775 ILL. COMP. STAT. ANN. 10/4 (LexisNexis 2010).

155. *See* Tarantolo, *supra* note 26, at 192.

156. *See id.*

157. *Id.*

158. *See id.* at 193.

159. *Id.*

160. Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 383, 391 (1982).

liable for disparate impact discrimination.[161] This poses a significant hurdle because proving such intent is extremely difficult.[162] Judge Posner noted, "Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible."[163] These claims, then, are very challenging to prove.

Additionally, if a plaintiff does not raise his Section 1981 claim in his opening brief, courts have held that such plaintiff has waived any claim based on Section 1981.[164] This may be problematic for workers who initially bring a Title VII claim, unaware that a court will deem them to be independent contractors and as such not covered by Title VII. In such cases, workers are then left without recourse.

Given these limitations, it appears that Section 1981, like individual state laws, does not constitute a complete solution to the issue of the exclusion of independent contractors from the major federal employment discrimination statutes.

C. Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act may offer a solution to provide independent contractors with federal statutory protection against employment discrimination based on disability.[165] For example, the Fifth Circuit recently held that "Section 504 of the Rehabilitation Act permits employment discrimination suits by independent contractors."[166]

However, as noted in Part II, the circuit courts are still split on whether or not the Rehabilitation Act is applicable to independent contractors, meaning that this solution is only viable

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161. *See id.* at 390 (holding that Section 1981 does not prohibit disparate impact discrimination). Disparate impact discrimination "occurs when a facially neutral policy or practice has a disproportionate impact on a protected class; rather, the statute forbids only disparate treatment, which requires evidence of discriminatory motive." Tarantolo, *supra* note 26, at 195.

162. Christopher Y. Chen, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 Cornell L. Rev. 899, 915 (2001).

163. *Id.*

164. *See* Yu v. McGrath, 597 Fed. App'x 62, 67 n.2 (3d Cir. 2014) (holding that the plaintiff waived any claim based on § 1981 "because she has not raised the claim in her opening brief").

165. *See supra* Section II.B.2.

166. Flynn v. Distinctive Home Care, 812 F.3d 422, 432 (5th Cir. 2016).

for independent contractors living in certain jurisdictions.[167] Even if the circuit split is resolved in favor of independent contractor protection, only independent contractors working for federally assisted employers would be able to pursue this option, as the Rehabilitation Act is only applicable to entities receiving federal funding.[168] Additionally, the Rehabilitation Act only covers discrimination on the basis of disability and therefore does not constitute a solution for claims otherwise brought under Title VII or the ADEA.[169]

Hence, this avenue is also not a comprehensive solution to the problem of a lack of protection for independent contractors under the three major federal employment discrimination statutes. Given the inability to craft effective solutions using state laws and other federal statutes, it appears only one option will suffice to provide independent contractors the protections they need: expressly changing the statutory definition of "employee" within the major statutes to include independent contractors.

D. Changing the Statutory Definition of "Employee"

Given the growing independent contractor workforce, the fact that there appears to be no valid policy argument for precluding independent contractors from discrimination protection, and the apparent conclusion that no other existing laws provide comprehensive discrimination protection for independent contractors, Congress should very seriously consider expressly changing the statutory definition of "employee" in the major discrimination statutes to include independent contractors.[170] This solution is the only feasible solution to protect *all* independent contractors, in *all* states, with regard to *all* types of discrimination, irrespective of whether the discrimination is intentional and irrespective of whether the employer receives federal funding.

VI. CONCLUSION

The major federal employment discrimination statutes do not currently provide protection for independent contractors. Given the number of incidents of lack of redressability this has caused, combined with the fact that the independent contractor workforce

167. *See* Petry, *supra* note 40, at 463.

168. *See id.*

169. *See* 29 U.S.C. § 794(a) (2012).

170. *See* Maltby, *supra* note 1, at 274 (concluding that "[a]mending the primary employment discrimination statutes to explicitly include independent contractors is the best way to protect these workers in the midst of a changing labor market").

is growing rapidly, this issue is one that needs to be addressed. The most promising solution to this problem is to amend the major federal employment discrimination statutes to explicitly include independent contractors, as this change is the only feasible solution to protect *all* independent contractors, in *all* states, with regard to *all* types of discrimination.

Orla O'Callaghan