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## LABOR & EMPLOYMENT



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Garry G. Mathiason, of Littler Mendelson's San Francisco office, co-wrote a report that found that as many as half of all people rehired after the recession will be employed as contingent workers.

# Future Work Force

By John Roemer

**S**AN FRANCISCO — Job security with lifetime benefits at an established company looked like a quaint and antiquated notion even before a nose-diving economy decimated U.S. employment rolls.

Now, the emerging trend toward wage earners completing short-term projects for a variety of employers will likely become the new normal as the nation recovers and people return to work, according to deep thinkers at the Massachusetts Institute of Technology's Sloan School of Management.

Sloan called its farsighted project "Inventing the Organizations of the 21st Century." Begun in 1994, it continues to yield dividends today as lawyers mine its insights for clues about the shape of the future workplace. Sloan distilled

the project into a 2003 book with the same name that predicted the end of "dinosaur" companies such as General Motors and proposed that developments such as the Internet would mean greater opportunities for independent workers.

The growth of a so-called contingent work force has enormous repercussions for how the law will come to treat work and workers, according to academics involved in the Sloan study and lawyers in the field.

"It's the evolution of a business trend toward efficient methodology," said **Garry G. Mathiason**, a senior shareholder at Littler Mendelson's San Francisco headquarters. The management-side firm keeps a sharp eye on work force issues.

"You bring in cadres of increasingly professional contingent workers until the project is accomplished," Mathiason said. "It's the way

the iPhone got made. It's the way motion pictures are made. Law firms work like this, grouping lawyers and support staff to focus on major pieces of litigation.

"The economy is so hungry for this kind of structure, and the implications are staggering for employment and labor law."

Mathiason is co-author of a Littler report published in April that draws on the Sloan research and predicts that as many as half of the U.S. job hunters rehired as "fillback" as the current recession eases will be contingent workers, up from 30 percent of those rehired following the 2001 downturn.

Mathiason and his co-authors recommend 12 steps companies can take to anticipate contingent work force challenges. Among them: seek out contingent worker providers and negotiate vendor contracts that comply with existing la-

bor laws; evaluate how workers' compensation coverage and unemployment insurance taxes will shift as the work force changes; avoid traditional labor law "land mines" like collective bargaining agreements that could bar contingent workers.

Mathiason's study also recommends employers factor in the likelihood that the Obama administration's National Labor Relations Board will ease barriers between traditional workers and temps.

### Is eBay the New Model?

Sloan management professor Thomas W. Malone, a key author of the 21st Century study, said a model for the emerging "virtual company" is the online auction giant eBay.

"This is a business analogous to Wal-Mart, only much more decentralized, a retailer run by a contingent work force of independent sellers," Malone said. "Its core organization has taken on some of the roles we see possible for future unions, such as insurance for power sellers [who attain high sales levels] and PayPal, a fund transfer mechanism for independent workers."

Inequality claims have so far marked the transition to independent workers looking beyond companies for benefits.

Union-side lawyers contend that company managers unfairly take advantage of the shifting employment landscape to underpay and deny benefits to temps or to longer-term employees they misclassify as independent contractors.

One inevitable response has been litigation, such as a \$200 million class action filed late last month in federal court in San Diego by former sales and finance representatives of Northwestern Mutual Life Insurance Co. claiming long-standing wage-and-hour violations. *Lint v. Northwestern Mutual Life Insurance Co.*, 09-1373.

The suit claims the insurer bilked workers by misidentifying them as independent contractors exempt from the protection of the federal Fair Labor Standards Act and California labor laws.

"In modern society, workers are not indentured servants — they are entitled to work a livable number of hours at a livable wage," said David W. Sanford of the New York-based labor-side employment discrimination firm Sanford Wittels & Heisler, representing the plaintiffs.

Northwestern Mutual spokeswoman Jean

Towell pointed out that a federal judge in Pennsylvania dismissed an almost identical suit against the company last year because the plaintiffs were indeed independent contractors, not employees. *Sofranko v. Northwestern Mutual Insurance Co.*, 2008 U.S. Dist. Lexis 2493 (W. Dist. Penn).

"These plaintiffs have never been our salaried employees," Towell said. "They are independent contractors in our nationwide distribution system. That's our business model."

### Unions Resistant

Labor unions have also shown hostility toward the contingent work force trend.

"We want to have fewer of this kind of worker. We want that trend not to continue," said Steve Smith, communications director for the California Labor Federation, an umbrella group representing 2.1 million union workers in the state. "We don't think it's good for the economy."

Smith said unions are trying to become more adept at protecting wrongly classified workers not covered by wage-and-hour laws. "But I don't think there's an overarching strategy to provide greater stability for temporary workers. We are trying to move away from a two-tier system. We are trying to push back on this."

Taking a longer view, academics involved in the Sloan School of Management study and labor and employment lawyers wonder how the law can catch up to new realities.

In a 1997 study, management professor Malone at Sloan imagined himself in 2015 peering into the past and the shift from big corporations to contingent work forces.

"Now, looking back at the 'dinosaur' era in which General Motors, Microsoft, and Sony stalked the earth," Malone wrote, "we are most aware of the tiny 'mammals' — entertainment production companies, construction project teams, and consultant work groups — which operated without much public notice back in the 1990s, only to become the prototypes of today's modern organization."

Malone said last month that independent workers face real questions that our culture is just beginning to seek answers for.

"Where do they go for needs previously met by long-term employers, such as financial stability, health insurance, a place to socialize, a place to develop their skills? If there were no such place, the work world could be fairly unpleasant."

Malone thinks independent organizations may evolve to meet these needs. He suggests the term guilds, as in associations of self-employed craftspeople. "Instead of being solely collective bargaining organizations, they would be service providers who would compete for membership."

An example came in late 2007 when the Writers Guild of America went on strike because of a dispute with a film and television producers' trade group over new-media residual pay and other issues. After 14 weeks, the opposing sides — both of which were composed of independent entertainment industry professionals — ratified a contract and returned to work.

Labor unions are an obvious candidate for an expanded role as full-service guilds, if they can transform themselves, Malone said.

"In the long run, collective bargaining will be less important because large dominant corporations will be less prevalent. There will be fewer big companies and more temporary combinations of workers."

A leading union lawyer said his clients already see such changes coming.

"There certainly is an opportunity for unions here," said Altshuler Berzon partner Michael Rubin of San Francisco, who represents the AFL-CIO and other unions. "We want to respond to the change to a contingent work force by preventing a dilution of workers' rights to organize and fight back."

Rubin said litigation remains a powerful weapon in the standoff between unions and companies over wage-and-benefit denials due to disputed worker classification. Beyond that, unions could negotiate group rates with health care providers to give members the insurance that traditional employers increasingly fail to furnish, he said.

Malone said laws will have to be rewritten to even the playing field.

"Labor, employment, even tax laws currently make an unhelpful distinction between employees and contract workers in the areas of tax withholding and health care expense deduction," he said. "That's introduced huge frictions into the work force. I don't see any public interest served that way."

"If you believe workers have certain rights, it makes no sense to distinguish among them. We'd be better off if the laws were neutral."