

Policy Approaches to Atypical Employment

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September 18, 2008

Atypical employment has become an important area of inquiry in labor market policy for developed countries as it has become apparent that atypical workers suffer many disadvantages including weaker legal protections, lower compensation, and less job security. This article reflects on three main policy approaches (legislative, union, and judicial) to atypical employment and offers suggestions for future policy.

Keywords: atypical employment, contingent work, flexicurity, fixed term, part-time, self employment

1 Introduction

“Atypical” employment is any type of employment that is not full-time and permanent with a single direct employer. It includes many diverse forms of work including part-time, self employment, fixed term contracts, temp work, free-lancing, piecework, unpaid family labor, and informal day labor. In each country the definitions and consequences of each type of atypical employment vary. For example, fixed term employment is similar to regular full-time work, with the exception that it has a specified end-date. In the United States, which has “employment at will,” this is not theoretically different from regular employment. In contrast, in Europe, where there are limitations

on severance, the full meaning of fixed-term work is largely defined in contrast to the limitations on severance for regular workers. The definition of part-time work also varies by country with thresholds normally between 30 and 35 hours a week. Workers working less than 10 hours per week are often considered “casual” workers rather than “part-time.” In the United States (US), part-time is employer-defined so that a worker working 38 hours a week could be considered part-time in the US but working overtime in France. Finally, entrepreneurial “self employment” might not be considered atypical employment, but often the category includes the “dependent self employed” – contractors who are in practice employees although legally have a contract for services. Studies attempting to parse out the the proportion of workers who are “dependent self employed” find that in the UK it is about 1.3% of the labor force, between .88 and 5.3% in Italy, about 1.5% in Austria, and about 1% in Greece (EIRO, 2005; Heineck et al., 2004; Böheim and Muehlberger, 2006; Muehlberger and Pasqua, 2006; Alteri and Oteri, 2004).

The literature on atypical employment and atypical employment policy has grown dramatically in recent years in response to the perception that atypical employment is growing rapidly and that atypical work is a form of disadvantaged employment. The combination of these two factors is hypothesized to lead to a new “underclass” of workers, to explain recent declines in real wages for low skill workers, and to perhaps put downward pressure on all workers’ wages and job security. Yet, the first observation, that atypical employment is rising, does not have strong empirical support. In fact, using Organization for Economic Co-operation and Development (OECD) and Eurostat data it seems that there there is considerable variation in the level of atypical employment across countries, and that levels have been relatively stable since 1990 and that the biggest increases occurred in the 1980’s.

Trends are difficult to determine since they vary depending on whether data are reported by employers or employees, which types of atypical employment are grouped together, and whether trends were extrapolated from shorter time periods (Grip et al., 1997; LeBlansch et al., 2000; Keller and Seifert, 2005; Magnani, 2003; Boeri and Garibaldi, 2007). Those studies that do look at absolute levels (Keller and Seifert, 2005) are often surprised how low the levels of fixed term employment actually are. Figure 1 shows the level of self, part-time, and fixed term employment in 2005 for 16 European Union (EU) countries and only the levels of self and part-time employment for the US, Canada, New Zealand, Switzerland, Japan, and Australia. Spain has very high fixed term employment, Greece has the most self employment, and the Netherlands has the most part-time employment.

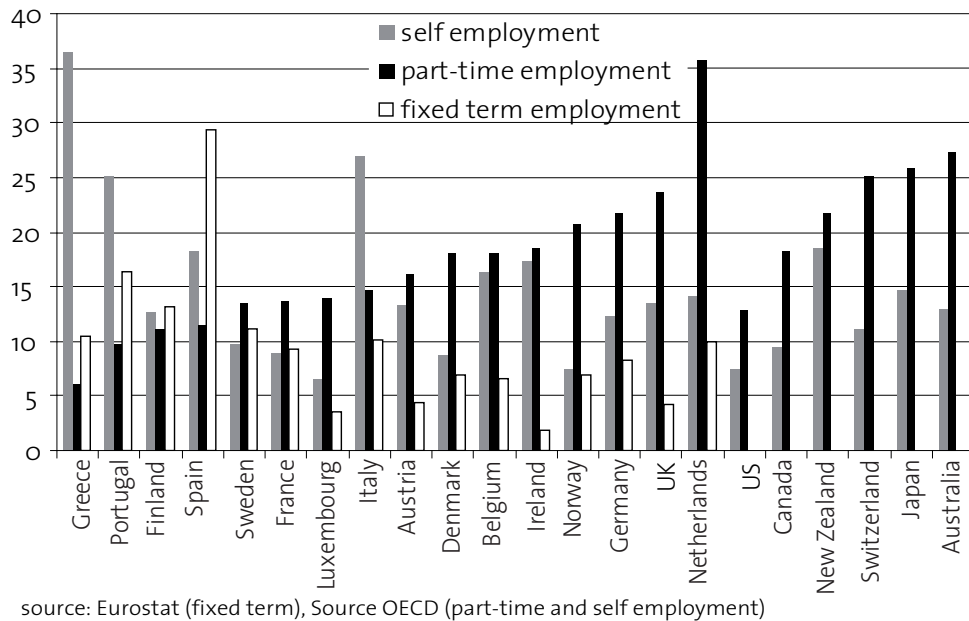


Figure 1: Levels of atypical employment by country, 2005

The first panel of figure 2 shows the time trends for the average percent of the workforce in these three forms of atypical employment. The figure shows

that part-time and fixed term work have increased slowly while self employment has declined. The average presented here is just for Western Europe (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom) and is weighted by population. Non-Western European countries have intermittently available trends, and are thus excluded. Including all countries listed in figure ??, the trends are mostly the same, but the self employment line shifts up. Using an unweighted average (where Luxembourg is equivalent to Germany), there is similar trend as what is depicted here. The second panel highlights trends in the UK, Czech Republic, Sweden, Italy, France, and Germany. Using OECD data from 1990 to 2006, self employment was relatively stable with higher levels in poorer countries and recent small declines in all countries except the former eastern-bloc countries like the Czech Republic and Romania. In Europe, fixed term employment has increased slightly with the exception of Ireland and Norway where it declined, and Poland and Portugal, where it grew rapidly. Part-time work has increased in most countries (particularly Germany) with the exception of Iceland and the United States.

While there is not significant empirical support for the perception that atypical employment is slowly overtaking regular employment, there *is* significant support for the perception that atypical work is a disadvantaged form of work. Atypical workers are disadvantaged by their weaker protections under employment protection legislation, are often not part of unions, have weaker worker safety protections, no overtime pay, sometimes minimum wage does not apply to them, and they have lower compensation on average, although there are small occupational subgroups of atypical workers that earn more (Rica, 2004; Mertens and McGinnity, 2003; Booth et al., 2002;

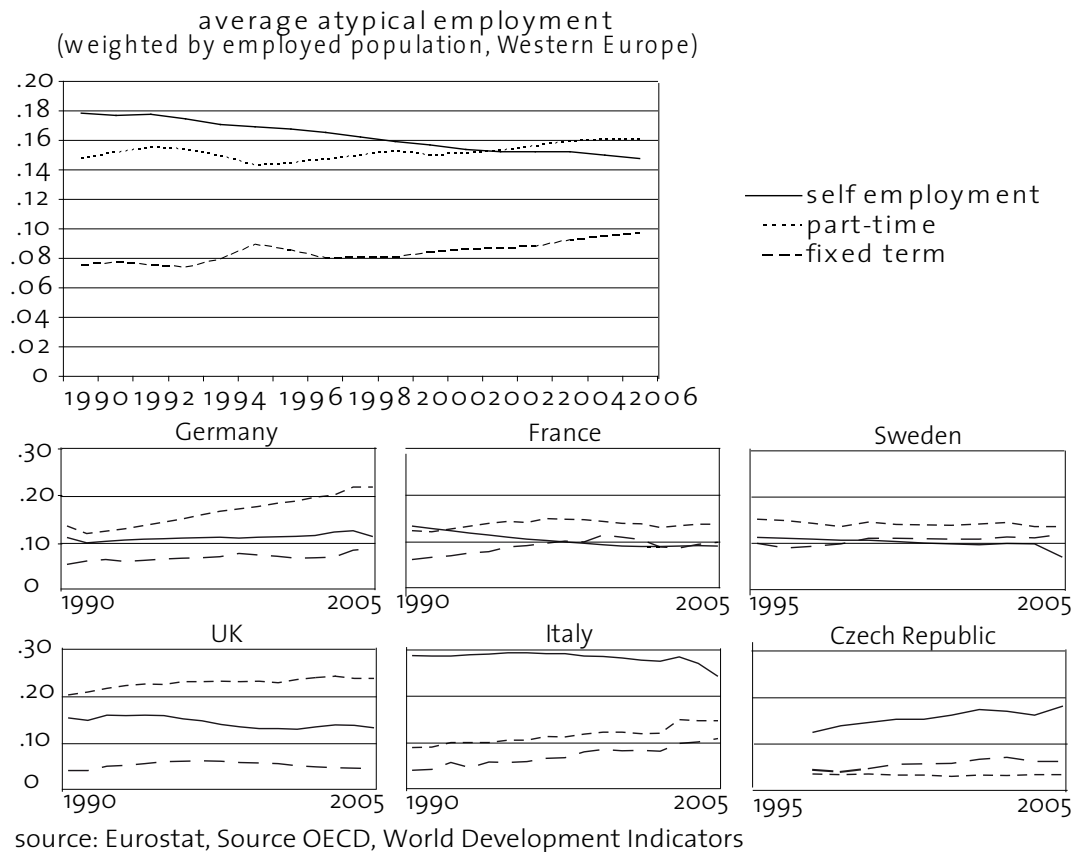


Figure 2: Trends in atypical employment

Brown and Sessions, 2003, 2005; Davia and Hernanz, 2002; Graaf-Zijl, 2005; Hagen, 2002; Picchio, 2006).

Atypical employees are suffer legal disadvantages to a different extent in different countries. For example, in the United States the US Fair Standards Labor Act (guaranteeing minimum wage and basic workers' rights) or Occupational Safety and Health (OSHA) apply to all "employees" and as such, temps, fixed term, and part-time workers are covered while independent contractors are not. This exclusion of independent contractors is usually addressed through the courts' determination of whether a worker should be reclassified as an "employee," which is addressed in detail in the next sec-

tion. Atypical workers who are “employees” still are likely to not qualify for other protections and benefits. For example, the Family and Medical Leave Act only applies to employers over some threshold in size and requires workers to have worked for the employer 1250 hours in the last 12 months; thus many atypical workers (who tend to work at smaller firms and who are less likely to have a long work record at one employer) do not qualify. Similarly, unemployment insurance has varying eligibility requirements by state with respect to the required number of hours worked under an employer for eligibility and minimum earnings to be covered. These eligibility requirements make atypical workers less likely to be covered. Furthermore, usually only laid-off workers are eligible for unemployment insurance while workers finishing a fixed term contract or in between temp assignments are not considered to be “laid off.” In sum, atypical workers miss out on a large portion of the social safety net that was designed with a traditional employee-employer relationship in mind (Stone, 2006). Which workers are left out of which social scheme varies across countries, depending on whether the benefit is issued through the employer, state, or unions, the worker’s relationship to those parties (status as “employee” or as union member), and on eligibility requirements.

The gaps in atypical workers’ protections are being addressed by governments in a piecemeal fashion—first determining where atypical workers are vulnerable and then improving their status through one of three avenues: *legislation*, the *courts*, or *unions*. The paper continues with a description of these three approaches, highlighting a few specific countries in each section.

2 The Legislative Approach

The first legislative approach to improving atypical workers' rights is often called the "flexicurity" model. This approach de-links workers' benefits and the safety net from the employee-employer relationship and replaces it with benefits and a safety net coming directly from the government. While analysts discuss the "Danish flexicurity model" as a unified approach of weak limits on firms and extensive worker protections, it is actually not one clear or consistent policy and Denmark has actually had several changes in their policies in the past few years (Zhou, 2007). Today Denmark has a low payroll tax burden on businesses, meaning that only 10.3% (2005) of firms' compensation costs were not wages compared to 22.7% in Finland or 31.2% in France (BLS, 2007).¹ While there is no "at will" employment, as in the US, dismissal notices are significantly shorter than in much of Europe, reaching a maximum of 6 months notice. Workers also receive generous unemployment benefits with replacement rates on average 50% of prior salary, as measured by the OECD.² This is the highest unemployment insurance replacement rate among the OECD countries (with the exception of the Netherlands which has 53%); the next highest countries, Belgium and Portugal, have much lower rates around 42 and 41%. The generous Danish program has also become more restricted in recent years, reducing unemployment insurance maximum benefit periods from 5 to 4 years, and requiring unemployment insurance recipients to accept job offers or to enter retraining schemes. Denmark also spends significantly more per person on retraining. The downside of the Danish system is that it is expensive. In 2004 before a recent tax cut, average income tax rates could reach 59.1%, among the highest in Europe (Denmark, 2004). The positive side of a high and progressive income tax and strong safety net is that Denmark is very equal, with a gini coefficient of

only .24 in 2005.

This “flexicurity” model is currently a popular one among analysts because the Danish labor market is doing extremely well with an unemployment rate under 5% and some of the highest salaries in Europe at \$26 per hour (2006 PPP); only workers in Belgium, Austria, Finland, Germany, the Netherlands, and Norway earn equivalent or better wages. However, the causal relationship between flexicurity and Danish success is uncertain; there are many alternative explanations for the high wages, such as 74% union membership (OECD, 2003) and 82% union coverage (both in 2000) (ILO, 2004). Further, the flexicurity system does not entirely remove incentives for atypical employment. In 2005, Denmark still had 18% of its workforce in part-time jobs, 9% in fixed term, 9% self employed, and 6.5% in temp work (OECD, 1990-2008; Eurostat, 2007).

The second legislative approach is to patch the leaks in the current social safety net that are breached by atypical employment contracts. The European Union as a whole has taken this approach, in particular with the two aforementioned directives regarding part-time and fixed term work. Directive 1999/70/EC on fixed term employment did not set forth specific requirements for countries, but developed a framework that countries could use to limit fixed term work. The directive requires countries to specify who is covered by a law limiting fixed term contracts (i.e. individuals in apprenticeships might be excluded), to specify whether employers must justify fixed term contracts (i.e. to replace a specific individual on leave), to specify the maximum number of contract renewals possible and the total maximum duration of those contracts, and possibly the total period (including the time in the fixed term contract) that must pass before a worker could be rehired in the same fixed term position. All EU states responded to the directive (including several

applicant countries) with diverse implementations. Table 1 lists implementation by country. Several countries excluded public sector workers or trainees from the limitations on fixed term contracts while others, like Italy, have seemingly arbitrary exclusions like workers in catering. Many countries also exempted workers from the law as long as the contract is justified. This strips the law of its power insofar as firms can always find plausible justifications to infinitely renew contracts. Similarly, Denmark applied the law only to workers not under collective agreements. With over 82% of their workforce covered by collective agreements, this clause makes the law inconsequential. Most of the implementations are relatively weak, such as Sweden's limitation to a maximum of three years of contract renewals within five years. However, other countries such as Austria took the directive as an opportunity to implement a strict limit of three months on renewed fixed term contracts. Note that the Netherlands entry (which might be confusing in the table) says that any series of contracts enduring more than 36 months or renewed more than three times is reclassified as permanent unless breaks of at least 3 months in length occurred between contracts. Overall, one might say that the countries followed their legislative inclinations before the directive; the highly regulated countries limited atypical employment and free market countries minimized the law's impact.

Directive 97/81/EC on part-time work had more specific requirements. The directive required pro rata compensation for part-time workers, a non-discrimination law, and required that firms facilitate switches to and from part-time work. Few European countries varied implementation. Some countries like Austria, Belgium, and Greece excluded public workers while Denmark excluded public sector seasonal workers; Finland excluded workers in tourism, and the UK excluded judicial and armed forces workers. The imple-

	scope	justification necessary?	allowed renewals	max contract duration	max cumulative duration
Austria	excl. public	yes	1	-	3 mo
Belgium	all	if so, no limit	4	3/6 mo	2/3 yrs
Denmark	excl. unionized	no	0	-	-
Finland	excl. public	yes	court determined "abuse"		
France	all	yes	1	9/18/24 mo	50% contract length break
Germany	excl. public	if so, no limit	3	2 yrs	2 yrs
Greece	all	if so, no limit	3	2 yrs	2 yrs
Ireland	excl. training	if so, no limit	after 3 yrs, 1	4 yrs	4 yrs
Italy	many industry exceptions	by industry if so, no limit	1	3 yrs	3 yrs
Luxembourg	excl. public, edu, & religious sectors	yes	2	2 yrs	2 yrs
Netherlands	excl. public	no	unlimited/ 3	3 mo bet contracts	36 mo/ unlimited
Portugal	excl. public & other sectors	yes	2	6 yrs	33% contract length break
Spain	all	yes	no limits if collective agreement		
Sweden	excl. managers & family workers	yes	-	6 mo 3 yrs	12 mo 5yrs
UK	excl. training	no	-	4 yrs	4 yrs
Czech	excl. disabled, minors, training	no	-	2 yrs	2 yrs
Hungary	all	yes	-	5 yrs	5 yrs
Iceland	excl. managers	no	-	2 yrs	2 yrs
Lithuania	all	yes unless unionized	-	5 yrs	5 yrs
Poland	all	if so, no limit	2	-	1 mo break
Slovakia	excl. small firms	for renewals	-	3 yrs	3 yrs
Slovenia	all	yes	-	3 yrs	3 yrs

Details excluded (i.e. Denmark's weaker restrictions for universities)

source: Commission of the European Communities CEC (2006); EIRO (2005); ILO (2008)

Table 1: Fixed term employment legislation

mentation of the anti-discrimination clause can vary from a general affirmation of equality to Austria's requirement that the employer has the burden of proof when a worker complains about discrimination. Some of the laws add special provisions such as Austria's promotion of part-time work for employees taking care of elderly parents or Belgium's decision to integrate it into parental leave and retirement policy. Denmark denied the original law and refused to guarantee workers a right to part-time work because it is already included in collective agreement negotiations. In France, part-time policy is also a part of family policy, where requests for part-time work should be justified by family reasons. Finland requires any new tasks in the organization to be offered to part-time workers before new workers are hired. Table 2 shows for EU countries the adjustment to the baseline directive and for non-EU countries, their relevant policies for part-time work.

There are two interesting and relevant legislative histories that can be used as examples positive and negative results of the legislative approach—Spain's fixed term employment legislation and the Netherland's part-time employment legislation.

In Spain, approximately 30% of the workforce is in fixed term employment, about twice that of any other European country. The original growth in fixed term contracts (from 10 to 30% of the workforce) occurred in the 1980's and was the consequence of labor market policies and economic conditions. Under Franco, and in the first few years afterwards, employment policy was centralized and employment protection was strict. Employment policy was dominated by Instituto Nacional de Empleo (INEM), a central clearinghouse that matched jobs and workers, and managed unemployment benefits, vocational training programs, and employment records. Originally, unemployed workers and firms with vacancies were obliged to register with INEM

	scope	provisions (beyond EU standard for EU)
Austria	excl. public, managers, homeworkers	allows older workers to reduce hours; employer has burden of proof in PT discrimination case
Belgium	all	bargaining rights, paid training leave, workers have the right to switch PT/FT
Denmark	excl. seasonal public	union responsible for bargaining
Finland	excl. casual workers	must offer PT more work when available
France	all/ appeals allowed	right to leave & vocational training
Germany	all	right to switch PT/FT
Greece	excl. public	must inform unions as PT:FT ratio changes
Ireland	excl. casual	none
Italy	all	right to training & must inform unions as PT:FT ratio changes
Luxembourg	all	PT for parents guaranteed PT promoted as partial retirement
Netherlands	excl. defense workers	EU directive only
Portugal	public and private	EU directive only
Spain	excl. skilled & managers	access to PT work
Sweden	all	right to PT work for parents
UK	excl. judicial, military	EU directive only
Australia	< 35 hrs/week	pro-rated wage & sick leave, 4 wks holiday
Canada	< 40 hrs/week	no longer required to offer PT hrs if available not entitled to paid holiday or vacation
Czech*	< 40 hrs/week	mothers' and caretakers' right to switch to PT
Hungary	all	EU directive only
Iceland	all	right to take leave in summer months
Japan	all	minimum daily wages & proportional leave
Slovakia	< 40 hrs/week	same protections as FT
Switzerland	< 40 hrs/week	same protections as FT
US	employer-defined	OSHA and Fair Standards Labor Act apply, no anti-discrimination, pro rated benefits, or right to PT work

*ILOEX contradicts EU source stating that Czech mothers have no right to PT work, but division 3 section 241 of the Czech legal code at http://www.mpsv.cz/files/clanky/3221/labour_code.pdf says Czech women with children under 15 or pregnant have the right to PT work.

Table 2: Part-time employment legislation

although by 1980, 90% of vacancies were filled independently. Centralized administration and strong worker protections were liberalized in 1980 under the pressure of rising unemployment rates (Dolado et al., 2002). The “Ley Basica de Empleo” or “Ley del Estatuto de los Trabajadores” deregulated fixed term contracts, allowing them for temporary activities or as preliminary contracts for young workers. The law mandated equal wages for fixed term workers, reinforced private temporary work agencies’ illegal status, and reaffirmed INEM’s place as the central placement organization. This legislation allowed firms the first legal means to circumvent strict employment regulations, while at the same time reinforcing most constraints. In another attempt to reduce unemployment, fixed term contracts were liberalized in 1984 under the Worker’s Statute Reform which allowed firms to use fixed term workers for permanent activities and created a new form of contract that endured a minimum of 6 months, and was renewable up to 3 years. Under this contract, after three years the worker had to be either permanently hired or replaced with 12 days of severance pay. The final step towards liberalizing atypical employment was legalizing temporary work agencies under Royal Decree 18 (1993), although in fact, temporary work agencies already existed in practice. Strict limitations on temporary work agencies exist to this day, as they must be officially registered and authorized as non-profits and are generally run by local governments, unions, or employers’ associations.

In the early 1990’s, when it became apparent that the liberalization of fixed term contracts had divided the labor market into separate and unequal sectors, the government began to relax the strict employment protection legislation (EPL) governing regular employment contracts and increased constraints on fixed term employment, equalizing their legal status. In 1992, the

typical 6 month-3 year renewal contract was changed to a 1 year contract, again renewable up to a total of 3 years. In 1994, this contract was restricted to hard-to-employ workers including those over 45 years old and the long-term unemployed. Finally, in 1997 the contract was entirely eliminated. In 1997 and 1998, laws 8/1997, 63/1997, and 15/1998 made small adjustments to the difference in EPL for fixed term and permanent employees and finally in 2001, dismissal costs for fixed term workers were introduced (8 days per year of service) (Izquierdo et al., 2005). The most recent limitations on fixed term employment were passed in 43/2006, “Reforma Laboral,” a response to the 1999 EU directive demanding limits on either the number of fixed term contract renewals or their cumulative duration (MTAS, 2006). This law requires fixed term contracts to be justified by the employer as “training” or fulfilling “short-term production needs” such as specific projects or replacing employees on leave. The law specifies that contracts cannot endure beyond 2 contract cycles for a maximum of 24 months in a 30 month period, after which the worker automatically becomes a permanent employee. The reform also set tax benefits for firms converting fixed contracts to permanent ones, offering 850 euro for women, 1,200 euro for people over forty-five, 600 euro for the long-term unemployed, and 6,300 euro for the disabled with all bonuses annual and renewable for up to four years of employment, except the disabled bonus which endures indefinitely. According to the Spanish government, this legislation was successful: from 2005 to 2006, there was 108% growth in the rate of turnover from fixed to permanent contracts and in 2007 a full 42% of permanent contracts were initiated as indefinite contracts, compared to only 30.1% in December 2006 (MTAS, 2007b). This method can be strongly biased by the possibility that in recent years more people have started their jobs in fixed term employment. Correcting for this error Guell and Petron-

golo (2007) finds there has been no increase in the hazard of transitions to permanent contracts.

In sum, Spain has come full circle, first supporting fixed term contracts as a solution to high unemployment, and then creating incentives for transitions to permanent employment after realizing they created a two-tier system of employment. Despite the policy reversal, fixed term contracts are still more common in Spain than elsewhere in Europe. While some (Toharia, 1999) argue that Spain naturally has a labor market with a core/periphery structure that lends itself to two-tier employment, it seems more likely that the high rate of fixed term contracts is a historical legal legacy of the earlier policies (Rica, 2004; Mertens et al., 2007; Dolado et al., 2002, 2004; Davia and Hernanz, 2002; Toharia, 1999; Casals, 2004; Royo, 2005; Amuedo-Dorantes et al., 2006; Amuedo-Dorantes and Serrano-Padial, 2005; MTAS, 2007a).

The Netherlands has an extremely high part-time employment rate, almost ten percentage points more than the next highest country, Australia. A full 66% of working women in the Netherlands work part-time compared with 30% in most EU countries; and the median employed woman works only 16 to 23 hours per week (Doorne-Huiskes, 2004). The high part-time employment rates seem to result from a combination of values, prosperity, and insufficient child care. In the Netherlands *both* men and women with children are more likely to reduce their working hours than other Europeans though married, less educated women with young children are the most likely to do so (Wel and Knijen, 2006). Further, part-time work is encouraged by legislation improving its standing relative to full-time work. In 1993 laws extended minimum wages and paid holidays to part-time workers working more than one-third normal hours, and in 1996 the provision was expanded to force full equality between all part-time and full-time work with prorated pay and

benefits. Finally, in 2000, legislation allowed all workers to request the right to move between full and part-time work, requiring firms to accommodate these requests and to justify rejections. The government initially introduced legislation supporting part-time work when the country was experiencing high growth and needed to attract additional workers into the labor market (Plantenga, 1996). Unions supported the legislation to prevent part-time workers from becoming a cheap substitute (Rasmussen et al., 2004). Further, child care is scarce and was not addressed by the government until the mid 2000's (Euwals, 2007), leaving part-time work as the primary option for working mothers. Surveys find that employed Dutch women actually prefer part-time employment, and more educated women prefer part-time work for *both* themselves and their partners (Wel and Knijen, 2006). Consequently, the Netherlands has one of the lowest *involuntary* part-time employment rates in Europe (Doorne-Huiskes, 2004). In sum, Dutch women prefer part-time work and the government encourages that preference through guaranteeing equal rights for part-time workers and by not putting a strong emphasis on child care needs. To contrast, both Spain and the Netherlands encouraged atypical employment through their legislative choices. In the Netherlands this resulted in a situation the the government and population are content with while in Spain it did not.

3 Union Approach

The second means to insure atypical workers' rights is through unions and collective bargaining. Atypical workers are difficult to organize because employers often do not have the legal obligation to negotiate with them, because they often change positions and employers, and because their legal employer could be a firm they have never gone to or that they might not even be

aware is their employer (in the case of temp work (Bjelland et al., 2006)). In America, atypical workers' rights with respect to unions have vacillated. A 2004 ruling on the National Labor Relations Act in 2004 found that temp workers cannot organize alongside direct hires although they can organize to negotiate with the temp firm. At the same time, on the ground, temps were making progress through organizing and the judicial system. In response to an IRS suit, Microsoft was forced to reclassify their independent contractors. While the ruling's intent was that the workers be reclassified as employees, Microsoft reacted by reclassifying many of them as temps. In response, the workers successfully organized the Washington Alliance of Technology Workers. While Microsoft is not legally obliged to negotiate with the union, the temps have nevertheless made some headway with respect to wages and access to facilities, although not with respect to stock options. Microsoft is a special case where the workers are well educated and remained at the (indirect) employer for an extended period, making collective action easier. Overall, the courts support atypical workers' rights to organize but do not usually require the firm to negotiate with them (Jaarsveld, 2006). Consequently, there are many efforts by established unions like the AFL-CIO to organize atypical workers as well as smaller unions like the LA Service Employees International Union which advocates for home workers who are independent contractors, the Chicago Coalition for the Homeless which advocates for temps and day laborers, and the Freelancers Union which offers free-lancers insurance and advocacy.

Efforts to unionize atypical workers have made more progress in other countries where unions have more power. In 1998, in Italy, the three main Italian trade union confederations, Cgil, Cisl and Uil, set up specific workers' organizations to represent atypical workers: the New Labor Identities (Nuove

Identit di Lavoro), the Association of Atypical and Temporary Agency workers (Associazione Lavoratori Atipici e Interinali, Alai-Cisl), and the Committee for Employment (Comitato per L'occupazione). These organizations have campaigned for the definition of precise juridical regulations and for a clear definition of the field of work and rights of workers employed on atypical contracts. In particular, they ask for rules regulating individual contracts and for the identification of professional and sectoral profiles, tools to stabilize precarious situations in the labor market, training, certification, and access to credit, insurance, and supplementary pension. In recent years, these trade unions bargained at the national, company and local levels. In addition, recently unions in the UK representing journalists, actors, and construction workers have started to organize independent contractors (Böheim and Muehlberger, 2006). Union organization is, in some sense, partly judicial action, as courts must grant them the right to organize before the next steps can be taken.

4 Judicial Approach

Beyond protecting atypical workers' rights to organize, the courts are engaged in protecting one type of atypical worker, the dependent self employed, by determining whether independent contractors should be reclassified as "employees." The debate about the line between independent contractors and employees has been raging for over forty years since the term "dependent contractors" was developed (Langille and Davidov, 2000) and has continued to this day, even being the topic of several conferences like the ILO's 2003 "The Scope of the Employment Relationship." The classification of a worker as self employed or employee controls that worker's access to an array of rights such as liability for on-the-job accidents and retirement benefits. A

country by country overview of the benefits that the self-employed do not receive, and the criteria used in that country to reclassify workers follows.

In Canada “employees” are protected by the Employment Standards Act (guaranteeing paid vacations, equal pay for equal work, parental leave, and a maximum hours of work), the Labor Relations Acts (right to collective bargaining), and employees have the right to dismissal notice under common law. Independent contractors have none of these. The courts use multiple criteria to determine whether a worker is an employee including: the worker’s “control” over his work, economic independence (risk and chance of profit), the duration of the employment relationship, reliance on the employer, the exclusivity of the relationship, the right to use substitutes, ownership of tools, the freedom to reject job opportunities, fee variation, integration into the organization, the degree of specialization or skill, and whether more than 80% of the worker’s income comes from a single firm. The courts have often reclassified workers (for example, redesignating salesmen working on commission as employees) although owner-operated trucking has had mixed success (Langille and Davidov, 2000).

In Belgium, reclassification cases are often pursued by the social security administration (which loses revenue from misclassification) and have been supported based on the criterion of: exclusivity of the employment relationship, limitations on competitive activities, terms of notice that are similar to those in an employment relationship, and obligations for particular individuals to personally perform the services, and earning profit from others’ work. Reclassification takes place for both high and low-skill jobs although in Belgium high earners are often better off classified as non-employees because their social security payments to the government are lower than they would be as employees (Engels, 2000).

In Germany, independent contractors (compared to employees) get no sick pay (vs. 6 weeks), no paid holidays (vs. 4-6 weeks), no unjust dismissal protection, and no social security contributions. Until 1999 Germany used the following criteria to define “employees”: whether the contractor’s tasks are identical to employees’, control over the time and place of work, number of clients, and bearing entrepreneurial risk. Meeting one criterion was not sufficient; for example courts considered those with only one client but able to set their own hours to be independent contractors. In 1999 a more rigid legislative approach was tested, classifying workers as employees if two of the following applied: labor is performed within one individual or family, the contract is regular and for one customer, tasks are normally performed by employees, and the worker has no direct contact with the market. This legislation was rapidly revoked, returning to a more flexible court-enforced approach with a new category of workers: “worker-like persons,” who have the right to sick and vacation leave and collective bargaining, but not social security. The courts are often inconsistent in their judgments with one court deeming pharmaceutical representatives “employees” because the number of customers the worker visits is controlled through reporting, while another court found the same workers to be independent contractors because they could choose their customers (Däubler, 2000).

In Japan the benefits of being an employee rather than a contractor include worker’s compensation, severance pay, and protection from unfair dismissal. As in Germany, the courts have developed a new “mixed contract” in which a worker is protected from unfair dismissal and can receive workman’s comp. This category has been applied to designers working at a firm who were paid per design rather than per hour. The courts use a test that rests on the idea of worker subordination and uses the following criteria: whether the worker

can refuse work or bargain, the strength and degree of supervisory direction, whether the worker can substitute another person's services for his own, whether the worker owns his own equipment, whether the worker earns more than employees doing similar work, the exclusivity of the worker-firm relationship, how similar the hiring process is to that for employees, disciplinary rules, and the application of provisions regarding allowances and fringe benefits. Japanese courts are inconsistent in their application of these rules, finding that owner-operator truck drivers were independent contractors, carpenters working on-site during standard working hours were reclassified as employees of a construction firm, scientists working on-site and supervised were also reclassified as employees, as were teachers, doctors, engineers, and computer scientists (Ramakawa, 2000).

In the Netherlands independent contractors are covered under some of the regular employee protections like rules about safety and protections, sick and vacation pay, protection for the equal treatment of women, and probationary work periods, as well as social security. However, like in the other countries where independent contractors go to the court to be reclassified, Dutch workers must pass a "dependency test". Criteria include: whether the employer controls work hours and location; whether the worker can substitute another worker to complete the task; whether the employer is paying wages; and whether the worker is required to perform the labor during a certain period. While these criteria are similar to those listed in other countries, in the Netherlands the burden of proof is on the employer. Independent contractors who were awarded employee rights include: club dancers, an Imam (versus his mosque), a manufacturing home worker, a shopkeeper working in a laundromat, and a schoolboy working for a bulb grower. Employer arguments were diverse from the inability for a secular institution to oversee religious

work (the Imam) to the child who was supposedly not an employee because he could come and go as he pleased. These cases are primarily brought to court by the National Institute for Social Insurance, which loses revenue when workers are classified as independent contractors (Peijpe, 2000)

In Sweden the distinction is in part controlled by the courts, the tax agency, and unions. The label of “employee” determines whether the worker is protected by workman’s compensation, and whether he or she has vacation, employment security, and benefits. Criterion used by the courts include: a personal duty to perform the work, predetermined work tasks, the length of the relationship, whether the laborer can work for other parties, whether the mode of performing work including the time and place of work are controlled, who provides work equipment, whether the laborer is reimbursed for expenses (like travel), who bears economic risk, and the relative economic and social condition of the worker and employees. Again, the case history is very mixed. In two separate cases hairdressers renting out seats in salons sought to be reclassified as employees. The case of the recently trained apprentice was reclassified as an “employee,” while that of a more experienced hairdresser was rejected because the worker brought their own clients. Many of the cases that have been brought to the courts and reclassified seem almost trivial such as a child taking care of her parents’ dog, parent volunteers at a nursery (won), and foster parents seeking employee status (lost). Unlike in the other countries, it seems that multiple agents turn to the courts, not merely executive agencies seeking lost revenue (Källström, 2000).

Finally, in the United States the self employed worker pays and receives social security, but is not covered by the Fair Labor Standards Act and does not have health insurance, vacation time, or sick time. The litmus test in the courts for determining whether a worker is an “employee” is that of “control”

over the worker. The definition of “control” has not been clearly sorted out, with successful claims for reclassification for shohtim (kosher slaughterers) who worked alongside regular workers in a slaughterhouse (the firm claimed they could not supervise worker working under Jewish religious laws they did not understand) and Microsoft programmers. Unsuccessful claims include: cab drivers (they control their workplace conditions), grocery store baggers (they have control over whether they come to work), Mexican mine workers paid daily rates and housed in the mining facilities, individuals installing floors for a flooring company, nude dancers (they just rent floor space), landscapers, cleaners, waiters for a catering service, and oyster shuckers for a fishing company. While the courts and legislature have been generally supportive of business, the IRS aggressively sought to reclassify workers since it loses revenue from misclassification. However, in response, the legislature passed laws minimizing firm penalties from IRS reclassification (Linder, 2000).

There are strong similarities across the countries reviewed here. In all cases the courts have the right to reclassify workers as employees, entitling them to greater workplace protections. Only in the United States does access to health care hinge on the contract type, but on the other hand, the self employed have access to social security unlike in many other countries. In all cases, the courts use similar theoretical criteria to assess whether a worker is an “employee.” In most countries reclassification cases are pursued by executive agencies (social security or the revenue service) rather than the workers themselves. Finally, in all countries the rules and subsequent decisions are extremely flexible, creating an environment of uncertainty. There are few incentives for workers to pursue legal action which is expensive, has uncertain outcomes, and could lead to job loss. The aforementioned Microsoft case is

an example of the odd mix of incentives and recourses available to all parties in this debate. The IRS had the economic incentive to pursue legal action; Microsoft complied, but then had an incentive to use a second form of atypical employment (temp work), and finally with no success on the legislative or judicial fronts, the workers sought a solution through collective action. It is uncertain how this struggle will end, but presuming workers win and get the legal status equivalent to that of regular workers, Microsoft may as well hire the workers directly and cut out the cost of a middle man.

5 Conclusion

We have seen three policy approaches to protecting atypical workers. The first method is legislative and can take the form of flexicurity (de-linking worker benefits from the employer) forcing employers to pay benefits for atypical workers (the part-time example), or encouraging atypical employees to move into traditional employee status (i.e. limiting the renewals on fixed term employment). The second approach was the union approach. The union approach requires that first the courts grant atypical workers the right to organize and second that firms negotiate with them. Once that right is granted, atypical workers must organize, despite often not knowing their coworkers and despite rapid turnover. The third approach, through the courts, is primarily used to first ensure the right to collective bargaining, and second, to reclassify independent contractors. Having already examined the descriptive empirical evidence, here, I finish the paper by comparing the efficacy of the three approaches.

The main question behind the legislative approach is whether to detach protections from the employment relationship (flexicurity) or to patch the existing system. There are strong arguments on both sides of the debate.

One major critique of the flexicurity approach is that it assumes social insurance can replace employment protection. This might be a false trade-off; workers can and should have both. Second, the flexicurity approach takes a somewhat defeatist stance towards the breaching of employment security by firms even though these breaches are not an insurmountable problem. Many public systems are regularly breached and patched, such as the tax system. There have been some successes in the “patching the dam” approach such as international union advocacy (European Trade Union Confederation) and the two EU directives on fixed term and part-time work. In some sense, the breaches in workers rights through atypical work are only the result of earlier misguided legislation that loosened regulations on some forms of contracts in hopes of increasing employment. Theoretically, a reversal of that legislation could remove the two tier system, although in Spain, so far, they have been unable to reverse course. In addition, the flexicurity approach is extremely expensive and therefore often politically infeasible. While it is theoretically irrelevant whether it is funded by employer or wage taxes, it can be difficult to pass the appropriate revenue-raising measures on either side.

On the other hand, the flexicurity approach is attractive, in that firms will always find new ways to circumvent worker protections. Insofar as the firm’s obligations to their workers begin and end with the paycheck (with the government taxing either the business or individual side of that paycheck) it might be easier to provide worker protections directly from the government. In comparison, EPL necessarily has complicated rules about contract types and regulations for different size businesses and will require expensive enforcement and will inevitably be evaded. Only independent contractors could not be easily covered under a flexicurity scheme because of the ambiguity between a check for services and for pay. Further, many in favor of

flexicurity cite the negative side effects of strict EPL. While it is true that past research has found that strict EPL has no effect on unemployment, it *has* been shown to slow down the labor market (increasing average job tenure and the length of unemployment spells), and to increase self employment (though not part-time or fixed term work) (Cazes and Nesporova, 2003). Those arguing in favor of patching the dam argue that this is evidence that strict EPL has no negative effect and we may as well expand it to capture atypical workers. This is, in my opinion, a naive interpretation of these results. Slow turnover can lead to the deterioration of skills among the unemployed. Slow turnover also creates a matching problem (Schioppa, 1993) with worse worker-job matches when the market is stagnant. Guaranteeing that firms are not paying less non-compensation costs for atypical workers and creating equal rules for dismissal, a flexicurity approach should remove distortions of employer's hiring and firing decisions. Finally, the flexicurity system should guarantee that in a dynamic work environment, workers do not bear the brunt of their employer's flexibility.

Specific policy proposals taking a flexicurity approach include expanding unemployment insurance, funding worker retraining programs, flex-insurance, and social drawing rights. Flex-insurance is a scheme under which employers contribute to a social insurance program in proportion to the flexibility of their contracts. The idea is an extension of US unemployment insurance contributions, where employers with histories of layoffs contribute more. Social drawing rights are a scheme where workers contribute to a national program throughout their lives, accumulating credits (Stone, 2007). These credits can then be used for retraining, care giving, and insuring against career transitions. Of course, all of these flex proposals can be combined with policies from the "patching the dam" approach. While there is a strong theoretical

difference between the approaches, practically they need not be mutually exclusive.

The two non legislative approaches, unions and court enforcement, are a bit too piecemeal to be effective. Unions are making significant progress incorporating atypical workers, but in a context where unions negotiate at a lower level (unions bargain at the firm, industry, and overall economy level in different countries, with firm-level bargaining being the “lowest” level), the fast turnover of atypical employees make this an uphill battle. In addition, the union approach requires court action to underpin it. With respect to the court-reclassification approach, workers do not have the incentive to take legal action on their own behalf. Thus, court enforcement only works if another party is granted the right to take action on part of the workers, thus protecting workers from retaliatory job loss. In addition, in most countries, the courts seem to not uniformly enforce a single standard. Perhaps over time one will develop, but currently court enforcement yields inconsistent protections for atypical workers. Finally, if legal action is taken infrequently, and the cost of a firms’ workers being reclassified by the courts is low (as is guaranteed by the aforementioned US ruling), then from the firm’s perspective the expected costs of reclassification are less than the savings from misclassifying workers. Thus, even when workers are regularly reclassified by the courts, it could still be worth it for firms to purposely misclassify workers, leaving the courts with no deterrence effect.

In conclusion, the legislative flexicurity approach removes negative incentives to use atypical workers, while leaving important incentives in tact, like firms’ needs for a flexible workforce. On the other hand, flexicurity gives up some protections that many see as unnegotiable. In contrast, the dampening approach also removes some of the cost-saving incentives to use

atypical workers, but it also creates some unusual incentives. Automatic conversions of fixed term contracts, like those encouraged by the EU directive, could encourage firms to replace fixed term workers before reaching the limit on their fixed term status. This puts workers in a weak position in an even weaker one. Some rules guaranteeing equal status for part time workers can also inadvertently encourage firms to hire fewer women since they would be forced to accept women's requests to switch back and forth between part and full time as child care needs arise. Of course, this has not been the case in some countries, like the Netherlands, that have put strong part time worker protections in place. Court enforcement of atypical workers' rights seems to be a weak approach as long as expected penalties for reclassification are not more costly than the savings from using atypical workers (which seems to be the case today); as long as court reclassification is seldom pursued by workers; and as long as court reclassification is enforced inconsistently. Unions are also an uncertain approach given the high turnover and instability among atypical workers, unless union negotiation happens at a higher level.

Word Count: 7,541

Notes

¹These numbers might not be exact- the International Labor Organization (ILO) reports 6.3% in 1999, the same year that the Bureau of Labor Statistics (BLS) reports 7.5%. Regardless, according to all sources, the tax burden is low.

²This is the average of the gross unemployment benefit replacement rates for a worker with a full record of employment at two earnings levels (67% and 100% of average production worker earnings), three family situations (single, married with dependent spouse, married with spouse in work) and three unemployment spell durations (first year; second and third year; fourth and fifth year.)

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