

**AN IRISH LESSON FOR EMPOWERING AMERICA'S
PART-TIME WORK FORCE:
ERISA AND THE PROTECTION OF EMPLOYEES
(PART-TIME WORK) ACT, 2001**

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I. INTRODUCTION

Pension, 401(k), and 403(b) plans provide millions of Americans with the expectation of a financially secure retirement. These employer-sponsored plans are routinely made available to employees and are regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA ensured responsible and transparent plan management and has benefited the retirements of American workers.¹ ERISA, however, has failed one significant segment of the U.S. workforce—the part-time worker. Today, there is "substantial agreement" that part-time workers suffer from reduced pension and retirement plan benefits.²

This article proposes a revision to ERISA to remedy the failure of current U.S. federal law to provide employer-sponsored retirement plans to part-time workers.³ Specifically, the ERISA § 202(a)(3)(A) one-thousand hour rule fails to adequately compensate many part-time

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¹ BARBARA J. COLEMAN, PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT 3 (BNA, 4th ed. 1993).

² Arne L. Kalleberg, *Nonstandard Employment Relations: Part-time, Temporary, and Contract Work*, 26 ANN. REV. OF SOC. 341, 358 (2000).

³ Commentators have long called for ERISA to secure pension and retirement benefits for part-time workers. See Arne Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 796 (1995) ("Differences in retirement and pension benefits between part-time and full-time employees underscore the need to extend the Employment Retirement Income Security Act (ERISA) to prohibit the exclusion of part-time workers from pension plans where full-time workers are covered."); see also MARTIN REIN, PENSION COVERAGE LESSONS FOR THE UNITED STATES FROM OTHER COUNTRIES 7-8 (John Turner AARP Public Policy Institute, 2004).

employees because it requires one-thousand hours of service with a particular employer over a twelve month period in order to have employee participation in an employer-sponsored retirement plan guaranteed.⁴ This paper proposes modifying ERISA's one-thousand hour rule based upon the concept of comparable employment as embodied in Ireland's Protection of Employees (Part-Time Work) Act, 2001.⁵ This Irish employment statute, which also applies to employee benefits, takes a step away from a bright line minimum hours rule by allowing for a pro-rata provision of benefits based more upon the substance, rather than quantity, of labor.⁶

This article's focus on Ireland is due to five important factors. First, Ireland is an economically advanced country with an established pension system.⁷ Second, Ireland has a large, established, and growing part-time employment sector.⁸ Third, both ERISA and Irish law exist at the federal or national level, circumventing potential problems that may arise from comparing national to local or state law. Fourth, both the United States and Ireland have government-regulated, defined benefit and defined contribution retirement plans.⁹ Lastly, Ireland's Protection of Employees (Part-time Work) Act, 2001 is a useful model for ERISA because it utilizes a "comparable employment" principle rather than ERISA's numerical bright-line rule and, unlike ERISA, the Act guarantees, with exceptions, part-time workers the same access to pension benefits as full-time employees.¹⁰

⁴ See 29 U.S.C. § 1052(a)(3)(A) (2005).

⁵ See Protection of Employees (Part-Time Work) Act, 2001 (Act No. 45/2001) (Ir.) available at <http://www.irishstatutebook.ie/2001/en/act/pub/0045/print.html> (last visited Nov. 3, 2006) [hereinafter Part-Time Work Act].

⁶ *Id.* at § (3)1.

⁷ CIA WORLD FACTBOOK, IRELAND, <https://www.cia.gov/cia/publications/factbook/geos/ei.html> (last visited Oct. 17, 2007).

⁸ Hielke Buddelmeyer, Gilles Mourre & Melanie Ward, *Recent Developments in Part-Time Work in EU-15 Countries: Trends and Policy* 7 (IZA DP Working Paper No. 1415, 2004), available at <http://opus.zbw-kiel.de/volltexte/2005/3148/pdf/dp1415.pdf>. ("A second group of EU countries, including Denmark, Belgium, France, Germany, Ireland, Austria, Sweden and the UK, currently have relatively high part-time employment shares, between 16 and 25 per cent."); Mark Smith, Colette Fagan & Jill Rubery, *Where and Why is Part-time Work Growing in Europe?*, in PART-TIME PROSPECTS: AN INTERNATIONAL COMPARISON OF PART-TIME WORK IN EUROPE, NORTH AMERICA AND THE PACIFIC RIM 35, 40-43, 49-51 (Jacqueline O'Reilly & Colette Fagan eds., 1998).

⁹ THE PENSIONS BOARD, WHAT ARE MY PENSION OPTIONS? 10, 40-41 available at [http://www.pensionsboard.ie/uploadedfiles/Publications/What_are_my_pension_options_September_2007\(1\).pdf](http://www.pensionsboard.ie/uploadedfiles/Publications/What_are_my_pension_options_September_2007(1).pdf) [hereinafter THE PENSION BOARD, PENSION OPTIONS].

¹⁰ Compare 29 U.S.C. § 1052(a)(3)(A) (2005) with Part-Time Work Act, *supra* note 5; Olive Donovan, *The Twilight Zone*, LAW SOC'Y GAZETTE, June 2004, at 33.

This article has four sections. Part II provides an overview of part-time employment in the United States. This section focuses on the prevalence of women in part-time employment, the industries most reliant upon part-time employees, and the growing prevalence of part-time work in modern U.S. job creation. Part III discusses the interplay between ERISA and part-time employment, with a particular focus on the application and interpretation of ERISA's one-thousand hour rule. Part IV examines Ireland's Protection of Employees (Part-Time Work) Act, 2001 (the "Part-Time Work Act") with an emphasis on its origins, impact, and concept of "comparable employment."¹¹ Part V proposes reforming ERISA's one-thousand hour rule to incorporate a version of the Irish comparable employment concept in order to include more part-time workers in employer's retirement plans.

II. THE UNITED STATES' PART-TIME WORKFORCE

A. AN INTRODUCTION TO THE AMERICAN PART-TIME WORKER

The size of the U.S. part-time workforce has shifted continuously since ERISA's enactment in 1974.¹² The level of part-time employment is driven by numerous factors including:¹³ (1) the number of teenagers and students as a share of the national population; (2) the number of women working outside the home; (3) economic conditions; and (4) the evolution of American job growth.¹⁴ This paper is not meant to be an exhaustive overview of the history and status of part-time workers in the United States; rather, the proposed ERISA reforms are directed towards alleviating the retirement risks of constrained part-time workers. A constrained part-time worker is someone whose primary source of income is part-time employment and who works part-time for

¹¹ Part-Time Work Act, *supra* note 5.

¹² See Kalleberg, *supra* note 2, at 343, 363 (citing Thomas J. Nardone, *Part-Time Employment: Reasons, Demographics, and Trends*, 16 J. LABOR RES. 275-92 (1995)).

¹³ See generally Smith et al., *supra* note 8, at 35, 40-43, 49-51.

¹⁴ *Id.* at 50.

economic reasons.¹⁵ Under this definition, economic reasons are either slack business conditions¹⁶ or an inability to find full-time employment.¹⁷

Part-time work in the United States is defined as a position in which an individual may work no more than thirty-four hours per week.¹⁸ Many constrained part-time workers, however, are employed for far fewer hours.¹⁹ In 2005, the average hours worked in a single position per week for the constrained part-time employee was 23.3.²⁰ In fact, the average hours worked per position per week for all American workers, both full-time and part-time, was 33.9 in September 2006, which is below the official government measure for part-time employment.²¹ This figure is particularly low when compared to the 38.5 hours per position per week average in 1964.²² Because of the continual drop in the average number of weekly hours worked in the United States per position, it is becoming increasingly more difficult for many workers to reach the one-thousand hours of service per year per position required to guarantee eligibility to their respective company's employer-sponsored retirement plan.²³

¹⁵ "Constrained part-time worker" is the author's own term. While the proposed reforms are not meant to be exclusive to this class, the alleviating the plight of the constrained part-time worker is the primary objective.

¹⁶ Slack business conditions are meant to be the equivalent of a national economic slowdown or recession. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HISTORICAL DATA TABLES, available at <http://www.bls.gov/web/apps/legacy/cpsatab5.htm>.

¹⁷ The elements included in the definition of economic reasons are taken from Bureau of Labor Statistics. See *id.*

¹⁸ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY 243 (2007), available at <http://www.bls.gov/cps/cpsaat20.pdf>; Kalleberg, *supra* note 2, at 343 ("In the United States, part-time work is generally defined as less than 35 hours a week.").

¹⁹ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY 243 (2007), available at <http://www.bls.gov/cps/cpsaat20.pdf>.

²⁰ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY 35 (2007), available at <http://www.bls.gov/web/cpseea25.pdf>.

²¹ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ESTABLISHMENT DATA HISTORICAL HOURS AND EARNINGS, available at <ftp://ftp.bls.gov/pub/suppl/empstat.ceseeb2.txt> (The federal government considers employment of 34 hours per week per position to be part-time employment.).

²² *Id.*

²³ *Id.* (data demonstrates that the average weekly number of hours worked has fallen steadily from 1964 until the present).

**B. THE SIGNIFICANCE OF THE CONSTRAINED PART-TIME WORKER
IN THE AMERICAN WORKFORCE**

Constrained part-time workers compose a large share of the U.S. workforce.²⁴ In September 2006, the United States had 4,056,000 persons working part-time time because of either business conditions or an inability to find full-time placement.²⁵ Of this number, 2,614,000 worked part-time due to business conditions and 1,137,000 worked part-time because they were unable to secure full-time employment.²⁶ The remainder worked part-time for other economic reasons, such as seasonal work.²⁷

Many commentators expect an increased presence of part-time employment in the U.S. economy.²⁸ Three primary reasons for the growing significance of part-time work in the U.S. economy include corporate attempts at reducing labor expenses,²⁹ a shift towards a more service-based economy,³⁰ and increased workforce participation by women.³¹ Yet, it is important to refrain from over-simplifying the growth of part-time work by resorting to a few isolated variables. Americans take part-time work for a myriad of reasons including

²⁴ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ACCESS TO HISTORICAL DATA FOR THE "A" TABLES OF THE EMPLOYMENT SITUATION RELEASE, available at <http://www.bls.gov/webapps/legacy/cpsatab5.htm>.

²⁵ *Id.* (Data obtained from the U.S. Department of Labor search tools under the table "Persons at Work Part Time." The search was performed for all industries in order to achieve a complete picture as possible.).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See generally Kalleberg, *supra* note 2; Chris Tilly, *Reasons for the Continuing Growth of Part-Time Employment*, 144 MONTHLY LAB. REV. 10, 12 (1991); Patrick Bollé, *Part-Time Work: Solution or Trap?*, 136 INT'L LAB. REV. 557, 572 (1997).

²⁹ Kalleberg, *supra* note 2, at 342 ("Global economic changes increased compensation and uncertainty among firms and put greater pressure on them to push for greater profits and to be more flexible in contracting with their employees . . ."); Tilly, *supra* note 28, at 13.

³⁰ Kalleberg, *supra* note 2, at 345

The growth in part-time work in the United States since 1979 appears to have been due to the expansion of industries that typically employ many part-timers (services, retail trade, finance, insurance, real estate) The growth of part-time employment has similarly accompanied the expansion of the service sector in other industrialized countries.

See also Bollé, *supra* note 28, at 557, 772.

³¹ Kalleberg, *supra* note 2, at 342; Bollé, *supra* note 28, at 570-72.

business recession³² or retired persons wishing to stay active.³³ Therefore, this paper briefly discusses labor force participation by women, corporate policy, and the rise of a service economy, as merely broad trends that can be pointed to in order to explain long-term shifts towards part-time employment and the increasing number of constrained part-time workers.

First, increased participation by women in the labor market has contributed to the growth of part-time employment.³⁴ Many women sought part-time employment to supplement their work as homemakers in the 1950s and 1960s.³⁵ This demand for part-time work initially gave rise to the growth of part-time employment;³⁶ however, the contemporary increase in part-time employment is primarily a result of growth in the service-industry and the corporate policies discussed below.³⁷

Second, a desire to reduce labor costs has affected modern U.S. corporations' labor and hiring practices.³⁸ While many corporations have undertaken lay-offs or early retirement offers to cut labor costs, others have looked to part-time employees.³⁹ Labor costs are reduced by both a decrease in wages ("part-time or temporary employees are typically paid a lower wage than full-time or permanent employees") and a reduction in benefit expenses, including retirement plans.⁴⁰ An often-noted example of such a policy, now emulated by competitors such as Sears and Target, is Wal-Mart.⁴¹ Wal-Mart, America's largest private employer, has increased its share of part-time employees by nearly fifty

³² Kalleberg, *supra* note 2, at 343 ("Part-time work has historically increased during economic recessions and decreased during economic expansions as those desiring full-time work are better able to obtain it.").

³³ See generally Gary Burtless and Joseph F. Quinn, *Retirement Trends and Policies to Encourage Work Among Older Americans*, *passim* Paper for Annual Conference of the Nat'l Acad. Of Soc. Ins. (Jan. 26-27, 2000), available at <http://fmwww.bc.edu/ec-p/wp436.pdf>.

³⁴ Tilly, *supra* note 28, at 10, 13.

³⁵ *Id.*

³⁶ *Id.* at 10, 16.

³⁷ *Id.* at 11.

³⁸ Kalleberg, *supra* note 2, at 344 ("Employers have been motivated by cost containment to use part-timers, since typically they cost less in wages and particularly in fringe benefits.").

³⁹ Julia J. Bartkowiak, *Trends Toward Part-Time Employment: Ethical Issues* 12 J. OF BUS. ETHICS 811, 811 (1993) ("The primary reason for this type of employment is to increase profits."); Kalleberg, *supra* note 2, at 344.

⁴⁰ Bartkowiak, *supra* note 39, at 811; Tilly, *supra* note 28, at 10 ("employers may be hiring more part-time workers to minimize benefit costs").

⁴¹ Steven Greenhouse & Michael Barbaro, *Wal-Mart to Add Wage Caps and Part-Timers*, N.Y. TIMES, Oct. 2, 2006 available at <http://www.nytimes.com/2006/10/02/business/02walmart.html>.

percent between October 2005 and October 2006.⁴² As more companies realize the cost savings associated with such a work force, Wal-Mart's "new labor practices may well influence policies more broadly."⁴³

Lastly, the United States' economic shift towards a more service-based economy may produce a higher percentage of new job creation being part-time.⁴⁴ Service industries are defined loosely as industries that do not produce tangible goods, as in manufacturing.⁴⁵ Since the end of World War II, the United States has experienced significant growth in service industries.⁴⁶ Because service industries employ more part-time workers than manufacturing sectors,⁴⁷ the result is an increase in the rate of part-time employment.⁴⁸

III. THE INTERPLAY BETWEEN ERISA AND PART-TIME EMPLOYMENT

A. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

The Employee Retirement Income Security Act of 1974 ("ERISA") is the primary piece of federal legislation governing employee benefit plans.⁴⁹ Pension plan regulation first began with the Revenue Act of 1921, but it was not until the 1960s that the federal

⁴² *Id.*

⁴³ *Id.*; see also, Michael Barbaro, *Wal-Mart Trips As It Changes a Bit Too Fast*, N.Y. TIMES, Nov. 30, 2006, available at <http://www.nytimes.com/2006/11/30/business/30walmart.html> ("The way the company manages its work force has also helped its bottom line. For example, it is relying on more part-time workers . . .").

⁴⁴ Kalleberg, *supra* note 2, at 345.

⁴⁵ *Service Industry*, CRYSTAL REFERENCE ENCYCLOPEDIA, <http://www.reference.com/browse/crystal/28940> (last visited Oct. 17, 2007)

[Service industry is defined as:] An industry which does not manufacture a product, but provides a service. It is a fast-growing sector in most Western nations, representing a higher proportion of gross domestic product and employment than manufacturing industry. Activities range from banking and other financial services to tourism, hotels, and catering.

⁴⁶ JACK E. TRIPPLET & BARRY BOSWORTH, PRODUCTIVITY IN THE U.S. SERVICES SECTOR 4 (2004) ("Over the past half-century, the share of the nation's output accounted for by goods-producing industries has fallen by nearly half, and the services-producing industries now account for more than three-quarters of GDP and a comparable proportion of total employment.").

⁴⁷ Tilly, *supra* note 28, at 14.

⁴⁸ *Id.*

⁴⁹ COLEMAN, *supra* note 1, at 3.

government considered adopting a more stringent regulatory scheme.⁵⁰ The impetus for what would eventually be ERISA was the 1963 collapse of the Studebaker automobile company.⁵¹ When Studebaker ceased all manufacturing operations, over four-thousand workers, some within weeks of retirement, lost some or all of their pensions.⁵² The ensuing public outcry stimulated Congressional action, but the glacial pace of legislative hearings and proposals prevented ERISA from becoming law until 1974.⁵³

ERISA, and the associated IRS regulations, govern virtually all aspects of retirement plans.⁵⁴ ERISA does not mandate that employers have retirement plans, but does set the rules for employers who choose to offer such a benefit.⁵⁵ The statute regulates plan participation, management, accrual of benefits, termination, and a host of other related issues.⁵⁶ ERISA regulations set the boundaries and framework in which pension plans can operate.⁵⁷ This allows pension plans to develop their own plan documents, such as a summary plan description, to provide the details of plan operation and benefits.⁵⁸ Given this framework, this article will not be discussing the rules of specific pension plans, but rather examining the boundaries and requirements ERISA sets for participant eligibility.

Before this article turns to participation standards, one final general point should be addressed. The most important aspect of ERISA, for the purposes of this article, is the preemption rule. When drafting ERISA, Congress sought uniform rules across the states for employee benefit plans.⁵⁹ The objective was to ease management and compliance issues for businesses with operations in multiple states.⁶⁰ ERISA includes a preemption clause whereby ERISA trumps all other relevant state and federal law.⁶¹ It is for this reason that this paper focuses exclusively on ERISA. This is also one of the reasons that Ireland,

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See generally *id.* at 7-11.

⁵⁵ *Id.* at 3.

⁵⁶ See generally *id.* at 7-11.

⁵⁷ *Id.* at 7.

⁵⁸ *Id.* at 113.

⁵⁹ See generally *id.* at 113-16.

⁶⁰ *Id.*

⁶¹ *Id.*

whose pension governance is national rather than provincial, was chosen as this articles's model for ERISA reform.

B. PLAN PARTICIPATION AND THE "ONE-THOUSAND HOUR RULE"

Part-time workers already have the job—the issue is whether they are eligible to participate in their employer-sponsored retirement plan. It is at this point where the law allows companies to deem many of their part-time or seasonal employees ineligible for participation.⁶² The purpose of the eligibility requirements is to “strike a balance between protecting workers and not unduly burdening employers.”⁶³ As will be discussed later, the concept of an “objective grounds” exception plays a similar role in the Part-Time Work Act.⁶⁴

ERISA, in keeping with its theme of setting up boundaries rather than rules, contains several key requirements for participation eligibility and leaves the door open for employers to adopt even more.⁶⁵ An employee must meet the eligibility standards set by both ERISA and his or her employer before becoming a participant.⁶⁶ The three areas of eligibility requirements are age, employer elected, and, central to this article, service requirements.⁶⁷

First, ERISA governs age requirements for participants. Generally, if an employee reaches the age of twenty-one and has met all other requirements of his or her employer's plan, the employee must be permitted to participate.⁶⁸ Maximum age requirements were at one time a permitted eligibility requirement, but today no employer can use a maximum age requirement as a participation eligibility requirement.⁶⁹ Second, an employer may elect to adopt plan-specific eligibility

⁶² See generally 1 MICHAEL J. CANAN, QUALIFIED RETIREMENT PLANS § 8:10 - 16 (2006 ed.).

⁶³ U.S. GEN. ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE, GAO/HEHS-00-76, at 30 (2000) [hereinafter U.S. GAO, CONTINGENT WORKERS] (the General Accounting Office is now known as the Government Accountability Office).

⁶⁴ Part-Time Work Act, *supra* note 5.

⁶⁵ See generally CANAN, *supra* note 62 at § 8:10-16.

⁶⁶ *Id.*

⁶⁷ See generally *id.* at § 8:10 – 15.

⁶⁸ *Id.* at § 8:10.

⁶⁹ *Id.* at § 8:11. (In the past, different types of plans have been treated differently when it comes to maximum age requirements. For example, “before January 1, 1988, a defined benefit plan or a target benefit plan could exclude an employee from coverage if the employee began employment after he or she had attained an age, which was not more than five years before normal retirement age.”).

requirements within certain boundaries erected by ERISA and the associated IRS regulations. For example, an employer may require completion of a withholding form or employment within a specified job classification to be eligible for the employer-sponsored retirement plan.⁷⁰ Lastly, ERISA requires that employers follow one of two minimum service requirements—either the elapsed time or the hours of service method.⁷¹ The elapsed time method bases eligibility upon the total time between the first and last dates of employment.⁷² The first date of employment is “the time at which the employee is credited with at least one hour of service.”⁷³ The last date of employment is “the earlier of the date the employee (i) quits, retires, is discharged, or dies; or (ii) the first anniversary of the first day of absence for any other reason.”⁷⁴ The rationale behind such an approach is that it simplifies employer record keeping;⁷⁵ however, if an employee is part-time or seasonal, the employer may incur greater costs than with the next approach to eligibility, hours of service.⁷⁶

The hours of service method bases eligibility upon an employee completing one-thousand hours of service within a twelve-month period.⁷⁷ ERISA § 202(a)(3)(A), commonly referred to as the one-thousand hour rule, states that, “[f]or purposes of this section, the term ‘year of service’ means a twelve-month period during which the employee has not less than one-thousand hours of service.”⁷⁸ This section thereby permits employers to withhold retirement plan participation from those employees completing less than one-thousand hours in a given twelve-month period.⁷⁹ An hour of service includes any time for which the employee is compensated, directly or indirectly, and

⁷⁰ *Id.* at § 8:12 n.1.

⁷¹ *Id.* at § 8:12.

⁷² *Id.*

⁷³ *Id.* at § 8:15.

⁷⁴ *Id.* (other reasons may include illness or recovery from an accident).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at § 8:12.

⁷⁸ 29 U.S.C. § 1052(a)(3)(A) (2006).

⁷⁹ 29 U.S.C. 1052(a)(1)(A)(ii)

No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer . . . extending beyond the later of the following dates—(i) the date on which the employee attains the age of 21; or (ii) the date on which he completed 1 year of service.

includes sick leave, disability, on-call hours, and vacation.⁸⁰ The hours of service method, because of its applicability to the part-time workforce, is the focus of the proposed statutory revision and the remainder of this article.

C. IMPACT UPON THE AMERICAN CONSTRAINED PART-TIME WORKER

The difficulty faced by part-time workers due to their exclusion from employer sponsored pension and retirement plans is not a new phenomenon.⁸¹ While ERISA cannot bear full responsibility for such difficulties, the one-thousand-hour requirement is at the center of part-time workers' legal hurdles.⁸² The one-thousand-hour rule's impact on the American constrained part-time worker is a reduction in access to employer-sponsored plans. In addition, this lack of access is compounded by a lack of alternative means of saving for retirement.⁸³

The American constrained part-time worker lacks the access to employer sponsored pension and retirement plans that many full-time workers enjoy.⁸⁴ In 1995, only "41[percent] of part-time men and 38 [percent] of part-time women were eligible for a pension or retirement plan at their workplace."⁸⁵ These percentages were less than the 67 percent figure for full-time men and 69 percent of full-time women.⁸⁶ Of those who were eligible in 1999, 60 percent of full-time workers had pension coverage but only 21 percent of part-time workers had pension coverage.⁸⁷ In fact, according to a Government Accountability Office ("GAO")⁸⁸ report, "the likelihood of lacking coverage is 20 percentage points higher for part-time workers than for fulltime workers."⁸⁹

⁸⁰ 29 C.F.R. § 2530.200b-2(a)(2) (2007).

⁸¹ See Kalleberg, *supra* note 3, at 796.

⁸² See *id.*

⁸³ See generally Marianne A. Ferber and Jane Waldfogel, *The Long-Term Consequences of Non-traditional Employment*, MONTHLY LAB. REV., May 1998, at 3 (1998).

⁸⁴ Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?*, 52 WASH. & LEE L. REV. 731, 733 (1995).

⁸⁵ Kalleberg, *supra* note 3, at 783.

⁸⁶ *Id.*

⁸⁷ U.S. GEN. ACCOUNTING OFFICE, PRIVATE PENSIONS: IMPROVING WORKER COVERAGE AND BENEFITS, GAO-02-225, 14 (2002).

⁸⁸ For additional information, see www.gao.gov.

⁸⁹ U.S. GEN. ACCOUNTING OFFICE, PENSION PLANS: CHARACTERISTICS OF PERSONS IN THE LABOR FORCE WITHOUT PENSION COVERAGE, GAO/HEHS-00-131, 14 (2000) [hereinafter U.S. GAO, PERSONS WITHOUT PENSION COVERAGE].

When discussing the lower pension participation by part-time workers, the GAO identifies the one-thousand-hour rule as a key eligibility exclusion contributing to this discrepancy.⁹⁰ While other factors also contribute to the lower rates of pension plan participation, the eligibility barrier is a considerable obstacle for workers.⁹¹ Regardless of whether or not a worker would choose to participate in a plan, the constrained part-time worker who works less than nineteen hours a week per position is barred from participation by the one-thousand hour rule.⁹²

The failure of ERISA's one-thousand-hour rule also has national implications, aside from the personal hardship it creates for constrained part-time workers.⁹³ As stated by Professor Medill, "the general tendency of employers to exclude part-time employees from retirement plan coverage has obvious and serious implications for national retirement policy."⁹⁴ Access to employer-sponsored retirement plans largely dictates the method and amount an individual will save for retirement.⁹⁵ Since secure retirement planning is a major social, political, and economic issue in the United States, reform should address the exclusionary one-thousand-hour rule.⁹⁶ This article now turns to a discussion of Ireland's Part-Time Work Act, Ireland's retirement system, and how the Act has impacted the retirement prospects of Ireland's part-time workforce.

⁹⁰ U.S. GEN. ACCOUNTING OFFICE, CONTINGENT WORKERS: INCOMES AND BENEFITS LAG BEHIND THOSE OF REST OF WORKFORCE, GAO/HEHS-00-76, 4-7, 28-30 (2000). "Many of these workers either are not offered benefits by their employers or do not qualify for benefits because they do not work enough hours" *Id.* at 4. "Contingent workers, such as temporary, on-call, and part-time workers, may not be covered by some of the laws designed to protect workers For example, ERISA allows employers to exclude workers who have worked fewer than 1,000 hours in a 12-month period from their pension plans." *Id.* at 30.

⁹¹ U.S. GAO, PERSONS WITHOUT PENSION COVERAGE, *supra* note 89.

Additionally, qualification standards for pension participation permit firms that sponsor a plan to retain favorable tax treatment, even if they exclude part-time and seasonal employees from participation. Such exclusions might be significant for the 4.6 million employees (3.5 percent of the labor force) who were involuntarily employed part time in 1998; that is, they said they would prefer to work full time but could not find full-time work.

⁹² *Id.*

⁹³ Colleen E. Medill, *Targeted Pension Reform*, 27 J. LEGIS. 1, 6 (2001).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See generally John F. Wasik, *Retirement Funding Should Be a Big Issue*, L.A. BUS. J., Oct. 18, 2004, at 63.

IV. THE IRISH SOLUTION: THE PROTECTION OF EMPLOYEES (PART-TIME WORK) ACT, 2001

A. AN OVERVIEW AND HISTORY OF PART-TIME EMPLOYMENT IN IRELAND

Since the 1970s, part-time employment has been increasing in nearly all Organization of Economic Co-operation and Development (“OECD”)⁹⁷ countries and Ireland is no exception.⁹⁸ In 2004, the part-time employment rate in Ireland was 16 percent.⁹⁹ This is a substantial increase from 1991 when part-time employment comprised only 9.05 percent of the Irish workforce.¹⁰⁰ Further, this growth is expected to continue with estimates that nearly 25 percent of all new jobs being created in Ireland are part-time.¹⁰¹

As in the United States, Irish workers hold part-time positions for numerous reasons. Some may work part-time while in school, or to allow for child-care responsibilities.¹⁰² Also, as in the United States, many individuals work part-time because they are unable to secure a full-time position.¹⁰³ These “involuntary” part-time workers in Ireland are comparable to the American part-time worker. In 2002, 13.7 percent of Irish part-time workers were “involuntary,” including 27.9 percent of male employees.¹⁰⁴ In all, 2 percent of the Irish workforce is “involuntarily” employed in part-time positions.¹⁰⁵

⁹⁷ See About OECD, <http://www.oecd.org> (follow About OECD hyperlink) (last visited Oct. 18, 2007) (The OECD is an organization of 30 economically developed countries including most European, North American, and economically advanced Asian nations.).

⁹⁸ Smith et al., *supra* note 8, at 35.

⁹⁹ Antonio Lo Faro, *Italy: adaptable employment and private autonomy in the Italian reform of part-time work*, in *EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS* 156, 162 (Silvana Sciarra, Paul Davies & Mark Freedland eds., 2004).

¹⁰⁰ Ursula Barry, *Women, Employment and Part-Time Work in Ireland*, in *PART-TIME WORK IN EUROPE: GENDER, JOBS, AND OPPORTUNITIES* 109 (Martina Klein ed., 1997).

¹⁰¹ *Feeding the Tiger: How Will Ireland's Tiger Economy Keep Up Its Momentum?*, Federation of European Employers, <http://www.fedee.com/celtictiger.shtml> (last visited Oct. 19, 2007).

¹⁰² EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *PART-TIME WORK IN EUROPE* 7 (2006), <http://www.eurofound.eu.int/ewco/reports/TN0403TR01/TN0403TR01.pdf>.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.*

¹⁰⁵ Bollé, *supra* note 28, at 576.

The growth of part-time employment in Ireland has a similar underpinning as the growth of part-time employment in the United States. As discussed earlier, three primary social and economic factors contribute to an increase in part-time employment: (1) the increased participation of women in the work force,¹⁰⁶ (2) corporate policy,¹⁰⁷ and (3) the rise of the service economy.¹⁰⁸ Ireland is no exception to these trends, experiencing varying degrees of all three.¹⁰⁹

The economic role of women in Ireland has experienced rapid change since the 1960s with ever-increasing numbers of women working outside the home.¹¹⁰ For example, in 1961 only 25.7 percent of women worked outside the home and by 2001 that figure reached 48.6 percent.¹¹¹ The significance of these figures is that women perform an overwhelming amount of the part-time work in Ireland.¹¹² Many women choose to work part-time given their family responsibilities, providing a large pool of potential part-time employees for Irish business.¹¹³ This growth in the available part-time work force, in turn, has played a role in increasing the willingness of companies to expand their part-time hiring

¹⁰⁶ Barry, *supra* note 100, at 108-110; EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *supra* note 102, at 7 (“Women tend to be more interested in considering to work on a part-time basis.”); PHILLIP J. O’CONNELL ASTONISHING SUCCESS: ECONOMIC GROWTH AND THE LABOUR MARKET IN IRELAND, (International Labour Organization, Employment and Training Papers 44, 1999) available at <http://www-ilo-mirror.cornell.edu/public/english/employment/strat/download/etp44.pdf> (“[T]here has been a significant increase in part-time working, particularly amongst women.”).

¹⁰⁷ EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, PART-TIME WORK IN THE EUROPEAN COMMUNITY: THE ECONOMIC AND SOCIAL DIMENSION 45 (1993) (Many Irish companies saw economic advantages to greater reliance upon part-time employment. Specifically, “operational reasons for the introduction of part-time work are cited particularly frequently by managers . . . in Ireland.”).

¹⁰⁸ Buddelmeyer et al., *supra* note 8, at 8; O’CONNELL, *supra* note 106, at 24.

¹⁰⁹ Buddelmeyer et al., *supra* note 8, at 9; Barry, *supra* note 100, at 108-110; EUROPEAN FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *supra* note 107, at 45.

¹¹⁰ Barry, *supra* note 100, at 97.

¹¹¹ *Id.*; LABOUR FORCE DEV. DIV. IRELAND DEP’T OF ENTERPRISE, TRADE, AND EMPLOYMENT, IRELAND EMPLOYMENT ACTION PLAN 103 (Apr. 2002), available at www.entemp.ie/lfd/Eap2002.pdf.

¹¹² Barry, *supra* note 100, at 105.

¹¹³ *Id.* at 99-104; O’CONNELL, *supra* note 106, at 24.

Women’s labour force participation has thus partly increased in response to an increase in the demand for part-time workers, an arrangement which allows women greater scope to combine working with child rearing and other domestic work – a particularly important factor in Ireland, given the absence of public provision of, or even support for, child-care services.

practices.¹¹⁴ Second, as in the United States, part-time employment has taken on even greater significance as businesses seek to reduce labor costs by employing more part-time workers.¹¹⁵ Lastly, corresponding to this growing supply of workers available for part-time employment has been a growing dependence of the Irish economy upon service industries.¹¹⁶ Today, the service economy employs over 61 percent of Irish workers and the sector has been experiencing significant expansion.¹¹⁷ During the 1990s, part-time employment accounted for 102 percent of employment growth and was concentrated in “routine, low-paying services.”¹¹⁸ In fact, the service sector was the dominant engine of part-time employment growth, increasing at a quicker rate as compared to other economic sectors.¹¹⁹ The importance of the growth in services to the study of part-time employment is brought into sharp relief when one considers that in 2001 the Irish service economy employed 70 percent of the part-time female employees and 37.9 percent of total part-time workers.¹²⁰

B. AN OVERVIEW OF THE IRISH PENSION SYSTEM

The Irish pension system is a three-pillar system of state pension, occupational (company) pensions, and personal retirement accounts.¹²¹ Yet, because ERISA only concerns private company retirement plans in the United States, and not individual retirement accounts (IRAs) or

¹¹⁴ Buddelmeyer et al., *supra* note 8, at 6 (“[T]he growth in part-time work was predominantly supply-led and that the growth of the services sector facilitated this increase.”).

¹¹⁵ Denis O’Hearn, *Globalization, “New Tigers,” and the End of the Developmental State? The Case of the Celtic Tiger*, 28 POL. AND SOC’Y 67, 81 (2000) (“Employers introduced new forms of [part-time] work because they were more profitable.”).

¹¹⁶ *Id.* at 79.

¹¹⁷ Ireland Now, *The Economy*, <http://www.irelandnow.com/economy.html> (last visited Oct. 14, 2007).

¹¹⁸ O’Hearn, *supra* note 115, at 79.

¹¹⁹ Buddelmeyer et al., *supra* note 8, at 30 (“service workers and shop and market sales workers” increased 18.5 percent, more than any other sector listed).

¹²⁰ SUSAN MCRAE, *PART-TIME WORK IN THE EUROPEAN UNION: THE GENDER DIMENSION* 25 (1995) (“Together, these two large industrial groupings [service industries], employed 70 per cent of the women part-time workers covered by the survey.”); Buddelmeyer et al., *supra* note 8, at 29 (“service workers and shop and market sales workers” are 37.9 percent of Ireland’s total part-time employment work force); O’CONNELL, *supra* note 106, at 26 (“The most important sectors for part-time working are all in services, including commerce, insurance, finance and business, as well as professional and other services.”).

¹²¹ David Natali, *Ireland: The Pension System*, in *LA METHODE OUVERTE DE COORDINATION (MOC) EN MATIERE DES PENSIONS ET DE L’INTEGRATION EUROPEENNE 1* (Service Public Fédéral Sécurité Sociale ed., 2004), available at www.ose.be/files/mocpension/IrelandOMC.pdf.

Social Security, this article will examine only the occupational pension facet of the Irish pension system.

Occupational pensions are plans established by employers to provide a source of retirement benefits for their employees.¹²² Irish statutory law does not require that employers offer occupational pensions, yet 46.8 percent of all Irish workers are enrolled in such plans.¹²³ The Protection of Employees (Part-Time Work) Act, 2001 is directed at the part-time workers of employer's offering occupational pension plans.¹²⁴

As in the United States, Ireland's pension plans may take one of two forms—defined benefit or defined contribution plans.¹²⁵ The basic format of these plans varies little with their American counterparts, facilitating comparison to ERISA. Defined benefit plans “provide a set level of pension at retirement, the amount of which normally depends on your service and your earnings at retirement.”¹²⁶ This type of plan appears similar to the traditional American pension commonly offered by unions or large industrial corporations, i.e., General Motors or Ford. Defined contribution plans combine both the employer and employee contributions, while investing the used proceeds to buy a pension at retirement.¹²⁷ This type of plan appears most comparable to American 401(k) or 403(b) plans; however, Irish defined contribution plans do differ in one significant way from 401(k) and 403(b) plans. When an Irish employee with a defined contribution plan retires, the employee does not begin the process of withdrawing money as 401(k) participants would. Rather, a lump sum is used to purchase an annuity.¹²⁸ For this reason, Irish defined contribution plans are often referred to as “money purchase” plans.¹²⁹

¹²² THE PENSIONS BOARD, PENSION OPTIONS, *supra* note 9.

¹²³ *Id.*; Natali, *supra* note 121.

¹²⁴ The Pensions Board, Part-Time Work and Pensions Frequently Asked Questions, <http://www.pensionsboard.ie/index.asp?locID=109&docID=-1> (last visited Nov. 4, 2007) [hereinafter Pensions Board FAQ].

¹²⁵ PENSIONS BOARD, PENSION OPTIONS, *supra* note 9, at 10.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 40-41.

¹²⁹ *Id.*

C. THE PROTECTION OF EMPLOYEES (PART-TIME WORK) ACT, 2001**1. BACKGROUND**

The Protection of Employees (Part-Time Work) Act, 2001 has its origins with the Council of the European Union Directive 97/81/EC of December 15, 1997 (“EC Directive”).¹³⁰ The EC Directive is the European Union’s implementation of the Framework Agreement on Part-time Work concluded on June 6, 1997 by UNICE,¹³¹ CEEP,¹³² and the ETUC.¹³³ An overall understanding of the Act, its origins, and provisions is important if the Act is to serve as a model for change in the United States. This article includes such a review because the Act has received little international legal coverage and has not been the subject of substantial American legal scholarship.

The Framework Agreement is the product of the concept of European “social dialogue.”¹³⁴ European social dialogue “is the primary vehicle for the joint involvement of the organisations of management and labour in European policy-making.”¹³⁵ The dialogue involves the social partners mentioned above—UNICE, CEEP, and the ETUC.¹³⁶ The basis for the dialogue is Articles 138-139 of the European Community Treaty that “formally establish a role for management and labour in the legislative process of the EU, including the making of binding agreements through social dialogue at the EU level.”¹³⁷ Specifically,

¹³⁰ Part-Time Work Act, *supra* note 5.

¹³¹ “UNICE” is the Union des Industries de la Communauté Européenne (The Confederation of European Business). UNICE arose from the European Coal and Steel Community and is now an engine for European wide industrial policy. For additional information, see <http://www.buinessseurope.eu/content/default.asp?pageid=414>.

¹³² “CEEP” is the European Centre for Enterprises with Public Participation and Enterprises of General Economic Interest. CEEP is a European Union-level industrial association. For additional information, see www.ceep.org.

¹³³ “ETUC” is the European Trade Union Confederation. ETUC is an association “set up in 1973 to promote the interests of working people at European level and to represent them in the EU institutions.” About Us, ETUC, <http://www.etuc.org/r/5> (last visited Oct. 15, 2007).

¹³⁴ See Council Directive 97/81/EC, *prmb.*, 1998 O.J. (L 14) 9, 10 (EU).

¹³⁵ European Industrial Relations Dictionary, European Foundation for the Improvement of Living and Working Conditions, European Industrial Relations Dictionary, <http://www.eurofound.eu.int/areas/industrialrelations/dictionary/definitions/EUROPEANSOCIALDIALOGUE.htm> (last visited Oct. 15, 2007).

¹³⁶ *Id.*

¹³⁷ *Id.*; Consolidated Version of the Treaty Establishing the European Community, arts. 138-139, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

Article 138 states, “the Commission shall consult management and labour on the possible direction of Community action.”¹³⁸ Article 139 governs the implementation of directives by the Commission and European Union member states.¹³⁹ It is through this system of European-wide dialogue and collaboration between industry, labor, and government that the concept of comparable employment, the Directive 97/81/EC, and the Part-Time Work Act have their roots.¹⁴⁰

The purpose behind the Framework Agreement and the implementing Directive 97/81/EC is to provide for the “removal of discrimination against part-time workers and to improve the quality of part-time work” and “to facilitate the development of part-time work on a voluntary basis.”¹⁴¹ The method adopted in pursuit of this aim is the concept of comparable employment.¹⁴²

The Framework Agreement introduced the concept to the European Union in Clause Four, Section One that reads, “[i]n respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.”¹⁴³ The Framework Agreement defines a comparable full-time worker as “a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.”¹⁴⁴ Directive 97/81/EC, which also called for implementation at the member state level, then adopted the framework’s comparable employment concept and definition without edit.¹⁴⁵

¹³⁸ *Id.* at art. 138.

¹³⁹ *Id.* at art. 139

1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

¹⁴⁰ See Council Directive 97/81/EC, art. 1, 1998 O.J. (L 14) 10 (EU); Part-Time Work Act, *supra* note 5.

¹⁴¹ Council Directive 97/81/EC, cl. 1, 1998 O.J. (L 14) 9, 13 (EU).

¹⁴² Part-Time Work Act, *supra* note 5, at § 9.

¹⁴³ Council Directive 97/81/EC, cl. 4, sec. 1, 1998 O.J. (L 14) 13 (EU).

¹⁴⁴ *Id.* at cl. 3, sec. 2.

¹⁴⁵ *Id.* at arts. 1-2

Upon issuance of Directive 97/81/EC, Ireland's legislative body, the Oireachtas, adopted the Protection of Employee's (Part-Time Work) Act.¹⁴⁶ The newly adopted statute transferred comparable employment from simply an agreed upon concept to a functioning statutory framework.¹⁴⁷ In substance, the Part-Time Work Act "substantially mirrors" the provisions of the EC directive and Framework Agreement, yet it contains procedural differences and a statutory form more easily comparable to ERISA.¹⁴⁸ For these reasons, the article's focus is on the Irish Act and not the European Union Directive.

2. OVERVIEW OF ADJUDICATORY PROCESS UNDER THE ACT AND OF THE LACK OF JUDICIAL PRONOUNCEMENTS ON THE ACT

The Act provides a part-time employee redress through the filing of a complaint with the Labour Rights Commission ("Commission") and an ability to appeal Commission decisions to the Labour Court.¹⁴⁹ The first step for a petitioner under the Act is to file a complaint with the Commission.¹⁵⁰ The Labour Rights Commission is a division of the Labour Relations Commission, a quasi-judicial body charged with providing "industrial relations advisory and mediation services."¹⁵¹ The Labour Rights Commission "investigate[s] disputes, grievances, and claims that individuals or small groups of workers refer" under seventeen

Article 1—The purpose of this Directive is to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organizations (UNICE, CEEP and the ETUC) annexed hereto.

Article 2(1)—Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 20 January 2000, or shall ensure that, by that date at the latest, the social partners have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive.

¹⁴⁶ Part-Time Work Act, *supra* note 5, at preamble.

¹⁴⁷ See generally Part-Time Work Act, *supra* note 5.

¹⁴⁸ Michelle Ní Longain, *Part-Time Workers and the Law*, LAW SOC'Y GAZETTE, Oct. 2002, at 19.

¹⁴⁹ See Part-Time Work Act, *supra* 5, §§ 16-17.

¹⁵⁰ *Id.* § 16; see generally, Labor Relations Commission, Ireland, Rights Commissioner Service, <http://www.lrc.ie/ViewDoc.asp?fn=/documents/work/index.htm&CatID=13&m=w> (follow the Rights Commissioner Service hyperlink) (discussing the role of the Rights Commissioner) [hereinafter Rights Commissioner Service].

¹⁵¹ Labour Relations Commission Ireland – Introduction, <http://www.lrc.ie/ViewDoc.asp?fn=/documents/work/index.htm&CatID=13&m=w> (last visited Nov. 4, 2007).

different labor laws including the Part-Time Work Act.¹⁵² These complaints are private and no public record is available.¹⁵³

Upon the filing of a complaint, a petitioner is entitled to a hearing, is granted the right to present evidence on his or her behalf, and is entitled to have the subsequent ruling communicated to the parties in writing.¹⁵⁴ If a petitioner is unsatisfied with the ruling, the Act provides an appeals procedure.¹⁵⁵ Appeals are directed to the Labour Court, a specialized court handling only labor, employment, and industrial relations matters.¹⁵⁶ The Court's decisions, in general, are not enforceable, yet the Court's rulings on claims brought under the Act are an exception and are fully enforceable.¹⁵⁷

Despite the existence of this extensive legal framework and opportunity for challenge, the number of cases brought under the Act remains low. Table 1 illustrates the number of complaints and cases brought under the Act in recent years, while table 2 illustrates the number of complaints brought under the Act as compared to the whole of the Labor Rights Commission's work. The short history of the Act, coupled with the lack of published case law available for review, makes evaluation more difficult and more ambiguous. The appendix also provides an overview of the substantial cases brought before the Labour Court. It is important to note that the Labour Court has yet to hear a case under the Act dealing with pension benefits.¹⁵⁸

¹⁵² Rights Commissioner Service, *supra* note 150.

¹⁵³ *Id.*; Ken Stafford, *In the Land of Employment Law, the Employer is No Longer King*, IRISH INDEP., May 10, 2004, available at <http://www.independent.ie/business/in-the-land-of-employment-law-the-employer-is-no-longer-king-170925.html>.

¹⁵⁴ Part-Time Work Act, *supra* note 5, § 16(1).

¹⁵⁵ *Id.* § 17.

¹⁵⁶ *See generally*, The Labour Court, Frequently Asked Questions, <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeFrequentlyAskedQuestions> (last visited Nov. 4, 2007).

¹⁵⁷ *Id.* (follow About "Labor Court Recommendations" hyperlink; then follow "Is a Labor Court Recommendation Enforceable?" hyperlink)

Due to the voluntarist nature of the industrial relations machinery in [Ireland], Labour Court Recommendations for the resolution of trade disputes are not legally binding. There are, however, certain other categories of cases dealt with by the Labour Court in which the decision of the Court (as expressed in a Determination or Order or Decision, depending on the legislation under which heard) is enforceable. Such cases include . . . Protection of Employees (Part-Time Work) Act.

¹⁵⁸ *See*, Appendix.

Table 1 Number of Complaints Filed with the Labor Rights Commissioner Under the Act and Cases Completed by the Labour Court

Year	Labor Rights Commissioner	Labour Court
2001	27	0
2002	1092	0
2003	99	5
2004	85	10
2005	75	6
2006	—	6 ^a

Source: LABOUR RELATIONS COMMISSION ANNUAL REPORT (2005) 38, *available at* <http://www.lrc.ie/documents/annualreports/2005/AnnualReport2005English.pdf> and THE LABOUR COURT ANNUAL REPORT (2001) 29, *available at* <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (follow “Annual Report” hyperlink).

^a Search performed (Heard Under: Part-time work legislation, Act: Part-time Work Act) <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations> (follow “By Legislative Type” hyperlink; then follow “Heard-Under Part-Time Work Legislation” hyperlink; then follow “Protection of Employees (Part-Time Work) Act, 2001).

Table 2 Share of Complaints Filed with the Labor Rights Commissioner Under the Part-Time Work Act

Year	Complaints Filed Under the Act	Total Complaints Filed	The Act’s Share (%)
2001	27	4156	0.65
2002	1092	5692	19.18 ^a
2003	99	4737	2.09
2004	85	4749	1.79
2005	75	5598	1.34

Source: LABOUR RELATIONS COMMISSION ANNUAL REPORT (2005) 38, *available at* <http://www.lrc.ie/documents/annualreports/2005/AnnualReport2005English.pdf>.

^a The spike in the number of complaints filed in 2002 is an intriguing event, though research for this paper has been unable to uncover a reason for it. Possible explanations include greater public and professional awareness with the law or an initial apprehension to bring forth claims immediately upon the law’s adoption without first seeing how such complaints are treated by the Commissioner and Courts. This view of professional hesitancy is suggested by Ms. Ní Longain’s view that “It remains to be seen how rights commissioners will carry out their functions under the 2001 act.” Longain, *supra* note 148, at 23. Further research would be helpful in explaining this usage pattern.

3. REVIEW OF THE ACT

a. Overview

The Protection of Employees (Part-Time Work) Act, 2001 has four main analytical sections. First, use of the act requires the existence of a condition of employment, which is explained below.¹⁵⁹ Second, the Act requires a relationship of comparable employment between the part-time employee and another employee through one of three methods.¹⁶⁰ Third, the heart of the Act is the treatment rule, mandating equal treatment for all conditions of employment whenever comparable employment is found.¹⁶¹ The Act contains an objective grounds exception to the treatment rule, which allows deviation from the treatment rule so long as certain conditions are met.¹⁶² Lastly, the treatment rule is implemented using either an equal or a pro-rata method.¹⁶³ Each of these sections is reviewed in detail below.

b. Conditions of Employment

The Part-Time Work Act of 2001 provides that “a part time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee.”¹⁶⁴ While the heart of this article focuses on comparable employment, it is necessary to determine when the comparable employment analysis occurs. Per the Act, comparable employment is used when dealing with “conditions of employment.”¹⁶⁵ A review of the statute and case law reveals an extremely broad meaning for comparable employment.

The phrase “conditions of employment” and variants (i.e., employment conditions) were used in both the original Framework Agreement and in the Directive from which the Act arose;¹⁶⁶ however,

¹⁵⁹ Part-Time Work Act, *supra* note 5, § 3.

¹⁶⁰ *Id.* § 7. (The three methods are the Employer Method, Collective Bargaining Method, and External Comparator Method.).

¹⁶¹ *Id.* § 9(1).

¹⁶² *Id.* § 9(2).

¹⁶³ *Id.* § 10.

¹⁶⁴ *Id.* § 9(1).

¹⁶⁵ *Id.* § 3.

¹⁶⁶ See Council Directive 97/81/EC, 1998 O.J. (L 14) 9, 10 (EU).

neither document provided a definition.¹⁶⁷ Adoption of the Part-Time Work Act saw the inclusion of a very broad definition for “conditions of employment.”¹⁶⁸ The definition reads “conditions in respect of remuneration and matters related thereto.”¹⁶⁹ The most interesting part of the definition, though, follows in italics where the Act specifically recognizes the applicability of the Act’s protections to pension benefits.¹⁷⁰

The broadness of the plain language definition has held true in practice. Courts have broadly construed a condition of employment to refer to any monetary sum, property right, or thing of value obtained because of employment.¹⁷¹ In fact, this author’s review of Labour Court decisions from 2001 to 2006 found no occurrences when a complaint was defeated because the question at hand was not a condition of employment.¹⁷² A review of Labour Rights Commissioner decisions was not completed due to a lack of access to the necessary files.¹⁷³ Examples of what the Labour Court has deemed to be “conditions of employment” can be found in table 3. A complete review of all Labour Court cases since 2001 and their respective conditions of employment can be found in the appendix.

¹⁶⁷ See *id.*

¹⁶⁸ Part-Time Work Act, *supra* note 5 § 3.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (“In relation to any pension scheme or arrangement, includes conditions for membership of the scheme or arrangement and entitlement to rights thereunder and conditions related to the making of contributions to the scheme or arrangement . . .”).

¹⁷¹ See, Appendix.

¹⁷² See, Appendix.

¹⁷³ The decisions are private and unavailable for review. See The Rights Commissioner Service, *supra* note 150; Stafford, *supra* note 153.

Table 3 Sample Conditions of Employment

Condition of Employment	Case	Citation
Parity of Break Time for For Part and Full-Time	Abbott Ireland, Ltd. and Services Industrial Professional Technical Union	Labour Court Determination PTD043 Employees (2004)
Travel (mileage) allowances	Department of Justice, Equality, and Law Reform and Margaret Ennis	Labour Court Determination PTD041 (2004)
Paid sick leave	Diageo Supply v. Rooney	Labour Court Determination PTD042 (2004)
Service pay	Dunnes Stores—Letterkenney and A Group of Workers	Labour Determination PTD046 (2004)
Christmas Shopping Leave	Mullaney Brothers and Two Workers	Labour Court Determination PTD066 (2006)

Despite the broad definition of conditions of employment, this author's review of case law uncovered a possible limitation to what the Labour Court may consider a condition of employment. In the case of *Mullaney Brothers and Two Workers*, a drapery company asked its full-time workers to work six days a week in anticipation of the busy Christmas shopping season.¹⁷⁴ As a reward for working extra hours during such a busy time of the year, the drapery company gave each full-time employee a paid one-half day leave in order to get his or her own Christmas shopping done.¹⁷⁵ At first, the same benefit was provided to part-time employees;¹⁷⁶ however, management rescinded the benefit believing that those who did not work extra hours should not receive extra benefits.¹⁷⁷ Part-time staff then filed a complaint with the Labor Rights Commissioner alleging unequal treatment under the Part-Time Work Act.¹⁷⁸ On appeal, the Labour Court found for the part-time

¹⁷⁴ *Mullaney Brothers and Two Workers*, [2006] Labour Court Determination No. PTD066 (Ir.) available at <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (go to "2. By Parties Alphabetically" hyperlink; enter "Mullaney Brothers" into "Name of Party" box; follow "Mullaney Brothers – A Worker" hyperlink) [hereinafter *Mullaney Brothers and Two Workers*].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

staff.¹⁷⁹ The court held that withholding the benefit was unequal treatment because the awarding of the benefit was not strictly contingent upon working a six-day week.¹⁸⁰ In fact, the court found that the benefit “applies equally to full time staff who worked a five-day week or a six-day week,” therefore, creating a situation in which a supposedly contingent condition of employment was indiscriminately awarded and withheld from different classes of employees.¹⁸¹

While the case was eventually decided in favor of part-time workers on an objective grounds question,¹⁸² the case raised the issue of contingent conditions of employment.¹⁸³ The court left unanswered the question of whether it still would have been a condition of employment if there had not been the discrepancy? It is unlikely, given the emphasis the Court placed upon the discrepancy.¹⁸⁴ This scenario creates a possible contingency exception to the definition of conditions of employment, which would be that any condition of employment that is contingent upon some act by the employee outside the normal scope of employment does not fall within the protections provided by the Part-Time Work Act. The basis for such an exception lies with comparable employment and the need for comparison between two similar positions or a position and a similar norm.¹⁸⁵ If a condition of employment is based upon a contingency, that contingency may make two positions incompatible or “incomparable” for a finding of comparable employment.

c. Finding Comparable Employment

The Part-Time Work Act provides three methods to find comparable employment in Section 7(2).¹⁸⁶ A plain language reading of the statute can summarize the three ways by which one can deem an employee to be a comparable employee:

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Part-Time Work Act, *supra* note 5, § 9(2).

¹⁸³ Mullaney Brothers and Two Workers, *supra* note 174.

¹⁸⁴ *Id.*

¹⁸⁵ *See* Part V.

¹⁸⁶ Part-Time Work Act, *supra* note 5; *see also* Ni Longain, *supra* note 148, at 19.

1. "Employer Method:"¹⁸⁷ employees are employed by the same or associated employers and either: (a) the employees perform the same or similar work (*Diageo v. Rooney*); (b) the differences between the two positions are negligible; or (c) the work of the part-time employee is of equal or greater value than the full-time employee.
2. "Collective Bargaining Method:"¹⁸⁸ comparable employee status provided in a collective bargaining agreement.
3. "External Comparator:"¹⁸⁹ employees are employed in a same or similar industry and either: (a) the employees perform the same or similar work; (b) the differences between the two positions are negligible; or (c) the work of the part-time employee is of equal or greater value than the full-time employee.¹⁹⁰

The inclusion of the external comparator method broadens the finding of comparable employment from the European Union Directive and Framework Agreement, neither of which provide for such a finding.¹⁹¹

The most utilized of the three methods by Irish litigants has been the employer method.¹⁹² A review of Labour Court decisions between 2003 and 2006 has determined that the employer method was the dominant way in which claimants sought to establish a basis for comparable employment with the Collective Bargaining and External Comparator methods seeing little usage. The findings are summarized in table 4.¹⁹³

Table 4 Usage Statistics for the Three Comparable Employment Methods¹⁹⁴

Employment Method	2003	2004	2005	2006	Total
Employer	3	8	2	3	16
Collective Bargaining	0	0	1	0	1
External Comparator	0	0	1	1	2

¹⁸⁷ "Employer Method" is the author's own term and will be used throughout the paper to refer specifically to Part-Time Work Act, *supra* note 5, § 7(2)(a).

¹⁸⁸ "Collective Bargaining Method" is the author's own term and will be used throughout the paper to refer specifically to Part-Time Work Act, *supra* note 5, § 7(2)(b).

¹⁸⁹ Ní Longain, *supra* note 148, at 19. "External comparator" will be used throughout the paper to refer specifically to Part-Time Work Act, *supra* note 5, § 7(2)(c).

¹⁹⁰ Part-Time Work Act, *supra* note 5, § 7(3)(b).

¹⁹¹ Ní Longain, *supra* note 148, at 19.

¹⁹² *See*, Appendix.

¹⁹³ *See id.*

¹⁹⁴ *Id.* No cases decided by the Labour Court in 2001-02 were brought under the Part-Time Work Act.

The usage statistics are important when considering amendments to ERISA because an ERISA provision should contain the tools most accessible to part-time employees. The asymmetrical nature of the Irish experience suggests that the Employer Method has proven more manageable by claimants and therefore more useful to those part-time workers looking to enforce their rights. A possible reason for the employer method's popularity is the greater ease at which claimants may compare their position with another in the same facility rather than a hypothetical employee in another firm.¹⁹⁵ The higher usage is evidence of favoritism, but it is not necessarily evidence of effectiveness. Table 5 details the claimants' success rates for each method; however, given the very small sample size and the possible influence of other factors—i.e., factual strength of the case, etc.—the results are inconclusive.

Table 5 Success Rates for the Three Comparable Employment Methods¹⁹⁶

Employment Method	Decisions for Claimant	Decisions for Respondent	Claimant Success (%)
Employer	10	6	63
Collective Bargaining	0	1	0
External Comparator	1	1	50

d. The Treatment Rule

The importance of finding comparable employment is that a finding of comparable employment enacts the treatment rule¹⁹⁷ of Section 9(1).¹⁹⁸ The treatment rule states that upon a finding of comparable employment “a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee.”¹⁹⁹ In other words, a part-time employee cannot be treated in a less favourable manner, within limits,

¹⁹⁵ Compare Roberts and O'Leary, [2004] Labour Court Determination PTD044 (Ir.) available at <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (go to “2. By Parties Alphabetically” hyperlink; enter “Roberts” into “Name of Party” box; follow “Cahill May Roberts and Rachel O'Leary” hyperlink) with ESB and English, [2006] Labour Court Determination PTD065 (Ir.) available at <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (go to “2. By Parties Alphabetically” hyperlink; enter “ESB” into “Name of Party” box; follow “ESB Joe English” hyperlink).

¹⁹⁶ See Appendix for the complete data set.

¹⁹⁷ “Treatment rule” is the authors own term and will be used in this paper to refer specifically to Part-Time Work Act, *supra* note 5, § 9(1).

¹⁹⁸ Part-Time Work Act, *supra* note 5, § 9(1).

¹⁹⁹ *Id.*

than a comparable full-time employee in regards to the amount and scope of benefits provided on condition of employment.²⁰⁰ The significance of this rule is that part-time and full-time workers be treated as “equals” for purposes of pension benefits.²⁰¹ This is in contrast to ERISA, which does not require equal, or even comparable, treatment for part-time workers.²⁰²

Dunnes Store Letterkenny and SIPTU is representative of the treatment rule in practice.²⁰³ Here, part-time employees of Respondent’s department stores alleged that they were awarded less sick leave time per hours worked than the store’s full-time employees.²⁰⁴ The condition of employment was sick leave time and the court found comparable employment using the employer method.²⁰⁵ The court then utilized the treatment rule, mandating that the part-time and full-time workers be treated the same for all conditions of employment, including sick leave time per hours worked.²⁰⁶

e. The Objective Grounds Exception to Finding Comparable Employment

The Part-Time Work Act includes one notable exception to the treatment rule.²⁰⁷ Section 9(2)’s “objective grounds” exception provides that if treating a part-time employee on less favourable grounds than a comparable employee can be “justified on objective grounds” then such treatment is permissible.²⁰⁸ Section 12 provides three necessary elements for the objective grounds exception.²⁰⁹ First, the objective ground must be something other than employment status.²¹⁰ Second, the employer must treat the part-time employee less favorably for some legitimate purpose.²¹¹ Lastly, the treatment is necessary for the purpose identified

²⁰⁰ Ni Longain, *supra* note 148, at 20.

²⁰¹ Donovan, *supra* note 10, at 33.

²⁰² See 29 U.S.C. § 1052(a)(3)(A) (2006).

²⁰³ *Dunnes Store Letterkenny and SIPTU*, [2004] Labour Court Determination PTD052 (Ir.), available at <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (go to “2. By Parties Alphabetically” hyperlink; enter “Dunnes” into “Name of Party” box; follow “Dunnes Stores SIPTU” hyperlink).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Ni Longain, *supra* note 148, at 20.

²⁰⁸ Part-Time Work Act, *supra* note 5, § 9(2).

²⁰⁹ *Id.* § 12.

²¹⁰ *Id.* § 12(1).

²¹¹ *Id.*

in the second element.²¹² However, the Labour Court has also applied a slightly modified version of the objective justification test based upon European common law.²¹³ The European Court of Justice,²¹⁴ in *Bilka – Kaufhaus, GmbH v Karin Weber von Hartz*,²¹⁵ established an objective justification test that is largely similar to the Part-Time Work Act's language, but provides another view of qualifying for the defense. *Bilka-Kaufhaus, GmbH* lists three elements for finding an objective justification. These elements include: (a) corresponding to a real need on the part of the undertaking; (b) being appropriate with a view to achieving the objective pursued; and (c) being necessary to that end.²¹⁶ It is likely that either the plain language elements or the *Bilka-Kaufhaus, GmbH* test are valid for finding the objective grounds exception.²¹⁷

The objective grounds exception has commonly been employed as a defense in many Labour Court cases.²¹⁸ If successful, an employer is permitted by the Act to continue the unequal treatment of part-time workers.²¹⁹ The rationale behind the exception is that in some instances an employer may have a legitimate purpose in denying equal treatment that outweighs the employee's reliance upon the condition of employment.²²⁰ *Louth VEC and Bernadette Martin* demonstrates an effective use of the defense.²²¹ Here, a part-time employee challenged "the award of incremental credit for previous unqualified service as a

²¹² *Id.*

²¹³ *Louth VEC and Bernadette Martin*, [2005] Labour Court Determination PTD051 (Ir.) available at <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (go to "2. By Parties Alphabetically" hyperlink; enter "Louth" into "Name of Party" box; follow second "Louth VEC A Worker" hyperlink) [hereinafter *Louth VEC and Bernadette Martin*].

²¹⁴ The European Court of Justice is an international judicial body serving the European Community member states. See Official Website of The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/index_cje.htm.

²¹⁵ Case 170/84, *Bilka-Kaufhaus, GmbH v. Karin Weber von Hartz*, 1986 E.C.R. 01607.

²¹⁶ *Id.*

²¹⁷ See generally *Louth VEC and Bernadette Martin*, *supra* note 213; *Mullaney Brothers and Two Workers*, *supra* note 174 (The three step analysis has been used by courts in each of the cited cases.).

²¹⁸ See generally Department of Justice, Equality, and Law Reform and Margaret Ennis, [2004] Labour Court Determination PTD041 (Ir.), available at <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeAnnualReport> (go to "2. By Parties Alphabetically" hyperlink; enter "Ennis" into "Name of Party" box; follow "Department of Justice Margaret Ennis" hyperlink) [hereinafter Dep't of Justice and Ennis]; *Louth VEC and Bernadette Martin*, *supra* note 213; *Mullaney Brothers and Two Workers*, *supra* note 174.

²¹⁹ *Ni Longain*, *supra* note 148, at 20.

²²⁰ *Id.*

²²¹ *Louth VEC and Bernadette Martin*, *supra* note 213.

teacher.”²²² Martin had been working part-time as an unqualified teacher and did not receive the same credit as qualified full-time teachers.²²³ The educational system resisted, urging that there was a legitimate public necessity to encourage all teachers to be fully qualified before obtaining teaching credit.²²⁴ The Court employed the *Bilka-Kaufhaus, GmbH* test and agreed that Louth VEC had a valid objective justification for the difference in treatment.²²⁵

f. Usage of the Pro-Rata Method

In Section 10, the Part-Time Work Act provides a method for treating a part-time worker no less favorably than a comparable full-time worker.²²⁶ The Act establishes a pro-rata method in which “a condition of employment shall be provided to a part-time employee to an extent related to the proportion which the normal hours of work of that employee bears to the normal hours of work of the comparable full-time employee.”²²⁷ The condition, in either amount (if monetary) or scope (if anything else), must be a condition dependent upon the number of hours.²²⁸

The primary consideration of the pro-rata method is the temporal component of the benefit. When analyzing a condition of employment, one must ask whether the benefit depends upon the number of hours worked.²²⁹ If the benefit does depend upon number of hours worked, the pro-rata method of Article 10 is used.²³⁰ If the benefit does not depend upon the number of hours worked, then equal benefits must be provided.²³¹ The temporal problem is illustrated by *Department of Justice, Equality, and Law Reform – and – Margaret Ennis* in which an employer sought to pro-rate the travel (mileage) allowances of part-time employees.²³² Ennis successfully challenged the pro-rating as in

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Part-Time Work Act, *supra* note 5, § 10.

²²⁷ *Ní Longain*, *supra* note 148, at 20.

²²⁸ Part-Time Work Act, *supra* note 5, § 10(2).

²²⁹ *Dep’t of Justice and Ennis*, *supra* note 218.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

violation of Article 10.²³³ The court found that mileage reimbursements were not “an allowance in the nature of pay which forms part of the weekly remuneration package but must be seen as compensation for the time and expense involved in the distance traveled.”²³⁴ Therefore, the condition of employment, the mileage reimbursement “is not dependent on the number of hours worked” and cannot be pro-rated.²³⁵

V. APPLICATION TO THE UNITED STATES AND ERISA § 202(A)(3)(A)

The number of constrained part-time workers in the United States is substantial and expected to grow in the coming years.²³⁶ These part-time workers will be approaching the end of their working years with reduced or inadequate pension and retirement plan assets.²³⁷ ERISA reforms, particularly the one-thousand-hour rule, are necessary to stem such consequences.

Secure retirement planning is a major social, political, and economic issue in the United States and adequate retirement savings is vitally important for all American workers.²³⁸ Such savings are necessary to guard against unforeseen hardship, future income instability, and to maintain an acceptable standard of living during retirement.²³⁹ The need is particularly acute for constrained part-time workers who are often at an economic and social disadvantage compared to those with full-time positions.²⁴⁰ In addition to often being ineligible for retirement plan participation, constrained part-time workers suffer from lower

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ U. S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ACCESS TO HISTORICAL DATA FOR THE “A” TABLES OF THE EMPLOYMENT SITUATION RELEASE, available at <http://www.bls.gov/webapps/legacy/cpsatab5.htm>; See generally Kalleberg, *supra* note 2; Tilly, *supra* note 28; Bollé, *supra* note 28.

²³⁷ Kalleberg, *supra* note 2, at 358.

²³⁸ See generally Wasik, *supra* note 96; Elizabeth Bell, Adam Carasso & C. Eugene Steuerle, *Strengthening Private Sources of Retirement Savings for Low-Income Families*, OPPORTUNITY AND OWNERSHIP PROJECT (Urban Institute), Sept. 2005, at 1.

²³⁹ Bell et al., *supra* note 238.

²⁴⁰ See generally Bollé, *supra* note 28; O'CONNELL, *supra* note 106 (“The risk of low pay is strongly related to working time In general, a greater proportion of part-time workers falls below hourly low-earnings thresholds than is the case among full-timers.”).

wages and impaired career advancement.²⁴¹ Such individuals are less able to save on their own, outside of an employer sponsored plan, making retirement plan eligibility even more vital to their well-being. In short, access to employer-sponsored retirement plans largely dictates how and how much an individual will save for retirement.²⁴²

The constrained part-time worker must be empowered to take responsibility for his or her own retirement savings to avoid the pitfalls discussed above. Reformation of the one-thousand-hour rule is not about forced participation, but rather about access. For millions of workers, ERISA effectively makes the choice not to participate in an employer sponsored retirement savings plan. Reforms must establish a legal framework under which the employees themselves are empowered to make such a decision.

The extension of pension plan eligibility to include a greater number of part-time employees is not a new idea, having been promoted by numerous scholars, politicians, and commentators.²⁴³ Many have called for a lowering of ERISA's one-thousand-hour requirement to five-hundred hours per year.²⁴⁴ Others point out the increasing costs U.S. business would bear as a rationale for maintaining the status quo.²⁴⁵ This author sides with the reformers on the need for change, but differs on the method. While a new five-hundred hour rule has dominated the discussion,²⁴⁶ the Protection of Employees (Part-Time Work) Act and its

²⁴¹ Bollé, *supra* note 28, at 557; Ferber & Waldfogel, *supra* note 83, at 3.

²⁴² Medill, *supra* note 93, at 6.

²⁴³ Rein, *supra* note 3, at 4; Kalleberg, *supra* note 2, at 796; see H.R. 2188, 103d Cong. (2006).

²⁴⁴ Women's Retirement Security Act, S. 3951, 108th Cong. (2006); *A More Secure Retirement for Workers: Proposals for ERISA Reform: Hearing Before the Subcommittee on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 106th Cong. (2000)

Proposal Three: Extend pension coverage to part-time and temporary workers. Current law allows employers to exclude people who work less than 1,000 hours a year from their pension plans. Part-time and temporary workers would be protected by reform legislation providing pension credits to all employees working 500 hours or more a year.

available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3951is.txt.pdf; H.R. 2188, 103d Cong. § 4 (1993) (The proposal would have also changed the 1,000 hour rule to 500 hours); Schroeder, *supra* note 84, at 737 ("[E]mployees who worked 500 hours or more per year could participate in an employer-provided pension plan."). Ms. Schroeder was also a sponsor of H.R. 2188, 103d Cong. (1993) which sought to lower the 1,000 hour requirement to 500 hours. Rein, *supra* note 3, at 8; HR 1589, 109th Cong. § 401 (2005) ("Treatment of employees working at less than full-time under participation . . . rules governing pension plans.").

²⁴⁵ Rein, *supra* note 3, at 8.

²⁴⁶ See, e.g., Women's Retirement Security Act, S. 3951, 108th Cong. (2006); *A More Secure Retirement for Workers: Proposals for ERISA Reform: Hearing Before the Subcommittee on*

concept of comparable employment provides a new way forward and should be considered for adoption into any future ERISA reforms.²⁴⁷

The full impact of the Protection of Employees (Part-Time Work) Act, 2001 upon the Irish involuntary part-time worker will not likely be realized for some time as only a mere six years have elapsed since its adoption.²⁴⁸ This author's research has uncovered no recent statistics outlining pension plan participation among involuntary part-time workers. Further, the Labour Court has yet to hear a pension claim brought under the Act.²⁴⁹ However, as seen below, the immediate legal changes are profound when compared to pre-2001 Ireland and ERISA's current provisions.

Table 6 Impacts of the Part-Time Work Act

Provision	Part-Time Work Act (hrs/week)	Pre-2001 Ireland (hrs/week)	ERISA (hrs/week)
On average, how much does an employee need to work per week to qualify for benefits?	7.6 ^a	38 ^b	19.2 ^c
May an employee with two or more part-time jobs get equal pension benefits as a full-time employee who works the same number of hours?	Yes ^d	No ^e	No ^f
Administrative procedure to hear part-time worker retirement plan claims	Yes ^g	No	No ^h
Method for tailoring application to part-time workers	Yes ⁱ	No	No ^j

Employer-Employee Relations of the H. Comm. on Education and the Workforce, 106th Cong. (2000) available at <http://commdocs.house.gov/committees/edu/hedcew6-95.000/hedcew6-95.htm>; H.R. 2188, 103d Cong. § 4 (1993) (a proposal that would have changed the 1,000 hour rule to 500 hours); Schroeder, *supra* note 84, at 731, 733 (employees working 500 or more hours per year could participate in an employer-provided pension plan); Rein, *supra* note 3, at 8.

²⁴⁷ It is interesting to note that despite the frequency of calls to reform the 1,000-hour rule, the issue was noticeably absent from the Congress's most recent pension overhaul, the Pension Protection Act of 2006. *See generally* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 852 (2006).

²⁴⁸ Part-Time Work Act, *supra* note 5, at preamble.

²⁴⁹ *See* Appendix.

- ^a This figure was determined by the following calculation: $(20\%)(38) = 7.6$. The calculation represents the minimum percentage of hours required to work in order to qualify for comparable employment benefits times the average hours worked for a full-time position in Ireland in 2002. See CENTRAL STATISTICS OFFICE, CENSUS 2002 VOL. 6: OCCUPATIONS 108 (Ir.) available at <http://www.cso.ie/census/Vol6.htm>; Part-Time Work Act, *supra* note 5, art. 9(4)(1).
- ^b CENTRAL STATISTICS OFFICE, CENSUS 2002 VOL. 6: OCCUPATIONS 108 (Ir.) available at <http://www.cso.ie/census/Vol6.htm> (The average full-time employee worked 38 hours per week. Therefore, because an employee often needed to be full-time to be guaranteed pension benefits, 38 hours per week is the average amount of time one needed to work in order to obtain such benefits.).
- ^c Virginia L. duRivage, *New Policies for the Part-Time and Contingent Workforce*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 89, 101 (Virginia L. duRivage, ed. 1992) (“Similarly, the 1,000 hour rule excludes those working, on average, up to nineteen hours per week throughout the year.”); This figure was determined by the following calculation: 1,000 hour minimum / 52 weeks in a year = 19.2 hours per week. ERISA has established a floor of 1,000 hours per year in order to gain eligibility for pension benefits. Therefore, for purposes of comparison, the weekly average necessary to achieve such a yearly such is required. See 29 U.S.C. § 1052(a)(3)(A) (2005).
- ^d Pensions Board FAQ, *supra* note 124.
- ^e Prior to the Part-Time Work Act, Irish part-time employees were not expressly guaranteed comparable pension benefits. See Ni Longain, *supra* note 148, at 19.
- ^f ERISA requires 1,000 hours per year per position to qualify for benefits, not 1,000 hours per year total employment. See 29 U.S.C. § 1052(a)(3)(A) (2005).
- ^g See Part-Time Work Act, *supra* note 5, §§ 16-17.
- ^h ERISA plans provide two outlets for airing concerns but not a dedicated and independent administrative venue. Participants in an ERISA plan may utilize their employer’s in-house administrative process or file a claim in federal court. This author’s experience as a pension counselor suggests that many employees are distrustful and intimidated by the in-house process. Further, many are hesitant to file a federal claim due to cost, time, and retaliation concerns.
- ⁱ Ni Longain, *supra* note 148, at 20; Part-Time Work Act, *supra* note 5, § 9(2).
- ^j See 29 U.S.C. § 1052(a)(3)(A) (2006).

Using the Act as a model for ERISA reform provides a holistic approach to pension eligibility, worker empowerment, and business flexibility that both ERISA and the five-hundred-hour rule proposals lack. First, incorporation of the comparable employment concept would successfully extend pension eligibility to part-time workers by removing

the one-thousand hour per year, or nearly twenty hours per week, requirement.²⁵⁰ The constrained part-time worker, whose work may find him or her holding several part-time positions or seasonal hours, would then be eligible for some minimum benefit. Second, the Act's enforcement provisions provide an accessible grievance procedure²⁵¹ that ERISA may also incorporate to empower America's part-time work force.²⁵² Lastly, comparable employment does not bind employers to provide a benefit to every single employee. The Act's objective grounds exception, detailed in Section IV(c)(4), provides flexibility for employers and the government to set some minimum standards or exempt some categories of workers for whom the provision of benefits would be impractical.²⁵³ An effective and thorough framework exists for government professionals and politicians to use to develop future ERISA one-thousand-hour rule reforms.

VI. CONCLUSION

Recent employment trends and the retirement needs of American constrained part-time workers require action on the expansion of employee retirement savings. The most effective vehicle for such savings is employer-sponsored retirement plans; however, ERISA's one-thousand-hour rule permits the exclusion of millions of part-time workers from such vital plans. Noting this legal roadblock, Professor Kalleberg wrote, "[d]ifferences in retirement and pension benefits

²⁵⁰ Virginia duRivage, *New Policies for the Part-Time and Contingent Workforce*, in *NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE* 101 (Virginia L. deRivage, ed., 1992) ("Similarly, the 1,000 hour rule excludes those working, on average, up to nineteen hours per week throughout the year."). This figure was determined by the following calculation: 1,000 hour minimum / 52 weeks in a year = 19.2 hours per week. ERISA has established a floor of 1,000 hours per year in order to gain eligibility for pension benefits. Therefore, for purposes of comparison, the weekly average necessary to achieve such a yearly such is required. *See also* CANAN, *supra* note 62, at § 8:12.

²⁵¹ While the grievance procedure is accessible to employees, the private nature of the rulings makes the Rights Commissioner decisions less useful to businesses. *See* Part-Time Work Act, *supra* note 5, at § 18(c)(2). The decisions should be made public so as to educate businesses what are and what are not considered equitable practices under the Act. This change would achieve two aims: (1) increase notice and the effectiveness of pro-active business activity, and (2) decrease business litigation costs. Knowledge and precedent will allow better business planning and less guessing. Any incorporation of the objective grounds concept into ERISA should therefore include public records for all decisions. *See generally* Stafford, *supra* note 153.

²⁵² Part-Time Work Act, *supra* note 5, §§ 16-17.

²⁵³ Ni Longain, *supra* note 148 at 20; Part-Time Work Act, *supra* note 5, § 12(1).

between part-time and full-time employees underscore the need to extend the Employment Retirement Income Security Act (ERISA) to prohibit the exclusion of part-time workers from pension plans where full-time workers are covered.”²⁵⁴ Comparable employment, based upon the Irish model present in the Protection of Employees (Part-Time Work) Act, 2001, is a proven method of realizing the extension Professor Kalleberg called for.

The importance and timeliness of this issue will only increase along with the projected numbers of constrained part-time workers. It is vital that the U.S. government take action to extend employer sponsored retirement plan eligibility to constrained part-time workers. Otherwise, a substantial segment of the American workforce will be struggling, or even destitute, when their age forces them to retire from the workforce without adequate retirement savings.

²⁵⁴ Kalleberg *supra* note 2, at 796.

Appendix Overview of All Labour Court Decisions Brought under the Protection of Employees (Part-Time Work) Act, 2001

Case Name	Citation	Condition (s) of Employment	Comparable Employment Method			Objective Grounds Exception Issue	Decision For:
			Employer	Collective Bargaining	External Comparator		
2001 Cases							
<ul style="list-style-type: none">The Labour Court heard no cases brought under the Act during the 2001 session.							
2002 Cases							
<ul style="list-style-type: none">The Labour Court heard no cases brought under the Act during the 2002 session.							
2003 Cases							
<ul style="list-style-type: none">This year saw a total of five cases completed by the Labour Court.Of these, two were implementation cases and were not included. [PTD 032 and 033]							
Marks and Spencer Ireland Ltd - and - Services Industrial Professional Technical Union (SIPTU)	Determination No. PTD031	Service Pay	X				Respondent
Cahill May Roberts - and - Rachael O'Leary (represented by SIPTU)	Determination No. PTD034	Hourly Rate of Pay	X				Claimant
Boxmore Plastics Ltd - and - Roisin Curry (represented by SIPTU)	Determination No. PTD035	Availability of Overtime Pay	X				Respondent

Case Name	Citation	Condition (s) of Employment	Comparable Employment Method			Objective Grounds Exception Issue	Decision For:
			Employer	Collective Bargaining	External Comparator		
2004 Cases							
<ul style="list-style-type: none">• This year saw a total of ten cases completed by the Labour Court.• Of these, one case was settled before a determination was issued.• Also, PTD049 is an implementation case and not included.							
Department of Justice, Equality and Law Reform – and – Margaret Ennis	Determination No. PTD041	Pro-rata travel allowance	X			X	Claimant
Diageo Global Supply – and – Mary Rooney	Determination No. PTD042	Change in Working Hours / Payment of Sick Leave	X				Claimant
Abbott Ireland Limited – and – Services Industrial Professional Technical Union	Determination No. PTD043	Paid Work Day Breaks	X				Claimant
Cahill May Roberts – and – Rachel O’Leary	Determination No. PTD044	Hourly Rate of Pay	X				Claimant
Dunnes Stores, Cavan – and – A Group of Workers	Determination No. PTD045	Sick Pay / Service Pay	X				Claimant

Case Name	Citation	Condition (s) of Employment	Comparable Employment Method			Objective Grounds Exception Issue	Decision For:
			Employer	Collective Bargaining	External Comparator		
2004 Cases (continued)							
Dunnes Stores, Letterkenny – and – A Group of Workers	Determination No. PTD046	Service Pay	X				Claimant
Department of Education and Science – and – Vourneen Gallagher	Determination No. PTD047	Ex-gratia Payment	X				Claimant
Bus Eireann – and – A Group of Workers	Determination No. PTD048	Hourly Rate of Pay	X				Respondent
2005 Cases							
<ul style="list-style-type: none">• This year saw a total of six cases completed by the Labor Court.• Of these, one was settled before a determination was issued.							
Louth VEC – and – Bernadette Martin	Determination No. PTD051	Incremental credit for unqualified past service	X	X		X	Respondent
Dunnes Stores Letterkenny – and – SIPTU	Determination No. PTD052	Sick Leave	X				Claimant

Case Name	Citation	Condition (s) of Employment	Comparable Employment Method			Objective Grounds Exception Issue	Decision For:
			Employer	Collective Bargaining	External Comparator		
2005 Cases (continued)							
Bausch & Lomb – and – Job Sharers	Determination No. PTD053	Holiday Pay			X		Claimant
Wesley College – and – Eileen Peters	Determination No. PTD054	Not a question of condition of employment. The issue was whether claimant was a part-time employee	N/A	N/A	N/A	N/A	Respondent
St. Killians Deutsche Schule – and – Sean Mannion	Determination No. PTD055	Hourly Rate of Pay. The issue was one of dates, not of conditions of employment	N/A	N/A	N/A	N/A	Respondent

Case Name	Citation	Condition (s) of Employment	Comparable Employment Method			Objective Grounds Exception Issue	Decision For:
			Employer	Collective Bargaining	External Comparator		
2006 Cases							
<ul style="list-style-type: none">This year saw a total of six cases completed by the Labor Court.Of these, two were implementation cases and were not included. [PTD 063 and 064]							
Top Security Limited (Represented by Management Support Services) - and - Jun Yu Wang (Represented by the Independent Workers Union)	Determination No. PTD 061	Unfair Dismissal	X				Respondent
Department of Education and Science – and – Caitriona Caulfield	Determination No. PTD062	Ex-gratia Payment	X				Respondent
ESB - and - Joe English	Determination No. PTD065	Offer of different hours			X		Respondent
Mullaney Brothers (Represented by Irish Business and Employers' Confederation) - and - Two Workers	Determination No. PTD066	Christmas Shopping Leave	X				Claimant