

Guide to the Model **Just Employment** Policy

Prepared for review by the
Jesuit Just Employment Project

Prepared by the
Harrison Institute for Public Law
Georgetown Law

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1. INTRODUCTION

a. Colleges and Universities:

Promoters of the Common Good or a Cause of Growing Inequality?

In the past three decades, the United States has become a vastly more unequal society. The fortunes of the richest Americans have risen dramatically. From 1981 to 2007, the incomes of the top one percent rose over 200 percent and the incomes of the top 0.1 percent grew over 380 percent.¹

For the substantial majority of American families, real incomes have barely budged since the mid-1970s,² and the trend is getting worse. Median incomes fell throughout the 2000s.³ Following the Great Recession, the economy has resumed growing.⁴ Yet over half of all job growth since the recession ended in 2009 has been in low-wage occupations.⁵ Today, over one third of American workers are “contingent workers” such as temporary or part-time employees,⁶ and the wage share of the economy has fallen to a record low.⁷

Colleges and universities are no exception to this trend. In important ways, their policies are contributing to growing inequality. Since the 1970s, according to *Inside Higher Ed*, the ranks and salaries of top university administrators have grown by 140 percent and 175 percent, respectively.⁸ Today, hundreds of university administrators are members of the one percent, and dozens earn more than \$1 million a year, according to the *Chronicle of Higher Education*.⁹ Yet over 700,000 university workers—the individuals

¹ Lawrence Mishel and Josh Bivens, *Briefing Paper # 331: Occupy Wall Streeters are Right about Skewed Economic Rewards in the United States*, ECONOMIC POLICY INSTITUTE (26 Oct. 2011), available at <http://s1.epi.org/files/2011/BriefingPaper331.pdf>.

² Heidi Shierholz and Lawrence Mishel, *A Decade of Flat Wages: The Key Barrier to Shared Prosperity and a Rising Middle Class*, ECONOMIC POLICY INSTITUTE (21 Aug. 2013), accessed 29 Apr. 2014, <http://www.epi.org/publication/a-decade-of-flat-wages-the-key-barrier-to-shared-prosperity-and-a-rising-middle-class/>.

³ Steven Greenhouse, *Our Economic Pickle*, N.Y. TIMES (13 Jan. 2013), accessed 29 Apr. 2014, <http://www.nytimes.com/2013/01/13/sunday-review/americas-productivity-climbs-but-wages-stagnate.html>.

⁴ Chris Isidore, *Corporate profits hit record as wages get squeezed*, CNN MONEY (4 Dec. 2012), accessed 29 Apr. 2014, <http://money.cnn.com/2012/12/03/news/economy/record-corporate-profits/>.

⁵ Mark Gongloff, *Half of All Jobs Created In The Past 3 Years Were Low Paying: Study*, HUFFINGTON POST (13 May 2013), accessed 29 Apr. 2014, http://www.huffingtonpost.com/2013/05/13/low-paying-jobs_n_3266737.html

⁶ Chris Isidore, *Say Goodbye to Full-Time Jobs With Benefits*, CNN MONEY (5 Jun. 2010), accessed 29 Apr. 2014, http://money.cnn.com/2010/06/01/news/economy/contract_jobs/

⁷ Isidore, *Corporate profits*, *supra* note 4.

⁸ Colleen Flaherty, *Professor Pay Up 2.2%*, INSIDE HIGHER ED (7 Apr. 2014), accessed 29 Apr. 2014, <http://www.insidehighered.com/news/2014/04/07/faculty-salaries-are-22-report-sees-many-financial-issues-facing-professors#sthash.lrdfnG4.dpbs>.

⁹ Jonah Newman, *By the Numbers: Millionaires at Private Colleges*, 2011, CHRONICLE OF HIGHER EDUCATION (December 15, 2013), available at <http://chronicle.com/article/By-the-Numbers-Millionaires/143601/>; *Median Salaries of Senior College Administrators*, CHRONICLE OF HIGHER EDUCATION (March 3, 2014), available at <http://chronicle.com/article/Median-Salaries-of-Senior/144975/>; Katrina Trinko, *College is the Key to Financial Success...if you're a college president, that is*, NATIONAL REVIEW ONLINE (4 Jan. 2013), accessed 29 Apr. 2014, <http://www.nationalreview.com/articles/336906/college-key-financial-success-katrina-trinko>.

who feed us, maintain our campuses, and clean our classrooms—earn less than a living wage.¹⁰ Numerous observers, including the American Association of University Professors, have also noted that universities employ a growing number of part-time, contingent professors.¹¹

Whether colleges and universities will continue to profit from and exacerbate inequality or contribute to its solution is an urgent moral question for the nation—a question that is inescapable for Catholic and Jesuit colleges and universities. Catholic institutions are rooted in social teaching that promotes solidarity and social justice, but they are at risk of becoming instruments of growing inequality when they ignore the rights of workers and pay less than a living wage.

b. Just Employment and the Living Wage at Colleges and Universities

Colleges and universities have the potential to act as model employers, recognizing the rights of their workers and committing to pay them living wages. As colleges and universities have successfully promoted environmental sustainability, so too must they promote social sustainability, workers' rights, and social justice. For Catholic and Jesuit colleges and universities, this is a moral imperative.

c. What the Model Just Employment Policy Contributes

Over the past two years, Georgetown University's Kalmanovitz Initiative for Labor and the Working Poor has collaborated with students and faculty from the Loyola University of Chicago, Loyola University of New Orleans, Le Moyne College, John Carroll University, and St. Joseph's University to create a Model Just Employment Policy (JEP). We expect the JEP to support Catholic universities' living wage movements in three significant ways: First, the JEP channels the moral force behind Jesuit universities' living wage movements into a comprehensive proposal for how Catholic employers should structure their workplaces and work relationships in order to revere life and acknowledge the virtue of industry (hard work).¹² Second, the JEP translates abstract Catholic values into specific changes to university structures, helping advocates show university officials what their moral vision might look like in practice. Finally, the JEP creates a space within each university's administrative structure where faculty, students, and workers can oversee their university's commitment to these values on an ongoing basis.

d. How to Use this Guide

In order to frame advocates' requests in a way that is easier for university administrators to implement and harder for them to object to, the JEP implicitly acknowledges concerns that universities are likely to have. Drafting the policy required an understanding of universities' organizational structure, the financial and legal

¹⁰ Pablo Eisenberg, *Campus Workers' Wages: A Disgrace to Academe*, CHRONICLE OF HIGHER EDUCATION (10 Sept. 2012), accessed 29 Apr. 2014, <https://chronicle.com/article/A-Living-Wage-for-Campus/134232/>.

¹¹ Margaret Andrews, *Adjunct Nation*, STRATEDGY (21 Mar. 2012), accessed 29 Apr. 2014, <http://www.insidehighered.com/blogs/stratedgy/adjunct-nation#sthash.tzfbXgQP.dpbs>.

¹² Cf. Leo XIII, Encyclical Letter. *Rerum Novarum*, 44 (15 May 1891) and John Paul II, Encyclical Letter. *Laborem Exercens*, 9 (14 Sept. 1981).

contexts in which they operate, and how the methods with which universities and other major employers have adapted to similar policy demands in the past. Without this background information, advocates might have trouble recognizing the meaning and purpose of certain provisions in the policy. This guide to the JEP connects readers to this background research. It discusses the implicit assumptions about the way universities do business, the objectives of key provisions, and the practices at universities from which the JEP draws lessons and ideas.

2. Scope – Covered Workers

Universities and other large institutions structure their relationships with workers in a wide variety of ways (full-time, part-time, subcontracted, etc.). The JEP covers as many of these relationships as possible. Although an ideal policy might cover everyone, the JEP does not extend to certain workers for economic, logistical, and legal reasons. This section discusses those workers that *are* covered, but it also identifies (implicitly or explicitly) the ones that *are not covered*.

a. Direct Employees

This provision places all university employees except “volunteer professionals” within the JEP. The policy exempts volunteer professionals in order to devote a greater proportion of a university’s resources to workers with unmet needs. University administrators often object to living wage proposals that include adjunct professors because many adjunct professors are working professionals who teach university courses as a form of community service, for whom wages are an honorarium.¹³

However, other adjuncts work full-time teaching at multiple institutions under adverse conditions for significantly lower salaries than their tenure-track counterparts.¹⁴ Even though most adjuncts earn more than the hourly living wage for a single adult,¹⁵ the policy will still benefit them—particularly through its provision protecting freedom of

¹³ For example, the Dean of Liberal Studies at Atlantic Cape Community College, in New Jersey, responded to questions about adjuncts’ working conditions by pointing out that his adjunct faculty were a mix of working or retired professionals and young academics. See Diane D’Amico, *Colleges hiring more adjuncts to teach for lower pay, no benefits*, PRESS OF ATLANTIC CITY (8 Nov. 2013), accessed 29 Apr. 2014, http://www.pressofatlanticcity.com/education/colleges-hiring-more-adjuncts-to-teach-for-lower-pay-no/article_2ad5c35c-48e9-11e3-ace2-0019bb2963f4.html.

¹⁴ See House Committee on Education and the Workforce Democratic Staff, *The Just-in-Time Professor: A Staff Report Summarizing eForum Responses on the Working Conditions of Contingent Faculty in Higher Education* (January 2014), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/1.24.14-AdjunctEforumReport.pdf>.

¹⁵ This calculation of adjuncts’ hourly compensation at these institutions used the following assumptions: (1) An average course lasts 15-16 weeks. (2) Adjuncts prepare for 2.25 hours per hour of teaching or classroom time, see “Shared Responsibility for Employers Regarding Health Coverage,” 79:29 Fed. Reg. 8544, 8552 (12 Feb. 2014) (*amending* 26 CFR § 1; 54; 301). (3) Adjuncts’ compensation and needs conform to minimum compensation figures from the Chronicle of Higher Education and single adult living wage figures from the MIT Living Wage Calculator, respectively. See CHRONICLE OF HIGHER EDUCATION, THE ADJUNCT PROJECT, accessed 29 Apr. 2014, <http://adjunct.chronicle.com>, and see POVERTY IN AMERICA, MIT LIVING WAGE CALCULATOR, accessed 29 Apr. 2014, <http://livingwage.mit.edu>.

association.¹⁶ Exempting volunteer professionals addresses administrators' concerns without excluding more economically vulnerable adjuncts.

The JEP takes its definition of "primary occupation" from the Internal Revenue Service,¹⁷ but it reduces the earnings threshold from 50% to 30% in order to ensure that the JEP covers struggling employees (such as adjuncts) who take a second job in another occupation (such as a janitor) in order to make ends meet. For example, if a professor earns a significant portion of income through teaching, the JEP applies—even if the teaching activities occur at multiple universities and even if the professor has an additional non-teaching job. Professionals teaching for an honorarium easily make enough at their day job; we expect they will fall below the 30% threshold.

b. Contract Workers

This provision determines which contract workers are within the JEP. The JEP covers workers "who provide services to the university community." This clause includes workers serving under contractors who do not provide services directly to the university as a corporation; for example, this would include the employees of a university's Barnes & Noble bookstore. It excludes employees of a contractor when those employees serve neither the university as a corporation nor consumers within the university community, for example, employees of other Barnes & Noble outlets in the United States.

For two logistical reasons, the JEP exempts contract workers serving under contracts that are not large enough and do not continue long enough.¹⁸

The university has more leverage over large, long-term contracts than small, short-term ones. For example, a contractor would likely accept a smaller profit margin for a ten-year contract to provide cafeteria services than for a two-week contract to cater graduation and reunion events because the prospect of consistent income over a ten-year period is so valuable. Second, the university spends proportionally less administering the JEP in situations involving expensive contracts. Every contract the JEP covers requires the university to spend additional time negotiating the contract and additional resources monitoring its business relationship under the contract. For particularly small contracts, these negotiating and monitoring costs likely outweigh the

¹⁶ When Georgetown University's adjuncts began to discuss whether to form a union, Georgetown's Just Employment Policy helped ensure that the University remained neutral. Free from university interference, Georgetown's adjuncts successfully unionized. See Clayton Sinai, *Georgetown Students, Workers, Administrators Explain the University's 'Just Employment Policy'*, AMERICA: THE NATIONAL CATHOLIC REVIEW (13 Feb. 2014), accessed 29 Apr. 2014, <http://americamagazine.org/content/all-things/georgetown-students-workers-administrators-explain-university%E2%80%99s-%E2%80%9Cjust-employment>.

¹⁷ The Internal Revenue Service defines "primary occupation" as "the occupation of the taxpayer with the largest source of wage income for the year being examined." INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL § 4.10.16.1.2.5(3) (2 Jan. 2013).

¹⁸ The JEP's limitations on the scope of the policy were informed by wage policies at Harvard and Stanford Universities. See Harvard University, *Wage and Benefit Parity Policy (adopted 2002)*, available at <http://www.laborrelations.harvard.edu/pdf/WBPPPpolicy.pdf> (afterwards "Harvard Policy") and Stanford University, *Policies and Initiatives: Living Wage and Benefit Guidelines (adopted 1 Sept. 2007)*, available at https://www.stanford.edu/group/fms/fingate/suppliers/dobusiness/policy_living_wage.html (afterwards "Stanford Policy").

benefit of covering the contract workers serving under them. (Small contracts typically involve fewer contract workers.)

Short-term contracts provide too little time for a contractor to meaningfully alter its business practices or meaningfully improve employees' lives.

c. Unionized Workers

This provision determines how the JEP will affect unionized workers. Because of federal labor laws, the JEP cannot change work conditions for unionized workers in the same way as it does for non-unionized workers.¹⁹ Employers must negotiate in good faith with their unionized employees before changing their working conditions in any way—even if the employer intends the change to benefit its employees.²⁰ Moreover, unionized employees may appreciate the opportunity to change some of the policy's provisions. For instance, the JEP allows the university to adjust the living wage if it provides workers with health care,²¹ but it does not allow the university to make a similar decision in order to provide childcare. Unionized employees might negotiate a lower wage in exchange for employer-provided childcare.

3. SUBSTANCE – JUST EMPLOYMENT PRINCIPLES

a. Preference for Full-Time Positions

A variety of federal laws encourage universities to prefer contingent (part-time or temporary) labor by requiring employers to spend more money on full-time or continuing employees than on contingent ones.²² The JEP helps the oversight committee and the university community address these unfortunate incentives. In its procedure section, it requires an employee census to help the oversight committee see how the university structures its employment relationships.²³ In this provision, it provides a standard by which, the committee can use the census to judge whether the university is meeting its goal of relying on contingent labor only when necessary. The JEP sets a goal—not a mandate—for hiring contingent workers only when necessary. The approach is not mandatory because it may be too difficult for the university or the oversight committee to determine conclusively whether the university is meeting this necessity standard.

Interpreters of the policy should consider at least two theories of necessity: one based on market pressures and one based on the just-in-time nature of contingent labor. Because neither seemed ideal, the policy leaves the term “necessary” open for each

¹⁹ 29 U.S.C. § 158(a)(5).

²⁰ See *Labor Board v. Katz*, 369 U.S. 736, 745 (1962).

²¹ See JEP §3(d)(1).

²² For example, employers must provide family & medical leave to employees who work over 1,250 hours within a year or work over 20 full workweeks within a year, see 29 U.S.C. §2611(2)(A); §2611(4)(A)(i). They must contribute to health care costs for employees who work over 30 hours a week, see 26 U.S.C. §4980(H)(c)(4)(A). They must provide certain pension benefits to employees who work over 1,000 hours within a year, see 26 U.S.C. §410(a)(3)(A).

²³ See JEP §4(a)(2)(a).

university's oversight committee to interpret for itself.

- (1) *Market pressure theory* argues that contingent labor is necessary in order for employers to stay competitive with their peers.²⁴ For example, if a university cannot hire more full-time professors without raising tuition so high it would drive down enrollment, it could argue that its adjunct faculty are necessary. A market-based standard would be easy for the oversight committee to apply if it can find an average for contingent employees at competing institutions. The university would be less likely to resist such a standard, because it would allow them to remain financially competitive. However, this standard usually would not drive the university to improve its work environment.
- (2) *Just-in-time theory* argues that contingent labor is necessary in order to respond flexibly to seasonal and cyclical trends or unexpected emergencies.²⁵ For example, if a university's campus floods, the university would be able to argue that temporary groundskeepers are necessary to deal with the emergency, even if its decision means that it will employ more temporary groundskeepers than its competitors. A just-in-time standard is harder for the oversight committee to apply, and the university might resist it more strongly. But the standard would drive the university to provide a better work environment than its peers.

b. Preference for Employee Continuity

In order to prevent the JEP from costing particular contract workers their jobs, this provision expects the university to seek out new contract partners willing to employ the contract workers of a previous contractor and to prefer those contractors over others.²⁶ Empirical research suggests that when minimum wages increase, existing companies struggle to adapt their business plans; new ones with plans designed for the new wage floor replace them.²⁷ If the JEP's living wage increase leads to analogous turnover among university contractors, some contract employees might lose their jobs. This provision attempts to prevent this potential unintended consequence, helping workers

²⁴ See, e.g. Marshall University Board of Governors, Pol. No. AA-5 § 5.3 (*adopted* 12 Nov. 2003)(*effective* 23 Mar. 2004), available at [http://www.marshall.edu/board/files/policies/MUBOG%20AA-%205%20Adjunct%20Faculty%20Policy\(4-year\).pdf](http://www.marshall.edu/board/files/policies/MUBOG%20AA-%205%20Adjunct%20Faculty%20Policy(4-year).pdf) ("The number of adjunct faculty will not exceed the most recent U.S. Department of Education national average for like institutions.").

²⁵ See, e.g. Assoc. of Writers and Writing Programs, *AWP Recommendations Regarding Non-Tenure-Track Faculty*, accessed 29 Apr. 2014, https://www.awpwriter.org/programs_conferences/directors_handbook_recommendations_regarding_non_tenure_track_faculty ("[Non-tenure-track] faculty should be used only to meet short-term or special needs...rather than to staff regularly offered courses.") and U.S. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 61 (1 Dec. 1994), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace (Observing that contingent labor can beneficially "maximize workforce flexibility in the face of seasonal and cyclical forces [and] just-in-time production" or negatively "simply[] reduce the amount of compensation paid...for the same amount and value of work.").

²⁶ Stanford University employs a similar provision. "Stanford Policy," *supra* note 18.

²⁷ See Federal Reserve Bank of Chicago, *Firm Dynamics and the Minimum Wage: A Putty-Clay Approach* WP-2013-26 (Nov. 2013), available at https://www.chicagofed.org/digital_assets/publications/working_papers/2013/wp2013_26.pdf.

remain at the university, even if the contractor that employs them leaves.²⁸

This provision will change the way a university evaluates its potential contractors, and so it logically fits in the procedural (Contract Evaluation) section of the policy.²⁹ However, it appears in the substantive section of the JEP because protecting contract workers from the potential unintended consequences of the policy is important to fulfilling the policy's goal of improving workers' lives and protecting the university's reputation as a fair employer.

Under the JEP, the university does not commit to contracting only with companies that are able to employ current contract workers. Instead, it sets this as a goal rather than as a mandate because the university may not always be able to find a contract partner willing to hire the workers of a current contractor.

c. Equal Access to Community Resources

This provision recognizes that contract workers are equal members of the university community by extending them access to resources that direct employees already enjoy.³⁰ However, if the JEP were to require the university to extend all direct employee benefits to contract workers, the university might respond by reducing its benefit packages. Therefore, the policy assures access to a specific list of benefits, which can be modified, and also emphasizes that workers may negotiate for additional, unequal benefits outside the JEP's list.

The JEP list of benefits is based on a review of employee manuals from several Jesuit universities. The JEP does not include a number of benefits identified by a survey from the Society for Human Resource Management³¹ (pension fund access, parking, crisis counseling, tuition assistance, and childcare). The policy omits these benefits because the marginal cost of providing them to contract workers will likely be high enough to encourage universities to withdraw these benefits altogether rather than extend them to contract workers. For example, universities typically value library privileges at between one and several hundred dollars per user per year,³² but tuition assistance

²⁸ For example, Georgetown University was able to secure continuing positions for 100 workers when it switched its food service contract from Marriott to Aramark in 2007. See Georgetown University, *The First Biennial Report of the Advisory Committee on Business Practices* (2008) *12, available at <http://publicaffairs.georgetown.edu/document/1242766671081/Biennial.pdf> (afterward "Georgetown Committee Report").

²⁹ See JEP §4(c)(2)(a)(ii).

³⁰ Based on Georgetown University's Just Employment Policy. See Georgetown University, *Just Employment Policy for Georgetown University* (adopted 2005), available at <http://publicaffairs.georgetown.edu/acbp/just-employment-policy.html> (afterward "Georgetown Policy").

³¹ Society for Human Resource Management, *2013 Employee Benefits: An Overview of Employee Benefits Offerings in the United States* (2013), available at https://www.shrm.org/research/surveyfindings/articles/documents/13-0245%202013_empbenefits_fnl.pdf.

³² As of 2014, Georgetown University provides library cards with borrowing privileges to non-affiliated individuals for \$300/year, see Georgetown University, *Library Associates*, accessed 29 Apr. 2014, <https://www.library.georgetown.edu/associates>. The Ohio State University calculated the per student cost of extending library services to its distance learners at \$93.81/student, see Ruey L. Rodman, *Cost analysis and student*

costs thousands.³³ Advocates should consider tailoring the JEP list to their own universities by examining employee manuals to see what benefits offer direct employees and considering the likely cost of extending those benefits to contract workers on their campuses. (For instance, rural campuses would be able to extend parking benefits at less expense than urban ones.)

d. Living Wage

(1) *Living Wage: Definition & University Obligations*

The Catholic Church believes wages should support entire households.³⁴ In order to provide an attainable initial goal, this provision requires universities to pay wages sufficient to support one person and then *encourages* them to pay wages that can support one person and one dependent. The JEP uses the MIT Poverty in America Project (PAP)'s living wage definition³⁵ because PAP is a widely cited,³⁶ highly accessible, annually updated authority on the living wage. The JEP encourages but does not require universities to increase their wages in the future because it may be difficult for universities to predict their future financial capacity.

The JEP expresses its living wage requirements as an hourly figure; workers will earn enough to live if they work full-time. An hourly approach provides workers the option to work part-time, yet it curbs universities' incentives to replace full-time with part-time workers to avoid paying living wage costs.

e. Dignified Workplace

(1) *Nondiscrimination*

The model JEP includes two versions of this provision. Option one explicitly forbids certain practices,³⁷ consistent with the broadest antidiscrimination laws in the

survey results of library support for distance education, 91(1) J. Med. Libr. Assoc. 72 at Table 2 (Jan. 2003), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC141190/pdf/i0025-7338-091-01-0072.pdf>.

³³ J.E. Cornett, *Cost to Employers for Tuition Reimbursement Programs*, THE HOUSTON CHRONICLE, accessed 29 Apr. 2014, <http://smallbusiness.chron.com/cost-employers-tuition-reimbursement-programs-15726.html> (2010-2011 figure).

³⁴ See Leo XIII, Encyclical Letter. *Rerum Novarum*, 44 (15 May 1891) (noting that employers fulfill their obligation to support life by paying wages sufficient to support workers and their families); Fr. Robert Johansen, *The Minimum Wage and Catholic Social Teaching*, CRISIS MAGAZINE (27 May 2009), accessed 29 Apr. 2014, <http://www.crisismagazine.com/2009/the-minimum-wage-and-catholic-social-teaching>.

³⁵ See *District of Columbia*, POVERTY IN AMERICA PROJECT, MIT LIVING WAGE CALCULATOR, accessed 7 Apr. 2014, <http://livingwage.mit.edu/states/11>.

³⁶ See, e.g. *Calculating a Living Wage Across the United States*, PBS NEWSHOUR (15 Dec. 2013), accessed 29 Apr. 2014 via cache, <http://www.pbs.org/newshour/runtdown/how-much-do-you-need-to-get-by/>, Emily Jane Fox, *My living wage isn't a living wage*, CNNMONEY (22 Jan. 2014), accessed 29 Apr. 2014 <http://money.cnn.com/2014/01/22/news/economy/minimum-living-wage/>, and CNN WIRE, *Obama to raise minimum wage for federal contractors*, FOX 8 WGHP (28 Jan. 2014), accessed 29 Apr. 2014, <http://myfox8.com/2014/01/28/obama-to-raise-minimum-wage-for-federal-contractors/>.

³⁷ Based on the University of Michigan's Vendor Code of Conduct. University of Michigan President's Task Force on Purchasing Ethics and Policies, *Code of Conduct for University of Michigan Vendors (adopted 2004)*, available at http://www.finance.umich.edu/system/files/code_of_conduct.pdf (afterward "Michigan Policy").

country, such as the District of Columbia Human Rights Act³⁸ and San Francisco's non-discrimination ordinance.³⁹ As an alternative, option two requires a university to follow federal, state, and local law. This approach will protect workers to a different extent depending on where a university is located. Federal law is less comprehensive than option one. (For example, it does not protect individuals from discrimination based on sexual orientation or gender.)⁴⁰ States and localities vary in the degree of protection they provide from employment discrimination.⁴¹ Universities that are committed to providing the broadest possible protection from discrimination may prefer option one. Universities that are uncomfortable with any of the specific prohibitions of option one may prefer option two, which does not commit them to providing any protections they are not already obligated to provide by law.⁴²

Both options preserve universities' rights as religious institutions to deal with "ministerial employees" on religious grounds. The Free Exercise Clause of the U.S. Constitution and numerous state statutes exempt relations between religious organizations and individuals who contribute to their religious missions from federal, state, and local nondiscrimination laws.⁴³ However, federal courts have defined the term "ministerial employees" quite narrowly. The category is limited to clergy and teachers who are required to incorporate religion into their instruction;⁴⁴ it does not include employees like church clerks and administrators and professors at religious universities who teach secular subjects.⁴⁵

(2) Occupational Safety and Health

Unlike the provision for nondiscrimination,⁴⁶ the JEP only includes a single version of its provision concerning the university's obligation to provide a safe and healthful work environment. Like option two for the nondiscrimination provision, this provision requires a university to provide protections they already obligated to provide by law.⁴⁷

³⁸ See D.C. Code § 2-1401.01 (adopted 2007), available at http://dc.gov/ODR/ODR%20Publication%20Files/DRdc_human_rights_law.pdf.

³⁹ See S.F. Police Code Sec. 3301 (amended by Ord. 184-81, 20 Apr. 1981; Ord. 433-94, 30 Dec. 1994; and File No. 021462, 15 Nov. 2002), available at http://sf-hrc.org/sites/sf-hrc.org/files/migrated/FileCenter/Documents/Governing_Laws/Police_Code_Article_33_9_24_12.pdf

⁴⁰ See Human Rights Campaign, *Statewide Employment Laws and Policies*, available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/employment_laws_1-2014.pdf.

⁴¹ Cf. *Summary, 4 Emp. Discrim. Coord. Analysis of State Law II* (2014).

⁴² Based on the occupational safety and health provision of the University of Michigan's Vendor Code of Conduct, which requires the university to follow the law. "Michigan Policy," *supra* note 37.

⁴³ See *Hosanna-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 710 (2012).

⁴⁴ See *Hosanna-Tabor*, 132 S. Ct. 694; *Pardue v. Ctr. City Consortium Sch. of Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005).

⁴⁵ See *Whitney v. Great N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975); *EEOC v. Mississippi Coll.*, 626 F.2d 477 (5th Cir. 1980); *Leaphart v. American Friends Serv. Comm.*, No. Civ. A. 07-4919, 2008 WL 4682626 (E.D. Pa. Oct. 22, 2008).

⁴⁶ See JEP §3(e)(1).

⁴⁷ Based on the University of Michigan's Vendor Code of Conduct. "Michigan Policy," *supra* note 37.

(3) Protection from Workplace Bullying and Harassment

This provision addresses a significant gap in U.S. law: Although abusive supervisors can have a devastating impact on workplaces and individuals,⁴⁸ there are no state or federal laws outlawing workplace bullying, which the policy characterizes as psychological or verbal abuse or harassment. Bullying is only unlawful if it constitutes discrimination,⁴⁹ which can be quite difficult to prove.⁵⁰ Moreover, victims of workplace bullying rarely prevail in court.⁵¹ This provision is not based on any statute and is somewhat open to interpretation;⁵² university stakeholders should encourage the university to interpret it robustly.

Interpreters of this policy could look to several approaches to workplace bullying, such as the laws of other nations and at least one agreement between a U.S. union and an employer (a collective bargaining agreement, or “CBA”). The French labor code⁵³ defines workplace bullying quite broadly as behavior that is “likely to harm the dignity, the physical or psychological health of the victim, or his professional career.”⁵⁴ Alternatively, the Occupational Health and Safety Act of Saskatchewan defines workplace bullying somewhat more narrowly as behavior that “adversely affects the worker’s psychological or physical well-being and that the [perpetrating] person knows or ought reasonably to know would cause a worker to be humiliated or intimidated.”⁵⁵ However, French law regards only “repeated acts” as bullying,⁵⁶ while the Province of Saskatchewan defines bullying as either “repeated conduct, comments, displays, actions or gestures” or “a single, serious occurrence...comment, display, action or gesture, that has a lasting, harmful effect on the worker.”⁵⁷ The only major U.S. CBA with a workplace bullying provision is more vague than French or Saskatchewanian law.⁵⁸ It defines workplace bullying as

⁴⁸ See David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 Emp. Rts. & Emp. Pol’y. J., 475, 480 (2004).

⁴⁹ See Workplace Bullying Institute, *Healthy Workplace Bill: Frequently Asked Questions*, accessed 29 Apr. 2014, <http://www.workplacebullying.org/faq/>.

⁵⁰ Yamada, *supra* note 48 at 491.

⁵¹ See *id.* at 485.

⁵² Based on the University of Michigan’s Vendor Code of Conduct. “Michigan Policy,” *supra* note 37.

⁵³ Europeans developed the concept of workplace bullying in the 1980s and adopted the first statutes outlawing the practice in the 1990s. See Yamada, *supra* note 48 at 478, 512.

⁵⁴ See Phillippe Thomas, *French Law Prohibiting Bullying in the Workplace*, THEHRDIRECTOR (15 Nov. 2013), accessed 28 Apr. 2014, http://www.thehrdirector.com/business-news/diversity_and_equality/french-law-prohibiting-bullying-in-the-workplace/. The French term for workplace bullying is “moral harassment.” See

Yamada, *supra* note 48 at 512.

⁵⁵ The Occupational Health and Safety Act, S.S. 1993, sec. 2(1)(l) (2014)(amended by S.S. 1996, c.19; 2201, c.25; 2007, c.34; 2012, c.25; and 2013, c.27), available at <http://www.gov.sk.ca/adx/asp/adxGetMedia.aspx?mediaId=97&PN=Shared>.

⁵⁶ See Thomas, *supra* note 54.

⁵⁷ The Occupational Health and Safety Act, *supra* note 55, at sec. 2(3). The Saskatchewan term for workplace bullying is “harassment.” See *id.*

⁵⁸ The agreement is between the Service Employees International Union, National Association of Government Employees, and the Commonwealth of Massachusetts. See Workplace Bullying Institute, *First Anti-Bullying*

“behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior.”⁵⁹ Both France and the Saskatchewan require employers to take reasonable steps to ensure that their workplaces are free of bullying;⁶⁰ the U.S. CBA permits workers to file a grievance if they believe they have been a victim of workplace bullying but imposes no affirmative duty on the employer.⁶¹

(4) Freedom of Association

The Catholic Church has recognized freedom of association for over a century.⁶² This provision establishes a positive tone for university labor relations, but will not provide much protection for workers unless advocates convince their universities to interpret it differently than similar phrases in federal labor law. At Georgetown University, a nearly identical provision⁶³ has led to a neutral university stance toward union drives,⁶⁴ which Catholic labor advocates recently praised as “a model for Catholic institutions around the country.”⁶⁵ However, universities might interpret this provision to merely require them to behave consistently with federal labor laws,⁶⁶ which leave employers free to oppose unions in a variety of ways.⁶⁷ Advocates should vigorously monitor universities’ conduct during unionization drives to ensure the university interprets this provision robustly.

4. PROCEDURE – OVERSIGHT & IMPLEMENTATION

a. Oversight Committee

(1) Purpose and authority

A distinctive feature of the JEP, compared with other university employment policies, is the formal oversight role it provides university stakeholders such as students, faculty, and workers. This provision creates a committee to review

Provision in Major CBA in the U.S., March 2009, accessed 29 Apr. 2014, <http://www.workplacebullyingforunions.com/6a/>.

⁵⁹ *See id.*

⁶⁰ *See Thomas, supra note 54, The Occupational Health and Safety Act, supra note 55, at sec. 3(d).*

⁶¹ *See Workplace Bullying Institute, supra note 58.*

⁶² *See Leo XIII, Encyclical Letter. Rerum Novarum, 49 (15 May 1891).*

⁶³ *See “Georgetown Policy,” supra note 30.*

⁶⁴ *See Catholic News Service, Georgetown University viewed as a model for worker relations in schools, CATHOLIC SENTINEL, accessed 29 Apr. 2014, <http://www.catholicsentinel.org/main.asp?SectionID=2&SubSectionID=34&ArticleID=23952>.*

⁶⁵ Molly Simio, *Labor Network Honors GU for Fair Labor Practices*, THE HOYA (28 Feb. 2014), accessed 29 Apr. 2014, <http://www.thehoya.com/labor-network-honors-gu-for-fair-labor-practices/>.

⁶⁶ Federal labor law prohibits employers from interfering with, restraining, or coercing employees involved in union drives, collective bargaining, and other concerted activities—the same activities the JEP requires universities to respect. 29 U.S.C. § 158(a)(1).

⁶⁷ Federal labor law does not prevent an employer from exercising its free speech right to tell its employees its views about unions and its predictions about how a union presence might affect its business. *See N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 616-618 (1969).

university employment policies, practices, and service contracts; critique the university's relationship with its workers and its contractors; and inform the university community whether the university is implementing the JEP in good faith.

This concept of formal ongoing oversight is based on the history of Georgetown University's living wage movement. When students at Georgetown began to advocate for a living wage policy, the university formed an ad-hoc "Advisory Committee on Business Practices" to study the issue of employee compensation.⁶⁸ That committee proposed Georgetown's Just Employment Policy,⁶⁹ which preserved the committee as a continuing oversight body.⁷⁰

(2) Structure

This provision identifies committee membership according to stakeholder groups and specifies how each member is selected.⁷¹ The model JEP enables students to appoint workers to the committee because it would be logistically challenging for universities to set up and run fair processes for selecting worker committee members. This strategy also encourages student-worker solidarity. The oversight committee provides university stakeholders, including direct and subcontracted workers, with an opportunity to influence how the university implements this policy. However, the committee does not displace and is not a substitute for collective bargaining between direct employees and the university or subcontracted employees and university contractors.

(3) Access to Information

This provision requires the university to disclose to the committee certain *general information* about the policy and encourages it to disclose certain *specific information*. Specific information is not mandated because it is especially sensitive; universities and contractors guard it to protect themselves from competition and legal liability. (Specifics about a company can give competitors insight into its business strategy and violate its workers' privacy.).

(4) Confidentiality

This provision allows committee members to assume information the committee receives is public unless the university clearly warns them it is not. The university and its contractors may be unwilling to share some information with the committee unless the committee agrees to keep the information confidential. Committee members may receive confidential information—and thereby agree to maintain confidentiality—if they believe receiving it will enable them to more effectively exercise their oversight responsibilities. Committee members may decline to receive

⁶⁸ See Student Worker Resource Solidarity Center, *Georgetown University*, accessed 29 Apr. 2014, http://www.livingwageaction.org/campaigns_gtown.html (movement began in 2002) and "Georgetown Committee Report," *supra* note 28 at *6 (committee established 2003).

⁶⁹ "Georgetown Committee Report," *supra* note 27 at *7.

⁷⁰ See "Georgetown Policy," *supra* note 30.

⁷¹ Based on the structure of Georgetown University's "Advisory Committee on Business Practices." "Georgetown Committee Report," *supra* note 28 at *15.

confidential information if they prefer not to assume a duty of confidentiality to the university.

b. Worker Feedback

(1) Grievances

Providing university workers with a role in enforcing the JEP is likely one of the most effective ways of ensuring that the university and its contractors comply with their JEP obligations. This provision also seeks to provide workers with a greater voice in their workplaces.

This provision preserves but does not expand university workers' rights to bring employment-related claims in court. It provides workers with no additional rights to sue the university or its contractors, and it precludes the university and contractors from conditioning use of their grievance procedure on the forfeiture of any legal rights.

(2) Meetings

Because university workers may wish to discuss the policy in a context other than their workplace grievance procedure, this provision authorizes university administrators to meet directly with university workers and answer questions they may have about the policy.

(3) University Helpline

Because some university workers may be too shy or fearful to use the workplace grievance procedure or meet with university officials, this provision provides workers a feedback option that preserves their anonymity.⁷²

(4) Non-Retaliation

This provision protects workers who provide feedback to the university or its contractors concerning the JEP. It would be contrary to the spirit of the JEP for the university or its contractors to penalize employees for exercising their rights under the policy. Moreover, even the most assertive workers may be unwilling to use any of the worker feedback mechanisms if they fear that they may be disciplined for doing so.

c. Implementation

(1) Notice

This provision specifies how various stakeholders in the university community will learn about the policy. The university must ensure students are aware of the policy so that they can involve themselves in its oversight committee.⁷³ The university

⁷² Based on Georgetown University's "Compliance Helpline." See Georgetown University, *Georgetown University Compliance Helpline*, accessed 29 Apr. 2014, <https://secure.ethicspoint.com/domain/media/en/gui/17731/index.html>.

⁷³ See JEP §4(a)(1).

must ensure workers are aware of the policy so that they can advocate for themselves through its grievance procedures and report problems through its helpline and worker meetings.⁷⁴ To ensure illiterate workers understand the JEP, notice to workers includes oral as well as written information. To overcome language barriers, the JEP also requires notice in additional languages in workplaces wherever necessary.⁷⁵ For workers and students who misplace their written notices, the JEP requires the university to post notices both online and in physical workspaces.

(2) Contract Evaluation & Negotiation

(a) Evaluation

This provision requires the university to notify its potential contract partners of the commitments they must be willing to assume in order to do business with the university.⁷⁶ If it avoids negotiating with prospective contractors who are unlikely to comply with their JEP-related obligations, the university will save time and money. For large contracts, universities already invite contractors to negotiate on terms that specify the contractor's potential responsibilities and set requirements for the contractor's financial capacity.⁷⁷

Under the JEP, the university does not commit to contracting only with companies that have the capacity to comply with the JEP. Instead, it sets this as a goal rather than a mandate because the university may not always be able to find a contract partner with existing capacity. Also, it might be difficult for the university or the oversight committee to determine conclusively whether a particular contractor has appropriate capacity.

(b) Negotiation

Because the JEP is a policy adopted by universities, not contractors, it cannot control contractors' behavior directly. Instead, it requires the university to negotiate with its contractors to commit them to contract provisions consistent with the JEP.⁷⁸ The JEP commits the university to various other negotiating duties elsewhere; this provision requires the university to negotiate with contractors (1) to ensure it can effectively monitor contractors' JEP-related contract commitments, and (2) to obtain sufficient leverage to enforce those commitments.

⁷⁴ See JEP §4(b).

⁷⁵ Based on a defunct federal guideline previously mandated employers post notice in non-English languages shared by 20% of a given workplace. See 29 C.F.R. § 104.202 (*held invalid*).

⁷⁶ Inspired by Stanford University's approach. "Stanford Policy," *supra* note 18 (requiring living wage guidelines to be included in all requests for proposals).

⁷⁷ See, e.g. Colorado State University Purchasing Department, *Request for Proposal Manual 3-4*, available at <http://wsnet.colostate.edu/cwis191/policy/documents/rfp.pdf>.

⁷⁸ The JEP's negotiation provisions are more specific than Georgetown University's approach, but broader and more general than Stanford University's. Compare "Georgetown Policy," *supra* note (directing the university to revise contracts "to the extent appropriate) with "Stanford Policy," *supra* note (creating specific clauses for the university to include in its contracts).

Subsections i, ii, iv and v require the university to negotiate for access to contractors' information and their workplaces. The university may pass the information it receives to the oversight committee,⁷⁹ and it may use its access to contractors' workplaces to enable worker feedback⁸⁰ and conduct audits.⁸¹

Subsections iii, vi, and vii require the university to negotiate for the right to enforce the JEP-related provisions in its contracts against contractors.

- i. Should a contractor fail to meet its JEP-related obligations, subsections iii and vi provide the university with more significant leverage than it would enjoy otherwise. Together, these two provisions require the university to negotiate contracts that provide evidence that the university would not have entered those contracts had the contractor not agreed to its JEP-related provisions.⁸² This means that if a contractor fails to comply with these provisions, the university can collect damages based on the full value of the contract instead of only the provisions with which the contractor failed to comply.⁸³
- ii. Subsection vii requires the university to establish within its contracts the concrete amount its contractors will risk if they choose not to comply with their JEP-related commitments under the contract.⁸⁴ This saves the university the cost of arguing with contractors about appropriate damages after a problem occurs, making universities more likely to collect damages. It also puts contractors on notice about how much they would risk if they were to choose not to follow their contracts' JEP-related provisions. Courts are most comfortable enforcing provisions that set costs in advance for harms that are difficult to estimate,⁸⁵ such as harms to the university's reputation or the time and money it would spend resolving its relationship with a breaching contractor and seeking a new business partner.

(3) Audits

As large institutions, most universities have auditing departments. This provision requires those departments to review the university's JEP-related goals, but it leaves auditing departments free to decide how thorough and how frequent these investigations should be to effectively ensure that the university and its contractors comply with the policy.⁸⁶

⁷⁹ See JEP §4(a)(2).

⁸⁰ See JEP §4(b)(2).

⁸¹ See JEP §4(c)(3).

⁸² Cf. 17A Am. Jur. 2d Contracts § 706.

⁸³ *Id.*

⁸⁴ This contracting strategy is known as "liquidated damages." Cf. 24 Williston on Contracts § 65:1 (4th ed.).

⁸⁵ *Id.*

⁸⁶ Inspired by Harvard University's approach. See "Harvard Policy," *supra* note 18.

(4) NOTICE: Limit on Legal Obligation

This provision clarifies that the JEP does not directly extend new legal rights to workers, but instead, establishes moral standards for university communities that adopt it. Advocates for just employment practices within the university can shape the way the university implements those standards through the JEP's oversight committee. The oversight committee will report to the university community on the relevant activities and decisions of the university and its contractors,⁸⁷ and the university community can decide whether to advocate for the university or its contractors to change their ways.

⁸⁷ See JEP §4(a)(1)(a)(iii).