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INTRODUCTION

The workplace is not what it used to be. Labor unions have declined dramatically, with members constituting 10 percent of the private-sector workforce today, compared with 35 percent in the 1950s. Women and minorities are working in record numbers. The explosion of information technology has fueled the shift from manufacturing to service jobs. The rise of the global economy has put increasing pressure on firms to increase productivity, cut costs, and reduce waste. Temporary workers, leased workers, and quality circles are growing in importance.

Legal regulation has responded to the changing workplace with varying degrees of success. Federal laws regulating unions and collective bargaining have not changed significantly since 1959. These laws are now commonly criticized as being ineffectual or out-of-date. In well-publicized remarks a few years ago, Lane Kirkland, then head of the AFL-CIO, proclaimed (undoubtedly with tongue in cheek) that the union movement might be better off with the “law of the jungle” than with current labor laws. In contrast, employment law at the state and federal level has exploded in recent years. Congress passed major statutes beginning in 1964 regulating employment discrimination, and then in the mid-1970s regulating occupational safety and health, as well as pensions and other fringe benefits. More recent federal regulations cover polygraphs, plant closings, civil rights, and family and medical leave. At the state level, significant common law and legislative developments now regulate wrongful termination, drug testing, and privacy in the workplace—and arguably are eroding conventional assumptions of “at will” employment.

Legal scholars have struggled to assimilate these turbulent changes in the workplace and its legal regulation. A mundane but revealing sign of assimilation comes from the increasingly accepted distinction in terminology between employment law, meaning laws that protect individual workers, and labor law, meaning laws that regulate labor unions and collective bargaining. Among practitioners, the field is increasingly called labor and employment law, to capture the growing importance of regulations of employment decisions that apply to all employees whether or not they have chosen collective representation.

Scholars are vigorously questioning basic assumptions in both labor and employment law. Why are unions and collective bargaining declining in importance, and what can or should law do about the decline? How has the expansion in employment law affected the nonunionized workplace?
Answers to these questions require an understanding of the law as it has evolved thus far, but they also require familiarity with the tools of policy analysis.

As the workplace itself has changed so dramatically, many of the insights about the proper role of law are increasingly found outside traditional legal scholarship. That is where this book comes in. Interdisciplinary labor and employment law scholarship is more important than ever before. There exists a rich literature in industrial relations, labor economics, industrial sociology, labor history, and related fields that can illuminate the study of labor and employment law. Legal scholars indeed have much to learn from this scholarship. But they also have much to offer. The devil is in the institutional arrangements. Details of the law matter; and practical issues of procedure and access to remedies are necessary to a full account of the law “on the ground.” In short, there needs to be a two-way exchange between scholars in industrial relations, labor economics, and labor history, on the one hand, and legal scholars, on the other. This book attempts to provide an accessible text that might promote such an exchange.

This edited collection of articles displays the leading interdisciplinary thinking in regard to both the unionized and the nonunionized workplace— in both labor and employment law. Part I examines structural changes in the workplace. These include changes in career employment and the rise of contingent work, along with the decline of unions. Ironically, as unions have declined, scholars have increasingly appreciated the productive potential of unions, particularly their ability to solve collective goods problems in the workplace. So Part I, particularly Chapter 3, includes discussions of this second “voice” face of unions, as it is sometimes called (monopoly unionism being the first face).

Part II examines the legal regulation of unions. We examine existing legal arrangements in terms of their contribution to efficiency, redistribution, and democratic participation—with a particular emphasis on the growing “labor law and economics” literature.

Part III turns to legal regulation of the nonunion workplace. Essays presented there critically examine the rise in employment law regulating nonunion and union workplaces alike, particularly laws regulating termination of workers, minimum wages, and pensions.

Part IV attempts to glimpse the future. We include comparative assessments of the industrial relations and employment law systems of our leading competitors—including Canada, Japan, and Germany—and developments pursued under the “Social Charter” of the European Union.
Our final two chapters evaluate reform proposals that seek to shape the future role of unions and the future legal regulation of the nonunion workplace.

This book is intended for use in basic labor law and employment law courses as well as in advanced seminars. We believe it could also be profitably used in undergraduate and graduate offerings in schools of business, management, and industrial relations. Indeed, lawyers, union leaders, and human-resource specialists should find it helpful. Our hope is that the book sparks greater interaction among all these groups.

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