

FOUNDATIONS OF LABOR AND EMPLOYMENT LAW



LexisNexis Law School Publishing Advisory Board

William Araiza

Professor of Law
Brooklyn Law School

Lenni B. Benson

Professor of Law & Associate Dean for Professional Development
New York Law School

Raj Bhala

Rice Distinguished Professor
University of Kansas, School of Law

Ruth Colker

*Distinguished University Professor & Heck-Faust Memorial Chair in
Constitutional Law*
Ohio State University, Moritz College of Law

David Gamage

Assistant Professor of Law
UC Berkeley School of Law

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

David I. C. Thomson

LP Professor & Director, Lawyering Process Program
University of Denver, Sturm College of Law

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

FOUNDATIONS OF LABOR AND EMPLOYMENT LAW

Samuel Estreicher

*Dwight D. Opperman Professor of Law
New York University Law School*

Stewart Schwab

*Allan R. Tessler Dean and Professor of Law
Cornell University of Law*

Zev J. Eigen

*Assistant Professor of Law
Northwestern University School of Law*



ISBN: 9781422498842

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc. Copyright © 2006 Matthew Bender & Company, Inc., one of the LEXIS Publishing companies. All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

(Pub.3335)

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.

SAMUEL ESTREICHER
STEWART J. SCHWAB

FOUNDATIONS OF LAW SERIES

ROBERTA ROMANO, GENERAL EDITOR

Foundations of Administrative Law

Edited by Peter H. Schuck, Yale Law School

Foundations of Contract Law

*Edited by Richard Craswell, Stanford Law School and
Alan Schwartz, Yale Law School*

Foundations of Corporate Law

Edited by Roberta Romano, Yale Law School

Foundations of Criminal Law

*Edited by Leo Katz, Michael S. Moore and Stephen J. Morse,
all of the University of Pennsylvania Law School*

Foundations of The Economic Approach to Law

Edited by Avery Wiener Katz, Columbia Law School

Foundations of Employment Discrimination Law

Edited by John Donohue, III, Stanford Law School

Foundations of Environmental Law and Policy

Edited by Richard L. Revesz, New York University Law School

Foundations of Labor Law

*Edited by Samuel Estreicher, New York University Law School
and Stewart J. Schwab, Cornell Law School*

Foundations of Tort Law

Edited by Saul Levmore, University of Chicago Law School

CONTENTS

Part I Frameworks for Analyzing Labor Markets, 1

1 Models of the Labor Market, 1

- A. Price–Theory Model of the Labor Market, 2
 - “Who Bears the Burden of a Payroll Tax?”, 5
Ronald G. Ehrenberg and Robert S. Smith
 - Notes and Questions, 7
 - “Labor Markets and Labor Law Compared with Capital Markets and Corporate Law”, 11
Daniel R. Fischel
 - Note, 15
- B. Internal Labor Markets and Relational Employment Contracts, 16
 - “The Economics of Internal Labor Markets”, 18
Michael L. Wachter and Randall D. Wright
 - Notes and Questions, 23
- C. Changing Employment Markets, 25
 - “Contingent Workers”, 26
U.S. Departments of Labor and Commerce
 - Notes, 27
- D. The Level and Distribution of Earnings, 31

2 Models of Unions, 40

- A. The Monopoly Face, 40
 - 1. The Theory of Monopoly Unions, 40
 - “Some Comments on the Significance of Labor Unions for Economic Policy”, 42
Milton Friedman
 - Notes and Questions, 44
 - “A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace”, 47
Kenneth G. Dau–Schmidt
 - Notes and Questions, 48
 - 2. *Efficient Collective Bargaining, or the “Off the Demand Curve” Model*, 50
 - 3. *Median Voter Models of Unions*, 54
 - “Monopoly, Efficient Contract, And Median Voter Models of Union Wage Determination: A Critical Comparison”, 55

- Bruce E. Kaufman and Jorge Martinez–Vazquez
Notes and Questions, 64
- B. Evidence on Union Wage Effects, 65
- C. Unions as Providers of Collective Goods, 69
“The Two Faces of Unionism”, 69
Richard B. Freeman and James L. Medoff
Notes and Questions, 74
- D. Union Effects on Profitability, 77
“But Unionism Lowers Profits”, 77
Richard B. Freeman and James L. Medoff
“Unionization and Economic Performance”, 79
Barry T. Hirsch
Note, 84
- 3 The Changing Face of Industrial Relations: Decline of Private Sector Unionism, 85**
- A. Structural Shifts, 86
“Is the U.S. Unique in the Decline of Private Sector Unionism?”, 86
Leo Troy
Notes and Questions, 94
- B. Demand Shifts, 97
“Union Membership in the United States: The Decline Continues”, 97
Henry S. Farber and Alan B. Krueger
Notes and Questions, 103
- C. Employer Opposition, 104
“Promises to Keep: Securing Workers’ Rights to Self–Organization Under the NLRA”, 105
Paul C. Weiler
Notes and Questions, 107
- D. Union Wage Policy and Product Market Competition, 112
“Evaluating the Evidence on Union Employment and Wages”, 112
Peter D. Linneman, Michael L. Wachter, and William H. Carter
“Labor Law Reform in a World of Competitive Product Markets”, 116
Samuel Estreicher
Notes and Questions, 119

Part II Regulation of Labor Relations, 121

4 Goals and Institutional Features of Federal Labor Law, 121

- A. Redistribution, 121
 - “Inflation, Unemployment and the Wagner Act: A Critical Reappraisal”, 122
Daniel J.B. Mitchell
 - Notes and Questions, 126
 - “Whither Goest Labor Law: Law and Economics in the Workplace”, 128
Michael H. Gottesman
- B. Routinization of Industrial Conflict, 130
 - “The Post–War Paradigm in American Labor Law”, 131
Katherine Van Wezel Stone
 - Notes and Questions, 134
- C. Institutional Features, 134
 - 1. Adversarialism, 135
 - “Employee Involvement and the ‘Company Union’ Prohibition: The Case for Partial Repeal of the Section 8(a)(2) of the NLRA”, 135
Samuel Estreicher
 - “Democracy and Domination in the Law of Workplace Cooperation: From Bureaucracy to Flexible Production”, 140
Mark Barenberg
 - Notes and Questions, 143
 - 2. Scope of Bargaining, 145
 - “The Scope of the Duty to Bargain Concerning Business Transformations”, 145
Michael C. Harper
 - Notes and Questions, 150
 - 3. Strikes, 151
 - “Replacing Economic Strikers: The Law and Economics Approach”, 151
George M. Cohen and Michael L. Wachter
 - “Collective Bargaining or ‘Collective Begging?’: Reflections on Antistrikebreaker Legislation”, 153
Samuel Estreicher
 - Notes and Questions, 158

- 5 The Law and Economics of Federal Labor Laws, 162**
“Efficiency and Labor Law”, 163
Keith N. Hylton
Notes and Questions, 168
“Collective Bargaining and the Coase Theorem”, 169
Stewart J. Schwab
Notes and Questions, 180
“Labor Bargaining Units”, 180
Douglas L. Leslie
Notes and Questions, 188
“The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation”, 189
Michael L. Wachter and George M. Cohen
Notes and Questions, 196

Part III Legal Regulation of Employment Contracts, 197

- 6 Mandating Minimum Terms, 198**
“Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism”, 199
Steven L. Willborn
Notes and Questions, 205
“The Law and Economics Approach to Workplace Regulation”, 211
Stewart J. Schwab
Notes and Questions, 213
“Some Simple Economics of Mandated Benefits”, 215
Lawrence H. Summers
Notes and Questions, 221
- 7 Employment at Will, 223**
“In Defense of the Contract at Will”, 224
Richard A. Epstein
Notes and Questions, 232
“Just Cause for Termination Rules and Economic Efficiency”, 234
Mayer G. Freed and Daniel D. Polsby
Notes and Questions, 243
“Life–Cycle Justice: Accommodating Just Cause and Employment at Will”, 246
Stewart J. Schwab
Notes and Questions, 256

“An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate”, 258

J. Hoult Verkerke

Notes and Questions, 261

“Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting”, 263

Walter Kamiat

Notes and Questions, 266

8 Topics in Employment Regulation: Minimum Wages and Pensions, 268

A. Minimum Wage Regulation, 268

“The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy”, 268

Daniel Shaviro

Notes and Questions, 278

B. Pension Regulation, 279

“The Troubled Marriage of Retirement Security and Tax Policies”, 279

Michael J. Graetz

Notes and Questions,

“Paternalistic Pension Policy: Psychological Evidence and Economic Theory”, 282

Deborah Weiss

Notes and Questions, 292

Part IV The Future of Labor and Employment Law, 297

9 Looking Abroad, 297

A. Perfecting Redistributive Unionism: The Canadian Model, 298

From Uniformity to Divergence: Industrial Relations in Canada and the United States, 298

Pradeep Kumar

Small Differences That Matter: Canada vs. The United States, 300

David Card and Richard B. Freeman

Notes and Questions, 303

Note on Comparative Productivity Data, 306

B. Enterprise Unionism: The Japanese Model, 307

Enterprise Bargaining and Social Contract in Japan, 308

Lloyd Ulman and Yoshifumi Nakata

- Notes and Questions, 313
- C. Codetermination: The German Model, 318
Germany: Codetermining the Future?, 318
Otto Jacobi, Berndt Keller, and Walther Müller–Jentsch
Codetermination: The Fourth Decade, 323
Wolfgang Streeck
Notes and Questions, 328
- D. “Social Charter”: The European Community Model, 331
Labor and the Global Economy: Four Approaches to
Transnational Labor Regulation, 331
Katherine Van Wezel Stone
Notes and Questions, 335
- E. Globalization and Domestic Labor Standards, 336
Labor Markets and Integrating National Economies, 337
Ronald G. Ehrenberg
Notes and Questions, 342
The Fair Trade–Free Trade Debate: Trade, Labor, and the
Environment, 343
Robert Howse and Michael J. Trebilcock
Notes and Questions, 351

10 Reforming Unions and Labor Law, 353

- A. Nonmajority Unionism, 354
“The Road Not Taken: Some Thoughts on Nonmajority
Employee Representation”, 354
Matthew W. Finkin
Notes and Questions, 358
- B. Mandatory Employee Representation Committees, 360
“An Economic Analysis of Works Councils”, 360
Richard B. Freeman and Edward P. Lazear
“A Future Course for American Labor Law”, 364
Paul C. Weiler
Notes and Questions, 369
- C. Creating a Market in Representational Services, 372
Freedom of Contract and Labor Law Reform: Opening Up the
Possibilities for Value–Added Unionism, 372
Samuel Estreicher
Notes and Questions, 377

11 Models for an Individualistic Future, 380

- A. Standard Handbooks for Employers, 380
Reconstituting Workers’ Rights, 380
Richard Edwards

- Notes and Questions, 382
 - B. Arbitration of Employment Disputes, 383
 - Note on Uniform Law Commissioners' Model Employment Termination Act, 383
 - Arbitration of Employment Disputes Without Unions, 384
 - Samuel Estreicher
 - Notes and Questions, 386
 - C. Employee Ownership, 388
 - In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers, 388
 - Michael H. Gottesman
 - In Defense of Employee Ownership, 392
 - Alan Hyde
 - Notes and Questions, 398
-
- Appendix A Union Members in the United States, 1930–1979, 401
 - Appendix B Union Membership Density Among U.S. Wage and Salary Workers, 1973–97, 403
 - Appendix C Union Density Rates, 1900–1989, Eighteen and Twenty–Four Countries, 405
 - Appendix D Alternative Unemployment Indicators, Ten Countries, 1983–93, 407
 - Appendix E Indexes of Hourly Manufacturing Compensation Costs, 1975–94, 411
 - Appendix F Business Sector Productivity Growth, 413
 - Appendix G Indexes of Manufacturing Price Levels, Labor Productivity and Unit Labor Costs, Selected Years, 1970–93, 415