WORK LAW: CASES AND MATERIALS

Third Edition

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Preface

The law of work has evolved as a patchwork of legal interventions in the labor market, sometimes by statute, and sometimes through the common law of judicial decisions. Most law school curricula divide the law of work into three topical areas—Labor Law, Employment Law, and Employment Discrimination—and offer separate courses in each area. Labor law in the United States is understood to encompass the study of the National Labor Relations Act, the law governing union organizing and collective bargaining. It is the law of collective rights at work. Employment law refers to the statutes and common law governing individual rights at work. It ranges from minimum standards legislation to judicially created doctrines based in tort and contract law. Employment discrimination law deals with the statutes and interpretative case law advancing the antidiscrimination norm in the workplace. These statutes address the problem of status discrimination at work (e.g., discrimination on the basis of race, sex, national origin, ethnicity, religion, disability, or sexual orientation).

Regulation of the employment relation defies such categorical thinking, however. The law has struggled with the tension between the desire to leave things to private contract and market forces, and the impulse to intervene to redress inequitable results occasioned by the imbalance of power between employees and employers. In some areas freedom of contract principles have prevailed. In other areas the law has considered it essential to extend protection to employees to act collectively in dealing with the employer, as in the labor laws. An increasingly prevalent response is government legislation to afford minimum standards of protection to all workers, and particularly to those historically disadvantaged in the American labor market, such as people of color, women, and persons with disabilities. These legal regimes overlap and relate to one another in complex ways that are obscured by categorical study.

We believe that acquaintance with historical context and the multiple legal structures governing the workplace is vital for today's lawyers. Historical legal context affords important insights about how the law may evolve in the future. Understanding the story behind the decline of labor unions and labor law provides critical assistance in evaluating new employee representation systems and conceptualizing rights. Minimum standards legislation was established partly because gaps in union representation left many workers unprotected at the workplace. Antidiscrimination law responded to union failures to represent the rights of subordinated groups. Is there any logical stopping point to this progression? As each new right is conceptualized and political momentum builds for legal protection, will laws continue to proliferate? Similarly, as groups of employees previously excluded from protection against discrimination press for legal agency, will new employment discrimination statutes be enacted? Where is the sunset? Yet at the same time, the politics of the global economy militate in favor of more flexibility for U.S. employers attempting to compete in an international market. Will employers block such legislation? Will legislative impasse ensue, as it ultimately did in the area of labor law? What, then, might evolve to replace individual statutory rights?

A comprehensive study of the law of work also provides an opportunity to assess critically what form enforcement of rights should take. Should conflicts between employers and employees be channeled into private resolution systems such as collective bargaining or contractual arbitration, or is the public interest sufficient to justify

committing administrative, judicial and legislative resources to it? What is the significance of casting employee rights as collective—and therefore entrusting their enforcement to an employee representative such as a union—versus conceptualizing them as individual? Must such a collective representative be independent of the employer, or do employer-initiated employee committees further worker voice just as effectively? Doesn't history also warn of the risks of subordinating individual interests to those of the collective, particularly in the context of a diverse workforce with minority groups characterized by race, ethnicity or gender?

Accordingly, we have denominated this text "Work Law" and endeavor here to present basic materials on each system of labor market regulation. We identify core themes of conflict and concern in the workplace, canvass the governing law, and offer a vantage point for assessment. Several themes furnish the organizing structure for the book. We ask how law should mediate the perennial conflict between employer and employee rights; what difference it makes whether employee rights are conceptualized individually or collectively; what significance the increasing racial, ethnic, and gender diversity of the workforce should have for legal policy; whether dispute resolution systems should be privatized (via collective bargaining or individual contract) or remain in the public fora (courts and legislatures); and whether law is the most effective way to address interests of employers and employees (as contrasted, for example, with human resource practices, employer initiatives, or employee self-help measures).

The book will be most useful in Employment Law courses that address the significance of conceptualizing rights at work individually as opposed to collectively. Its strength, we believe, is its refusal to categorize the law of the workplace in doctrinal boxes that may be out-of-date by the time the book reaches maturity. We advert to Labor Law principles at a number of points throughout the book, but at a policy level rather than a doctrinal level, as a way of introducing and evaluating an alternative model of employee representation; we assume no knowledge of Labor Law on the part of teacher or student and make no effort here to provide a satisfactory substitute for a Labor Law text. We offer some detail in the law of Employment Discrimination but do so primarily with an eye toward surveying the field and assessing antidiscrimination regulation as a response to an increasingly diverse workforce, rather than providing an in-depth study of Employment Discrimination principles.

This text surveys the existing legal landscape, but it does not stop there. Work Law is an exciting and intellectually stimulating practice area because it is of necessity in a constant state of flux, responding to labor market innovations. Flexibility in thinking is vital to this area of practice. We urge students to reject traditional rigid categories and to ask: what new paths might emerge from a holistic conception of Work Law, and the demolition of categorical divides between Labor Law, Employment Law, and Employment Discrimination Law? Toward that end, we offer the following specific questions as a guide for study. We suggest that professors and students consider them in each area covered throughout the course:

1. Which worker desires predominate in this area? Which employer desires predominate? What public interests, if any, are at stake? In short, what is the justification for law to enter the market in this area?

2. What form has the law assumed in this area: e.g., statutory, common law, agency regulation/decisionmaking?

A. What is the substance of the law?

B. Who is covered by it (how are covered employees defined, which employers are covered)?

C. What are the catalysts for change and is the law in this area receptive to change?

3. What remedies does the law offer for the harms/problems it conceptualizes? Are they adequate?

A. How is the law enforced and what are the enforcement mechanisms? Who enforces it (e.g., watchdog system or individuals, agency or union, etc.)? Is the law enforced by federal or state authorities?

B. What is the interaction between systems of law addressing a given area (e.g. collective bargaining and individual statutory rights; federal vs. state regulation)?

C. Is adjudication private or public? What is the significance of this choice?

4. What extralegal alternatives are available? What human resource strategies have employers developed to manage their workforces? What self-help strategies do employees utilize, both individually and collectively? Are they adequate?

Several colleagues were instrumental in getting this project off the ground. We owe a huge debt to Professor Charles Craver, whose encouragement and vision made this book possible. Without his careful planning, insight, and enthusiasm we might not have attempted this task. Professor Cynthia Estlund collaborated on the outline and philosophy of the text, and was a guiding force in the project's early days. Much of her work appears throughout these pages, as well. Professor Clyde Summers' thoughtful scholarly assessment of the law of work was a powerful influence on our conceptualization of the materials presented here and his voice is audible through many excerpts from his work. We are grateful to him, and to the many other authors whose work graces these pages, for permission to use their words to tell the story of Work Law.

We owe thanks to all who have assisted us in our day-to-day work on this project. We offer special thanks to Washington University School of Law and George Washington University Law Center who provided research support; to our hardworking and enthusiastic student research assistants Kelly Behr, Erika Hanson, Lisa Mays, Michelle Seares, Robert Sonnenfelt, Sylvia Tsakos, and Alex Zuckerman and our clerical support, Nancy Cummings.

We have included relevant statutory provisions at appropriate points in the text for convenience; accordingly, use of a Statutory Supplement is not necessary. We chose to edit the cases according to the following conventions: parallel citations and other distracting material have been removed to make the cases as readable as possible. Extraneous detail was omitted to conserve space and focus attention on the issues in the principal cases we included, using ellipses to indicate all deletions of text other than footnotes or citations to authority. Original footnote numbers for included footnotes are shown in brackets at the outset of the footnote. We conformed to bluebook citation format wherever possible to ensure consistency, but ignored the rules when they were silly or unhelpful.

We hope you enjoy this journey through the law of work!

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