

**EMPLOYMENT LAW
UNIONS,
SAFETY,
EEO: Equal Employment Opportunity**

UNIONS

**LABOR - MANAGEMENT RELATIONS
COMMON LAW**

**employment at will
public policy of competition
unions are a criminal conspiracy**

**INDUSTRIAL REVOLUTION
impersonal relationship**

**unequal power
monopsony**

LABOR - MANAGEMENT RELATIONS

**federal law
SHERMAN ACT**

legal if

**proportional to
legitimate
business
interest**

felony if not

***per se* unreasonable restraints of trade
price fixing
group boycott: i.e., strike**

INJUNCTION

**equitable remedy to compel action
cease and desist in collective action**

**economic realities versus economic assumptions
monopsony versus competition**

law based on assumptions favors one side

leads to

**violence in the streets
deflation**

triggers legalization of unions

proportional to legitimate business interest

ADVERSARIAL v. CODETERMINATION

USA is adversarial

peace through bargaining

us v. them

viewed as

labor v. management

rest of world is codetermination

us v. them

viewed as

(labor + management) v. world

**Federal Laws Governing
Labor-Management Relations**

Clayton Act, section 6 1914
labor is not an article of commerce
labor is exempt from the antitrust laws

Norris - Laguardia 1932
no federal injunctions

Wagner (NLRA) 1934
peace through bargaining
favored unions
management unfair labor practices

**Federal Laws Governing
Labor-Management Relations**

Taft - Hartley Act (L - MR Act) 1947
union unfair labor practices
mediation and cooling off

Lanham - Griffin (L - M Rept & Disc Act 1959)
union corruption
bill of rights

Wagner (National Labor Relations Act), 1934
right to organize

"direct effect"

v.

"close and substantial affect"

secret election

laboratory conditions

justifiable reliance on unilateral offer

bargaining unit

labor or management?

question of agent's loyalty

implement v. formulate policy

independent judgment

managed care

nurses v. doctors

Wagner (National Labor Relations Act), 1934

subjects of bargaining

mandatory

**wages,
hours, and
terms and conditions of employment
past contracts**

permissive

prohibited

Wagner (National Labor Relations Act), 1934

Arbitration

no precedence, but Rule of Shop

private property rights v. right to organize

Secondary Boycott

- 1) primary employer present**
 - 2) primary employer's normal hours**
 - 3) reasonably close to primary employer**
- AND**
- 4) clearly disclose primary employer dispute**

SAFETY

Risk cannot equal zero.

MARKET AND LAW FAIL IF RISK IS EITHER
not known
or
not voluntarily accepted

INDUSTRIAL REVOLUTION
impersonal relationships
abuse of unequal bargaining power

Employee's View of Workplace risk

limited information
one worker
justification for unions

complex causation

present value of risk premium

STATE LAW

employment at will

common law: slow, favors employer

fellow servant

failed duty to report

assumption of risk: normal risk

known and voluntary

contributory negligence

bar v. offset

statute: fast, favors employee

Workers' Compensation Insurance

no fault

employee v. independent contractor

insurance rating

industry and firm

STATE LAW: Workers' Compensation Insurance

the insured risks include those risks which are

ARISING OUT OF
risk peculiar

AND
HAPPENING IN THE COURSE OF EMPLOYMENT
time and place

going and coming rule

FEDERAL LAW OF WORKPLACE SAFETY

Occupational Safety and Health Act
OSHA

11 or more employees
safe and healthful working conditions
degree of objectivity

What is the State's Police Power?
How does OSHA fit under the Commerce Clause?
Can the federal government preempt the States?

OSHA

General Duty Clause: arising from

IF

- 1) known risk of
- 2) serious physical injury which is
- 3) preventable

THEN

- 4) **absolute duty**
to remove the cause of the risk.

OSHA

Specific Duty Clause

**OSHA selected means of
avoiding the known risk**

enforcement

record keeping

no reprisals

WORKPLACE SAFETY POLICY QUESTIONS

labor is 80% or risk

Design v. Performance

innovation retarded?

job loss for poor safety?

SAFETY v. HEALTH

objective

immediate harm

cost of harm

cost of prevention

WORKPLACE SAFETY POLICY QUESTIONS

what is FEASIBLE ?

OSHA variance

firm variance

v.

industry variance

A legislative selection of a technology

carries with it

the clear implication of a legislative desire

for some firms to go bankrupt.

Specifically, those firms that can

only survive if use the rejected technology.

EEO
EQUAL EMPLOYMENT OPPORTUNITY

Rarely is nearly everything you already "know" about a given area of law wrong. However, in this area of law, often everything you already "know" about the law is wrong.

The employer's legitimate business interest is in obtaining, retaining, and promoting objectively qualified employees.

One's objective intent can be objectively proven even in the absence of an underlying and identical subjective intent.

When does the legislature tend to react?

The equal employment opportunity laws outlaw the use of specific types of cheap information due to its inherent inaccuracy.

The employer is required to determine whether the individual applicant is objectively qualified, rather than being allowed to rely on stereotypical indicators which show that different groups are differentially objectively qualified.

Protected Classes continued

Age can not change **Age Discrimination Employment Act 1967**
(over 40) (federal contracts)

Physical Handicap can not change **Vocational Rehabilitation Act 1973**
reasonably accommodate
major life activity **Americans with Disabilities Act 1990**
(15+ employees)

What is race? 1864 versus 1964 Civil Rights Acts
ethnic?: Jewish, Arab

Title VII of the Civil Rights Act of 1964

employer's legitimate business interest to hire and promote objectively "qualified" persons

Three ways to objectively prove that the employer did not hire or promote objectively qualified persons.

- Disparate Treatment**
- Disparate Impact**
- Pattern or Practice**

Employer's plausible, alternative, legitimate explanation.

Title VII of the Civil Rights Act of 1964

Disparate Treatment

individual intentional

inference from circumstantial evidence

- protected class**
- qualified for job**
- rejected**
- job remained open**
- continued seeking applicants**

Title VII of the Civil Rights Act of 1964
Disparate Impact
group

facially neutral
e.g., six feet tall to be police officer

disproportionately affects
a particular protected class

job related

business necessity

Title VII of the Civil Rights Act of 1964
Pattern or Practice
group

general policy
which does not satisfy its objective
e.g., require high school diploma
to assure reading and math skills

statistical inference
relevant labor market

4 / 5 ths Rule
not conclusive
starts an investigation
high transaction cost

Title VII of the Civil Rights Act of 1964

Bona Fide Occupational Qualifications BFOQ

NEVER Race or Color

business necessity
"necessity"
equals reasonably necessary

narrow interpretation
perspective of the public policy
not perspective of business

Title VII of the Civil Rights Act of 1964

Seniority if bona fide

collective bargaining agreements
legitimate business interests of
union and employer
to agree seniority
objectively measures
increased qualification

may not use seniority to discriminate

Title VII of the Civil Rights Act of 1964
Reverse Discrimination v. Affirmative Action

court ordered affirmative action
recruitment and hiring and promotion
corrects adjudicated past discrimination
e.g., FTC's corrective advertising

voluntary affirmative action
recruitment
expand pool of qualified applicants
correct self identified past discrimination
clean hands?
BUT: have current employees personally
benefited from past discrimination?

SEX DISCRIMINATION

Sexual Harassment

managers are personally liable
unless
take preventative steps

harassment is reasonably expected
if
not take preventative steps

SEX DISCRIMINATION
Sexual Harassment

definition of sexual harassment

Defendant

reasonable person would
subjectively intend harassment

Plaintiff

reasonable person would
subjectively perceive harassment

reasonable interpretation
by the person harassed
not by the person "harassing"

SEX DISCRIMINATION
Sexual Harassment

to avoid personal liability
managers must

develop a policy

communicate the policy

enforce the policy

internal versus external resolution
quid pro quo harassment
equals soliciting prostitution?

SEX DISCRIMINATION

Sex - plus and Pregnancy

unpregnant persons

EQUAL PAY ACT

only applies to the sex protected class

equal pay for equal work

not comparable worth

AMERICANS WITH DISABILITIES ACT OF 1990

THOSE AFFECTED:

43 million

physical or mental disability
affecting a major life activity
not disabled if correctable condition

includes
AIDS
recovering drug (e.g., alcohol) addicts

AMERICANS WITH DISABILITIES ACT OF 1990

Does not cover every one in all contexts.

Scope of Commerce Clause.

Only covers some
jobs
buildings
transportation
telephones

AMERICANS WITH DISABILITIES ACT OF 1990

JOBS

employers 15+ employees
no discrimination against "qualified" applicants
alter workplace unless "undue hardship"

BUILDING ACCESS

restaurants, hotels, grocery, medical
alterations if "readily achievable"
new construction must conform

TRANSPORTATION

new buses, trains, subways must be accessible
special pickup if not usable
Amtrak: 1 car per train

AMERICANS WITH DISABILITIES ACT OF 1990

TELEPHONES

provided to hearing and speech impaired

ENFORCEMENT

EEOC in federal court
