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The Low-Wage Worker: Legal Rights--Legal Realities

Bryan M. Seiler

Laura J. Cooper

Catherine L. Fisk

Foreword

The Low-Wage Worker: Legal Rights—Legal Realities

Bryan M. Seiler,* Laura J. Cooper† & Catherine L. Fisk††

By any measure, work is an exceedingly important aspect of life. The conditions under which the vast majority of people work determine—so far as material conditions can—the wealth, health, and happiness of workers and their families. Work conditions powerfully influence the productivity of the economy, the profitability of firms, and the nature and distribution of wealth and well-being of people throughout the world. Given the social, economic, and political importance and complexity of the work relationship, it should come as no surprise that the law regulating work is complex, hotly contested, and constantly changing.

Despite the importance and universality of work and the complexity of American and other law regulating it, leading law reviews publish comparatively few articles on labor and em-

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* Symposium Articles Editor, Minnesota Law Review, Volume 92. I would like to thank my coauthors and advisors, Professors Laura J. Cooper and Catherine L. Fisk, for their critical role in shaping our symposium. I would also like to thank the board and staff of the *Minnesota Law Review*, particularly the Editor-in-Chief, Kevin O'Riordan, for their hard work and support on November 2, 2007 and their dedication to excellence in producing our published symposium issue. Finally, we owe a special debt of gratitude to the Labor Law Group, our cosponsor, for both their financial support and their wisdom and resources in the field of low-wage work.

† J. Stewart & Mario Thomas McClendon Professor in Law and Alternative Dispute Resolution, University of Minnesota Law School and a member of the Labor Law Group. She is grateful for the collaboration of Bryan Seiler, Catherine L. Fisk, the *Minnesota Law Review* board and staff and the symposium presenters in so successfully realizing the symposium's objectives.

†† Douglas Blount Maggs Professor of Law, Duke University Law School and a member of the Labor Law Group. She echoes the thanks already mentioned, and also thanks Michael M. Oswalt for his insight, research, and good cheer in the planning and execution of this symposium.

ployment law. The dearth of high-profile scholarship on the law of the workplace is a problem not only for scholars, but also for policymakers, lawyers, and judges. This symposium is an effort to give the subject the attention in an influential law review that we believe it is due. The symposium was cosponsored by the Labor Law Group, a not-for-profit organization of law professors and practicing lawyers from North America, Europe, Asia, and Israel dedicated to the creation of interdisciplinary and relevant scholarship and classroom teaching materials. The Labor Law Group was founded in 1953 by law professors and practicing lawyers to develop textbooks and other teaching materials to train law students in the law of the workplace.[1] Royalties from the sale of the books are held in trust to support research and the development of better materials for legal education in the law of the workplace.

The decision to focus the symposium on low-wage work in particular was animated by a sense that it is among the most important of work law topics, yet is clearly the most neglected (at least if neglect is measured by the number of articles in elite law reviews). The growing gap between rich and poor, the disappearance of the stable middle-class jobs that were the paradigmatic jobs serving as the foundation of much of labor and employment law, and the questions of whether, how, and why many low-wage jobs seem to fall through the net of federal, state, and local legal protections are among the most pressing of sociolegal issues in the United States today.

Our goal in organizing this symposium was to assemble empirical, practical, and interdisciplinary scholarship. The empirical focus was prompted by a sense that the gap between the law on the books and the law in action is especially large in the case of low-wage work. It also reflects the Labor Law Group's longstanding commitment to scholarship that provides students, the bench, and the bar with an accurate picture of working conditions and the operation of law. The subtitle "Legal Rights—Legal Realities" alludes to the core empirical focus of the symposium on the existence and nature of, and the reasons for, the lack of enforcement of legal rights in low-wage

1. Each of the following casebooks includes a Foreword describing the history of the Labor Law Group. JAMES ATELSON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY, at v–viii (2008); ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW, at v–viii (7th ed. 2004); LAURA J. COOPER ET AL., ADR IN THE WORKPLACE, at v–viii (2d ed. 2005); ROBERT J. RABIN ET AL., LABOR AND EMPLOYMENT LAW, at vii–x (3d ed. 2002).

workplaces. The practical focus was chosen to make this symposium of use not only to scholars, but also to lawyers, policymakers, activists, and judges. Finally, we aimed to include both economists and historians because, in our judgment, these two disciplines shed particularly bright light on the core normative disputes about the legal regulation of low-wage work.

Our first panel, *Minimum Wage Legislation: Questioning the Paradigm*, directly challenged two key assumptions underlying the Fair Labor Standards Act (FLSA)[2]: first, that minimum wage laws improve the economic circumstances of low-wage workers, and second, that the statute can effectively remedy violations. In *Minimum Wages and Low-Wage Workers: How Well Does Reality Match the Rhetoric?*, economists David Neumark and William Wascher compare the rhetorical justifications for minimum wage laws with the effects of those laws on low-wage workers. Their analysis begins with a survey of the history of rhetorical arguments supporting the FLSA and demonstrates how the articulation of the Act's goals has changed over time. The authors then evaluate how well the FLSA's minimum wage provisions have achieved the articulated aims. Finally, the authors speculate about why minimum wage laws remain so popular despite economic evidence of their ineffectiveness. The Article concludes by suggesting that programs such as the earned income tax credit and job training would be more successful than minimum wage laws in reducing poverty.

The second Article, written by Craig Becker and Paul Strauss, two practicing lawyers with substantial experience in the FLSA and other class action cases, addresses the question whether the collective action procedures authorized by the FLSA can effectively remedy FLSA violations. *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards* explores structural barriers to effective FLSA enforcement resulting from the Act's peculiar class representation requirements. The Article starts with a history of section 16(b) of the FLSA,[3] including the significance of the Supreme Court's decision in *Hoffman-La Roche, Inc. v. Sperling*.[4] The authors then describe the developing jurisprudence under section 16, with particular attention to how

2. 29 U.S.C. §§ 201–219 (2000).
3. *Id.* § 216(b).
4. 493 U.S. 165 (1989).

federal court interpretation has made successful actions increasingly rare. In the final section, the authors identify several negative consequences of the current FLSA enforcement regime including fewer plaintiffs, lower damage awards, fewer cases, greater burdens on plaintiffs, barriers to settlement, ethical dilemmas for plaintiffs' attorneys, and decreased overall enforcement of wage and hour laws.

Our second panel, *Organizing Strategies: Lessons from Recent Successes and Failures*, offered recent historical accounts of the effectiveness of organizing as a tool to protect the legal rights of low-wage workers. In *Counting What Matters: Privatization, People with Disabilities, and the Cost of Low-Wage Work*, Professor Ellen Dannin recounts the story of disabled workers in the Washington, D.C. mailroom of the Internal Revenue Service who were harmed by the agency's decision to contract out their work. After describing both the structural incentives for federal agencies to contract out their work and the harm that contracting out inflicts on workers, Professor Dannin argues that privatizing government jobs does not reduce labor costs for the government, but instead reduces wages and benefits for employees while delivering handsome profits for private contractors at taxpayer expense. Dannin offers specific evidence from the case of the IRS mailroom to demonstrate privatization's adverse effect on worker wages and benefits, as well as the ultimate failure of privatization successfully to deliver services or to do so at promised cost savings.

Peggie R. Smith's case study of home care workers shows how organizing can help low-wage workers, even in a decentralized labor market. Her Article, *The Publicization of Home-Based Care Work in State Labor Law*, explores recent innovations in several states to extend protective labor legislation to home care workers. These workers include those who provide in-home services for the elderly and disabled, as well as family child care. Professor Smith first identifies the shared characteristics of home-based care work and its labor market. She then reviews the many barriers to worker empowerment, including worker mobility and the challenge of identifying a common employer to permit collective bargaining. She next analyzes national and state campaigns to organize home care and family child care workers, noting their successes and failures. Professor Smith concludes by underscoring the rapid growth of home-based caregiving and the corollary need to empower and protect those workers.

The third symposium panel, *The Immigrant Worker in a Global Economy: A Special Case for Protection*, focused on the unique challenges faced by immigrant workers in seeking enforcement of their labor and employment rights. David Weissbrodt, in *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of* Hoffman Plastic Compounds, Inc. v. NLRB, contends that U.S. courts can and should use international law to narrow the Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. NLRB*.[5] In *Hoffman*, the Court held that illegally fired undocumented workers may not recover back pay under the National Labor Relations Act.[6] Professor Weissbrodt critiques the result and reasoning of *Hoffman* under several well-settled principles of international law. His Article identifies a variety of international law doctrines, including *jus cogens*, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, that immigrant workers might assert in U.S. courts.

Michael Wishnie, Yale clinical law professor and active participant in litigation and policymaking on the law affecting low-wage undocumented immigrant workers, offers an analysis of the likely future of the law of immigrant labor. In his Essay entitled *Labor Law After Legalization*, Professor Wishnie argues that the most important labor law reform in a generation will be an immigration reform law that, he predicts, will emerge from Congress within the next few years. After summarizing the principal features of any likely immigration reform law—including the terms on which existing immigrants will obtain legal status, terms of temporary worker programs, and the major debates over enforcement of prohibitions on employment of undocumented workers—Professor Wishnie explains the overwhelming importance of specific protections for the tens of millions of immigrant workers who are in the United States already and for the millions who are certain later to come.

Our final symposium panel, *Challenging Global Capital on Main Street: The Case of the Big-Box Store*, examined efforts by states and localities to address the employment rights of low-wage workers in the retail industry, directed at Wal-Mart and other "big box" stores. The two Articles, one by labor historian Nelson N. Lichtenstein and the other by Professor Catherine L. Fisk and Michael M. Oswalt, identify the labor practices that

5. 535 U.S. 137 (1998).

6. *Hoffman*, 535 U.S. at 151.

prompted regulation, the nature of the regulation, and the social and legal consequences of regulation, allowing for generalization from the experience of Wal-Mart to larger societal trends. As one Article argues, "[w]here Wal-Mart goes, debate over the labor practices of the world's largest retailer seems inevitably to follow."[7]

In *How Wal-Mart Fights Unions*, Dr. Nelson Lichtenstein recounts the antiunion activities of Wal-Mart and other "big-box" stores that motivated demands for regulation by states and municipalities. The Article offers a history of those anti-union activities, from the time of the passage of the Wagner Act in 1935 to Wal-Mart's growing role in fighting unions. Professor Lichtenstein specifically recounts Wal-Mart's battles with unionized drivers and distribution center employees in the 1970s and 1980s. Professor Lichtenstein views Wal-Mart's large size and success in defeating unionization as permitting it to play a national leadership role in encouraging other firms to engage in battle with what he terms "union America."[8]

In *Preemption and Civic Democracy in the Battle over Wal-Mart*, Catherine L. Fisk and Michael M. Oswalt offer a novel argument based on civic democratic theory against preemption of state and local regulation of big-box stores. After briefly canvassing the inadequacy of federal regulation of Wal-Mart, the Article examines two of the most significant state and local efforts to halt the growth of low-wage retail work: fair-share laws and land-use regulation, also known as "site fights." Fair-share laws require employers that do not provide health benefits to pay taxes to defray their fair share of employee health care costs. Site fights, in contrast, utilize land use regulation to protect local employers who do pay higher wages and benefits from low-wage competition. Fisk and Oswalt then describe the legal campaign of Wal-Mart and other low-wage retailers to invalidate these local laws by asserting that they are preempted by the federal Employee Retirement Income Security Act (ERISA). Moving beyond the usual technical arguments about the scope of ERISA preemption, the Article offers a normative argument based on the negative effects of preemption on civic democracy. The Article then draws on these consequences to craft a legal argument against preemption.

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7. Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1502 (2008).

8. *See* Nelson Lichtenstein, *How Wal-Mart Fights Unions*, 92 MINN. L. REV. 1462, 1479 (2008).

In sum, these papers address four of the most pressing and significant employment and labor policy issues of the decade: the effect and enforcement of basic legal protections in low-wage workplaces; the prospects of unions and other organizing efforts among the most difficult-to-organize low-wage workers; the difficulty of crafting meaningful legal rights for transnational workers in a globalized labor market; and the respective role that local and national law and activism will play in regulating the low-wage service sector and retail jobs that are increasingly dominated by enormous multinational companies like Wal-Mart. We hope that the diverse legal and social science perspectives reflected in the symposium articles highlight the empirical, theoretical, and practical barriers to enforcement of the legal rights of low-wage workers and offer creative strategies for overcoming those barriers.