### Law 283

# Spring 2010

### **Professor David Rosenfeld**

#### Class 1

Introduction: West Coast Hotels v. Parrish and Proposals for Federal Action: Introduction to the IWC Orders

We will use the first class to review the system of industrial wage orders and statutory regulation. The Instructor will do a presentation of some of the most interesting employment laws which affect low wage workers in this framework.

Please Read:

"Rebuilding a Good Jobs Economy: A Blue Print for Recovery and Reform," published by the National Employment Law Project available at <a href="http://www.nelp.org/page/-/Federal/NELP\_federal\_agenda.pdf?nocdn=1">http://www.nelp.org/page/-/Federal/NELP\_federal\_agenda.pdf?nocdn=1</a>

Please read West Coast Hotels v. Parrish, 300 U.S. 379 (1937)

You may read the summary from your Constitutional Law Book.

Please glance through IWC Order 4 which will be emailed to each student. You need only review this Wage Order to get an idea of the extent of regulation of wages and hours in California. Note Sections 3, 4, 8, 9, 11 and 12. Industrial Welfare Commission Order 4, 8 CCR § 11040. is also available at <a href="http://www.dir.ca.gov/IWC/IWCArticle4.pdf">http://www.dir.ca.gov/IWC/IWCArticle4.pdf</a> Please keep this IWO handy as we will be referring to it in various class sessions.

Additional suggested reading:

Lochner v. New York, 198 U.S. 45 (1905)

<u>Industrial Welfare Commission v. Superior Court of Kern County</u>, 27 Cal. 3d 690 (1980), cert. denied, 449 U.S. 1029 (1980)

Cynthia Estlund, "Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace." 12 Lewis & Clark L. Rev 671 (2008)

Bureau of Labor Statistics, "A Profile of the Working Poor, 2006" BLS Report 1006,

September 2008 available at <a href="http://www.bls.gov/cps/cpswp2006.pdf">http://www.bls.gov/cps/cpswp2006.pdf</a>

The Employment Situation, December 2009 from the BLS available at

http://stats.bls.gov/.relnewsease/pdf/empsit.pdf

Jennifer Gordon, "We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change," 30 Harv. C.R. – C.L. L. Rev. 407 (1995)

David A. Rosenfeld, "Using the California Labor Laws Offensively," (2009)(emailed to the students)

#### Class 2

## California Wage and Hour Laws

**Introduction:** We will review the enforcement of critical California laws affecting wages and wage payments. California law defines wages very broadly in Labor Code § 200 as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece rate, commission basis, or other method of calculation." California has established an administrative agency known as the Department of Labor Standards Enforcement to enforce the provisions of the Labor Code. The Labor Commissioner is the adjudicatory entity within the Department.

We will use the class to review how the Labor Code is enforced both through the Berman Hearing process (Labor code Section 98) and direct suits in court. Part of this class will be to understand the relationship between the statutory provisions of the Labor Code and the Industrial Welfare Commissioner Orders (Regulations). These processes are common to most states which have developed labor regulation. The class will then focus on the issues of Minimum Wage and Overtime requirements particularly in the piece rate environment.

We will also compare state law to the minimums provided for in the Fair Labor Standards Act. 29 U.S.C. § 201 et. seq.

We will get an insider's view of the operation of this agency from its *former* Chief Counsel, Miles Locker.

#### Please Read:

California Labor Code § 98, 98.1, 98.2, 98.3, 98.4, and 98.5 (Administrative Process)(please review these provisions, you are not expected to understand them in detail)

Industrial Welfare Commission Order 4, 8 CCR § 11040. Available at <a href="http://www.dir.ca.gov/IWC/IWCArticle4.html">http://www.dir.ca.gov/IWC/IWCArticle4.html</a> (Read §§3(A), (D) (F) (I) and 4) California Labor Code § 510 (overtime); § 514 (exemption for collective bargaining agreements); Labor Code §§ 1194, 1194.2, 1194.5, 1195.5, 1197 (state minimum wage enforcement); and 29 U.S.C. § 207(a) and (g) (overtime rules and applicability to piece rate); 29 U.S.C. § 206(a) (federal minimum wage) (you do not need to read exceptions (b) though (g))

Morillion v. Royal Packing Co., 22 Cal. 4th 575 (2000);

Armenta v. Osmose, 135 Cal. App 4<sup>th</sup> 314 (2005)

Please review the following Opinion Letter as it relates to the issues raised in Morillion: DLSE Opinion Letter 11/25/2008 at <a href="http://www.dir.ca.gov/dlse/opinions/2008-11-25.pdf">http://www.dir.ca.gov/dlse/opinions/2008-11-25.pdf</a> (TWIC Cards)

You may want also to Review:

DLSE Opinion Letter 2/21/2002 at http://www.dir.ca.gov/dlse/opinions/2002-02-21.pdf

DLSE Opinion Letter 1/29/2002 at <a href="http://www.dir.ca.gov/dlse/opinions/2002-01-29.pdf">http://www.dir.ca.gov/dlse/opinions/2002-01-29.pdf</a>

If you have a chance review Division of Labor Standards Enforcement Policies Interpretation Manual, Chapters 43 – 56 (Review for application to issues which arise under the statutes and regulations mentioned above). Available at: http://www.dir.ca.gov/dlse/Manual-Instructions.htm

#### A few issues to consider:

How does the California system of Berman Hearings work to discourage employer litigation of defenses?

How do the attorney fees and appeal procedures discourage appeals?

How formal are the procedures? Is there enough formality to assure complete and fair litigation and resolution by employees and employers?

Even though the minimum wage in California is \$8.00 effective January 1, 2008, how is computed? By each hour? Average for each day? Average for the week?

How is California law different from federal law on overtime and/or minimum wage? What deference do courts grant to the DLSE Opinions? See, <u>Morillion</u>.

Where is it likely that employers will make mistakes in paying minimum wage overtime?

How do minimum wages and overtime provisions apply where there is a collective bargaining agreement?

How would <u>Morillion</u> apply in a piece rate setting where employees were not paid by the hour but by a lawful piece rate?

Class 3

## Reducing the Workforce

We will use this class to explore how employers are reducing their workforces. These rules generally apply to all workers. We will explore these issues through a very accomplished management lawyer. Richard Hill from Littler. He will lead the discussion of how employers attempt to reduce their workforces while avoiding both legal problems and minimizing the impact on employees. This is often complicated from a personal and human resource perspective. It is also a challenge as there are various laws that regulate these issues.

We will compare the layoff procedures of a collective bargaining agreement governing janitors.

Come prepared to think about how you would effect a reduction of employees. And what can employees do to stop, reduce or delay them? We will talk a little about how employees can mitigate the effects of layoffs but we will devote a whole session to unemployment benefits later in the semester.

Please read:

"Reduction in Force Considerations" by Richard Hill

<u>Kruchowski v. Weyerhaeuser Company</u>, 423 F. 3d 1139 (10<sup>th</sup> Cir. 2005) (Weyerhaeuser I)

<u>Kruchowski v. Weyerhaeuser Company</u>, 446 F. 3d 1090 (10<sup>th</sup> Cir. 2006) (Weyerhaeuser II)

Layoff Language from SEIU Local 1877 Agreement.

Suggested Reading

Littler: "Reductions in Force: Issues, Strategies and the Process for the Downsizing Employer" Chapter 16 of the National Employer 2000-2010

Office of Personnel Management "Summary of Reduction in Force under OPM's Regulations." Available at <a href="http://www.opm.gov/rif/general/rifguide.asp">http://www.opm.gov/rif/general/rifguide.asp</a>

# **Class 4 Immigration Issues**

**Introduction:** Immigration issues often intersect with enforcement of employee rights for low wage workers. As a result of the Supreme Court's decision in <u>Hoffman Plastic Compounds</u> issues have been increasingly raised about enforcing employment laws on behalf of undocumented workers. We will explore <u>Hoffman Plastic</u> as it applies in the employment context both under the National Labor Relations Act and other employment laws. Discovery disputes are often the time when these issues are first raised. We will also explore the anti-discrimination provisions of the Immigration Reform and Control Act. We will review the I-9 form and reverification issues. We will review how arbitrators have considered these issues under collective bargaining agreements. We will note the current issue is the use by employer of E-Verify. We will review the various tactics which lawyers can use to protect workers from scrutiny over their immigration status.

## **Please Reading:**

New I-9 Form (glance over the form, we will discuss it in more detail)

Hoffman Plastic Compounds, Inc. v. NRLB, 535 U.S. 137 (2002)

Rivera v. NIBCO Inc., 364 F. 3d 1057 (9<sup>th</sup> Cir. 2004), cert. denied, 545 U.S. 905 (2005), on remand, 2006 WL 845925 (E. D. Ca. 2006)(Read 9<sup>th</sup> Circuit opinion)(read only Ninth Circuit decision)

California Labor Code §1171.5

Aramark Facility Services and Service Employees, Local 1877 (Arbitrator George Marshall)(2005) (Employer violated agreement when it discharged employees when they failed to correct discrepancies pursuant to SSA no-match letter). The decision was enforced by the Ninth Circuit after the District Court vacated the award. Aramark Facility Services v. Service Employees Intern. Union, Local 1877, 530 F.3d 817 (9<sup>TH</sup> Cir. 2008). (read the arbitrator's decision)

## **Suggested Reading:**

Incalza v. Fendi North America, Inc., 479 F.3d 1005 (9th Cir. 2007)

<u>AFL-CIO v. Chertoff</u>, 552 F. Supp. 2d. 999 (N.D. Cal. 2007)(now AFL-CIO v. Napolitano)(read to see issues raised in support of injunction).

Chamber of Commerce v. Janet Napolitano, 648 F. Supp. 2d 726(D. Md. 2009)

National Immigration Law Center, "Immigrant Workers' Rights Resources Manual: Legal Advocates," available at

http://www.nilc.org/immsemplymnt/IWR\_Material/Attorney/attorney\_index.htm

See also: "Foreign-Born Workers: Labor Force Characteristics in 2007," (Bureau of Labor Statistics) available at <a href="http://www.bls.gov/news.release/pdf/forbrn.pdf">http://www.bls.gov/news.release/pdf/forbrn.pdf</a>

"Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB," National Employment Law Project (2005) available at http://www.maldef.org/publications/pdf/Hoffman\_11403.pdf

### NLRB:

<u>Agri-Processors</u>, 347 NLRB 1200 (2006), <u>enforced</u>, 514 F. 3d 1 (D. C. Cir. 2008), <u>cert.</u> denied, 129 S. Ct 594 (2008).

Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy. G. C Memorandum 08-10 (2008) available <a href="http://www.nlrb.gov/shared\_files/GC%20Memo/2008/GC%2008-10%20Guideline%20Memorandum%20Concerning%20ULP%20Charges%20Involving%20Political%20Advocacy.pdf">http://www.nlrb.gov/shared\_files/GC%20Memo/2008/GC%2008-10%20Guideline%20Memorandum%20Concerning%20ULP%20Charges%20Involving%20Political%20Advocacy.pdf</a>

<u>Nortech Waste</u>, 336 NLRB 554 (2001) ( review of I-9's unlawful in response successful union organizing drive, unlawful to take people off the job without bargaining with union over decision and effects of immigration issue);

<u>Tuv Taam Corp.</u>, 340 NLRB 756 (2003)(no-match letter does not prove undocumented status so as to deny back pay)

<u>Double D Construction Group Inc.</u>, 339 NLRB 303 (2003) (cannot discredit a witness simply because he gave phony social security number to employer)

<u>Sara Lee d/b/a International Baking Co.</u>, 348 NLRB 1133 (2006)(employee did not discriminate when it terminated union activities where it had some information that her work authorization documents were incorrect)

North Hills Office Services, Inc., 346 NLRB 1099 (2006) (employer did not commit objectionable conduct when it distributed newsletter stating the union had told federal authorities that workers were undocumented)

<u>Case Farms Of North Carolina, Inc.</u>, 353 NLRB No. 26 (2008)(worker who admitted false social security number and false identity allowed to demonstrate entitlement to work as part of remedy provision, if authorized to work can receive backpay and reinstate).

Concrete Form Walls, Inc., 346 NLRB 831 (2006), enforced, 225 Fed.Appx. 837, (11th Cir. 2007) (Board reaffirms view that undocumented workers are employees within the meaning of the Act; Employer failed to prove that discharged employees were undocumented in order to meet its Wright Line burden)

In the following two cases ALJ's have found that Hoffman does not apply where the employer knowingly violated RICA in hiring undocumented workers:

Mezonos Maven Bakery, Inc. Case No 29-CA-25476, JD(NY)-48-06 available at <a href="http://www.nlrb.gov/shared\_files/ALJ%20Decisions/2006/JD-NY-48-06.pdf">http://www.nlrb.gov/shared\_files/ALJ%20Decisions/2006/JD-NY-48-06.pdf</a> (where employer hires employees knowing they are undocumented, conditional reinstatement remedy is appropriate notwithstanding <a href="https://example.com/Hoffman Plastic Compounds">Hoffman Plastic Compounds</a>) (Pending on Exceptions to the NLRB)

<u>Majestic Restaurant and Buffet</u>, Case No. 22-CA-27468 JD (NY)-31-09 available at <a href="http://www.nlrb.gov/shared\_files/ALJ%20Decisions/2009/JD-NY-31-09.pdf">http://www.nlrb.gov/shared\_files/ALJ%20Decisions/2009/JD-NY-31-09.pdf</a> (Pending on Exceptions to the NLRB)

#### Arbitration:

<u>Service Maintenance Corporation and Service Employees International Union, Local</u> 1877 (Arbitrator McKay)(employer may not refuse to let workers continue working with nothing more than no-match letter and employer may not consistent with collective bargaining agreement take further steps to inquire into status if employer has I-9)

<u>Patterson Frozen Foods and Teamsters Local 948</u> (Arbitrator Gerald Mckay)(Employer did not violate agreement when it discharged employees when they failed to correct discrepancies pursuant to SSA no-match letter)(and if you are interested read McKay's earlier decision in <u>Service Contracting mentioned below</u>)

### RICO:

RICO has become a new tool in the immigration debate. See, Williams v. Mohawk Industries, Inc., 465 F 3d 1277 (11<sup>th</sup> Cir 2006), cert denied, 2007 WL 560211 (2007), earlier case, 411 F.3d 1252 (11th Cir 2005). See also Trollinger v. Tyson Foods, Inc., 370 F.3d 602(6th Cir.2004); Mendoza v. Zirkle Fruit Co., 301 F. 3d 1163 (9<sup>th</sup> Cir. 2002); Baker v. IBP, Inc., 357 F. 3d 685 (7<sup>th</sup> Cir. 2004), cert. denied, 543 U.S. 956 (2004); and Commercial Cleaning Services, LLC v. Colin Service Systems, Inc., 271 F. 3d 374 (2<sup>nd</sup> Cir. 2002).

Additional Cases Allowing Back Pay, Resolving Discovery Disputes or Permitting Other Remedies for Undocumented Workers:

Zamora v. Elite Logistics, Inc., 449 F.3d 1106 (10th Cir. 2006)

Zavala v. Wal-Mart Stores, Inc., 393 F.Supp.2d 295, (D.N.J. 2005)

E.E.O.C. v. Bice of Chicago, 229 F.R.D. 581, 583 (N.D.III. 2005)

<u>E.E.O.C. v. First Wireless Group, Inc.</u>, 225 F.R.D. 404, 405+ (E.D.N.Y. 2004)

Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 502 (W.D.Mich. 2005)

<u>Balbuena v. IDR Realty LLC</u>, <u>6 N.Y.3d 338</u>, <u>845 N.E.2d 1246</u>, (N.Y. 2006.) (undocumented worker could recover lost wages in tort action)

Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219 (2nd Cir. 2006)

Design Kitchen and Baths v. Lagos, 882 A.2d 817, 388 Md. 718 (Md. 2005)

Rosa v. Partners in Progress, Inc., 868 A.2d 994, 152 N.H. (N.H. 2005)

<u>Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.,</u> 133 Cal.App.4th 533 (2005)(immigration status irrelevant for Workers Compensation benefits)

Pineda v. Kel-Tech Const., Inc., 15 Misc.3d 176, 832 N.Y.S.2d 386 (N.Y.Supp., 2007)

<u>Coma Corp. v. Kansas Dept. of Labor</u>, 283 Kan. 625 (2007) (Kansas Supreme Court holds that undocumented worker can enforce claims under state law for earned but unpaid wages)

Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604 (2007), cert denied, 128 S. Ct. 1222 (2008)

Other Sources:

Law Review Articles:

"Developments in the Law-Jobs and Borders: Legal Protections for Illegal Workers," 118 Harv. L. Rev. 2224 (2005)

Chris Ho and Jennifer Chang, "Drawing the Line After Hoffman Plastic Compounds Inc v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond," 22 Hofstra Lab. & Emp. L. J. 473 (2005)

"Model Enforcement Of Wage And Hour Laws For Undocumented Workers: One Step Closer To Equal Protection Under The Law," 37 Colum. Hum. Rts. L. Rev. 755 (2006)

Brooke Sikora Purcell, "Undocumented and Working: Reconciling the Disconnect Between U.S. Immigration Policy and Employment Benefits Available to Undocumented Workers," 43 U.S.F. L. Rev. 197 (2008)

Christina M. Rodriquez, "The Significance of Local Immigration Regulation," 106 Mich. L. Rev. 567 (2009)

Nhan T. Vu and Jeff Schwartz, "Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny," 29 Berkeley J. Emp. & Lab. L. 1 (2008)

#### Class 5

## **Immigration and Section 7 Rights**

We will finish our discussion of immigration issues by discussing <u>Rivera v. NIBCO</u>. We will look also at Labor Code §1171.5 and its application in <u>Reyes v. Van Elk</u>.

We are lucky that the Tenth Circuit just decided an important preemption case involving immigration issues in <u>Chamber of Commerce v. Edmondson</u>, 2010 U.S. App LEXIS 2248 (10<sup>th</sup> Cir. 2010). The Instructor will review the jurisdictional issues. Students are asked to read only Part V of the Majority Opinion which discusses whether Sections 7(C) and 7(B) of the Oklahoma statute are preempted. You need not read Parts I-IV. The Dissent focuses on jurisdictional issues except Part III which you should read (one paragraph).

<u>Incalza v, Fendi North America, Inc.</u>, is an interesting twist on these problems and the Instructor will review that case. In essence it involved an employee who admittedly could not work because he lack the appropriate visa yet a jury found that the employer unlawfully terminated him and he was awarded back pay. We will talk about how the Court got around Hoffman Plastic Compounds.

We will explore the class how Section 7 of the National Labor Relations Act can be used to protect the activities of immigrant workers who seek to improve or protest their status.

Low wage workers are usually employed in an "at will" employment environment with no protection from discharge. Even though there may be no "union" activity, the National Labor Relations Act does offer some protection to them. We will consider "protected concerted activity" under the National Labor Relations Act. Section 7 of the NLRA protects the right of employees to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." This protection extends beyond the right of employees to form unions and extends to much of what workers do in support of themselves and low wage worker issues without the involvement of unions. We shall explore the concept and how section 7 can be used to protect workers who attempt to remedy or complain about workplace issues outside the context of a union particularly in the political advocacy context of immigrant rights.

Washington Aluminum is the lead case on this and illustrates an important principle. We will note how the NLRB has narrowed section 7 rights dealing with the immigration rallies of several years ago.

Please read:

Rivera v. NIBCO Inc., 364 F. 3d 1057 (9<sup>th</sup> Cir. 2004), cert. denied, 545 U.S. 905 (2005), on remand, 2006 WL 845925 (E. D. Ca. 2006)(Read 9<sup>th</sup> Circuit opinion)(read only Ninth Circuit decision)

Reyes v. Van Elk, Ltd., 148 Cal.App.4th 604 (2007), cert denied, 128 S. Ct. 1222 (2008) California Labor Code §1171.5

<u>Chamber of Commerce v. Edmondson</u>, 2010 U.S. App LEXIS 2248 (10<sup>th</sup> Cir 2010)(Part V of Majority, Part II of dissent)

NLRB v. Washington Aluminum, 370 U.S. 9 (1962)

NLRB Advice Memorandum in <u>Calmex, Inc. d/b/a Chevy's</u>, Case 32-CA-22651 available at <a href="http://www.nlrb.gov/shared\_files/Advice%20Memos/2006/32-CA-22651.pdf">http://www.nlrb.gov/shared\_files/Advice%20Memos/2006/32-CA-22651.pdf</a>

## **Suggested Reading:**

Incalza v. Fendi North America, Inc., 479 F.3d 1005 (9th Cir. 2007)

Eastex, Inc. v. NLRB, 437 U.S. 556, (1978)

<u>Jolliff v. NLRB</u>, 513 F. 3d 600 (6<sup>th</sup> Cir. 2008), granting review of <u>TNT Logistics</u>, 347 NLRB 568 (2006).

Holling Press, 343 NLRB 301 (2004)(narrowing of concerted activity)

"Guidance Memorandum Concerning Unfair Labor Charges Involving Political Advocacy", GC Memorandum 08-10 (2008)(General Counsel of NLRB)

Nhan T. Vu & Jeff Schwartz, "Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, its Predecessors and its Progeny," 29 Berkeley J. Emp. & Lab. L. 1 (2008)

Rod Tanner "Application of National Labor Relations Act to Non-Union Workplaces"

William R. Corbett, "Waiting for the Labor Law of the Twenty-First Century Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again," 23 Berkeley J. Emp. & Labor L. 259 (2002) and William R. Corbett, "The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability," 27 Berkeley J. Emp. & Labor L. 23 (2006)

California Labor Code § 923 and §§ 1101-1106.

Gay Law Students Ass'n v Pacific Tel & Tel, 24 Cal 3d 458(1979) (Read part 3, at pp.486-489, regarding Labor Code §§ 1101 and 1102)

# Class 6 Living Wage Strategies

#### **Introduction:**

As the federal government has failed to effectively deal with the problems of low wage workers, advocates have increasingly turned to local and state legislation. This strategy has paid off in many local living wage ordinances which are variations of federal and state minimum wage laws. These laws often have "add-ons" which provide additional job protections as well as more effective enforcement mechanisms. In some cases there are provisions which help union organizing. The enactment of the San Francisco Health Care Ordinance is an important victory in use of this tactic. Like most of these efforts they are challenged at virtually every turn and the challenge to this effort is pending an a Petition for Writ of Certiorari by the Supreme Court after the Ninth Circuit upheld it against an ERISA attack.

### We will review:

- 1) Background on living wage strategies and policies.
- 2) The impact of Living Wage ordinances.
- 3) Legal framework and issues including preemption problems.
- 4) Additional provisions beyond minimum wage.
- 5) Enforcement issues.

We will review the Los Angeles Grocery Worker Retention Ordinance as an example.

We will have as our guest Ken Jacobs who is currently Chair of the UC Labor Center and is a recognized national expert on living wage and other local strategies. He is one of the principal architects of the San Francisco Health Care Ordinance known as "Healthy San Francisco."

We will have as our guest Margot Feinberg who is one of the leading experts on the drafting and enforcement of these ordinances. She and her firm are currently defending the Los Angeles Grocery Workers Retention Ordinance in the California Supreme Court.

## **Required Reading:**

Please read the ordinances and materials on living wages. The cases are important for the legal issues such as preemption which always affect the drafting of these ordinances.

Basic issues for Living Wages Strategies.

Los Angeles Grocery Worker Retention Ordinance

<u>California Grocers Association v City of Los Angeles</u>, 176 Cal App 4<sup>th</sup> 51 (2009), review granted, No S176099.

Please read this case challenging an ordinance in Berkeley. Part I A through D, and Parts II and III. <u>RUI ONE Corp v City of Berkeley</u>, 371 F.3d. 1137 (9<sup>th</sup> Cir. 2004), <u>cert. denied</u>, 543 U.S. 1081 (2005) (upholding application of Berkeley Living Wage Ordinance to employers in the Berkeley Marina.)

## Suggested Reading:

Michael Reich, "Living Wage Ordinances in California," State of California Labor 2003, Institute of Labor and Employment, Ruth Milkman ed. Available at <a href="http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1034&context=ile">http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1034&context=ile</a>

Golden Gate Restaurant Association v. City and County of San Francisco, 546 F. 3d 639 (9<sup>th</sup> Cir 2008) rehearing and hearing en banc denied 558 F. 3d 1000 (2009), petition for writ of certiorari pending, No. 08-1515.

# Cintas and Hayward:

Hayward ordinance available at <a href="http://www.hayward-ca.gov/municipal/HMCWEB/LivingWageOrdinance.pdf">http://www.hayward-ca.gov/municipal/HMCWEB/LivingWageOrdinance.pdf</a>

Amaral v. Cintas Corporation No 2, 163 Cal. App. 4th 1157 (2008)

<u>Aguiar v. Cintas Corporation No. 2</u>, 144 Cal. App. 4<sup>th</sup> 121 (2006)(upholding class action for two class in enforcement action over Los Angeles LWO)

<u>Aguiar v. Cintas Corporation No. 2</u>, 170 Cal. App. 4<sup>th</sup> 313 (2009)(upholding declaratory relief as to Los Angeles LWO).

Selected Ordinances which show a mix of provisions.

Los Angeles: <a href="http://bca.lacity.org/index.cfm?nxt=ee&nxt\_body=div\_occ\_labor.cfm">http://bca.lacity.org/index.cfm?nxt=ee&nxt\_body=div\_occ\_labor.cfm</a>

#### Berkelev:

http://www.ci.berkeley.ca.us/bmc/Berkeley Municipal Code/Title 13/27/index.html

SF Minimum Wage: http://www.municode.com/content/4201/14131/HTML/ch012r.html

<u>Washington Service Contractors Assn v District of Columbia</u>, 54 F.3d 811 (D.C. Cir 1995) (Upholding worker retention ordinance against an NLRA preemption challenge)

Michael Reich, Peter Hall and Ken Jacobs, "Living Wage Policies at San Francisco Airport: Impacts on Workers and Businesses," Industrial Relations, January 2005. Available at

http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1096&context=iir

Carol Zabin and Isaac Martin, "Living Wage Campaigns in the Economic Policy Arena: Four Case Studies from California," June 1999 available at <a href="http://www.iir.berkeley.edu/livingwage/pdf/livwage.pdf">http://www.iir.berkeley.edu/livingwage/pdf/livwage.pdf</a>

Stephanie Luce, "Fighting for a Living Wage," Cornell University Press, 2004.

Robert Pollin and Stephanie Luce, "The Living Wage: Building a Fair Economy," The New Press (1998).

#### Other resources:

UC Labor Center:

http://laborcenter.berkeley.edu/livingwage/resources.shtml

Brennan Center:

http://www.brennancenter.org/content/resources/all/category/labor\_standards/

Mode Living Wage available at

http://brennan.3cdn.net/e61c68429d7bba9c29\_vkm6bnhwj.pdf

Los Angeles Alliance for the New Economy (LAANE):

http://www.laane.org/

Santa Fe Living Wage Network:

<u>http://www.santafelivingwage.org/lawsuit.html</u> (lawsuits, briefs and decisions challenging this ordinance)

SPIN Project: <a href="http://www.spinproject.org/article.php?id=95">http://www.spinproject.org/article.php?id=95</a> (media material on living wage campaigns)

"The New San Francisco Living Wage Ordinance" (a management law firms view) <a href="http://www.nixonpeabody.com/linked\_media/publications/ELA\_02202004.pdf">http://www.nixonpeabody.com/linked\_media/publications/ELA\_02202004.pdf</a>

"The Economics of City-Wide Minimum Wages; The San Francisco Model," Michael Reich, Arindrajit Dube and Gina Vickery (UC Berkeley Institute of Industrial Relations) (2006) available at <a href="http://iir.berkeley.edu/research/sfminimumwage.pdf">http://iir.berkeley.edu/research/sfminimumwage.pdf</a>

Economic Policy Institute Issue Guide Living Wage available at <a href="http://www.epinet.org/issueguides/livingwage/LivingWage\_IssueGuide.pdf">http://www.epinet.org/issueguides/livingwage/LivingWage\_IssueGuide.pdf</a>

EBASE (East Bay Alliance for a Sustainable Economy) at http://www.workingeastbay.org/article.php?list=type&type=15

For a contrary view see Economic Policies Institute at <a href="http://www.epionline.org/index\_lw.cfm">http://www.epionline.org/index\_lw.cfm</a>

#### Class 7

## **Unemployment and other Wage Replacement Laws**

**Introduction:** Prior to the depression there was little social welfare which provided wage supports or wage replacement for workers who couldn't work. Although Europe had developed state mandated social security systems in the 19<sup>th</sup> century, this country had no such system. Britain enacted the first comprehensive system of unemployment insurance in 1911. This country did not follow until after the depression created massive joblessness. A few states in the early 1930's enacted very limited unemployment programs. Even though as much as 25% of the workforce was unemployed, the federal government took no action until 1935. As part of the Social Security Act, the federal government adopted a system of encouraging the states to set up and administer unemployment insurance. The law imposes a federal unemployment tax (FUTA) which is rebated to those states which enact a state unemployment program. As a result almost all of the states enacted unemployment laws. In order to receive the rebate from FUTA state laws must meet federal standards.

We will use this class to examine how the California system works. The California Unemployment Insurance Code provides for both unemployment and disability insurance. We will examine such issues as: (1) funding, (2) amount of benefits, (3) benefit computation, (4) disqualification from benefits, (5) repayment of benefits received and (6) the administrative process including the appeal process for claimants, employers and the Employment Development Department which administers the program. We will see that there is a well-defined administrative procedure which provides benefits for workers who are laid off, terminated and otherwise unemployed. We will look briefly at the constitutional issues in denying benefits.

There are many fascinating questions. For example, under Unemployment Insurance Code § 1256 an employee is disqualified from benefits if she/he left his or her most recent work "voluntarily without good cause." Is it good cause to leave a job: (1) Where an employee leaves because of mandatory retirement provision (which may be unlawful); (2) Where an employee does not have a job to return to after taking a leave of absence for a period of time; (3) Where an employee resigns, the resignation is accepted and then the employee attempts to return to work; (4) Where an employee is laid off due to a seniority provision of collective bargaining contract; (5) Where a collective bargaining agreement

allows senior employee to accept layoff in place of junior employee; (6) Where an employee quits because of slight or large reduction in pay; (7) Where an employee is terminated for refusal to pay union dues; (8) Where an employee is terminated for wearing a beard based on religious reason; (9) Where an employee is terminated for refusal to work on Saturday due to religious beliefs; (10) Where an employee leaves job in anticipation of discharge where employee has been subject to a continuing course of discrimination; (11) Where an employee is denied return to work from pregnancy leave; (12) Where an employees voluntarily leaves work to accompany spouse or domestic partner to a remote location where employee can no longer commute to work; (13) Where an employee leaves work to attend school; (14) Where an employee quits a job because of long commute; (15) Where an employee leaves work because he/she is in jail and (16) Where employees leave job because of joining a strike, respecting a picket line or a lockout?

We will also look at the grounds for disqualifying a claimant because of "misconduct connected with his or her most recent work." Unemployment Code § 1256. What reasons come to mind as sufficient "misconduct to warrant denial of employment insurance?

We will briefly mention Family Temporary Disability Insurance (Paid Family Leave). Unemployment Insurance Code §§ 3300 et. seq. We will also mention State Disability Insurance. Unemployment Insurance Code §§ 2601 et. seq. These are forms of wage replacement important to low wage workers

The exciting part of this class will be that we can discuss the modernization reforms which Congress enacted as part of the American Recovery and Reinvestment Act on 2009 (ARRA). This part of the ARRA is called the Unemployment Insurance Modernization Act. By providing \$7 billion of funding the federal government was able to offer incentives to states to modernize their programs. Not all states have done the modernization required. These reforms have been advocated for a number of years and only because of the financial crisis were these reforms achieved. It is important as part of our understanding of Unemployment Insurance to understand the relationship between the federal government and the states which actually administer the unemployment provisions.

We are incredibly fortunate to have Matt Goldberg as our guest. He worked at the Employment Law Center developing their unemployment claims handling procedures. He is now with the Department of Labor as a Policy Specialist and is in a unique position to talk about both the processing of UI claims and well as the modernization efforts.

## **Required Reading:**

"Do It-Yourself Guide to Unemployment Insurance Benefits," published by the Unemployment and Wage Claims Project of the Legal Aid Society-Employment Law Center (San Francisco, 2006)

<u>Gilles v. Department of Human Resources Development</u>, 11 Cal.3d 313 (1974) (problem of overpayments, case contains good description of system)

Goldberg v. Kelly, 397 U.S. 254 (1970) (unemployment insurance benefits are a property interest protected by Due Process Clause)

Read one of the following which describe the changes in the law:

Employment And Training Administration, Advisory System "Program Letter No 14-09 and Attachments I through III (Describes requirements of modernization imposed on states).

OR

NELP: "Implementing the Unemployment Insurance Modernization Provisions" (2010) available at http://www.nelp.org/page/-/UI/uimastatelegislation.pdf?nocdn=1

## **Suggested Reading:**

<u>California Department of Human Resources v. Java</u>, 402 U.S. 121 (1971) (withholding benefits after an employer appealed from initial determination in favor of claimant improper)

"Unemployment Insurance: Low-Wage and Part-Time Workers Continue to Experience Low Rates of Receipt,' GAO Report 07-117, Government Accounting Office (2007) available at http://www.gao.gov/new.items/d071147.pdf

"Changing Workforce, Changing Economy: State Unemployment Insurance Reforms for the 21<sup>st</sup> Century," National Employment Law Project (2004) available at <a href="http://nelp.3cdn.net/31c9039786a84cdc52">http://nelp.3cdn.net/31c9039786a84cdc52</a> <a href="http://nelp.acdn.net/31c9039786a84cdc52">http://nelp.acdn.net/31c9039786a84cdc52</a> <a href="http

Department of Labor website: http://www.workforcesecurity.doleta.gov/unemploy/

California Employment Development Department website for unemployment insurance: <a href="http://www.edd.ca.gov/Unemployment/">http://www.edd.ca.gov/Unemployment/</a>

NELP "Federal Stimulus Finding Produces Unprecedented Wave of State Unemployment Insurance Reforms 920090 available at <a href="http://www.nelp.org/page/-/UI/UIMARoundup1209.pdf?nocdn=1">http://www.nelp.org/page/-/UI/UIMARoundup1209.pdf?nocdn=1</a>

California Employment Development Department website for disability insurance: http://www.edd.ca.gov/Disability/Disability Insurance.htm

California Employment Development Department website for FTDI (PFL): <a href="http://www.edd.ca.gov/Disability/Paid\_Family\_Leave.htm">http://www.edd.ca.gov/Disability/Paid\_Family\_Leave.htm</a>

### Class 8

# Enforcing Workers' Rights Abroad; The Anti-Sweatshop Movement

**Introduction** Various organizations have attempted to improve working conditions in other countries by using leverage against American companies or foreign companies doing business in this country. . Sometimes referred to as the anti-sweatshop movement, various techniques are used. These tools raise unique legal issues

We will explore how this movement uses tactics to improve and effect such working conditions. In doing so legal issues such as secondary boycott, defamation, freedom of association and preemption arise. We will explore those issues and look at some antisweatshop ordinances which have been adopted. We will look at Labor Codes of Conduct. We will look at one campaign involving Russell Athletic in Honduras to explore these issues.

We will have as our guest Ben Hensler who is Deputy Director and General Counsel of the Workers Rights Consortium one of the leading groups pursuing these issues. He is extremely skilled, articulate and experienced in these campaigns and has just participated in a campaign involving Russell Athletic which we will use as a basis for discussion.

The legal issues which arise such as preemption, defamation, compliance with international labor standards, and secondary boycott will be discussed. Additionally does pressure from this country on foreign suppliers interfere with the freedom of association of workers employer by these companies? These issues will be discussed by the Instructor and Mr. Hensler. You are encouraged to read some of the material below which discuss these issues.

You are asked to read the material concerning the Russell Athletic campaign. Citations to some of the important cases and materials on the legal issues are part of the suggested reading. You are also asked to review the San Francisco Sweatfree Contracting Ordinance as a basis of discussion of such legislation.

## **Required Reading:**

Collegiate Licensing Corporation, Special Agreement Regarding Labor Codes of Conduct (Jan. 2003), <a href="http://licensing.wisc.edu/CLC\_UW\_Code">http://licensing.wisc.edu/CLC\_UW\_Code</a> of Conduct.pdf.

Worker Rights Consortium, Jerzees de Honduras (Russell Corporation) Findings and Recommendations (Nov. 7, 2008),

http://www.workersrights.org/freports/Jerzees%20de%20Honduras%2011-07-08.pdf.

Memorandum of Agreement Between the Worker Rights Consortium and Fruit of the Loom/Russell Athletic (Nov. 14, 2009), http://www.workersrights.org/linkeddocs/WRC-FOTL11-14-09.pdf.

Worker Rights Consortium Progress Report re Implementation of Russell Athletic/Fruit of the Loom Remediation Agreements for Operations in Honduras (February 17, 2010) <a href="http://www.workersrights.org/linkeddocs/WRC%20Progress%20Report%20re%20Russell%20Athletic%202%2017%2010.pdf">http://www.workersrights.org/linkeddocs/WRC%20Progress%20Report%20re%20Russell%20Athletic%202%2017%2010.pdf</a>

San Francisco Sweatfree Contracting Ordinance. Chapter 12U available at <a href="http://www.sweatfree.org/policies/SFordinance\_Nov\_2008.doc">http://www.sweatfree.org/policies/SFordinance\_Nov\_2008.doc</a>

Please check out the website for the Workers Rights Consortium of which Mr. Hensler is Deputy Director and General Counsel at <a href="http://www.workersrights.org/">http://www.workersrights.org/</a>

## **Suggested Reading:**

Kasky v. Nike, Inc., 27 Cal. 4<sup>th</sup> 939 (Cal. 2002), cert dismissed, 539 U.S. 654, 654 (2003)

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

Mayor of New York v. Council of New York, 789 N.Y. S. 2d (Sup. Ct 2004) (New York law preempted by state law)

Russell Manufacturing, 82 N.L.R.B. 1081, 108511-1089 (1949)

<u>International Longshoremen's Ass'n v. Allied International, Inc.</u>, 456 U.S. 212 (1982) (political boycotts prohibited by NLRA)

Designated Suppliers Program issued by Workers Rights Consortium available at <a href="http://www.workersrights.org/dsp/Designated%20Suppliers%20Program%20-%20Revised.pdf">http://www.workersrights.org/dsp/Designated%20Suppliers%20Program%20-%20Revised.pdf</a>

OECD "Codes of Corporate Conduct: Expanded Review of their Contents, (2001) available at <a href="http://www.oecd.org/dataoecd/57/24/1922656.pdf">http://www.oecd.org/dataoecd/57/24/1922656.pdf</a>
International Labour Organization (ILO): Corporate Codes of Conduct" available at <a href="http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/main.htm">http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/main.htm</a>

Rhys Jenkins, "Globalization, Corporate Social Responsibility and Poverty," (2005) available at

http://earthmind.net/fdi/misc/ia-globalisation-csr-poverty.pdf

Compa, L., & Hinchliffe-Darricarrère, T. "Enforcing International Labor Rights Through Corporate Codes of Conduct" (1995). Columbia Journal of Transnational Law, 33, 663-689 available at

## http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1178&context=articles

Jill Esbenshade, "Economic And Social Security And Substandard Working Conditions: Monitoring Sweatshops: Workers, Consumers, and the Global Apparel Industry" (Temple University Press 2004)

Adrian Barnes, Note: "Do They Have to Buy From Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws," 107 Colum. L. Rev. 426(2007)

Mark Barenberg, "FLA Comments on Proposed Designated Supplier Program – Freedom of Association Issues," available at <a href="http://www.flawatch.org/memobarenberg.pdf">http://www.flawatch.org/memobarenberg.pdf</a>

Scott L. Cummings, "Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement," 30 Berkeley J. Emp. & Lab. L. 1 (2009)(discussion of domestic campaign)

Sweatfree Toolkit published By Global Exchange available at <a href="http://www.globalexchange.org/campaigns/sweatshops/sweatfreetoolkitcomplete.pdf">http://www.globalexchange.org/campaigns/sweatshops/sweatfreetoolkitcomplete.pdf</a>

Fair Labor Association at <a href="http://www.fairlabor.org/">http://www.fairlabor.org/</a>

There are a number of organizations involved in related activities. See links at <a href="http://www.workersrights.org/links.asp">http://www.workersrights.org/links.asp</a>

Steven Greenhouse,

"Labor Fight Ends in Win for Students," New York Times (Nov. 17, 2009), <a href="http://www.nytimes.com/2009/11/18/business/18labor.html?\_r=2&adxnnl=1&ref=business&adxnnlx=1267298083-n0CfrWW3pTFgffh20DUpbQ">http://www.nytimes.com/2009/11/18/business/18labor.html?\_r=2&adxnnl=1&ref=business&adxnnlx=1267298083-n0CfrWW3pTFgffh20DUpbQ</a>

#### Class 9

### **Workers' Compensation**

Introduction: This class will explore workers' compensation. Virtually all low wage workers are entitled to workers' compensation for "injury or disease arising out of the employment..." Labor Code § 3208. The administrative process to make claims is available to low wage workers and their advocates. We will use this session to explore the administrative process set up to adjudicate claims. We will review the basic benefits available to low wage workers and the basic process to obtain benefits. We will mention how the reforms have adversely affected workers over the last 5 years. Steve Siemers, a former workers compensation judge, applicant attorney and administrator of the most successful ADR program in the state will be talking about these issues.

Low-wage workers face particular problems in pursuing workers' compensation claims. Juliann Sum who is with the Labor Occupational Health Program at U.C. Berkley will do

a presentation entitled: "Problems faced by Low Wage Workers with Job Injuries." This is particularly timely because of the impact of many of the "reforms" imposed on the workers compensation system by recent legislation. Ms. Sum has been one of the leaders in developing strategies to assist workers and organizations in representing workers in obtaining workers compensation benefits. She is the project director for the "Guide for Injured Workers" described below.

We intend to show that advocates can assist low wage workers to have access to these benefits to which many all of them are entitled. Note that a recent California appellate decision has held that immigration status is irrelevant to entitlement to workers' compensation benefits. Will the same rule apply to third party tort claims arising out of the same accident or injury?

### **Required Reading:**

Please review the Workers' Compensation Materials which is being sent to each student. There is a summary of workers compensation laws which should be reviewed this just to see how the laws have changed through "reform." The flow chart illustrates how claims are processed. The selections from "Workers Compensation in California" should be read to learn about he basic benefits and issues. Items 4 through 8 are forms. Item 9 is about the Uninsured Employers Fund which low wage workers will encounter. Item 10 is an example of an award. You need only review these items.

Juliann Sum, "Problems Faced by Low-Wage Workers with Job Injuries" and "Problems and Applicable Laws" sent to each student.

## **Suggested Reading and Sources:**

The best source for workers and advocates is "Workers' Compensation in California, A Guidebook for Injured Workers," 3d edition published by the Labor Occupational Health Program, Center for Occupational and Environmental Health, School of Public Health, UC Berkeley available at <a href="http://www.lohp.org/graphics/pdf/WC06-07">http://www.lohp.org/graphics/pdf/WC06-07</a> engfullguide.pdf

<u>City of Moorpark v. Superior Court</u>, 18 Cal. 4<sup>th</sup> 1143 (1998)(discussing exclusivity of 132a remedy)

<u>Shoemaker v Myers</u>, 52 Cal. 3d 1 (1990) (exclusivity principle and "compensation bargain)

<u>Crown Appliance v. WCAB</u>, 115 Cal App 4<sup>th</sup> 620 (2004) (application of Labor Code § 132a)

Please look at the forms and information provided by the Division of Workers' Compensation to assist workers' in filing their own 132a claims available at <a href="http://www.dir.ca.gov/dwc/iwguides/IWGuide07.pdf">http://www.dir.ca.gov/dwc/iwguides/IWGuide07.pdf</a> See pages 24-27 of the handout.

<u>Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.,</u> 133 Cal.App.4th 533 (2005)(immigration status irrelevant for Workers' Compensation benefits)

S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal. 3d 341 (1989)(Applies control test to determine employee status for purposes of workers' compensation coverage)(important case for low wage worker issues with respect to independent contractor status)

<u>Hinojosa v. WCAB</u>, 8 Cal 3d 150 (1972) (going and coming rule applied to farm worker)

The Division of Workers' Compensation has published a series of fact sheets and workers guides for workers who want to process their own workers' compensation claims. Available at <a href="http://www.dir.ca.gov/dwc/iwguides.html">http://www.dir.ca.gov/dwc/iwguides.html</a>

The website of the Labor Occupational Safety and Health Program at UCLA (UCLA-LOSH) contains further references at <a href="http://www.losh.ucla.edu/">http://www.losh.ucla.edu/</a>

Additional links may be found at <a href="http://www.lohp.org/Projects/Workers\_compensation/workers\_compensation.html">http://www.lohp.org/Projects/Workers\_compensation.html</a>

"A Study of the Effects of Legislative Reforms and California Workers' Compensation Insurance Rates," Department of Industrial Relations (2006) available at <a href="http://www.dir.ca.gov/dwc/Study\_legislativeReformsCaWCInsuranceRates/Study\_legislativeReformsCaWCInsuranceRates/Study\_legislativeReformsCaWCInsuranceRates.html">http://www.dir.ca.gov/dwc/Study\_legislativeReformsCaWCInsuranceRates/Study\_legislativeReformsCaWCInsuranceRates.html</a> (The Executive Summary is worth reading available at

 $\frac{http://www.dir.ca.gov/dwc/Study\_legislativeReformsCaWCInsuranceRates/DWCExecSu\_mmary.pdf})$ 

An excellent source of information on OHSA issues is found at WORKSAFE! <a href="http://www.worksafe.org/">http://www.worksafe.org/</a>

See also Voters Injured at Work available at <a href="http://www.viaw.org/">http://www.viaw.org/</a>

And California Applicants' Attorneys Association available at <a href="http://caaa.org/cs/">http://caaa.org/cs/</a>

## Class 10

## Wage and Hour Enforcement: The Meal Period and Rest Break Battle

The wage and hour laws found in the Labor Code are enforced through the adjudicatory mechanism of the Labor Commissioner who is designated to hear and decide such disputes arising under the Labor Code. The Department of Labor Standards Enforcement enforces the Labor Code through its legal department which has sometimes vigorously enforced the law on behalf of workers. The independent Industrial Welfare Commission issues "Orders" which are regulations. The courts also enforce the statutes. All of this

creates some interesting conflicts. It becomes even more interesting when a very contentious issue develops and politics surface. It becomes more contentious as changes in administration at the state level occur.

We have talked a little about this in an earlier class. We will use this session to examine how these conflicts are playing out with respect to meal period and rest break issues.

In 2000 new provisions of the Labor Code and Industrial Welfare Commission Orders became effective requiring or allowing workers to take meal periods and rest breaks and adding an element of compensation to those employees who are not provided their rest breaks and meal periods. Thereafter a fight developed between workers and their advocates primarily lawyers, and employers and their lawyers over many legal issues involved in the meal and rest period statutes and regulations. This battle has moved from the courts, to the efforts by DLSE to engage in rule making, to the announcement of a precedential decision, to the legislature, to the DLSE in its enforcement role and back to each of them. Many of these issues are not resolved and one important case involving these issues is now in the California Supreme Court. Brinker Restaurant Corporation v. Superior Court, No. S166350.

We will use this session to see how all of this has played out over the last 10 years. We have two guests who have been intimately involved in this battle for the last 10 years. One of will be Miles Locker who was a DLSE attorney for 16 years until he was fired in 2006 because of his active role in supporting worker rights to meal periods and rest breaks. Our second guest is Ted Franklin who has been litigating these issues for almost ten years and has been involved in many aspects of these battles.

This will be a true insider and outsider view of an important agency processes. We will not only review the substantive rules but talk about court deferral to agency decision and enforcement procedures of such agencies.

There is a lot of material so focus on the meal period and rest break issues. Read the IWC Orders (particularly Sections A and B of each) and Labor Code Section 226.7 (attached to this document).

The following are selected readings showing how this battle has continued since the statutes and IWC Orders went into effect in 2000. You are not expected to understand all of the arguments. The idea is to get an understanding of how these disputes have played out in various ways.

The two main issues are: (1) Whether the one hour pay provided for in Labor Code Section 226.7 is compensation or a penalty. This affects the statute of limitations (three versus one year). (2) What is the obligation of the employer regarding rest breaks and meal periods? Is it to "allow," "provide," or to "insure" that employees take meal periods or rest breaks?

Read:

<u>Murphy v Kenneth Cole Productions, Inc.</u> 40 Cal 4<sup>th</sup> 1094 (2007) (focus on first half of opinion concern whether the hour pay is compensation or a penalty)

Please read the portion of the proposed but never adopted regulations dealing with meal periods and rest breaks:

http://www.dir.ca.gov/dlse/TextofModifiedReg3.pdf

And the explanation of the need for these regulations: http://www.dir.ca.gov/dlse/InitialStatementofReasons4.pdf

The Labor commissioner issued a "precedent" decision known as the <u>Hartwig</u> decision. The <u>Hartwig</u> decision was issued by the Labor Commissioner to get around her failure to issue regulations. It has been withdrawn for reasons which will be discussed in class. See <a href="http://www.dir.ca.gov/dlse/PD/12-56901.pdf">http://www.dir.ca.gov/dlse/PD/12-56901.pdf</a>

Read how one management firm touted the Hartwig decision: http://www.thelen.com/resources/documents/art\_259%5B1%5D.pdf

Read <u>Corrales v. Bradstreet</u> 153 Cal.App.4th 33 (2007) to see how the court criticized the Labor Commissioner for issuing the <u>Hartwig</u> "precedential" decision.

You may want to read the part of the <u>Brinker</u> decision dealing with meal periods and rest breaks. <u>Brinker Restaurant Corporation v. Superior Court</u> 165 Cal. App 4<sup>th</sup> 25, 80 Cal.Rptr.3d 781(2008), review granted No. S166350 You do not need to read the part dealing with the maintenance of a class action. You also may want to read the portion of <u>Cicairos</u> concerning the obligation of an employer to provide meal periods and rest breaks. <u>Cicairos v. Summit Logistics, Inc.</u> 133 Cal.App.4th 949 (2005). <u>Cicairos</u> sets up the conflict which caused the Court to grant review.

Read how the Labor Commissioner jumped on <u>Brinker</u> until it was depublished and then had to retract to some degree her public position. http://www.dir.ca.gov/DLSE/CourtRulingsMemo-Brinke-10.23.08.pdf

The Governor has made this an issue as part of the current state budget debate.

Read Letter of Miles Locker addressed to Supreme Court in Support of Request for Review. This explains the issues.

#### 11. Meal Periods

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes,

except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual

consent of the employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period

and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

- (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.
- (C) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.
- (D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.
- (E) Employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24 hour residential care, and employees of 24 hour residential care facilities for the elderly, blind or developmentally disabled individuals may be required to work onduty meal periods without penalty when necessary to meet regulatory or approved program standards and one of the following two conditions is met:
- (1) (a) The residential care employees eats with residents during residents' meals and the employer provides the same meal at no charge to the employee; or
- (b) The employee is in sole charge of the resident(s) and, on the day shift, the employer provides a meal at no charge to the employee.
- (2) An employee, except for the night shift, may exercise the right to have an off-duty meal period upon 30 days' notice to the employer for each instance where an off-duty meal is desired, provided that, there shall be no more than one off-duty meal period every two weeks

#### 12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half

- (31/2) hours. Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.
- (C) However, employees with direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24 hour residential care and employees of 24 hour residential care facilities for elderly, blind or developmentally disabled individuals may, without penalty, require an employee to remain on the premises and maintain general supervision of residents during rest periods if the employee is in sole charge of residents. Another rest period shall be authorized and permitted by the employer when an employee is affirmatively required to interrupt his/her break to respond to the needs of residents.

#### Labor Code Section 226.7:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

#### Additional Cases:

Brown v. Federal Express Corp. (C.D. Cal. 2008) 2008 WL 906517

White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d 1080

### Class 11

## **Independent Contractors and Misclassification**

One of the common devices used by employers to avoid obligations to employees is to classify them as independent contractors. There are many advantages to employers primarily substantial cost savings. Independent contractor status for most workers (but certainly not all) results in substantial pressure on wages, benefits and working conditions. For example, minimum wage and overtime laws do not apply. Independent Contractors must provide their own benefits including insurance for on the job injuries

and they must provide in some cases tools, equipment, supplies and often capital investments. We will use this class to explore the different approaches to independent contractor status. This topic is a very current issue affecting low wage workers.

The Department of Labor has very recently announced a new initiative to prevent this misclassification abuse. Secretary Solis stated recently on March 10 in Congressional testimony:

Employers who misclassify their employees as independent contractors often avoid paying the minimum wage and overtime. They evade payroll taxes, and often do not pay for workers' compensation or other employment benefits. As a result, employees are denied the protections and benefits of this Nation's most important employment laws, and their employers gain an unfair advantage in the market place. Employees are particularly vulnerable to misclassification in these difficult economic times. The FY 2011 budget requests \$25 million for a multi-agency initiative to strengthen and coordinate Federal and State efforts to enforce statutory prohibitions, and identify and deter employee misclassification as independent contractors.

For the Wage and Hour Division, the FY 2011 budget requests an additional \$12 million and 90 new investigators to expand its efforts to ensure that workers are employed in compliance with the laws we enforce. The funds will support targeted investigations that focus on industries where misclassification is most likely to lead to violations of the law, and training for investigators in the detection of workers who have been misclassified.

The Misclassification Initiative also will support new, targeted ETA efforts to recoup unpaid payroll taxes due to misclassification and promote the innovative work of States on this problem. This initiative includes State audits of problem industries supported by Federal audits, and \$10.9 million for a pilot program to reward the States that are the most successful (or most improved) at detecting and prosecuting employers that fail to pay their fair share of taxes due to misclassification and other illegal tax schemes that deny the Federal and State UI Trust Funds hundreds of millions of dollars annually.

In addition, the Misclassification Initiative includes:

• For the Office of the Solicitor, \$1.6 million and 10 FTE to support enforcement strategies, with a focus on coordination with the States on

litigation involving the largest multi-State employers that routinely abuse independent contractor status.

- For the Occupational Safety and Health Administration, \$150 thousand to train inspectors on worker misclassification issues.
- Legislative changes that will require employers to properly classify their workers, provide penalties when they do not, and restore protections for employees who have been classified improperly.

With these efforts, we intend to reduce the prevalence of misclassification and secure the protections and benefits of the laws we enforce. This effort strikes at the core of the Department's mission — and the hard working people of this country deserve no less.

Attacking misclassification has drawn interest from state and local governments because it is a serious tax issue; employers avoid payroll taxes by this scheme. They avoid workers compensation obligations by this scheme. Management lawyers have widely reported this new initiative and have advised their clients publicly to consider this a serious effort.

The California Labor Commissioner posts information on this issue on her website. http://www.dir.ca.gov/dlse/faq\_independentcontractor.htm

We will explore this concept under various regimes. We will see that there are three basic tests used to determine independent contactor status: The common law test, the economic realities test and the hybrid test (various combinations thereof). These rules play out differently in cases in part because each setting contains factual differences and the legal regimes where these issues arise are different.

In the past we have explored this issue using the on going litigation against FedEx over its use of the independent contractor status as applied to its FedEx Home Delivery subsidiary. We will discuss the D. C. Circuit's decision which has determined for NLRB purposes that the drivers are independent contractors. A Washington state jury ruled after a jury trial that the drivers in dispute were not employees. The FLSA and other litigation however continues in MDL (Multi-District Litigation) proceedings. In re MDL-1700 FedEx Ground Package System Inc. Employment Practices Litigation No II, case number 05-md-00527, in the U.S. District Court for the Northern District of Indiana. There are number of websites which advertise this litigation.

The class will begin with a discussion of some independent contractor schemes used by employers. The Instructor will hand out some of the paperwork associated with these schemes at that time.

All students should reread Borello to remind themselves of the issues. Then read your assigned case

Each student will be asked to read carefully one important case and to be prepared to give a 4 to 5 minute summary and explanation of the case. The Instructor will send a list of the cases to be read by each student but will send all cases to all students. You need read only Borello and your assigned case however.

Each student should be prepared to comment on her case for the rest of the class. Be prepared to explain the procedural posture of how the independent contractor issue got to the court, the standard of review if any, any procedural complications and, any policy considerations which appear in the case and finally the factual basis upon which the court reached the result that the workers involved were or were not independent contractors.

S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal. 3d 341 (1989)

Borello is the important California case for independent contractor status under California law.

# **Suggested Reading and Sources:**

NELP "Summary of Independent Contractor Reforms New State Activity" (2009) available at <a href="http://www.nelp.org/page/-">http://www.nelp.org/page/-</a>
/Justice/SummaryIndependentContractorReformsJuly2009.pdf

NELP checklist for Independent Contractor Tests available at <a href="http://www.nelp.org/page/-/Justice/Employment%20Relationship%20Checklists.pdf">http://www.nelp.org/page/-/Justice/Employment%20Relationship%20Checklists.pdf</a>

"Combating Independent Contractor Misclassification in the States: Models for Legislative Reform," National Employment Law Project (2005) available at <a href="http://nelp.3cdn.net/a7199e02c9a2dff987\_g4m6bhinn.pdf">http://nelp.3cdn.net/a7199e02c9a2dff987\_g4m6bhinn.pdf</a>

"From Orchards to the Internet: Confronting Contingent Workers Abuse," Catherine Ruckelshaus and Bruce Goldstein, National Employment Law Project (2003) available at <a href="http://www.fwjustice.org/Immigration\_Labor/ContingentDOCS/OrchardstoInternet.pdf">http://www.fwjustice.org/Immigration\_Labor/ContingentDOCS/OrchardstoInternet.pdf</a>

"Independent Contractors: The Good, The Bad and the Phony," H Victoria Hedian and Paul Starr (LCC 2001).

Reading for Class participants:

<u>JKH Enterprises, Inc. v. Department of Industrial Relations</u>, 142 Cal App. 4<sup>th</sup> 1046 (2006)

Estrada v. RPS, Inc., 125 Cal. App. 4<sup>th</sup> 976 (2005)

Messenger Courier Association v. CUIAB, 175 Cal. App 4th 1074 (2009)

NLRB v. Friendly Cab Company, 512 F. 3d 1090 (9th Cir 2008)

<u>Estrada v FedEx</u>, 154 Cal. App. 4<sup>th</sup> 1 (2007) (read only pages 1 through 12 regarding status)

FedEx Home Delivery v NLRB, 563 F. 3d 492 (D. C. Cir 2009)

<u>Vizcaino v. Microsoft Corp.</u> 120 F. 3d 1006 (9<sup>th</sup> Cir. 1196)(en banc) (Vizcaino II), cert. denied, 522 U.S. 1098 (1998), on remand, 1998 WL 122084, 1998 U.S. Dist. LEXIS 2008 (W. D. Wash. 1998), petition for writ of mandamus granted, 173 F. 3d 713 (9<sup>th</sup> Cir 1998), opinion amended, 184 F. 3d 1070 (9<sup>th</sup> Cir. 1999), cert. denied, 528 U.S. 1105 (2000). (Read only en banc decision)

The Arizona Republic, 349 NLRB 1040 (2007)

Internal Revenue Service, Employment Tax Guidelines: Classifying Certain Van Operators In The Moving Industry 23, Available at <a href="http://www.irs.gov/pub/irs-utl/van-ops.p">http://www.irs.gov/pub/irs-utl/van-ops.p</a>

Nationwide Mutual Insurance v Darden, 503 U.S. 318 (1992)

NLRB v United Insurance Co., 390 U.S. 254 (1968)

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)

Baker v. Flint Engineering & Construction, 137 F. 3d 1436 (10th Cir. 1998)

Reich v. Circle C. Investment, 998 F. 2d 324 (5<sup>th</sup> Cir. 1993)

Rockwell International Corp., 17 OSHC 1801, 1996 OSAHRC LEXIS 87, (OSHR 1996)

Eisenberg v. Advanced Relocation & Storage, Inc. 237 F. 3d 111 (2d Cir. 2000)

Montoya v. S. C. C. P. Painting, 589 F. Supp 2d 569 (D. Md. 2008)

Heath v Perdue Farms, 87 F. Supp 2d 452 (D. Md. 2000)

<u>Adcock v. Chrysler Corp.</u>, 166 F. 3d 1290 (9<sup>th</sup> Cir. 1999), cert. denied, 528 U.S. 816 (1999).

### Class 12

# **Family Rights and Time Off From Work**

### A. Introduction

Low Wage Workers need more protection on the job to deal with family needs because they lack other economic resources. Some laws and legal principles permit employees to take time off from work to respond to family issues. We will use this class to explore some of the significant laws which protect employees who have family issues. We will look at the federal Family and Medical Leave Act as well as some state laws which allow employees time off from work. Getting time off from work is a central issue when family rights are involved.

## Students are asked to do three things:

- (1) Go to an appropriate website (and there are several good government websites) and learn about the Family and Medical Leave Act or the California Family Rights Act. You need to answer the following questions: (1) What employers are covered? (2) Which employees are eligible? (3) When is leave granted? and (4) What benefits or protections are provided? These are straightforward questions although as usual the details leave room for litigation and regulation.
- (2) Make a list of those laws and legal principles which allow employees time off for family issues. Be creative. There are laws and legal principles which encourage employers to reduce hors, laws and legal principles which compel employers to allow employees time off, laws and legal principles which offer some form of wage replacement, laws and legal principles which protect workers from adverse action. You should look to federal laws and state law. You may search other states for examples. You may use any source as long as you disclose how you did your search. I expect everyone to come to class with a list of those laws or legal principles you have located. I expect each student to spend at least an hour in this search. You must also disclose how you did this search but you are not limited to any source. Please have this list of laws and principles with a statement of the sources prepared on a piece of paper to hand in at the start of the class. You can email also to the instructor before 2:30 pm on Tuesday if you have it done before then and he will print it and bring it to class. <a href="mailto:drosenfeld@unioncounsel.net">drosenfeld@unioncounsel.net</a>
- (3) In doing the above exercise keep in mind what laws and protections are lacking.

We will focus the class discussion on the FMLA and CFRA. We will look at a number of laws and principles which can be used to get time off for workers and to the extent possible some form of wage replacement if possible. Our guest will be Sharon Terman who is a Staff Attorney in the Gender Equity Program of The Legal Aid Society–Employment Law Center in San Francisco.

## B Suggested Reading and Sources:

Ann O'Leary, "How Family Leave Law Left Out Low-Income Workers," 28 Berkeley J. Emp & Lab. L. 351 1 (2007)

Updated Research on Paid Family Leave from Ruth Milkman: http://www.familyleave.ucla.edu/pdf/NewData08.pdf

Five Key Laws for Parents

poster: http://www.paidfamilyleave.org/pdf/FiveKeyLawsPoster.pdf

Fact sheet on the need for paid sick days in CA: <a href="http://www.paidsickdaysca.org/learn/PSD\_FactSheet\_English.pdf">http://www.paidsickdaysca.org/learn/PSD\_FactSheet\_English.pdf</a>

"Our Working Nation: How Working Women are Reshaping America's Families and Economy and What it Means for Policymakers" by Ann O'Leary & Heather Boushey, (2010) available at

http://www.americanprogress.org/issues/2010/03/pdf/our\_working\_nation.pdf

"The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle," by Joan Williams and Heather Boushey (2010) available at <a href="http://www.americanprogress.org/issues/2010/01/pdf/threefaces.pdf">http://www.americanprogress.org/issues/2010/01/pdf/threefaces.pdf</a>

DOL's Summary of New Regulation 2009 available at http://www.dol.gov/esa/whd/fmla/finalrule/factsheet.pdf

Paid Sick Leave in the United States, Program Perspective issued by the Bureau of Labor Statistics (March 2010) available <a href="http://www.bls.gov/opub/perspectives/program\_perspectives\_vol2\_issue2.pdf">http://www.bls.gov/opub/perspectives/program\_perspectives\_vol2\_issue2.pdf</a>

Nina Fendel et al., "California's New Paid Family Leave Law: Family Temporary Disability Insurance FTDI," CPER Journal No 161, page 11 (2003)

Ruth Milkman and Eileen Applebaum, "Paid Family Leave in California: New Research Findings," "The State of California Labor 2004" available at <a href="http://www.familyleave.ucla.edu/briefingpapers/papers/newresearch.pdf">http://www.familyleave.ucla.edu/briefingpapers/papers/newresearch.pdf</a>

BLS Monthly Labor Review "Family and Medical Leave: Evidence from the 2000 Surveys," 17, September 2001. http://www.bls.gov/opub/mlr/2001/09/art2full.pdf

A. Dube and E. Kaplan, "Paid Family Leave: An Analysis of Costs and Benefits," (2002) available at <a href="http://www.paidfamilyleave.org/pdf/dube.pdf">http://www.paidfamilyleave.org/pdf/dube.pdf</a> 105489/375318

Peggie R. Smith, "Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century," 25 Berkeley J. Emp & Lab. L. 351 (2004)

Joan C Williams and Nancy Segal, "Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job," 26 Harvard Women's Law Journal 77 (2003)

Gillian Lester, "A Defense of Paid Family Leave," 28 Harv. J. L. & Gender 1 (2005).

"Putting Families First: How California Won the Fight for Paid Family Leave," Labor Project for Working Families, available at <a href="http://www.paidfamilyleave.org/pdf/paidleavewon.pdf">http://www.paidfamilyleave.org/pdf/paidleavewon.pdf</a>

Labor Project for Working Families at http://www.working-families.org/about/

National Partnership for Women and Families at <a href="http://www.nationalpartnership.org/site/PageServer?pagename=issues">http://www.nationalpartnership.org/site/PageServer?pagename=issues</a> work

## **Class 13 ERISA and Benefits for Low Wage Workers**

**Introduction:** Some employers provide more than wages; some employees will earn pension benefits and health care coverage. Many low wage workers do not have any such benefits. Those who work on a cash basis or in the underground economy have no benefits at all. Government programs such as social security, medicare and the new Patient Protection and Affordable Care Act supplement what some employers provide. In many cases this is the only coverage where employers provide no benefits. Coverage rates for workers however continue to decline. Fewer workers have such benefits.

We will use the class to explore those benefits which are provided to some low wage workers who are participants in health and welfare plans or pension plans which are more formal and governed by the federal law governing such benefits. ERISA 29 USC § 1001 *et. seq.* Wal-Mart and other employers have such benefits available. Many large temporary services make benefits available. State law governs some benefits such as vacation and sick leave. We will not explore these benefits which we have discussed in other classes.

We will use this session to become acquainted with ERISA and benefits available to low wage workers. We will review the structure of ERISA and its disclosure, minimum benefits for pension, preemption and jurisdiction provisions. We will review Wal-Mart's plans in some detail to understand how they work and what benefits are provided to its employees. We will look note Wal-Mart's recent improvements and its defense of its enrollment statistics. The Instructor will discuss at one benefits case (*Glenn*) to understand the difficulties in litigating benefit claims and to understand the internal appeals process which is contained in ERISA plans. We will note whether the new Patient Protection and Affordable Care Act resolves any of these issues.

### Please Read:

Lisa Gomez and Phyllis Borzi, "ERISA for Non-ERISA Lawyers: A Basic Approach to Title I of ERISA," (2004) This will be sent to students. Pages 1-10 are the most relevant parts. Parts 2 through 4 on pages 10 through 14 are not directly relevant since they define fiduciary duties. Read part 5 on pages 15-18. This concerns jurisdiction, remedies and preemption. Part 6 deals with COBRA and you should glance at it.

Portions of the Wal-Mart <u>Summary Plan Description</u> will be sent to the students. This will include "Wal-Mart Benefits" which describes certain non-ERISA benefits (pages 148-151) and eligibility criteria for health care benefits (pages 9-23)("Wal-Mart SPD Excerpts"). A second portion will include the appeal procedures available to contest denial of claims. You do not need to read these in detail. Rather spend a few minutes reviewing the provisions to see how complicated these plans can become. We will go over these documents in some more detail so it would be helpful if students print electronic copies to class. We will use these examples to show the structure of these plans and the impact on low wageworkers. Keep in mind that Wal-Mart associates have to understand this material to take advantage of these plans or be willing to contact Wal-Mart's benefits office with the right questions. We will briefly touch upon the provision of these plans dealing with collective bargaining.

Please read Wal-Mart's announcements of improved benefits and its analysis of its enrollment statistics. This will be sent to students. Note how Wal-Mart has responded to criticism.

Please look at the summary of the 2010 Patient Protection and Affordable Care Act from Kaiser Foundation. Identify how this new law impacts low wage workers.

### **Suggested Reading:**

Metropolitan Life Ins. Co. v. Glenn, 171 L. Ed 2d 299, 128 S.Ct. 2343 (2008)(conflict issues in processing health claims)

Hye Jin Rho and John Schmitt, "Health Insurance Coverage for U. S. Workers, 1979-2008," CPER available at <a href="http://www.cepr.net/documents/publications/hc-coverage-2010-03.pdf">http://www.cepr.net/documents/publications/hc-coverage-2010-03.pdf</a>

Maria Hylton, "The Changing World of Employee Benefits," 79 Chi.-Kent L. Rev 625 (2004)

Louise Trubek, "Working on the Puzzle: Health Care Coverage for Low-Wage Workers," 12 Health Matrix 157 (2002)

<u>Vizcaino v. Microsoft Corporation</u>, 120 F. 3d 1006 (9<sup>th</sup> Cir 1997), <u>cert. denied</u>, 537 U.S. 1018 (1998) (employees treated as independent contractors later determined to be common law employees entitled to pension benefits)

<u>Lupiani v. Wal-Mart Stores, Inc.</u>, 435 F.3d 842 (8th Cir. 2006)(action claiming that benefit plans used for purpose of defeating right of employees to organize rather than providing benefits to employees)

John Buckley and Robert Van Glezen, "Federal Statistics on Healthcare Benefits and Cost Trends: An Overview," Bureau of Labor Statistics, Monthly Labor Review, (November, 2004) at page 43 available at <a href="http://www.bls.gov/opub/mlr/2004/11/art5abs.htm">http://www.bls.gov/opub/mlr/2004/11/art5abs.htm</a>

William Wiatrowski, "Medical and Retirement Plan Coverage: Exploring the Decline in Recent Years," Bureau of Labor Statistics, Monthly Labor Review, (August, 2004) at page 29 available at <a href="http://www.bls.gov/opub/mlr/2004/08/art4abs.htm">http://www.bls.gov/opub/mlr/2004/08/art4abs.htm</a>

Some reports critical of Wal-Mart benefits:

"Wal-Mart and Health Care: Critical Condition," Center for a Changing Workforce, (2005) available at <a href="http://www.wakeupwalmart.com/research/CFCW-healthcare.pdf">http://www.wakeupwalmart.com/research/CFCW-healthcare.pdf</a>

"America Pays, Wal-Mart Saves," Wake Up Wal-Mart (2006) available at <a href="http://www.wakeupwalmart.com/images/americapays.pdf">http://www.wakeupwalmart.com/images/americapays.pdf</a>

Philip Mattera and Anna Purinton, Shopping for Subsidies: How Wal-Mart Uses

<u>Taxpayer Money to Finance Its Never-Ending Growth</u>
Brennan Center (May 2004)
available at http://www.goodjobsfirst.org/pdf/wmtstudy.pdf

Wal-Mart's Internal Memorandum entitled "Reviewing and Revising Wal-Mart's Benefit Strategy," prepared by Susan Chambers to the Board of Directors of Wal-Mart available at

http://walmartwatch.com/img/sitestream/docs/Susan Chambers Memo to Wal-Mart Board.pdf

Arindrajit Dube and Ken Jacobs, "Hidden Costs of Wal-Mart Jobs," UC Berkeley Labor Center (2004) available at

http://www.dsausa.org/lowwage/walmart/2004/walmart%20study.pdf

AFL-CIO, "Wal-Mart; Why Workers Remain Uninsured and Underinsured," (2003). This is optional but it explains how Wal-Mart sets up its cost structure and eligibility requirements to make them available to some of its workers and how many others are excluded available at <a href="http://www.aflcio.org/corporatewatch/walmart/upload/Wal-Mart\_final.pdf">http://www.aflcio.org/corporatewatch/walmart/upload/Wal-Mart\_final.pdf</a>

Arindrajit Dube, T. William Lester, and Barry Eidlin, "A Downward Push: The Impact of Wal-Mart Stores on Retail Wages and benefits," UC Center on Labor Research and Education (2007) available at

http://laborcenter.berkeley.edu/retail/walmart\_downward\_push07.pdf

#### **Class 14 Worker Centers**

**Introduction:** We will discuss the growing Worker Center movement. There are two conflicting strategies: The legal clinic approach and the worker and community organizing approach. In the first model, the center serves to represent workers in their employment problems through the legal process. The center offers legal advice and representation. In the second model, the center attempts to train and encourage community activists who can confront employers and organize around employment issues. These organizations act like a non-majority union. They also do legal representation but recognize the limitations of the legal process and seek alternative organizing strategies. We will discuss these conflicting strategies. These issues raise questions as to the ability of unions to effectively organize low wage workers.

Dr. Seven Pitts who has studied these centers will make a presentation about this movement. He is a Labor Policy Specialist at the UC Berkeley Labor Center.

Lilia Garcia who is the Executive Officer of the Maintenance Cooperation Trust Fund established by collective bargaining agreements in the building maintenance industry will be present. The fund monitors conditions in the janitorial industry and assists workers in asserting their rights. It has sponsored some of the most important joint employer litigation in California. It is a Labor Management Cooperation Committee authorized by 29 U.S. C. § 186 (c)(9). She will explain how unions and employer can set up LMCC's.

We will briefly discuss the problems which they encounter in representing low wage workers. Please read the NLRB Advice Memorandum in <u>Restaurant Opportunities Center</u> for purposes of discussing these issues.

## **Required Reading:**

"Worker Centers: Organizing Communities at the Edge of the Dream," EPI Briefing Paper by Janice Fine available at <a href="http://www.epinet.org/briefingpapers/159/bp159.pdf">http://www.epinet.org/briefingpapers/159/bp159.pdf</a> (Summary of her book mentioned below)

Advice Memorandum in Restaurant Opportunities Center available at http://www.nlrb.gov/shared\_files/Advice%20Memos/2006/2-CP-1067.pdf

## **Suggested Reading:**

Eli Naduris-Weissman, "The Worker Center Movement and Traditional Labor Law: A Contextual Analysis," 30 Berkeley J. Emp. & Lab. L. 232 (2009)(Most complete discussion of labor organization issue)

Rebecca Smith, National Employment Law Project, "Engaging in Direct Action Campaigns Without Getting Slapp'ed," (2007)

<u>Center for United Labor Action,</u> 219 NLRB 873 (1975)(when does a worker center become a labor organization?)

Alan Hyde, "New Institutions for Worker Representation in the United States: Theoretical Issues," 50 N.Y.L.S L. Rev. 385 (2005-2006)

Jennifer Gordon, "We Make the Road By Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change," 30 Harv. C.R.—C.L. L. Rev. 407 (1995).

Julie Yates Rivchin, "Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies," 28 N.Y.U. Rev. L & Soc. Change 397 (2004)

Julien Ross, "A Fair Day's Pay: The Problem of Unpaid Workers in Central Texas," 10 Tex. Hisp. J. L. & Pol'y 117 (2004).

Sharon M Dietrich, "When Working Isn't Enough: Low Wage Workers Struggle to Survive," 6 U. Pa. J. Lab. & Emp. L. 613 (2004)

Yungsuhn Park, "The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles," 12 Asian L.J. 67 (2005)

David Rosenfeld, "Review Essay, Worker Centers: Emerging Labor Organizations— Until They Confront the National Labor Relations Act," 27 Berkeley J. Emp. & Lab. L. 469 (2006)

Jayesh M. Rathod, "The AFL-NDLON Agreement: Five Proposals for Advancing the Partnership," 14 No. 3 Hum. Rts. Brief 8 (2007).

North American Alliance for Fair Employment worker center strategy paper available at <a href="http://www.worksafe.org/images/contentEdit/docs/NAFFE.pdf">http://www.worksafe.org/images/contentEdit/docs/NAFFE.pdf</a>

Abel Valenzuela Jr., Nik Theodore, Edwin Melendez and Ana Luz Gonzalez, "On the Corner, Day Labor in the United States: (UCLA 2006) available at <a href="http://www.sscnet.ucla.edu/issr/csup/uploaded\_files/Natl\_DayLabor-On\_the\_Corner1.pdf">http://www.sscnet.ucla.edu/issr/csup/uploaded\_files/Natl\_DayLabor-On\_the\_Corner1.pdf</a>

Two very readable and important books:

Jennifer Gordon: "Suburban Sweatshops: The Fight for Immigrant Rights," Harvard University Press (2004)

Janice Fine, "Worker Centers: Organizing Communities at the Edge of the Dream," Cornell University Press (2005)

### See also:

Vannessa Tait, "Poor Workers' Unions" (2005),

Immanuel Ness, "Models of Worker Organizing," The New Immigrant Workforce (Sarumathi Jayaraman & Immanuel Ness, eds. 2005).

Jennifer Gordon, "The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants change New York Wage Law," Carnegie Endowment for International Peace, Working Paper No 4 (1999) available at <a href="http://www.carnegieendowment.org/files/imp\_wp4gordon.pdf">http://www.carnegieendowment.org/files/imp\_wp4gordon.pdf</a>

Catherine K. Ruckelshaus, "Labor's Wage War," 35 Fordham Urb. L.J. 373 (2008)

Catherine Ruckelshaus and Bruce Goldstein, National Employment Law Project: "From Orchards to the Internet: Confronting Contingent Workers Abuse," (2002) available at <a href="http://nelp.3cdn.net/8af16441e7427cce36\_83m6ibx75.pdf">http://nelp.3cdn.net/8af16441e7427cce36\_83m6ibx75.pdf</a>

Restaurant Opportunities Center United at http://www.rocunited.org/

Annette Bernhardt et al., "Broken Laws, Unprotected Workers, Violations of Employment and Labor Laws in America's Cities" <a href="http://nelp.3cdn.net/1797b93dd1ccdf9e7d\_sdm6bc50n.pdf">http://nelp.3cdn.net/1797b93dd1ccdf9e7d\_sdm6bc50n.pdf</a>

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