This is syllabus from last fall. I will use essentially the same materials. There will be some variation in the order of the class and I will update the material as we move along. This is so students will get an idea of what we will cover.

Syllabus Law 283

Representing Low Wage Workers

Professor David A Rosenfeld

Fall 2011

Berkley School of Law

Class 1

Introduction: Low Wage Workers and Their Issues; West Coast Hotels v. Parrish; Introduction to the IWC Orders

We will use the first part of the class to talk about the structure of the class and what we intend to accomplish. Each of you has been sent the complete syllabus from the spring semester. We will cover most of the same subjects but I am open to deleting subjects or adding subjects which the class would want to explore. The readings will be somewhat changed for this course. Please briefly look through it to provide any suggestions or comments.

Please come prepared to describe some situation affecting low wage workers which you would like to learn about and offer some suggestion as to how the problem could be resolved. This situation can be from your own experience, that of family or friends or any other source including issues you have read about. We will keep a list of these issues and at the end of the class we will see if these subjects have been addressed. You are not limited to one situation or issue.

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.

He will review the history of the IWC Orders from the early part of the 20^{th} century to the present.

Most of you know that the Supreme Court invalidated a New York state law which limited the number of hours that bakers could work to no more than 10 hours per day or 60 hours per week on economic due process grounds. <u>Lochner v. New York</u>, 198 U.S. 45 (1905). The Court saw the law as in interference with the right of workers to contract for more than permitted by the statute (and obviously for bakeries to agree to work them more than the limit). If this doctrine had prevailed it would have limited much of the legislation which we will talk about. The Instructor will review the history of this doctrine.

Please read the excerpt from West Coast Hotels v. Parrish, 300 U.S. 379 (1937) which will be sent you. Does the reasoning of the Court in effectively reversing Lochner offend you for any reason? The Instructor will talk about this history of the California Industrial Welfare Commission orders from 1913 when they were first adopted until the 1970's when they were substantially changed. They were changed in part by accepting the reasoning of the dissent in Parrish.

Please glance through IWC Order 4. 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(A)(daily overtime), 4 (minimum wage), 8 (cash shortage), 9 (uniforms and equipment), 11(A, B, and C)(meal periods). Industrial Welfare Commission Order 4, 8 CCR § 11040. is also available at http://www.dir.ca.gov/IWC/IWCArticle4.pdf

Please keep this IWC Order handy as we will be referring to it in various class sessions.

The most important California case on the IWC Orders is <u>Industrial Welfare Commission v.</u> <u>Superior Court of Kern County</u>, 27 Cal. 3d 690 (1980), <u>cert. denied</u>, 449 U.S. 1029. The Instructor will talk about this case because the issues discussed will impact the rest of the class.

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), <u>cert. denied</u>, 449 U.S. 1029 (1980)(History of IWC Orders)

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, 2009" BLS Report 1027, March, 2011 available at http://www.bls.gov/cps/cpswp2009.pdf

The Employment Situation, July, 2011, from the BLS available at http://www.bls.gov/news.release/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," (2011) (emailed to the students)

Class 2

California Wage and Hour Laws and the Labor Commissioner Process

Introduction: We will review the enforcement of California laws governing wages through the Labor Commissioner system. 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 Division of Labor Standards Enforcement ("DLSE") to enforce the provisions of the Labor Code. The Labor Commissioner is the chief of the DLSE, and the term "Labor Commissioner's office" is another way of referring to the DLSE.

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. These administrative processes are common to many states which have developed labor regulation. This agency will become more active with the new labor Commissioner Julie Su.

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

The Berman hearing process is contained in California Labor Code § 98, 98.1, 98.2, 98.3, 98.4, and 98.5 which describe the process but it isn't required. Please read first the brief summary prepared by the DLSE. This is a very neutral summary and will help as background for the issues we will discuss.

Please read excerpt from Murphy v. Kenneth Cole Productions, Inc., 40 Cal. 4th 1094 (2007). This is an excerpt concerning whether the trial court on a *de novo* appeal can consider new claims when the employer appeals from a Decision of the Labor Commissioner, This process has advantages for employees and employers. It is a system which is informal but gives both sides due process rights. The loser in any hearing before the Labor Commissioner has the right to appeal to the Superior Court for a trial *de novo* but there are disincentives to file such appeals. We will talk about how this system works. Please keep in mind the recurring question of how employers and employees try to shape these administrative systems to protect their interests.

Please read the excerpt from <u>Sonic-Calabasas A, Inc. v. Moreno, 51 Cal. 4th 659 (2011)</u>. This case holds that the Berman process is not preempted by the Federal Arbitration Act. Please read the excerpt for the description of how the hearing process preserves substantive rights for employees against employers which would be lost in arbitration. You do not need to read the FAA preemption part of the case.

We will use Morillion v. Royal Packing Co., 22 Cal. 4th 575 (2000) to talk about two issues. This case involves the question of whether farm workers had to be paid for time riding a bus from an assembling point in Salinas to the fields each day and back to the assembling point. They performed no work on the bus.

First, we will discuss the important issue of the deference the Court gave to the DLSE 1989 Operations and Procedures Manual. Although not quoted in the Opinion it is clear that the DLSE manual supported the position of the workers. We will also talk about deference to the Opinion letters which are also issued by the DLSE. This is an important issue of administrative law and this issue often appears. Think about how these Opinion Letters get drafted and who drafts them.

Please review and skim one of the Opinion (Advice) letters mentioned in the <u>Morillion</u> decision. This will give you an idea of what they look like and will explain the deference concept. See Opinion letter "Compensable Time (February 3, 1994) available at http://www.dir.ca.gov/dlse/opinions/1994-02-03-3.pdf The instructor will provide this to the students.

You may want to review the following Opinion Letter which issued after Morillion as it relates to the issues raised in Morillion: DLSE Opinion Letter 11/25/2008 at http://www.dir.ca.gov/dlse/opinions/2008-11-25.pdf (TWIC Cards). Think about why judges may find such letters not reliable.

If you really want to follow up on this read footnote 7 in *Kenneth Cole* (not included in the excerpt).

Second we will examine the interpretative tools the Court used to resolve the disputed language in the IWC Order. This discussion includes the lower court's reliance on federal law drawn from the Fair Labor Standards Act. Read to understand how the Court got to conclusion that California law is different from federal law and the consequences of that determination. This involves understanding that Congress enacted a statute called the Portal-to-Portal Act in 1947 to eliminate these kinds of claims from the Federal Fair Labor Standards Act. California took a different path. Note also how the Court responded to the policy arguments.

If you are interested but it is not necessary read the excerpt from Armenta v. Osmose, Inc., 135 Cal. App. 4th 314 (2005), This case involves union workers who were paid a significant wage for the utility pole maintenance work but not for certain preliminary work. In this case the court considered the question of how California's minimum wage differed from the federal minimum wage. Although these union workers were paid significant amounts for certain periods of the day, they were not paid for certain parts of their work day. The court notes that there was no overtime claim. Can you discern from the case why no overtime claim was made? Once again it is important to look at how the Court treated an administrative opinion.

If you are further interested 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

If you are further interested you can read the Supreme Court's decision in *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007) to see how the Court deferred to a Department of Labor Regulation adversely to worker interests. The DOL is trying to fix this through the regulatory process of issuing new regulations. See http://www.dol.gov/regulations/factsheets/whd-fs-flsa-companionship.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 would 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?

One case currently pending in the Supreme Court also will impact these claims but not directly the administrative process:

<u>Kirby v. Immoos Fire Protection, Inc., 186 Cal. App. 4th 1361 (2010)</u>, review granted 2010 Cal. LEXIS 11722 (2010). In that case the Court of Appeal held that Plaintiffs could be liable for attorney's fees when they bring unsuccessful causes of action over rest period violations but not minimum wage or overtime claims pursuant to Labor Code 218.5. This case will discourage many claims from being brought to court if upheld.

Class 3 **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 Hoffman Plastic Compounds issues have been increasingly raised about enforcing employment laws on behalf of undocumented workers. We will explore Hoffman Plastic 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 certain provisions of the Immigration Reform and Control Act. We will review the I-9 form, e-Verify and reverification issues. . We will review the various tactics which lawyers can use to protect workers from scrutiny over their immigration status.

Please Read:

Please read the excerpt from Hoffman Plastic Compounds, Inc. v. NRLB, 535 U.S. 137 (2002). This is the most important case on the issues we will discuss. An open question in that case was whether a worker who was undocumented and obtained his job without fraud would be governed by the same result. Put another way if the employer hired a worker knowing he or she was undocumented, would the employer be able to fire the worker for union activity and not be ordered to reinstate or pay back pay to the worker? The NLRB has now finally answered that question in Mezonos Maven Bakery, Inc., 2011 NLRB LEXIS 422, 357 NLRB No. 57 (N.L.R.B. Aug. 9, 2011)(you do not need to read this). The Board held that it was limited by Hoffman Plastic and it made no difference whether or not the employer knowingly hired undocumented workers Two members of the Board issued a "concurrence' in effect criticizing Hoffman Plastics. This will help refine our discussion

Read the excerpt from Rivera v. NIBCO Inc., 364 F. 3d 1057 (9th Cir. 2004), cert. denied, 545 U.S. 905 (2005), on remand, 2006 WL 845925 (E. D. Ca. 2006) subsequent decision, 701 F. Supp. 2d 1135, 2010 U.S. Dist. LEXIS 27132 (E.D. Cal., 2010), on appeal Rivera v. Nibco, Inc., 372 Fed. Appx. 757 (9th Cir. 2010) cert. denied, 2011 U.S. LEXIS 402 (2011) (Read excerpt dealing with when and how immigration status issues may be raised in discovery, protections afforded under discovery rules, read for how court distinguishes Title VII from NLRA under Hoffman)

California Labor Code §1171.5 (enacted immediate after Hoffman Plastic)

<u>Salas v. Sierra Chemical Co.,</u> 198 Cal. App. 4th 29 (2011)(excerpt, appears to be contrary to <u>Rivera</u>)

We will look at the hiring process and subsequent checks on immigration status during the employment process.

Glance over the I-9 Form. We will discuss it in more detail. Available at http://www.uscis.gov/files/form/i-9.pdf How easy is it for employer to ignore real status of workers? And how easy is it for workers to complete an I-9 when they are not authorized to work?

The big issue today is the E-Verify program. Read this summary:

"Facts about E-Verify from the National Immigration Law Center" available at http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-facts-about-2011-02-15.pdf (Read first 2 and half pages to understand how E-verify works)

We will be joined by Conchita Lozano-Batista who has been handling E-Verify and immigration issues for workers in the union context.

Suggested Reading:

<u>Aramark Facility Services and Service Employees, Local 1877</u> (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. <u>Aramark Facility Services v. Service Employees Intern. Union, Local 1877</u>, 530 F.3d 817 (9TH Cir. 2008). This is an important case on the enforceability of arbitration awards issued under collective bargaining agreements.

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)

Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (U.S. 2011)

<u>Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir 2010)</u>, vacated and remanded in light of Whiting, 2011 U.S. LEXIS 4259 (2011)

Pew Research Center, "Unauthorized Immigration Population, National and State Trends, 2010" (2011) available at http://pewhispanic.org/files/reports/133.pdf

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 2010," (Bureau of Labor Statistics) available at http://www.bls.gov/news.release/forbrn.nr0.htm

"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

E-Verify Manual for Federal Contractors (2010): http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/E-Verify%20User%20Manual%20for%20Federal%20Contractors_Final.pdf

E-Verify Manual for Employers (2010) http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/E-Verify%20User%20Manual%20for%20Employers%20R3%200-%20Final.pdf

Quick Reference Guide for Employers (2010)(skim) http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/E-

Verify%20Quick%20Reference%20Guide%20for%20Employers%20R3%200-%20Final.pdf

NLRB:

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

Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy. G. C Memorandum 08-10 (2008) available http://www.nlrb.gov/shared_files/GC%20Memo/2008/GC%2008-10%20Guideline%20Memorandum%20Concerning%20ULP%20Charges%20Involving%20Political%20Advocacy.pdf

Updated Procedures in Addressing Immigration Status Issues That Arise in NLRB Proceedings (2011) available at http://www.nlrb.gov/publications/operations-management-memos

See also ICE Memo on Prosecutorial Discretion available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf

See also Revised Memorandum between ICE and DOL available at http://www.dol.gov/_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf

<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).

<u>Concrete Form Walls, Inc.</u>, 346 NLRB 831 (2006), <u>enforced</u>, 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)

NLRB v. Domsey Trading Corp., 636 F.3d 33 (2d Cir. 2011)(remanded to allow employer to prove lack of work status, case is from 1990)

Arbitration:

Service Maintenance Corporation and Service Employees International Union, Local 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 (11th 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 (9th Cir. 2002); Baker v. IBP, Inc., 357 F. 3d 685 (7th Cir. 2004), cert. denied, 543 U.S. 956 (2004); and Commercial Cleaning Services, LLC v. Colin Service Systems, Inc., 271 F. 3d 374 (2nd 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)

E.E.O.C. v. First Wireless Group, Inc., 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)

<u>Design Kitchen and Baths v. Lagos</u>, 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 (2008)

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)

Michael Duff, Article: Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace, 30 Berkeley J. Emp. & Lab. L. 133 (2009)

Christopher David Ruiz Cameron "The Evolving Definition Of The Immigrant Worker: The Intersection Between Employment, Labor, And Human Rights Law: Article: The Borders Of Collective Representation: Comparing The Rights Of Undocumented Workers To Organize Under United States And International Labor Standards," 44 U.S.F. L. Rev. 431 (2009).

Websites offering differing views:

National Immigration Law Center at http://www.nilc.org/

National Immigration Project of the National Lawyers Guild at http://www.nationalimmigrationproject.org/

National Employment Law Project, Immigrant Worker Project at http://www.nelp.org/site/issues/c/immigrants_and_work/

National Immigration Forum at http://www.immigrationforum.org/

The American Immigration Law Forum at http://www.ailf.org/

Center for Immigration Studies at http://cis.org/

Migration Policy Institute at http://www.migrationpolicy.org/

Recent Reports:

Mendelsohn Margot, Shayna Strom, and Michael Wishnie "Collateral Damage: An Examination of ICE's Fugitive Operations Program," Migration Policy Institute (2009) available http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf

Demetrios G. Papademetriou and Aaron Terrazas, "Immigrants and the Current Economic Crisis: Research Evidence, Policy Challenges and Implications," Migration Policy Institute (2009) http://www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf

Class 4

Unemployment and other Wage Replacement Laws

Introduction: Prior to the depression there was little social welfare which provided wage support or wage replacement for workers who couldn't work. Although Europe had developed state mandated social security systems in the 19th 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) 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-established 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 or company policy allows a 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 employee 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? You can find the answers to these questions at the Employment Development Department http://www.edd.ca.gov/UIBDG/. You do not need to research the answers. We will get some answers when students report on the Precedent Benefit Decisions noted below.

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.

We will discuss the modernization reforms which Congress enacted as part of the American Recovery and Reinvestment Act on 2009 (ARRA). This part of 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. If you interested in the politics of unemployment modernization take a look at this updated data: http://www.ows.doleta.gov/unemploy/docs/app_form.doc

California is modernizing its system. It is going "checkless" and now issuing debit cards to "customers." http://www.edd.ca.gov/About_EDD/pdf/nwsrel11-29.pdf

President Obama has proposed as part of his jobs program (America Jobs Act of 2011) to continue the extension of benefits which is now capped at 99 weeks.

We are incredibly fortunate to have Matt Goldberg as our guest. He currently works for the City of San Francisco's Office of Labor Standards Enforcement (OLSE) leading the enforcement efforts of San Francisco's landmark requirement that employers provide health care benefits to employees. Previously, he worked at the Employment Law Center developing their unemployment claims handling procedures and with the U.S. Department of Labor as a Policy Specialist on the unemployment insurance system. He is in a unique position to talk about both the processing of UI claims and well as the modernization efforts.

Required Reading:

Please read these 2 excerpts. They are intended to provide an overview of the administrative system and point out some of the issues which arise in administering the system. <u>Gilles</u> represents an attempt by California to evade the result in <u>Java</u>. Note in <u>Java</u> the court sidesteps the constitutional issue of due process. In light of later cases it is not clear the Court would have found this a due process issue. You do not need to read but if you are interested see. <u>Mathews v Eldridge</u>, 424 U.S. 319 (1976)(evidentiary hearing not required prior to termination of disability benefits).

<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)(Do you think the phrase "when due" would be interpreted the same today. Is a literal interpretation one meaning when finally due or initially (tentatively) due? What tools did court use to resolve this question?)

Gilles v. Department of Human Resources Development, 11 Cal.3d 313 (1974) (problem of overpayments, case contains good description of administrative system, note how the state administrative agency adopted procedures to avoid <u>Java</u>, and how the Supreme Court interpreted the federal requirements even though ambiguous to prohibit the procedure)

Please read one Precedent Benefit Decision. The Instructor will email to the students a list of such decisions. Please read and be prepared to give a 1 to 2 minute summary of the case. Precedent decisions are authorized by statute and allow administrative agencies to fashion the law without worrying about the effect of many decisions issued by administrative law judges. We will see in a later class how the Labor Commissioner's right to use this process was struck down by a court. They are available at

http://www.cuiab.ca.gov/precedent_decisions_Numerical.shtm#002

Please look at an Excerpt from the Benefits Guide which appears on the Employment Development Department Website available at

http://www.edd.ca.gov/UIBDG/Voluntary Quit VQ 155.htm Does a court have to show deference to this guide? It is a useful tool for advocates? Or is it nothing more than a recitation of Precedent Benefit decisions and regulations? The instructor will also provide a copy of this section to the students.

Please look at Title 22 California Code of Regulations Section 11256-10 regarding voluntary quitting-domestic circumstances. The regulation is available at <a href="http://weblinks.westlaw.com/result/default.aspx?action=Search&cfid=1&cnt=DOC&db=CA%2DADC&eq=search&fmqv=c&fn=%5Ftop&method=TNC&n=1&origin=Search&query=CI%28%2222+CA+ADC+S+1256%2D10%22%29&rlt=CLID%5FQRYRLT6618245116239&rltdb=CLID%5FDB59321245116239&rlti=1&rp=%2Fsearch%2Fdefault%2Ewl&rs=GVT1%2E0&service=Search&sp=CCR%2D1000&srch=TRUE&ss=CNT&sskey=CLID%5FSSSA14337245116239&sv=Split&tempinfo=FIND&vr=2%2E0The instructor will forward this regulation also.

Suggested 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, (2009)(will be sent to students)

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

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

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

"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 21st Century," National Employment Law Project (2004) available at http://nelp.3cdn.net/31c9039786a84cdc52_h5m6y1dsp.pdf

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

California Employment Development Department website for unemployment insurance: http://www.edd.ca.gov/Unemployment/

NELP "Federal Stimulus Finding Produces Unprecedented Wave of State Unemployment Insurance Reforms (2009) available at http://www.nelp.org/page/-/UI/UIMARoundup1209.pdf?nocdn=1

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): http://www.edd.ca.gov/Disability/Paid_Family_Leave.htm

Class 5

Section 7 Rights and Retaliation

Workers have rights in work place when they engage in a limited number of protected activities. Anti-discrimination laws prohibit some employer action while anti-retaliation theories offer other protection. Courts tend to take anti-retaliation claims seriously on the theory that retaliation undermines the basic protections of the applicable law. We will explore retaliation in the context of the National labor Relations Act and other statutes

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. This class will first 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. This is effectively an anti-retaliation statute for concerted activities. We will note how the former NLRB is narrowing section 7 rights.

We will also look at a few state and federal statutes which protect workers when they complain about conditions of work.

Please read:

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

Many workers will be faced with the kind of problem described in Holling Press.

Holling Press, 343 NLRB 301 (2004)

The following Advice memorandum involves mass protests by workers over potential immigration reform. This Advice Memorandum found that such protests were concerted activity. If you want to understand this more read the Eastex case mentioned below. the issue however was whether the conduct was protected when the workers left their jobs to attend such rallies. How is this different from when the employees left their jobs in Washington Aluminum? Once again you can read the General Counsel Memorandum mentioned below entitled "Guidance Memorandum Concerning Unfair Labor Charges Involving Political Advocacy" for more detail.

NLRB Advice Memorandum in <u>Calmex, Inc. d/b/a Chevy's</u>, Case 32-CA-22651 available at http://www.nlrb.gov/cases-decisions/advice-memos

Gay Law Students Ass'n v Pacific Tel & Tel, 24 Cal 3d 458(1979) (Excerpt regarding Labor Code §§ 1101 and 1102)

Suggested Reading:

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

Goya Foods, 356 NLRB No. 73 (2011)

<u>IBM Corporation</u>, (2004) 341 NLRB 1288 in which the NLRB overruled its prior decision in Epilepsy Foundation, (2000) 331 NLRB 676

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

Thompson v. North Stainless, 2011 U.S. LEXIS 913 (2011)

"Guidance Memorandum Concerning Unfair Labor Charges Involving Political Advocacy", GC Memorandum 08-10 (2008)(General Counsel of NLRB) available at http://www.nlrb.gov/publications/general-counsel-memos

Plaza Auto Center, 355 NLRB No. 85 (2010)

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)

State Retaliation and Discrimination Statutes Found in California Labor Code available at http://www.dir.ca.gov/dlse/FilingADiscriminationComplaint1.pdf

Whistle blower and Retaliation States, Department of Labor available at http://www.dol.gov/compliance/guide/whistle.htm

Class 6

Pensions

Almost all workers have access to a pension program enacted in 1935. This is Social Security. We have talked about one aspect of this legislation: Unemployment Insurance.

Since Social Security was enacted many employees have had access to private pension programs to supplement Social Security. Even some low wage workers and part time workers have access to "pension" programs which allow them to save a portion of their wages (if they can) towards retirement. Wal-Mart has a pension program for its employees which at one time included a stock purchase program which yielded some spectacular benefits for early employees. Some plans involve even some contributions from their employers. Public employees have enjoyed decent retirement systems. Unfortunately our pension system is collapsing. We will explore our retirement system. We will use as an example the program available to California teachers known as CalSTRS. It is an example of a public employee pension which plans are the subject of so much current debate.

We are fortunate to have a presenter who has represented various pension funds and who has been consulting with many groups who are concerned with the future of public and private pensions.

Bill Sokol has prepared a fascinating PowerPoint which will be sent to the students to review before class.

Recently the UC Berkeley Center for Labor Research and Education has published a series of studies regarding pensions in California. Entitled "Meeting California's Retirement Security Challenge," it is available at

http://laborcenter.berkeley.edu/research/CAretirement_challenge_1011.pdf You may want to read Jacob Hacker's piece "Introduction: The Coming Age of Retirement Security." At pages 4-

16 for the background. We will focus on the last piece "High Performance Pensions for All Californian" by Teresa Ghilarducci. Please read her piece. The Instructor will send the Hacker and Ghilarducci articles separately.

There are a number of terms which Ms. Ghilarducci uses: annuity, 401(k), IRA, CalSTRS, CalPERS, guaranteed rate of return, administrative costs, individually directed accounts, DB (defined benefit), DC (defined contribution), portable, cash balance, annuitization, contributions, participation, pooled funds, balanced portfolio, inflation indexed annuities, account balances, automatic with opt-out" OASDI, "pooled professional managed accounts," adverse selection, partial cash out, death payment, board of trustees, median long term annual real return, laddered TIPS, pension exchanges. Please get some idea of these terms. You can use any source to do so.

The author proposes a California Guaranteed Retirement Account as a partial solution to the retirement crisis. She attempts to make it politically acceptable. How does she so this? Is it a matter of timing? Or political will? We will focus on her ideas to learn about retirement and pensions.

If you want to get an idea of how a pension plan works, read pages 7-10 of the CalSTRS Member Handbook and scroll through the rest of the Handbook to see what subjects are covered. Pages 11-21 are the benefits for full-time teachers. You can if you wish compare them to the benefits available to part-time teachers at pages 23-29.

Part of the purpose of the class is to point out the procedures available to workers who have questions about their pension benefits. The process contained in public employee plans is largely the same as for private pensions which are regulated by ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. These plans all have internal methods for resolving questions over pension entitlements.

Please also ask yourself how you plan to prepare for retirement? And then put yourself in the place of a low wage worker. How can they plan for retirement? Is Social Security the only option? Is the CGRA an option? Or is there no option except to keep working?

Class 7

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. The California Supreme Court decided an important case presenting two preemption issues: (1)

federal labor law preemption and (2) preemption by state law this year. This involves a grocery workers retention ordinance. We will use this as way to look at these two kinds of preemption problems. We will look at an earlier case in Berkeley which involves the Marin which raises constitutional issues.

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." He will talk about the Hunters Point Shipyard/ Candlestick Point Integrated Development Project and other living wage projects.

We will have as our guest Andy Kahn who is one of the leading experts on the drafting and enforcement of these ordinances. He defended the Berkeley Ordinance at issue in RUI and the Emeryville Ordinance which he will talk about which raised numerous issues.

Required Reading:

Ken Jacobs, "The Hunters Point Shipyard and Candlestick Point Development Community Benefits Agreement."

Please read excerpts from 2 cases. First read them to get background on each of these ordinances. Understand the politics and purpose behind these efforts. <u>RUI</u> raises issues of contract impairment and equal protection. <u>Grocers Association</u> raises federal and state preemption issue. I don't expect students to understand these issues completely. I expect enough of an understanding so we can review in general these issues. The point is that in considering living wage issues, complicated constitutional issues do arise.

California Grocers Association v City of Los Angeles, 52 Cal 2d 177 (2011)

<u>RUI ONE Corp v City of Berkeley</u>, 371 F.3d. 1137 (9th Cir. 2004), <u>cert. denied</u>, 543 U.S. 1081 (2005) (upholding application of Berkeley Living Wage Ordinance to employers in the Berkeley Marina.))(You do not need to read the dissent; it is attached if you want to read a different perspective)

Finally review the Emeryville Workplace Justice Standard at Large Hotels Ordinance. This caused a protracted battle in Emeryville which Andy Kahn will talk about. Note particularly Section 5-32.1.1(c) regarding workplace standards.

Please have the ordinances electronically available so will have them for our discussion.

The Instructor will forward them to you.

Emeryville Workplace Justice Standard at Large Hotels Ordinance

Los Angeles Grocery Worker Retention Ordinance

Berkeley Living Wage Ordinance

Suggested Reading:

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

Golden Gate Restaurant Association v. City and County of San Francisco, 546 F. 3d 639 (9th Cir 2008) rehearing and hearing en banc denied 558 F. 3d 1000 (2009), cert denied, 130 S. Ct. 3497 (2010)

Cintas and Hayward:

Hayward ordinance available at http://www.hayward-ca.gov/municipal/HMCWEB/LivingWageOrdinance.pdf

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

<u>Aguiar v. Cintas Corporation No. 2</u>, 144 Cal. App. 4th 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. 4th 313 (2009)(upholding declaratory relief as to Los Angeles LWO).

<u>520 S. Mich. Ave. Assocs., Ltd. v. Shannon</u>, 549 F.3d 1119 (7th Cir. 2008), cert den 130 S. Ct 197 (2009).

Selected Ordinances which show a mix of provisions.

Core Community Benefits Agreement for Hunters Point Shipyard/Candlestick Point Integrated Development Project (Review particularly parts involving employment, hiring)(to be forwarded by Instructor, Ken Jacobs will discuss this agreement)

Los Angeles: http://bca.lacity.org/index.cfm?nxt=ee&nxt_body=div_occ_labor.cfm

Berkeley: 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 http://www.iir.berkeley.edu/livingwage/pdf/livwage.pdf

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:

Basic issues for Living Wages Strategies

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:

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

Community Benefits Agreements: Making Development Projects Accountable by Julian Gross available at

http://www.communitybenefits.org/downloads/CBA%20Handbook%202005%20final.pdf

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

"The New San Francisco Living Wage Ordinance" (a management law firms view) http://www.nixonpeabody.com/linked_media/publications/ELA_02202004.pdf

"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 http://iir.berkeley.edu/research/sfminimumwage.pdf

Economic Policy Institute Issue Guide Living Wage available at http://www.epinet.org/issueguides/livingwage/LivingWage_IssueGuide.pdf

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 http://www.epionline.org/index_lw.cfm

Class 8

Family Leave 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 generally about the California Family Rights Act which is the California version of the Family and Medical Leave Act. Government Code § 12945.1 et. seq. Please 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) Do the same for the California Pregnancy Leave Act, Government Code §12945.
- (3) Read excerpt from *Sanders v. City of Newport*. 2011 U. S. App. LEXIS 5263 (9th. Cir 2011) This contains interesting issues about burden shifting and jury instructions but also contains a good introduction to the FMLA.
- (4) Your assignment is to find answers to these 2 scenarios. You may use any source(s). I expect everyone will come with answers but you don't need to write them out and provide them to me before class. If you get hung up finding an answer, don't spend an inordinate amount of time trying to figure it out. No trick questions here. You may work with each other on this.

Martin

Martin works full- time as a janitor in California. He has been at his job for 12 years, and the company has about 60 employees. Recently, Martin's mother had a stroke and requires round-the-clock care while she recovers at home. Martin would like to take time off to care for his mother.

How much leave is Martin entitled to, and under which law(s)?

Is the leave paid or unpaid?

Will his health insurance benefits be continued during leave?

Does the analysis change if the company had only 20 employees?

Does it make any difference if Martin works under a union contract?

Does it make any difference if Martin has siblings who can help?

Does it make a difference if Martin requires only 4 hours a day to help?

Start with the California Family Rights Act, Government code §12945.2

Lisa

Lisa is expecting a baby. She is a full-time cashier at a fast food restaurant in California. She has worked for the company for 2 years, and they have 50 employees. Early on in her pregnancy, Lisa begins to experience pain in her legs and her doctor has recommended that she sit during her 8-hour shifts. Lisa brings in a doctor's note with this advice, and her supervisor tells her if she can't do the job, maybe she should leave.

What are Lisa's rights? Which law(s) apply? What if her company had only 5 employees?

Eight weeks before she gives birth, Lisa develops complications that require her to go on bed rest. She has a C-section and her doctor advises her to take 8 more weeks to recover. She'd like to take time to bond with her baby, too.

Draw a timeline showing how much leave Lisa is entitled to, under which laws. Indicate whether the leave is paid or unpaid.

Does the baby's other parent have the right to leave? If so, how much?

Does the analysis change if the other parent is a same-sex partner?

Do the company leave policies make any difference?

What if one or both parents worked for a small employer (10 employees)?

This involves pregnancy leave issues. Start with Government Code §12945. Check also if there are any issues about providing a seat for Lisa in any other statutes.

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. 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. She specializes in leave issues and just finished a trial in Fresno on these issues.

B Suggested Reading and Sources:

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

"Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers," Stephanie Bornstein (2011)(Center for WorkLife Law) available at http://www.worklifelaw.org/pubs/PoorPregnantAndFired.pdf

"Reforming Family And Medical Leave Laws: Promoting Health And Economic Security For California's Working Families," Berkeley Center on Health, Economic & Family Security, U. C. Berkeley School of Law (2011) available at http://www.working- families.org/learnmore/reforming_fmla.pdf

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: http://www.paidsickdaysca.org/learn/PSD_FactSheet_English.pdf

"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

San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees by Robert Drago, Ph.D. and Vicky Lovell, Ph.D. (February 2011), available at http://www.iwpr.org/publications/pubs/San-Fran-PSD/at_download/file

44 Million U.S. Workers Lacked Paid Sick Days in 2010: 77 Percent of Food Service **Workers Lacked Access**

by Claudia Williams, Robert Drago, Ph.D., and Kevin Miller, Ph.D. (January 2011), available at http://www.iwpr.org/publications/pubs/44-million-u.s.-workers-lacked-paid-sick-days-in-2010-77-percent-of-food-service-workers-lacked-access/at download/file

Newborn Family Leave: Effects on Children, Parents, and Business (2009), by Deanna S. Gomby & Dow-Jane

Pei, http://www.packard.org/assets/files/children%20families%20communities/NFLA fullreport final.pdf

Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected Paid Leave, by Patricia A. Shiu and Stephanie M. Wildman, 21 Yale Journal of Law and Feminism 119 (2009).

Giving and Taking Family Leaves: Right or Privilege? by Naomi Gerstel and Amy Armenia, Yale Journal of Law and

Feminism, https://udrive.oit.umass.edu/folbre/Gerstel%20Armenia%20yale%20journal%20of% 20law%20and%20feminism.doc

Joan C. Williams and Penelope Huang, "Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-cutting Strategy in a Globalized World," The Center For Worklife Law, (2010) available at

http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf

Eileen Applebaum and Ruth Milkman, "Leaves That Pay, Employer and Workers Experiences With Paid Family Leave in California," (2011) available at http://www.cepr.net/documents/publications/paid-family-leave-1-2011.pdf

Netsey Firestein, Anne O'Leary and Zoe Savitzky, "A Guide to Implementing Paid Family Leave: Lessons from California," (2011) available at http://www.working-families.org/learnmore/pfl_guide.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 http://www.americanprogress.org/issues/2010/01/pdf/threefaces.pdf

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 http://www.bls.gov/opub/perspectives/program_perspectives_vol2_issue2.pdf

"Expecting Better: A State By State Analysis of Parental Leave Laws," National Partnership for Women and Families available at http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052

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 http://www.familyleave.ucla.edu/briefingpapers/papers/papers/newresearch.pdf

California Labor Code 1508-1512 (bone Marrow and Organ donation paid leave)

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 http://www.paidfamilyleave.org/pdf/dube.pdf

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 http://www.paidfamilyleave.org/pdf/paidleavewon.pdf

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

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

Class 9 Worker Advocacy and Reform

We will spend this class with Lora Jo Foo, a truly extraordinary worker advocate. She has had an incredibly varied and productive career. We will spend the first half of the class talking with her about her career. Below I have listed some of her writings which you may want to read in preparation for the discussion with her about her accomplishments for working people. You will want to read the first item listed below because she has had an extraordinary influence on garment industry issues. Her law review article mentioned below has been repeatedly cited. California Labor Code §§2675-2684 are largely the results of her efforts. Please review them.

The second half of the class we will spend with her talking strategies to reform targeted industries.

In preparation for this discussion, you are asked to pick a narrow industry some of which are mentioned below. You don't have to limit yourself to any of these industries, but you need to identify some industry. The narrower the industry, the more productive the search can be. Once you have identified an industry, please do some research with respect to problems which you can find that the workers in that industry have. Then see if you can find enforcement or other strategies that have worked. I will ask each student to do a three minute presentation mentioning the problems and then the specific strategies which you have been able to locate that have been used by worker advocates.

These strategies can be particular forms of litigation, organizing, legislation, working with community groups, and anything else that you can find that advanced enforcement strategies. Be creative.

In addition to making the three minute report, each student is expected to provide a brief summary of the sources which you use in the oral presentation. The internet is obviously a welcome source. I expect each student will spend at least an hour and a half attempting to complete this project in preparation for class. I don't expect a complete report. Please email me by Monday at 3 pm your selected industry.

Suggested Reading:

"Asian American Garment Workers: Low Wages, Excessive Hours, and Crippling Injuries" by Lora Jo Foo excerpted from Asian American Women Issues, Concerns, and Responsive Human and Civil Rights Advocacy (Lora Jo Foo ed. 2002)

<u>Lora Jo Foo,</u> *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, **103 YALE L.J. 2179, 2185-88 (1994)**Lora Jo Foo, "Earth Passages: Journeys Through Childhood, <u>20 Hastings Women's L.J. 73</u> (2008)

<u>Lora Jo Foo</u> et al., "Worker Protection Compromised: The Fair Labor Standards Act Meets the Bankruptcy Code," 2 ASIAN PAC. AM. L.J. 38, 44 (1994)

Ms. Foo has donated her papers to Smith College: http://asteria.fivecolleges.edu/findaids/sophiasmith/mnsss479_main.html

See website at http://earthpassages.com/About_Biography_.html

This is just a partial list of suggestions:

Roofing, motel workers, fast food, drywall, golf courses, small restaurants, food processing, residential homebuilding, couriers, taxis, port drivers, nail salons, cosmetologists, nursing facilities, gardening, janitorial, ambulatory health care (providing transportation to people with health care or other issues0, home health care, recycling, call centers, farm labor, fruit picking and harvesting, and dairy,

Class 10

CLASS ACTIONS AND WORKER ADVOCACY

The recent decision by the Supreme Court in <u>Wal-Mart Stores</u>, Inc. v. <u>Dukes</u>, 131 S. Ct. 2541, 2011 U.S. LEXIS 4567 (2011) raises questions about the availability of class actions on the federal and state level. Additionally, the Supreme Court's decision last term in <u>AT&T Mobility LLC v. Concepcion</u>, 131 S. Ct. 1740, 2011 U.S. LEXIS 3367(2011), has encouraged employers to implement arbitration agreements prohibiting class actions. Nonetheless, they have been an invaluable tool in remedying employment related problems for workers and in particular low wage worker.

This class will explore several class actions brought on behalf of laundry workers working for Cintas Corporation, one of the largest national laundry and related companies in the country. You can learn about their national business at their website. http://www.cintas.com/

Our presenter Eileen Goldsmith has been involved in several important pieces of litigation against Cintas on wage and hour issues. Two of these were very successful efforts to enforce

Living Wage Ordinances-one in Los Angeles and one in Hayward. We will use these examples to talk about how class actions have been used and the substantive issues which are raised in those cases. The purpose of the class is not to learn the intricacies of Rule 23 or California Code of Civil Procedure Section §382. The purpose is to see how these actions work their way out in conjunction with important other labor right issues.

Please read the excerpt from *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121 (2006). Please review the issues concerning the Los Angeles Living Wage Ordinance (LWO) and in particular the 20 hour minimum rule adopted by the Department of Public Works which enforces the LWO. This 20 hour minimum rule became a central issue in this case. Please read the case to understand how the court of appeal resolved the potential conflict issue and review the standards applied in determining whether a class action could be maintained.

Please read the excerpt of the second opinion, *Aguiar v. Cintas Corp. No.* 2, 170 Cal. App. 4th 313 (2009). Read this to see how the plaintiffs effectively turned the 20 hour rule against Cintas. You only need to read this enough to understand the basis upon which the 20 hour rule was challenged and how the court resolved it. Keep in mind how this played into the maintainability of a class action.

You should also read the notice that was sent to the class members arising out of the Los Angeles litigation. This is a unique notice because of its "plain language" and indicates the basis of this settlement. Take a look at it and see if you think workers could understand the notice and their rights. See if there are any provisions which would have dissuaded workers from participating or encourage workers to opt out of the settlement. The Instructor will forward this notice.

That case has now been resolved and Ms. Goldsmith will talk about the evolution of that case.

A second case was brought by Ms. Goldsmith and her firm involving a similar ordinance in Hayward. The Instructor will forward to the Hayward ordinance. The second case is *Amaral v. Cintas Corp. No.* 2, 163 Cal. App. 4th 1157 (2008). This is a lengthy opinion and all that you are asked to do is look through it and identify all the issues which were subject to class action treatment.

Ms. Goldsmith and her firm brought a separate action in the federal court alleging violations of overtime rules under the Fair Labor Standards Act against Cintas. This case was litigated and finally resulted in a very substantial settlement. Under the Fair Labor Standards Act, a client can bring a "collective action" which is different than a class action. Please look at the notice the court ordered in the *Veliz* litigation *to* get an understanding of the difference between a class action and a collective action. You can check the Fair Labor Standards Act at 29 U.S.C. 216 (b). Note the necessity that the employees actually join in the action by giving a consent in writing. You can read about this litigation at http://www.cintasovertime.com. Ms. Goldsmith will talk about some of the interesting developments in that successful case.

Additionally, you can look at the *Dukes* case but hat is not required.

We have also listed a few other cases in which Cintas has been involved arising out of this entire dispute. Cintas was notoriously vigorous in its defense but as you will hear Ms. Goldsmith and her firm were very successful. Ms. Goldsmith is a partner at Altshuler Berzon in San Francisco

You might be interested in the following posted under "Labor Philosophy"

At Cintas, we respect our partners' freedom to choose union representation. We equally believe that unions should respect people's right not to be unionized.

We have always respected our employee-partners' decisions regarding unionization, and currently have several groups of employee-partners who are members of a union. In these situations, we work to create as positive a working relationship as allowed within the current labor regulations.

However, we work hard to provide great places to work, wages and benefits that are almost always equal to or above our competitors, and a culture based on respect and ethical standards. We think this is a big reason why almost all of our 30,000 employee-partners have chosen not to join a union and why 53 groups of employee-partners since 1981 have voted to discontinue their union relationships.

See the following additional cases:

<u>Cintas Corp. v. NLRB</u>, 589 F.3d 905 (8th Cir. 2009), enforcing Cintas Corp., 353 N.L.R.B. 752 (2009)

<u>Cintas Corp. v. United Here,</u> 355 Fed. Appx. 508 (2d Cir. N.Y. 2009), affirming dismissal of RICO claims against unions, **Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571 (S.D.N.Y. 2009)**

EEOC v. Cintas Corp., 2011 U.S. Dist. LEXIS 86228 (E.D. Mich. 2011) (and related series of sex discrimination cases)

<u>Cintas Corp. v. NLRB</u>, 482 F.3d 463 (D.C. Cir. 2007), enforcing 344 NLRB 943 (2005)

<u>Pichler v. Unite</u>, 542 F.3d 380 (3d Cir. 2008), cert. denied, 129 S. Ct. 1662 (2009) (Union found liable under Driver's Privacy Protection Act for recording drivers licenses)(Cintas not a party)

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 including 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 workers compensation 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 a year ago 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 multiagency 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 publicly advised their clients 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 This is a good summary of the law. Note how there are many governmental agencies involved in this issue, among others the taxing authorities.

We will explore this concept under various regimes. We will see that there are three basic tests used to determine independent contractor 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 with different policies concerns.

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.

It may be helpful to think of workers/independent contractors you have come across: contract lawyers, paralegals, delivery drivers, barbers, cosmetologists, consultants, artists, computer programmers and writers.

We will use as a case study the ongoing litigation involving drivers in Narayan v. EGL, Inc., 616 F.3d 895 (9th Cir. Cal. 2010).

We will have as our guest Aaron Kaufmann who is handling this litigation and who has written and spoken to various groups about the independent contractor problem.

<u>Borello</u> is the lead case in California on this issue. It came to the Supreme Court in an unusual way. All though pro-worker it left the issue of whether someone is misclassified a heavily fact intensive inquiry. Does it create any presumptions and which "test" of employee status does it really adopt, if any? <u>Borello</u> arose in the situation of sharefarmers so it is an interesting case but there are not many sharefarmers left. So these principles have to be applied to many other situations with which the courts have been struggling since <u>Borello</u>.

Please read:

You may to read as a summary to this problem the California Labor Commissioner's website mentioned above.

<u>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</u>, 48 Cal. 3d 341 (1989) Borello is the important California case for independent contractor status under California law.

Narayan v. EGL, Inc., 616 F.3d 895 (9th Cir. 2010) (Note also the choice of law issue)

Aaron Kaufman as written an update entitled "Recent Developments in Independent Contractor Misclassification Litigation." I will send that to each student. I will send an "assignment" to each student to read one section of his article and one or two cases cited so that you can participate in the discussion using the specific information on that issue.

Suggested Reading and Sources:

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

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

"Combating Independent Contractor Misclassification in the States: Models for Legislative Reform," National Employment Law Project (2005) available at http://nelp.3cdn.net/a7199e02c9a2dff987_g4m6bhinn.pdf

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

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

Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division (2010) available at http://www.dol.gov/whd/resources/strategicEnforcement.pdf

Eve Cervantez, "Preventing Wage Theft From Low-Wage Workers: Recent Developments in Litigating Independent Contractor Misclassification Cases."

JKH Enterprises, Inc. v. Department of Industrial Relations, 142 Cal App. 4th 1046 (2006)

Estrada v. RPS, Inc., 125 Cal. App. 4th 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)

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

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

Fedex Home Delivery, an Operating Division of Fedex Ground Package Systems, 356 NLRB No. 10 (2010)(Ordering Fedex to bargain over unit of single route drivers)

<u>In re FedEx Ground Package Sys., 2010 U.S. Dist. LEXIS 134959 (N.D. Ind. 2010)</u>(disposing of most claims)

<u>Vizcaino v. Microsoft Corp</u>. 120 F. 3d 1006 (9th 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 (9th Cir 1998), opinion amended, 184 F. 3d 1070 (9th 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 http://www.irs.gov/pub/irs-utl/van-ops.p

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 (5th 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)

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

<u>Juarez v Jani-King of California</u>, 2011 U.S. Dist. LEXIS 28068 (N. D. Ca. 2011)(denying class certification)

Class 12

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.

Other organizations have gone directly to these countries to improve working conditions.

We will look at 2 different efforts to improve working conditions in other countries through 2 presenters who are involved in two of the most cutting edge campaigns.

These campaigns address such legal issues as secondary boycott, defamation, freedom of association, anti-trust and preemption. We will explore those issues and look at one anti-sweatshop ordinance that has been adopted in San Francisco. 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 the 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 participated in a campaign involving Russell Athletic which we will use as a basis for discussion.

You are asked to read the assessment concerning the Russell Athletic campaign. Citations to some of the important cases and materials on the legal issues below are part of the suggested reading and are not required. You are also asked to review the San Francisco Sweatfree Contracting Ordinance as a basis of discussion of such legislation. The Steve Greenhouse article mentioned at the end of this syllabus is a good summary of the events in this campaign.

Our second guest has been actively involved in Haitian struggles. Nicole Phillips will discuss her involvement in Haiti and the campaigns to improve working conditions after the earthquake. You are asked to read one item on Labor Rights in Haiti. She is a staff attorney for the Institute for Justice and Democracy in Haiti.

You are asked to read a very recent WRC report on one factory in Haiti.

These are quite amazing presenters who are involved in creative and immediate campaigns. Please keep in mind the limited resources and limited reach of the law in these circumstances.

Required Reading:

As to these readings you do not need to read the details. Spend enough time to understand in general what happened and the result.

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.

Excerpt from Chapter "Corporate Codes of Conduct on Labor Standards by Ben Hensler, Read Part E on Honduras.

Examine this Ordinance which is a local ordinance designed as the title states:

San Francisco Sweatfree Contracting Ordinance. Chapter 12U available at http://www.sweatfree.org/policies/SFordinance_Nov_2008.doc

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

Please read for Ms. Phillips:

Haiti: Submission to the United Nations Universal Periodic Review: Labor Rights Submitted by: Antèn Ouvriye (2011)

You may want to read the article referred to below authored by Ms. Phillips and 2 others.

Please check out the website for Institute for Justice and Democracy in Haiti at http://ijdh.org/
Ms. Phillips is a staff attorney for this organization.

Read "Preliminary Report on Unlawful Dismissals at Genesis, S. A. (Haiti) which is a very recent report by the WRC on a situation in Haiti.

Suggested Reading:

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

<u>Doe I v. Wal-Mart Stores, In</u>c., 572 F. 3d 677 (9th Cir 2009)(incorporation of code of contract does not create an enforceable duty to protect workers)

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 http://www.workersrights.org/dsp/Designated%20Suppliers%20Program%20-%20Revised.pdf

OECD "Codes of Corporate Conduct: Expanded Review of their Contents, (2001) available at http://www.oecd.org/dataoecd/57/24/1922656.pdf

Collegiate Licensing Corporation, Special Agreement Regarding Labor Codes of Conduct (Jan. 2003), http://licensing.wisc.edu/CLC_UW_Code_of_Conduct.pdf.

Worker Rights Consortium, Factory Assessment, Productora Climinex Industrial (Mexico); Findings and Recommendations, November 19, 2010

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

International Labour Organization (ILO) :Corporate Codes of Conduct" available at http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/main.htm

Complaint, People v. Seventeen Inc. LA Superior Court BC 417214

Judgment in same action.

Benjamin Hensler, "Honduras Case a Historic Test for Code of Conduct Enforcement."

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 http://www.flawatch.org/memobarenberg.pdf

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)

Note And Comment: "Sweatshop Liability: Corporate Codes Of Conduct And The Governance Of Labor Standards In The International Supply Chain, " 14 Lewis & Clark L. Rev. 397 (2010)

William B. Gould, "Symposium: International Labor Standards: Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?" 21 Stan. L. & Pol'y Rev 401 (2010)

Carson Sprott, 'Reconceptualizing Human Rights: Note: Competitive and Fair: The Case for Exporting Stronger Extraterritorial Labor and Employment Protection," 33 Hastings Int'l & Comp. L. Rev. 479 (2010)

Meena Jagannath, Nicole Phillips and Jeena Shah, "Rights Based Approach to lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti," 10 N. W. J, In't Human Rights, (2011)

Gary Haugen and Victor Boutros, "And Justice For All," 89 Foreign Affairs 5, (2010)

Sweatfree Toolkit published By Global Exchange available at http://www.globalexchange.org/campaigns/sweatshops/sweatfreetoolkitcomplete.pdf

Fair Labor Association at http://www.fairlabor.org/

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

Steven Greenhouse,

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