

UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW

Representing Low Wage Workers

Law 283

Spring 2011

Professor David A Rosenfeld

INTRODUCTION

This class will focus upon identifying those areas of employment and labor law which affect low wage workers. With the economy in a recession or even depression for three years, many workers have lost their jobs. Unemployment is at a very high rate: over 12% in California. We will take a look at some of the laws designed to assist workers who are out of work. One of the interesting questions will be what programs the new administration implemented to help workers whether as part of a stimulus package or other relief subsequent. For example the rules regarding unemployment insurance have been substantially altered. We will follow those developments.

Labor has given up passage of the Employee Free Choice Act (EFCA). Although we will not study labor law issues which are generally part of the Labor Law course, we will see how section 7 of the National Labor Relations Act brings a substantial measure of protection to workers who seek to improve wages, hours or other conditions of employment without the involvement of a union. The most important development affecting low wage workers will occur in 2014 with the establishment of health care exchanges and mandatory coverage.

Low wage workers can be identified broadly as workers who earn a “wage” although some are actually salaried and some earn piece rates, commissions and other forms of “wages.” We cannot set a national maximum of yearly income to identify what is the cut off for “low wage.” Whether it is the federal poverty level or twice that, families find it difficult to survive. Moreover, many full-time employees who work for established employers with lawful payroll and employment practices are still “low wage.” We will review some economic materials in an effort to identify “low wage workers” employing various measures such as distance from federal poverty line, family size, and presence of disposable income after necessities are met and even availability of federal and state assistance programs. With the recession we see pressure to lower wages even more. Additionally many high paying jobs have disappeared. Although temporarily the three American auto manufacturers have survived the automakers have shed thousand of workers and the remaining workers have seen their conditions eroded.

We will examine some of the economic and work force changes which have occurred which have created such a large group of low wage workers. This will be

particularly important as some economists have declared that we are in a recession with some predicting a double-dip recession. There is a large amount of literature on this issue and we will read a few key pieces. The global economy has also fallen into a recession. We have seen the impact of this on jobs in this country.

Employers are facing fierce competitive pressures. Wage and benefit costs are variable costs which employers can “control” which generally means reduce. One way to reduce overall costs is to reduce wages or benefits which usually can be done legally. Some employers, however, either deliberately or otherwise violate legal rules designed to protect workers. There is a strong incentive to violate these laws since every dollar saved on wages means additional savings on taxes and workers compensation costs and every dollar saved is added to the gross profit.

Low wage workers are employed in various configurations. Some are direct full-time employees with benefits. Many are even union represented. Many are among the contingent work force. Many are part time employees. Some are employed through various schemes including leasing and temporary agency arrangements. Some are classified as independent contractors. The independent contractor mechanism is one of the common ways employers reduce costs and avoid the restrictions of the employment relationship. But often employers mis-classify employees as independent contractors. As we shall see the laws that regulate their employment often affect higher paid workers as well.

With so many layoffs, reduction in work opportunities, cutting of health care and pension benefits and plant and company closures, low wage workers have suffered dramatically. We will explore how employers deal with these problems and consider what remedies are available to unemployed workers. Representing low wage workers is thus shifting in many respects to representing unemployed workers.

The rights afforded such employees are limited under federal law. Although the Fair Labor Standards Act sets a minimum wage (\$7.25 per hour) and requires overtime compensation for many but not all low wage workers, it does little else for low wage workers. The Family and Medical Leave Act and other federal laws offer some measure of protection. Anti-discrimination laws afford no minimum standards. ERISA which regulates benefits does little for low wage workers since no employer is compelled to offer benefits. Some employers do offer benefit plans and we will explore ERISA in the context of benefit plans which are available to such workers. The new Patient Protection and Affordable Care Act of 2009 will change the availability of health care for low wage workers in 2014.

State law serves as a remedy for low wage workers in those states which have developed labor laws. Where a state has little labor law, there is very little regulation of employment. As we shall see, however, there are surprising laws in California which exist that, if enforced, can bring a substantial measure of protection. California is relatively unique in that regard. We will focus much of our attention on California law.

With a Democratic legislature and governor we may see some new legislation affording additional protection to low wage workers

Enforcement of these laws can bring about organizing, both in the traditional union setting and also around community groups such as worker centers. This can lead to more protection for such workers and their families. We will explore how we can promote the interests of such workers in this organizing context. We will see how many local governments re trying to fill the gap by enacting local legislation which imposes more worker protection.

We will address the historical context of such regulation. The issue of the Eight Hour Day has been a central issue in employment disputes since the 1860's. Most of the law that regulates the work place comes in an historical and social context.

We will survey several important issues in selected areas. A list of topics covered in last year's class follows below. We will not use the class as an attempt to comprehensively review any area of the law. Rather we will attempt to show how the low wage employment relationship is regulated. The purpose of the class will be to show that lawyers can effectively advocate for workers. It is often necessary to know that a worker may have remedies under various statutes, both federal and state. We will review examples of litigation which have been successful in improving working conditions.

We will not focus upon issues arising under the National Labor Relations Act. We will note how section 7, 29 USC § 157, protects concerted activities of workers although no union is involved. In one very recent case the NLRB held that a worker who protested to his supervisors about working conditions in very strong language could not be fired because he was engaged in protected concerted activity. This is an important tool to defend low wage workers who protest their working conditions.

We will consider Hoffman Plastic Compounds, Inc. v. NRLB, 535 U.S. 137 (2002) which makes it much more difficult to organize undocumented workers. It has also made in more difficult to enforce federal and state employment laws. We will explore California's efforts to afford undocumented workers maximum protection under California's wage and hour laws. With so much unemployment immigration issues have become less predominant as there is much more competition for low wage work.

We will also review preemption issues which impact or limit state and local legislation. For example ERISA preemption is a central issue in state and local efforts to establish health care systems which require employer funding. We will look at how local and state legislation designed to help low wage workers must be drafted to avoid preemption under the National Labor Relations Act. We will also note how state law preemption sometimes restricts the ability

The class will require selected reading and student participation for each class session and student participation. The Instructor invites selected presenters who have been successful in developing strategies to assist low wage workers. Additionally the

course will require a paper to be prepared which addresses some relevant issue affect low wage workers. Participants can satisfy their writing requirement if they chose in the class. The Instructor has accepted papers on a very wide range of subjects in the past and will supply a list of suggested topics. There is the opportunity to write a paper on a relevant topic which is also very current and of special interest to each student. Students will provide a summary presentation of their research and papers at the last class session.

No text is required. The Instructor will forward the reading material to the class by email in advance of each class.

The topics covered last year in the course are as follows:

1. Introduction: West Coast Hotels v. Parrish and Proposals for Federal Action; Introduction to the IWC Orders
2. California Wage and Hour Laws
3. Reducing the Workforce
4. Immigration Issues
5. Immigration Issues and Section 7 Rights
6. Living Wage Strategies
7. Unemployment and other Wage Replacement Laws
8. Enforcing Workers' Rights Abroad; The Anti-Sweatshop Movement
9. Workers' Compensation
10. Wage and Hour Enforcement: The Meal Period and Rest Break Battle
11. Independent Contractors and Misclassification
12. Family Rights and Time Off From Work
13. ERISA and Benefits for Low Wage Workers
14. Worker Centers

The Instructor intends to discuss the employment at will doctrine and the erosion of that doctrine and the right of privacy in the low wage worker context.

David Rosenfeld is available at his office 510-3377304, cell phone is 510-715 4218 and home phone is 510-653 8081. Please feel free to call. He tries to be at the law school an hour and half before class and is available to talk with students at Café Zeb. He will come to the school by special arrangement for other meetings. His email is drosenfeld@unioncounsel.net

Any student who would like the entire syllabus and reading from Representing Low Wage Workers, spring 2010, may contact the Instructor by email and he will forward it.

There is useful material available to students on low wage workers.

“California Workers Rights: A Manual of Job Rights, Protections and Remedies,” by David A. Rosenfeld, Miles Locker and Nina Fendel (IRLE, Berkeley, 2010) is a survey of the many laws affecting low wage workers in California. It contains references to the state and federal laws which also govern the workplace.

The following websites are helpful sources:

Institute for Research on Labor and Employment; <http://www.iir.berkeley.edu/> and <http://www.irle.ucla.edu/>

U. C. Berkeley Labor Center; <http://laborcenter.berkeley.edu/>

WORKSAFE!; <http://www.worksafe.org/about/who.cfm>
(OSHA Information)

California Budget Project; <http://www.cbp.org/> (Budget, Impact of State Programs)

Economic Policy Institute; <http://www.epinet.org/> (Economic Studies on many issues affecting workers)

Center for Law and Social Policy; <http://www.clasp.org/> (Social policy including welfare issues)

Public Policy Institute of California; <http://www.ppic.org/main/home.asp> (Studies of policy issues)

National Employment Law Project; <http://www.nelp.org/> (Employment Law issues)

National Immigration Law Center; <http://www.nilc.org/> (Immigration issues)

California Department of Industrial Relations; <http://www.dir.ca.gov/>

Department of Labor Standards Enforcement; <http://www.dir.ca.gov/dlse/>

Employment Law Information Network; <http://www.elinfont.com/>

The Center for Law and Social Policy; <http://www.lowwagework.org/new.htm>

Brennan Center; <http://www.brennancenter.org/>

Center for Worklife Law (U. C. Hastings College of Law); <http://www.worklifelaw.org/>

Worker Rights Consortium; <http://www.workersrights.org/>

International Labour Organization; <http://www.ilo.org/global/lang--en/index.htm>

The following are useful law review articles:

Stephen F. Befort, “Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work,” 24 Berkeley J. Emp. & Lab. L. 153 (2003).

Fran Ansley, “Standing Rusty and Rolling Empty: Law, Poverty and America’s Eroding Industrial Base,” 81 Geo. L. J. 1757 (1993).

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).

Andrew Elmore, “State Joint Employer Liability Laws and *Pro Se* Back Wage Claims in the Garment Industry: A Federalist Approach to a National Crisis,” 49 UCLA L. Rev. 395 (October 2001).

Julie A. Su, “Making the Invisible Visible: The Garment Industry’s Dirty Laundry,” The J. Gender Race & Just. (1998).

Rick McHugh, “Recognizing Wage and Hour Issues on Behalf of Low-Income Workers,” J. Poverty L. & Pol’y (Sept. – Oct. 2001).

Shirley Lung, “Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers,” 34 Loy. U. Chi. L. J. 291 (2003).

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

Lora Jo Foo, “The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation,” 103 Yale L. J. 2179 (1994).

Patricia Ball, “The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of

Involuntary Impermanent Workers and Those Who Employ Them,” 43 Santa Clara L. Rev. 901 (2003).

Stephen F. Befort, “Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment,” 43 B. C. L. Rev. 351 (2002).

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

Karl E. Klare, “Toward New Strategies for Low-Wage Workers,” 4. B.U. Pub. Int. L. J. 245 (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).

Arne Kahlberg, “Moving Out of Low Wage Jobs: Opportunities and Barriers: An Overview of Panel 3,” 10 Employee Rts & Emp. Pol’y J 81 (2006).

Rebecca Smith, “Human Rights At Home: Human Rights As An Organizing And Legal Tool In Low-Wage Worker Communities,” 3 Stan. J. Civ. Rts. & Civ. Liberties 285 (2007).

Jennifer Gordon, “Transnational Labor Citizenship,” 80 S. Cal. L. Rev. 503 (2007).

Richard Michael Fischl, “Rethinking The Tripartite Division Of American Work Law,” 28 Berkeley J. Emp. & Lab. L. 163 (2007).

Bryan M. Seiler, Laura J. Cooper and Catherine L. Fisk, “The Low-Wage Worker: Legal Rights—Legal Realities,” 92 Minn. L. Rev. 1289 (2008).

Peggie R. Smith, “The Publicization of Home-Based Care Work in State Labor Law,” 92 Minn. L. Rev. 1390 (2008).

Craig Becker and Paul Strauss, “Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards,” 92 Minn. L. Rev. 1317 (2008).

Nelson Lichtenstein, “[How Wal-Mart Fights Unions,](#)” 92 Minn. L. Rev. 1479 (2008).

David Weissbrodt, “Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB,” 92 Minn. L. Rev. 1424 (2008).

Catherine L. Fisk and Michael M. Oswalt, “Preemption and Civic Democracy in the Battle Over Wal-Mart,” 92 Minn. L. Rev. 1502 (2008).

Scott L. Cummings and Steven A. Boucher, “Civil Rights and the Low-Wage Worker: Article: Mobilizing Local Government Law for Low-Wage Workers,” 2009 U Chi Legal Forum 187 (2009).

Maria L. Ontiveros, “Civil Rights and the Low-Wage Worker: Article: Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers,” 2009 U Chi Legal F 103 (2009).

Ruben J. Garcia, “Civil Rights and the Low-Wage Worker: Article: Toward Fundamental Change for the Protection of Low-Wage Workers: The "Workers' Rights are Human Rights" Debate in the Obama Era,” 2009 U Chi Legal F 421 (2009).

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

Brishen Rogers, “Toward Third-Party Liability for Wage Theft,” 31 Berkeley J. Emp. & Lab. L. 1 (2010)

Elizabeth Kennedy, “The Invisible Corner: Expanding Workplace Rights for Female Day Laborers,” 31 Berkeley J. Emp. & Lab. L. 126 (2010)

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

Eli Naduris-Weissman, The Worker Center Movement and Traditional Labor Law: A Contextual Analysis, 30 Berkeley J. Emp. & Lab. L. 232 (2009)

Noah D. Zatz, “The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?”, 2009 U Chi Legal F 1 (2009)

Maria L. Ontiveros, “Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers,” 2009 U Chi Legal F 103 (2009).

The following books are recommended:

Paul Osterman, Thomas A. Kochan, Richard M. Locke, and Michael Piore, “Working In America: A Blueprint for the New Labor Market,” (2001).

[Lawrence Mishel](#), [Jared Bernstein](#), and [Heidi Shierholz](#), “State of Working America: 2008/2009,” Economic Policy Institute (2009).

Richard Kazis and Marc S. Miller, “Low-Wage Workers in the New Economy,” Urban Institute Press (2001).

Eileen Appelbaum, Annette Berhardt, Richard J. Murnane, "Low-Wage America: How Employers Are Reshaping Opportunity in the Workplace," Russell Sage Foundation (2003).

Katherine V. W. Stone, "From Widgets to Digit: Employment Regulation for the Changing Workplace," Cambridge University Press (2004).

A good history which sets out the context of social legislation and refers to many other sources is Daniel T. Rodgers, "Atlantic Crossings: Social Politics in a Progressive Age," (Harvard University Press (1998).

William E. Forbath, "Law and the Shaping of the American Labor Movement," Harvard, (1989).

Cynthia Estlund, "How Workplace Bonds Strengthen A Diverse Democracy," Oxford University Press (2003).

Rick Fantasia & Kim Voss, "Hard Work; Remaking The American Labor Movement," University of California Press (2004).

Janice Fine, "Worker Centers; Organizing Communities at the Edge of the Dream," Cornell University Press (2006).

Ruth Milkman and Kim Voss, "Rebuilding Labor: Organizing and Organizers in the New Union Movement," Cornell University Press (2004).

Lowell Turner and Daniel B. Cornfield, "Labor in the New Urban Battlegrounds," Cornell University Press (2007).

Sarumathi Jayaraman and Immanuel Ness, "The New Urban Immigrant Workforce," M. E. Sharpe, (2005).

Robert J. S. Ross, "Slaves to Fashion; Poverty and Abuse in the New Sweatshops," University of Michigan Press (2004).

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

Laura Hapke, "Sweatshop; the History of an American Idea," Rutgers University Press) (2004).

Ruth Milkman, "L.A. Story; Immigrant Workers and the Future of the U.S. Labor Movement," Russell Sage Foundation (2006).

Richard B. Freeman & Joel Rogers, "What Workers Want," Cornell University Press (1999).

Lance A. Compa and Stephen F. Diamond, “Human Rights, Labor Rights, and International Trade,” University of Pennsylvania Press (1996)

Katherine S. Newman, “Chutes and Ladders; Navigating the Low-Wage Labor Market,” Harvard University Press (2006).

Robert Pollin and Stefanie Luce, “The Living Wage: Building a Fair Economy,” The New Press (1998).

Robert Pollin; Mark Brenner; Jeannette Wicks-Lim; Stephanie Luce, “[A Measure of Fairness](#): The Economics of Living Wages and Minimum Wages in the United States,” Cornell University Press (2008)

Holly Sklar, Laryssa Mykyta and Susan Wefald, “Raise the Floor: Wages and Policies That Work for All of Us,” South End Press (2008).

[Rebecca M. Blank](#), [Sheldon H. Danziger](#) and [Robert F. Schoeni](#), “Working and Poor: How Economic and Policy Changes Are Affecting Low-Wage Workers,” Russell Sage Foundation (2008).

Richard Freeman, “America Works: Critical Thoughts on the Exceptional U.S. Labor Market,” Russell Sage Foundation (2008).

Robert H. Frank, “Falling Behind: How Rising Inequality Harms the Middle Class,” University of California (2007).

[Annette Bernhardt](#), [Heather Boushey](#), [Laura Dresser](#), and [Chris Tilly](#), “The Gloves-Off Economy; Workplace Standards at the Bottom of America’s Labor Market,” Cornell University Press (2008).

Ruth Milkman, Joshua Bloom and Victor Narro, eds, “Working For Justice,” Cornell University Press (2010).

There are a number of books published on the current economic crisis:

Robert B. Reich, “Supercapitalism: The Transformation of Business, Democracy, and Everyday Life,” Vintage (2008).

Jacob S. Hacker, “The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream,” Oxford University Press (2008).

Paul Krugman, “The Return of Depression Economics and the Crisis of 2008,” W. W. Norton (2008).

Jared Bernstein, “Crunch: Why Do I Feel So Squeezed? (And Other Unsolved Economic Mysteries),” Berrett-Koehler (2008).

Recommended popular books are:

David K. Shipler, "Working Poor: Invisible in America," New York (2004).

Barbara Ehrenreich, "Nickel and Dimed, On (Not) Getting Along in America," New York (2001).

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

Beth Shulman, "The Betrayal of Work; How Low-Wage Jobs Fail 30 Million Americans," The New Press (2003).

Steven Greenhouse, "The Big Squeeze: Tough Times for American Workers," Knopf (2008).

Richard P. McIntyre, "Are Worker Rights Human Rights?" University of Michigan Press (2008)

A valuable source of economic data on low wage workers:

Economic Policy Institute, "The State of Working American, 2010/2011," (EPI 2011)(published biannually)(available January 2011)

There are many studies and summaries prepared by advocacy groups. Two examples are:

Catherine Ruckelshaus and Bruce Goldstein, "From Orchards to the Internet: Confronting Contingent Work Abuse," National Employment Law Project and Farmworkers Justice Fund (2002) available at <http://www.nelp.org/docUploads/pub120.pdf>

Rebecca Smith & Maurice Emsellen, "Contingent Rights: The Legal Landscape for Nonstandard Workers in California," National Employment Law Center & The Center On Policy Initiatives, (2002) available at <http://www.nelp.org/nwp/rights/contingentrights0521.cfm>

Other sources are available on the websites mentioned above. Many management law firms publish useful summaries of legal developments including those affecting low wage workers.

The Employment Law Center publishes "Employment Law Manual" for the Workers Rights Clinic which is also a very useful compendium of law and resources. It is revised every year.

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