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EMPLOYMENT LAW

Private Ordering and Its Limitations

Second Edition

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Law & Business

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For My Parents
T.P.G.

For My Students, Past, Present & Future
R.S.A.R.

For the Usual Suspects
C.A.S.

Preface

Few institutions receive greater attention in Americans' private lives and in public policy debates than employment. Employment is everywhere: it is the means by which most Americans make their living; it is, for many, where they spend the majority of their waking hours and develop most of their interpersonal relationships; and it provides the primary economic input ("human capital") firms and government agencies rely on to produce their goods and services.

Because of its pervasiveness and importance, employment-related issues, such as outsourcing to foreign countries or whether to raise the minimum wage, receive significant public attention. More profoundly, many of the fundamental policy disputes of the day — immigration, health care, civil rights, environmental regulation, information privacy, globalization, social security, and tax policy — are either inherently entangled with employment or heavily influenced by employment-related considerations.

Thus, the institution of employment is paramount not just for individual workers and employing firms and government agencies, but also for society as a whole. Correspondingly, then, the legal rules governing the employment relationship have profound implications beyond the two parties to that relationship. This book will introduce you to the core aspects of this body of law and its implications.

As you work your way through the book, you will discover that the structure of employment law is complex and varied. It derives from multiple sources, including contract, tort, agency law, state and federal statutes, and, at least for government workers, federal and state constitutions. In addition, its application varies greatly depending upon a number of factors, including type of worker (e.g., employee v. non-employee, unionized v. nonunionized, white collar v. blue collar, disabled v. nondisabled); type of employer (large v. small, public v. private); type of industry; and jurisdiction (state v. state). Moreover, because American employment law leaves fundamental aspects of the relationship largely for the parties to determine, the "law" governing the American workplace is subject to immense individual variation. Indeed, for many workers, the most important terms of their relationship — including wage levels, benefits, hours, job security, and privacy considerations — are far more likely to be determined by market forces than by externally imposed legal mandates. Finally, like the structure of the workplace itself, the law of employment is ever changing.

Given its intricate and dynamic nature, employment law is challenging to understand and apply. This is what makes your study of it so critical. Workers and firms must rely heavily on counsel for advice on how to (1) structure working relationships to protect their interests and minimize their risks and (2) advocate on behalf of these interests when disputes arise. Similarly, employment policy makers need a solid understanding of the legal doctrines that govern employment, their implications and limitations, and how the varied aspects of the law interact with one another. This need for employment law expertise extends well beyond those engaged in employment-related work since employment and its legal rules have implications for a wide range of other areas and disciplines.

This text provides an accessible and comprehensive introduction into the study of employment law. Following the Introduction, the book contains seven parts with thirteen chapters exploring various employment law topics. You will be introduced immediately to our unifying theme of private ordering and its limitations — that is, the core tension in the law between the terms the parties themselves establish and publicly imposed mandates. In pursuing this theme through the various subtopics that make up our discipline, not only will you master (sometimes abstruse) doctrine but you will also be asked repeatedly to consider the law from transactional, counseling, litigation, and policy-making perspectives.

We have included standard cases to provide you with a solid background in each topic area. These are supplemented with more recent decisions addressing cutting-edge issues in the twenty-first century, including the growth of outsourcing and contingent (semi- or non-permanent) work arrangements, the role of new whistleblower protections such as those in the Sarbanes-Oxley and Dodd-Frank laws, privacy in the workplace, the enforcement of noncompetition agreements, new issues in antidiscrimination law, the law's role in facilitating the work/family balance, and the growth in various risk-management techniques by employers. We also provide extensive notes and commentary that offer further background and probe deeper into the compelling and difficult employment developments of the day. Finally, each chapter contains problems designed to expose you to the real-world challenges employment counsel face as both planners and litigators. If you want to sample even more recent developments in employment law, visit the casebook's website at http://law.shu.edu/private_ordering.

We believe this text offers a cohesive, thorough, and fascinating first look at employment-law theory and practice. We hope you enjoy it.

A Note on Editing

In cases and law review excerpts, all omissions are indicated by ellipses or brackets, except for footnotes and citations, many of which have been deleted or shortened to enhance readability. The footnotes that remain retain their original numbers.

Timothy P. Glynn
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Charles A. Sullivan

December 2010

Acknowledgments

Like all casebooks, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS builds on the experiences of its authors in wrestling with the problems of employment law with their law students at Seton Hall and the University of Denver. At each of these law schools, colleagues provided important insights in the formation of our pedagogic approaches. In a more focused way, we are indebted to Mike Zimmer of Loyola Chicago (emeritus at Seton Hall) and Rebecca Hanner White, Dean of Georgia, for their generosity in allowing us to abridge portions of CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (Aspen, 7th ed. 2008) and to Mike Zimmer and to Deborah Calloway of the University of Connecticut for permitting us to draw on a precursor to the present book, CASES AND MATERIALS ON EMPLOYMENT LAW (Aspen, 1993). Despite these deep intellectual debts, PRIVATE ORDERING is a radical departure from earlier efforts, offering a new understanding of employment law as both a scholarly discipline and a vibrant field of practice.

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As the copious citations to scholarship indicate, we have benefited greatly from the many scholars who have focused their research on employment issues. We have collected the citations in a Table of Selected Secondary Authorities at page 983, but we acknowledge more directly the following for permission to reprint parts of their work:

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Introduction

Private Ordering and Its Limitations

For most of its history, employment law in the United States has been a constant struggle between private ordering and government mandates. The term "private ordering" refers to the rules the parties themselves establish to govern their relationship. Such ordering may occur by the parties' express agreement, such as in a collective bargaining agreement or an individual employment contract. Absent formal agreement, such terms may be implied from the circumstances. In addition, private ordering may occur in absence of any express or implied agreement through a "default rule" establishing terms unless the parties "opt out" by an agreement to the contrary. As you will explore in later chapters, the most prominent default rule in American employment law is the notion that the relationship is "at will" — that is, that it may be terminated by either party at any time for any reason.

In contrast to a pure private-ordering regime, public mandates are government-imposed limitations that directly set terms and conditions of employment or affect such terms and conditions indirectly. Mandates range from flat commands — such as the requirement that employers pay a minimum wage, grant leave for certain family and medical needs, or provide compensation for workplace injuries — to rules creating procedural mechanisms to govern the workplace. Unionization and collective bargaining are the prime examples of the latter. Mandates are often negative: Employers must not discriminate on the basis of race, sex, or religion. But sometimes they are positive: Employers must reasonably accommodate disabilities if doing so would not cause an undue hardship. Mandates are often distinctive to employment law — such as the requirement that mass layoffs be conducted only with sufficient advance warning. However, they also come from more general sources of law; for instance, the U.S. Constitution provides federal and state government workers some protections that their private sector counterparts lack. A critical aspect of true mandates is the inability of workers to waive the substantive rights provided.

From the 30,000-foot level, the law governing the employment relationship has moved away from purely private ordering and toward greater government regulation. During much of the nineteenth century, laissez faire and "freedom of contract" prevailed in employment — with the striking exception of the law being largely constitutive of the

subordination of African Americans and women (indeed, often removing both groups from "employment").

Thus, in the post–Civil War era, the law tended to view employers and employees as equals, whose participation in "market transactions" would result in employment contracts — often "at will" — that the courts would then neutrally enforce. The reality of this view was always dubious. Many scholars have pointed out that cases such as *Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding a state statute barring women from the practice of law), and the use of antitrust laws to repress unions showed that the law was far from a neutral arbiter and often placed a heavy thumb on the side of the scale favoring employers and the interests of capital. Nevertheless, the prevailing ideology during the nineteenth century and well into the twentieth was one of the supremacy of private ordering, reflected most dramatically by "*Lochner* Era" court decisions that struck down public mandates regulating work in the name of freedom of contract. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (regulation of bakers' working hours); *Coppage v. Kansas*, 235 U.S. 1 (1915) (prohibition on agreements barring employees from joining unions); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wage mandate for female workers).

Even as *Lochner* was decided, however, change was in the air. In the next two decades, workers' compensation regimes would supplant the minimal protections tort law accorded to workers injured on the job. Perhaps critically, however, this statutory inroad for workers involved a trade-off of more certain liability for lower recoveries and therefore was also in the interests of employers who avoided the risks of a developing tort regime. In any event, as the twentieth century proceeded, workers' rights became increasingly recognized in the law. The Great Depression brought the New Deal, and the New Deal brought, among other initiatives, the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69 (2006), protecting the right to unionize and bargain collectively, and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 (2006), establishing a federal minimum wage and regulating overtime and child labor practices. The demise of *Lochner* in the wake of President Roosevelt's court-packing proposal, *see West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled for many the beginning of the end of private ordering.

Fast-forward 30 years, private ordering suffered another assault, beginning with a legislative response to the Civil Rights movement. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (2006), ushered in, for the first time on a national level, federal regulation effectively limiting employers' ability to hire and fire at will, by prohibiting discrimination on the basis of race, sex, national origin, and religion. That statute was followed within three years by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (2006), and, after two more decades, by the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C.A. §§ 12101-12213 (2010). As a result of these three laws, most employers no longer have free rein in their hiring and firing decisions, and states, even in what had been the Deep South, added their own legislation prohibiting discriminatory employment practices to reach many employers too small to be covered by the federal antidiscrimination laws.

The 1970s saw two further federal inroads on private ordering in employment, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381 (2006), and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651-78 (2006). ERISA was a response to horror stories of employers firing workers to avoid paying their pensions or otherwise reneging on promises of long-term benefits. The statute was designed to provide both carrots and sticks to ensure an equitable private retirement system.

OSHA, more directly command-and-control, was intended to be proactive in protecting worker safety. While the workers' compensation regimes enacted decades earlier ensured payment for injuries suffered, OSHA was designed to prevent injuries in the first place through a series of explicit administrative regulations and corresponding agency enforcement.

On top of these statutory assaults on private ordering, state courts were busy cutting back on what they viewed as the excesses of the at-will rule. This movement produced two major strands — one contractual, the other tort-based. First, drawing on general contract principles, the courts in most states expanded protections for job security beyond formal, written employment contracts to include oral agreements and terms implied from the circumstances. They also began to enforce job security provisions in personnel manuals and read individual agreements or circumstances to provide something more than at-will status. Second, drawing in part on the statutes that proscribe certain reasons as illegitimate bases for employment decisions, the courts began to formulate a tort-based "public policy" exception to the at-will doctrine. That is, while employers remained generally free to fire an employee for most reasons, there were certain reasons that the courts declared to be impermissible. Unlike earlier efforts in this direction that condemned specific reasons for termination (e.g., antiunion animus, race), the newer decisions were more open-ended. An actionable termination was one which offended "public policy," a term whose meaning depends upon judicial interpretation. While employers still did not need a good reason to fire someone, they could not act from bad reasons, and the list of bad reasons was no longer confined to statutory prohibitions like the antidiscrimination laws.

Thus, by the mid-1980s, public mandates appeared to be winning the day, and private ordering correspondingly seemed in eclipse. But this view was accurate, if at all, only at the 30,000-foot level. Closer to the ground, the picture was significantly different. The NLRA, for example, legalized unions and put the power of the federal government behind collective bargaining. But statutory amendments and court and National Labor Relations Board decisions limited the economic power of unions. In part as a result of these subsequent legal developments, union representation of the private-sector workforce has experienced a steady decline over the past half century. Similarly, the FLSA provides for a minimum wage and overtime protection, but it has always contained significant exemptions, and the failure of Congress to increase minimum wage levels to keep pace with inflation means that the federal floor provides very limited, and arguably inadequate, protection. In the antidiscrimination arena, legislative expansion has been countered by judicial contraction, with judicially crafted doctrines and proof problems blunting the thrust of the antidiscrimination laws. This was particularly true of the ADA whose definition of "disability" was subject to such narrow interpretations by the Supreme Court that Congress reacted with the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), Pub. L. 110-325, 122 Stat. 3553, to try to provide rights to workers with a broader range of physical and mental impairments. Finally, both OSHA and ERISA have been harshly criticized as ineffective. Indeed, ERISA has come to be seen as a barrier to workers' rights. An example is the 2006 decision striking down a Maryland law requiring very large employers, such as Wal-Mart, to provide health insurance for their workers. The court held that the law was preempted by ERISA, which regulates, but does not require, employers to provide any benefits to its workforce. *Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481 (D. Md. 2006), *aff'd*, 475 F.3d 180 (4th Cir. 2007). In reality then, despite substantial federal regulation, the many aspects of the most important terms of the employment relationship — job security, wages, and benefits — are left to private ordering between employers and employees.

In addition, in recent decades there has been a retreat from mandates and a corresponding increased commitment to private ordering at the state level. While the public policy tort for wrongful discharge has survived, its reach has been narrowed in many states. Further, progressive state contract-law decisions on employee handbooks have been largely negated by judicial approval of employer-drafted disclaimers of contractual liability. In the privacy area, state common-law protections that had emerged in the 1970s have largely disappeared as a practical matter, except where embodied in a few state statutes. Meaningful federal protections are scarce as well, contained only in a few discrete statutes like the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (2006), and the newly enacted Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. 110-233, 122 Stat. 881 (May 21, 2008) (codified in various sections of 26, 29, and 42 U.S.C.).

Other recent developments in employment-law mandates have been mixed as well. For example, in enacting the Family and Medical Leave Act ("FMLA") in 1993, 29 U.S.C. §§ 2601-54 (2006), Congress finally responded to the calls for protection for employees who want to balance work and family demands. Yet the protection provided is limited both in substance (eligible workers receive only unpaid leave) and scope (only larger employers are covered). Similarly, there has been a substantial growth in statutory whistleblower protections at the state and federal levels, the most prominent examples being the Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. No. 107-204, 116 Stat. 745, the health care reform law, Pub. L. 111-148, 124 Stat. 119, and the Dodd-Frank financial reform statute, Pub. L. 111-203, 124 Stat. 1376. All of these statutes provide whistleblower protections for employees who report behavior by their employers that violates the substantive provisions of those laws. But these protections, too, tend to be fairly narrowly drawn, leaving workers with perhaps less protection in reality than they might think.

Finally, employers are becoming increasingly creative in augmenting their baseline rights through contract. This can be seen in the widespread reliance on noncompetition clauses and other restrictive covenants. In addition, employers are developing new forms of private ordering, including various liability and forum management provisions (e.g., arbitration clauses, severance agreements, and forum-selection provisions) that, despite meaningful limitations, fundamentally alter the law's control over private ordering, leaving employers freer to protect their interests and minimize their liability risks.

In short, employment law is a story of private ordering and its limitations. But today, more than ever, it is a complex story, and one in which neither private ordering nor mandates has achieved unqualified primacy. Importantly, the tension between these competing conceptions generally plays out not at the 30,000-foot level but on the ground in particular employment law practices and disputes. Because the practice of law is largely done from a close-up perspective, it is important to understand what is left to private ordering and what is not and, to recognize that today's sphere of free enterprise may be tomorrow's field of government regulation (or vice versa).

The Importance and Elusiveness of Employment Law

This struggle between private ordering and public mandates within American employment law occurs in the context of a universally important relationship. Almost every adult in the United States is or has been an employee. The employment relationship is not only the vehicle though which most Americans make their living but the workplace is also the place where they spend most of their waking hours and develop a large number

of their interpersonal relationships. For many, personal identity is bound up not only with what they do but with where they do it. Professor Paul Weiler summarized this reality:

> The job rather than the state has become the source of most of the social safety net on which people must rely when they are not employed — that is, when they are sick, disabled, or retired. And the plants and offices in which we work are the places where we spend much of our adult lives, where we develop important aspects of our personalities and our relationships, and where we may be exposed to a variety of physical and psychological traumas.

PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 3 (1990). The stakes today are perhaps even higher. The development of technology has tended to push the "workplace" further into what was previously personal time and space, and aspects of the employment safety net have eroded, making access to "quality" employment (in terms of stability, flexibility, accommodations, wages, benefits, and prospects for intra- or inter-firm mobility, etc.) even more important to workers.

From the employer's perspective, the employment relationship is the means by which firms produce most of their value and government agencies provide most of their services. Indeed, in the modern economy, employers' success often depends more on the quality of their workers — their creativity, cooperation, adaptability, and productivity — than on other assets: "However rich its natural resources, however costly and sophisticated the capital technology, a firm or an economy which does not have a skilled or committed work force will not be able to transform those physical assets into efficient and productive enterprises." *Id.*

Thus, the institution of employment matters a great deal to individual workers, employing firms, government agencies, and society as a whole. Naturally then, the legal rules that govern this relationship have profound, wide-ranging implications.

Yet despite the overview laid out above, employment law is not easy to define or summarize. Even the threshold question of what constitutes "employment" — as opposed to one of several different kinds of relationships in which human beings work with and for others — is uncertain. Unlike other disciplines such as constitutional law, the law of employment does not flow from a single source, nor does it derive from a single doctrinal regime like contracts or torts. Rather, because employment law governs a relationship that is both pervasive and variable, it draws from many sources, for example, contract, tort, agency law, constitutional law, and federal and state statutes.

Just as the sources of employment law vary, so too do its rules. Different legal doctrines apply depending on the state in which an employee works, whether the workplace is unionized, and whether the employer is a public or private entity. Even federal statutes do not provide complete uniformity, but rather govern some employment relationships and not others. This is due to limitations on coverage (small employers are typically exempted, with "small" being defined differently in different statutes) and various codified exemptions (certain "professional" employees, for instance, are excluded from the maximum hours provisions of the FLSA and many agricultural and transportation workers are excluded from coverage completely). The governing law therefore depends on factors such as the type of occupation and the size of the employer. In application, it may also depend on more nebulous factors such as the autonomy and economic vulnerability of the worker, key considerations in determining whether a worker is an employee protected by federal employment statutes.

In addition, as suggested above, many of the terms governing a particular relationship may be established by, and therefore are unique to, the parties in that relationship. The "law" in the American workplace, as it is currently constituted, leaves ample — some would say, too much — room for individual variation in its most important terms, including wage levels, benefits, hours, job security, and privacy protections. All of these critical terms and conditions of employment are far more likely to be determined by the parties' reactions to market forces than by legal constraints. Again, for example, the federally mandated minimum wage is too low to have a direct effect on most workers' negotiating for compensation because both employers and workers start compensation discussions at a point far in excess of that wage. In light of its patchwork nature, understanding when and how the law constrains or promotes these terms, either directly or indirectly, is a formidable challenge.

Finally, the law of employment is dynamic because the workplace is ever-evolving: Tomorrow's workplace will be different than today's, and so will tomorrow's law — a law you will help shape after you graduate. At best, then, we can say that employment law embodies the legal rules and standards that govern the employment relationship, but those legal rules and standards vary enormously in kind, substance, and application.

The breadth and variability of employment law poses significant challenges to workers and firms trying to understand their rights and obligations. There is in fact much misunderstanding regarding both, especially among workers. One particularly important example is that most workers believe that the law provides them with greater job security than it actually does, as you will explore in Chapter 2. This misperception can affect worker behavior, for instance, lulling them into thinking they need not seek greater protections, whether through unions, individual contracts, or otherwise. In addition, uncertainty in the law can inflict real costs on employers, not only ex post (litigation expenses and unexpected liabilities) but also ex ante (in terms of risk aversion and investments in planning and compliance).

The maze of employment-law doctrines also creates enormous difficulties for counsel seeking to advise parties on how to comply with the law, protect their interests, and avoid liability and other risks attendant to employment relationships. Given the increasing importance of human capital in our information- and technology-driven economy, a basic understanding of the law of the workplace and its implications is essential even for lawyers practicing in other areas. For example, a grasp of employment law should be standard fare for attorneys in the corporate and intellectual property fields. Indeed, surveys of corporate general counsel often show that, of the legal risks faced by their firms, labor and employment litigation ranks at or near the top. *See e.g.,* Adele Nicholas, *GCs Reveal Their Litigation Fears and Headaches*, CORP. LEGAL TIMES 72 (October 2004) (indicating that 62 percent of survey respondents ranked labor and employment litigation as their number one potential exposure). This concern is especially legitimate in tough economic times, like the Great Recession, when employers are more likely to layoff workers and terminated workers are less able to find replacement employment. The year 2010 saw the largest number of filings on record at the EEOC — nearly 100,000 — although a variety of other factors besides the economy may explain this surge. *See* Bureau of National Affairs, *EEOC's New Charges Reach High, But Agency Slows Growth of Case Backlog,* 24 LABOR RELATIONS WEEK 1972 (2010); Nathan Koppel, *Claims Alleging Job Bias Rise With Layoffs,* WALL STREET JOURNAL, Sept. 24, 2010, at A6.

The nature and scope of employment law mean that a single course cannot even attempt to cover every legal issue and doctrine that may govern or affect the workplace. Largely for this reason, most law schools offer other courses addressing areas of