



# UNIONS, WORKERS, and the LAW

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Betty W. Justice



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to my parents,

who taught me the dignity both of work  
and of resistance to its oppression



## Preface

This book is a textbook. It is neither a political commentary nor a discussion of utilization of the law to achieve social change. Its purpose is to introduce the reader to the legal framework in which workers relate to employers both as individuals and as a group through unions. The text examines major principles of labor law, as well as specific rules of law governing those relationships with some attention to the social policy decisions that underlie them.

This book is not intended to be a comprehensive treatment of all law impacting on the employment relationship. Because of space limitations, some important developments in the law are not covered at all. For example, neither criminal law as it may apply to activities that are a part of a labor dispute nor publicly imposed "just cause" limitations on an employer's discretion in making personnel decisions are discussed in this book. My selection of topics is not meant to suggest the unimportance of other topics which have been excluded. Even on those topics included in the text, the treatment is not always detailed and thorough. I have tried to illustrate, sometimes by extensively discussing a particular case, the legal process, labor-management problems that receive the attention of the legal process, the public response, and the mechanics of government regulation as expressed in specific rules.

I have not attempted to catalog rules governing the employment relationship, because a mere compilation of rules would have little long term utility for the student. The law is not etched in stone; it is a dynamic process, reflecting ever shifting balances of power between various groups within the society. Indeed, a major role of law (and of government) as seen by the framers of the Constitution was the resolution of disputes caused by the fact that "Those who hold and those who are without property have ever formed distinct interests in society." (James Madison in *Federalist Paper* No. 10). During the past and into the present, the rule of law has recognized the power of these two groups and has directed that they act toward each other in such a manner that the social peace and good is maintained.

Beyond this general framework of the law, its application often depends on the particular facts of each situation brought to the legal decisionmaker. While some definite rules can be confidently stated, it is a troublesome responsibility to state precise rules. While the author of a rule knows the factual situation that led up to its enactment, a reader may read the rule and think of a situation that has one additional, or one less, fact. For instance, one might think that the right of employees to communicate about union business on the employer's premises would be a simple one. But the rule, or more accurately the rules, in this instance change according to the presence or absence of a number of factors: whether it is an employee or a nonemployee organizer attempting to communicate; whether the employee is on the premises on his or her day off or during a shift break; whether the premises are open to the public; whether the communication is oral or printed; what the content of the communication is; whether or not the workplace is already unionized; and dozens of other such possibilities that can impact on the legality of the activity. Furthermore, the rules sometimes change for no other reason than that the judge(s) now deciding an issue believe that it was incorrectly decided the previous time around. Because of the nature of the legal process and of the crucial distinctions that can be made on the basis of a single fact, I caution readers to use extreme care in using information contained herein as the basis for deciding on an appropriate course of behavior.

While this book is not meant to be a political analysis or a critique of the law, I think my bias is obvious. I am partisan toward unions because of my life experience, because of my professional role, and because of my ideology. I have presented the law and the rules as the lawmakers and judges have declared them to be. I have sometimes commented on the impact of these laws and rules on unions. Generally, however, I believe that editorializing is unnecessary. The law usually speaks for itself, eloquently justifying or indicting the policies behind it. Whether it is a justification or an indictment depends, of course, on one's point of reference, and I suggest that we each have one. I make mine obvious. I think it more insidious to hide under a veneer of academic neutrality and, thereby, disarm the reader on the importance of critically analyzing the material presented. I do not ask that readers be won over to my conclusions, but rather that they think for themselves.

BETTY W. JUSTICE  
January 1983

## Acknowledgments

Writing a book is in an immediate sense an individual experience, and authorship is reserved to named individuals. Even though those who have made specific and concrete contributions to this book can be named, scores of people who have participated in shaping my understanding of the law in the employment context go unnamed. In my role as an instructor in the labor education program at the Institute for Labor Studies at West Virginia University, I have “taught” thousands of workers and union members. But these students have also been my teachers, because they have required me to think clearly on issues that emerge from their practical experience on the job. I am grateful to these men and women for sharing their experience and their knowledge and for their desire to learn about the law. No less important has been their patience, and affection, and the example they set by their dedication and vision of a more just society for all of us, as workers and as citizens. I also acknowledge warm regards for my formal teacher of Labor Law, David Scribner.

This book was initiated by the George Meany Center for Labor Studies through its Tripartite Program for Apprenticeship and Associate Degree in Labor Studies. The staff of that project conceived the idea of an undergraduate labor studies curriculum with a complete series of texts and has guided the production of this book from beginning to end. Richard Hindle and David Alexander of the project staff also commented on the draft, as did Jacqueline Brophy of the Meany Center faculty. Fred K. Hoehler, director of the Meany Center, and Russell Allen, deputy director, also provided important support.

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# 1

## Law and the Employment Relationship

Labor law is a recent historical phenomenon. Prior to industrialization, there existed little basis for collective action by workers, since economic organization was characterized by various forms of unfree labor, such as slavery, feudalism, and indentured servitude. The first free labor primarily involved self-employed workers in subsistence-type enterprises in both agriculture and the crafts, wherein the participants bartered their own product or services for others that they needed. Money played only a rudimentary role in the society.

Trade unions, in the modern sense of concerted action by workers to improve their wages and working conditions, could develop only under a wage-labor system, wherein workers sell their labor power to employers. In this context, workers discovered that they could most effectively improve their wages and working conditions by dealing collectively with employers. Individually, they found themselves powerless, forced by economic reality to compete with each other in terms of the wages and conditions they would accept.

Collective action by workers in the United States has, from its earliest manifestation, engendered a public response via the law, particularly as developed and applied by the courts. Until the 1930s, the law generally was unfavorable toward workers who combined to protect their self-interest. Application of restrictive theories of law reflected the political assumptions that competition, the right of individuals to enter contracts without any outside interference, and the property rights of individuals were fundamental and supreme values of society. This law reflected classic economic theory in which the free operation of the law of supply and demand was considered fundamental. According to this theory, control of wage rates by workers artificially inflated prices, ultimately harming commerce, the com-

munity, and even workers themselves, because higher prices discouraged consumption and created unemployment. Therefore the only prescription for a healthy economy was one free of either government regulation or private regulation via collective action of workers. Since 1935 labor-management relations in the United States have been subject to direct government regulation and to regulation by workers through a legally recognized right to join unions and to engage in collective bargaining. Although this regulation initially helped unions to flourish, it has since 1947 served to channel disputes into narrow legalistic categories, undercutting efforts of workers and unions to become more conscious of their interests as a group vis-à-vis employers as a group.

### What Is Law?

Law is made when a society, acting through government, formally adopts rules governing particular activities of its members. These rules are enforced by persons officially delegated the responsibility to implement the rules. The rules that become law reflect the attitudes and needs of the society, or at least that portion of the society that controls the law-making processes. Because attitudes and needs are ever changing, the law is also ever changing. Behavior acceptable today may be considered a crime next year.

For example, until less than a century ago, the decision on whether a child was to receive any formal schooling was left entirely to the parents. Now the prevailing view is that society has a right to require parents to send their children to school in order that they may acquire knowledge and skills necessary for them to be useful members of the society. Acting through government, society has passed laws requiring school attendance. A once private matter has become a public concern, dealt with not in the home but by law enforcement officials, social workers, and courts. This change in the law reflects changing social attitudes as to the needs of the society and the appropriate role government should play in meeting those needs.

All law, including labor law, is the result of this kind of process—the contention of differing social forces over the relationship of individual citizens to their government and to each other. Labor law is society's notion of the socially desirable relationship between people who work for wages and those for whom they work.