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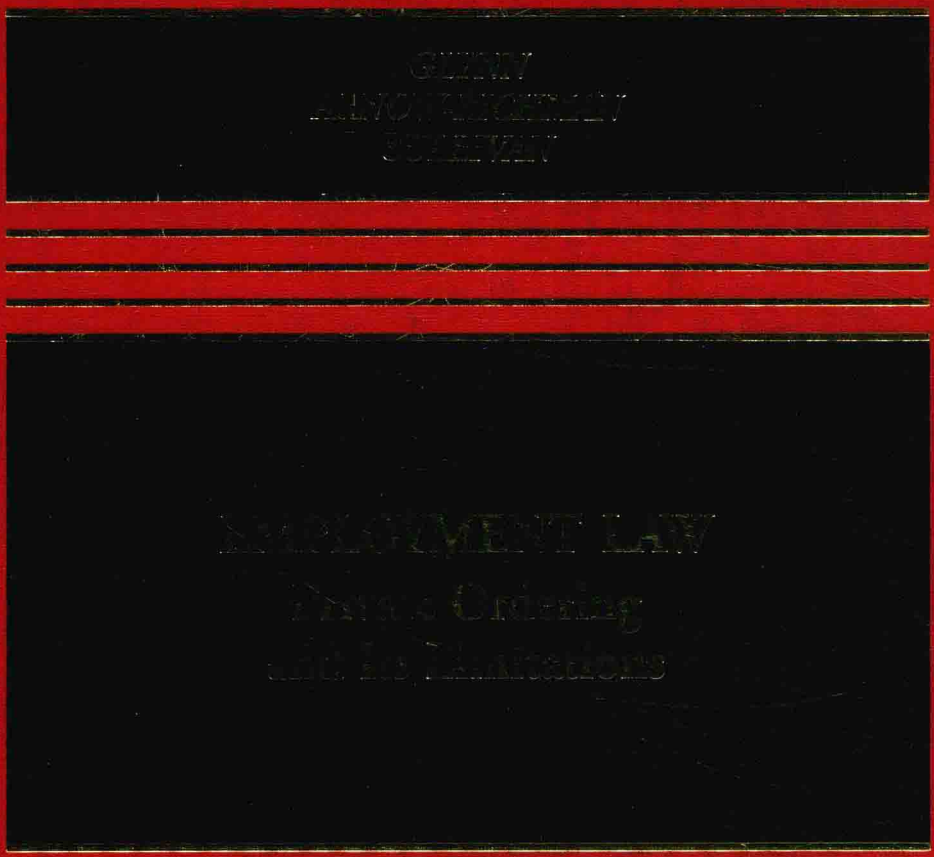

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Employment Law

Private Ordering and Its Limitations

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Crystal, Alexander, and Maya
T.P.G.

Michael Richman
(he knows why)
R.S.A.R.

The Usual Suspects
C.A.S.

Preface

In the twenty-first century, few institutions will 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, issues related directly to employment, such as outsourcing to foreign countries or whether to raise the minimum wage, receive significant public attention. And, perhaps even 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, the U.S. Constitution. In addition, its application varies greatly depending upon a number of factors, including type of worker (e.g., employee v. non-employee, unionized v. non-unionized, 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. And the need for employment law expertise extends well beyond those engaged in employment-related work since, again, 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 the 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, 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 Act, 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
Rachel S. Arnow-Richman
Charles A. Sullivan

December 2006

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, Texas Wesleyan, Temple, and the University of Denver. At all 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 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, 6th ed. 2003) 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, 2003). 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.

This casebook would not have been possible without the support of Barbara Roth, Carol McGeehan, Richard Mixter, and Troy Froebe, and would not have seen the light of day so soon without Barbara's gentle nagging. Moreover, we all want to thank Mike Zimmer and Judd Sneirson who were brave enough to teach out of this as it was being written and provided us with invaluable feedback. Professor Arnow-Richman particularly acknowledges the support of Melissa Hart, Martin Katz, Nantiya Ruan, and Catherine Smith. We are also grateful to the unidentified professors who Aspen retained to review chapters as they emerged from the three authors. While we do not know who these reviewers are, they will see our responses to their critiques throughout this work.

Then there are the individuals who helped us turn this project into reality. They include Latisha Porter, Professor Sullivan's assistant at Seton Hall, and the following Seton Hall research assistants for both Professors Sullivan and Glynn: Michele Austin, Christina Bae, Joseph Fanning, Robert Flanagan, Angela Kopolovich, Gregory Reid, and Allison Scaduto, all class of '08; Lauren DeWitt, Rawan Hmoud, and Mohamed Shiliwala, class of '07; Julie Yoo, class of '06; and Monica Perrette, Shulamit Shvartsman, and Lauren Walter, class of '05. Professor Arnow-Richman would like to thank Melissa Brand, Lindsay Burleson, Crystal Littrell-Miller, Marlys Hartley Roehm, and Cristel Shepherd from the University of Denver; James Boyer and Ralph Powell from Temple Law School; and her fall 2005 Law of the Workplace students.

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 p. 963, 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. Occasionally, and even absent formal agreement, such terms may also 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 presumption 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 which 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: thou shalt not discriminate on the basis of race, sex, or religion. But sometimes they are positive: thou shalt 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 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 developed away from 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 such a 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 in particular and the monied classes in general. 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—although, admittedly, the workers' comp trade-off of more certain liability for lower recoveries was not in the interest of workers only. And 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.A. §§ 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 forwarding thirty years, private ordering suffered another series of hits, beginning with 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 law was followed within three years by the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621-634 (2006), and, after two more decades, by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2006). 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.

In the 1970s, the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001-1381 (2006), and the Occupational Safety and Health Act (OSHA), 29 U.S.C.A. §§ 651-78 (2006), were two more federal inroads on private ordering in employment. 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 a number of 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 which proscribe certain reasons as illegitimate bases for employment decisions, the courts began to formulate "the 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 which the courts declared to be impermissible. Unlike earlier efforts in this direction which specifically defined bad reasons (e.g., antiunion animus, race, etc.), the newer decisions were more open-ended. A "bad" reason 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. Perhaps as a result of this 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 exceptions, and the failure of Congress to increase minimum wage levels to keep pace with inflation means that the federal minimum 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, particularly the ADA whose definition of "disability" has been radically narrowed by the Supreme Court. 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. *Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481 (D. Md. 2006). 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, there has been a retreat from mandates and increased commitment to private ordering on 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 recognition of the validity of employer-drafted disclaimers of contractual liability. State common-law privacy protections that emerged in the 1970s have largely disappeared as a practical matter, except where embodied in state laws such as those baring genetic discrimination. Meaningful federal protections are scarce as well, contained only in a few discrete statutes like the federal Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (2006).

The most recent developments in employment-law mandates have been mixed. 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 level, the most prominent recent example being the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, which provides whistleblower protections for employees who report wrongdoing with regard to publicly traded firms' securities and financial dealings. 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 frontiers in private ordering, including various liability and forum management provisions (such as 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 (rising to the 30,000 feet only occasionally), it is important to understand what is left to private ordering and what is not, to appreciate why, and, perhaps most of all, 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:

> [T]he 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). While Professor Weiler's description remains largely accurate, 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 or advantages: "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 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, and one that is both pervasive and variable, it draws from many sources, e.g., contract, tort, agency law, constitutional law, and federal and state statutes.

Just as the sources of employment law vary, so too does the applicability of particular 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 laws do not provide complete uniformity since they govern some employment relationships and not others due to limitations on coverage (small employers are typically exempted, with "small" being defined differently in different statutes) and more or less sweeping exemptions (certain "professional" employees, for instance, are excluded from the maximum hours provisions of the FLSA). The governing law and its application may also depend on factors such as the type of occupation and the economic vulnerability of the worker. For instance, certain transportation and agricultural workers are largely exempted from the requirements of the FLSA.

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 some of its most important terms, including wage levels, benefits, hours, job security, and privacy considerations. 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 it is today, 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 what those legal rules and standards are varies 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 such rights and obligations, 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 adversely 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, a recent survey of corporate general counsel showed that, of all the legal risks faced by their firms, the responders were most concerned about labor and employment litigation. 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).

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 employment law, including courses in Labor Law, Employment Discrimination, Workers' Compensation, Employee Benefits, and even more particularized disciplines, such as Disability Discrimination and Labor and Employment Arbitration. In addition, some of these areas, most notably Labor Law (which governs unionization and collective bargaining), are sufficiently distinct doctrinally that they are best left to separate study, except to the extent they provide context for broader inquiries.

Private Ordering and Its Limitations as a Framework

So how should one approach beginning to learn employment law? Despite employment law's disparate sources and wide variability, there is, as we suggested at the outset, a theme common to the debates regarding the law of the workplace. Employment law is, at its core, a course about *private ordering and its limitations*. This description not only captures the core historical conflict over employment regulation but also provides a framework for analyzing the key pressure points in the various aspects of what we call "employment law" today. It is the lens through which we can not only begin to discuss what the law is and what it ought to be in a multitude of contexts but also explore various legal risks and incentives of the parties and the extent to which these may be altered by planning.

This tension between public ordering and private mandates is not unique to employment law. Yet, because the employment relationship is consensual, pervasive, and of profound importance to individual stakeholders and society, this relationship is one of the primary contexts — both qualitatively and quantitatively — in which the law seeks to balance contractual freedoms and market forces with countervailing social interests. Indeed, this tension runs through each doctrinal area in employment, from formation (i.e., whether worker and firm have an "employment" relationship or some other kind of