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## An Introduction to Labor Law

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## An Introduction to Labor Law

### Abstract

[Excerpt] The purpose of this book is to introduce the reader to the federal law of unions and employers. This law is composed of two major elements. The first element is the National Labor Relations Act and the amendments to it. The second element is the decisions of the National Labor Relations Board and of the federal courts; these decisions interpret and apply the statutes.

The statutes are long and complex, and the decisions of the Labor Board and of the courts number in the hundreds of thousands. As a result, this book cannot cover all of the law. Only the most important areas of the law are discussed, and the discussion of these areas is purposefully simplified. Although all of the following statements about the law are accurate, many are incomplete. Much more could be said about every topic addressed in this book.

### Keywords

labor law, labor unions, National Labor Relations Act, National Labor Relations Board

### Disciplines

Collective Bargaining | Labor and Employment Law

### Comments

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# **AN INTRODUCTION TO LABOR LAW**

*Third Edition*

**Michael Evan Gold**

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## INTRODUCTION

Learning the law is less like studying mathematics, and more like studying the web of a spider. The student of mathematics can learn the most basic operation, and proceed step by step to advanced operations that depend only on the previous ones. The student of law finds that one legal idea does not lead to another so much as that every idea connects to every other idea, and even fundamental principles require knowledge of other principles. In a sense, one needs to know everything in order to understand anything.

Yet not everything can be explained at the same time. This book attempts to organize topics in a logical order, but the reader is unlikely fully to understand even the first topic unless the reader also understands (at least something about) several of the topics that follow it. One solution to this problem is to suggest that the reader read this book more than once. Even the author cannot advise that step. Another solution is to include cross-references (which are the way a book presents hyperlinks). But no one likes skipping back and forth in a book, and probably no one does it as often as one should. Some cross-references seem necessary, but they are kept to a minimum. Our best solution is to summarize a few basic ideas here at the outset. Some of these ideas are discussed in greater detail in their logical place in the organization of the

book. If a better solution to this problem exists, the author would be grateful to learn about it.

### THE MEANING OF "THE LAW"

Most Americans believe that legislatures make the law and that courts apply the law to individual cases. As any lawyer well knows, this belief is more false than true. It is somewhat true because legislatures do enact statutes, which the courts interpret and apply. But the belief is false because most law is actually made by the courts and by administrative agencies of the National Labor Relations Board.

Courts make law in two ways. In the first way, which was more prevalent in the past, judges simply announced the law; we might say (though the judges never admitted it) that they invented the law. Legislatures had passed only a few statutes, and the judges used customs in the community or applied their own ideas of right and wrong to decide cases; those decisions then became precedents that judges followed in later cases. Such lawmaking is known as the *common law*. The common law continues to affect our lives today, though less powerfully than in the past.

In the second way that courts make law, the starting point is a statute passed by a legislature. If the case of A v. B falls squarely within the words of the statute, we may say that the legislature has made the law that governs that case. But what if the case of C v. D is just slightly outside the words of the statute? In this event, the judge must decide whether or not the statute applies to the case. In making this decision, the judge is making law for the parties to the case. Because of the doctrine of precedent, this new law will also control future cases that are similar to C v. D. Then the case of E v. F comes along, and it is slightly different from C v. D; once again the judge will make new law in deciding this case. And then the case of G v. H comes up, and so on.

If a legislature is dissatisfied with a court's interpretation of a statute, the legislature has the power to amend the statute in order to override the court's interpretation; however, this power is not exercised often. As a result, most law is made by court decisions.

## EMPLOYMENT AT WILL: THE LEGAL DEFAULT

For more than a century, American law has conceived of the basic relationship of employer to employee as a *contract at will*, which means that either party is free to enter or exit the employment relationship at any time and for any reason. Whenever the employer desires, she may hire or fire the worker; whenever the worker desires, she may accept a job or quit it: and neither need say why.

One consequence of employment at will is that the term "permanent," as in a "permanent job," is misleading. In most aspects of life, "permanent" means *lasting forever, or at least a long time*. In labor relations, however, "permanent" says little about how long something will last. Instead, "permanent" means *not temporary, but having no specific termination date*. A permanent job today could be abolished next week; a permanent employee today could quit or be laid off tomorrow. Another definition of "permanent" might be *as of this moment, there is no plan to change*.

Employment at will is the legal default position in every state. Under employment at will, the employer and each individual employee negotiate the employee's wages and working conditions. We will call such negotiations *individual bargaining*. In individual bargaining, the parties may agree on any terms they please. Take wages as an example. An employer might agree to pay, and an employee might agree to accept, compensation of a dollar a day or a million dollars a day. Two employees might be doing identical work, yet one might be paid more than the other because each struck a different bargain with the employer.

Like other defaults, employment at will can be changed. Individual bargaining can change employment at will. For example, the parties may agree that the job will last one year. If, without good cause, the employer fires the employee, or the employee quits the job, before the year is over, the action is a breach of contract, and a lawsuit may result. Statutes can also change employment at will, and many have done so. For example, one federal statute prohibits an employer from paying less than a minimum wage, and other statutes prohibit discrimination on the basis of race, sex, age, or disability. But these



changes to employment at will are minor compared to the changes made by labor law.

### THE MEANING OF "LABOR LAW"

The term "labor law" does not mean what it seems to. It seems to mean all of the law that applies to workers and employers. In fact, "labor law" refers to only a part of this law, namely, *the law that applies to unions and private employers*. The reason for the confusion is that, when the term "labor law" came into use, the major laws that existed regarding workers applied to unions and private employers. In the last seventy-five years, the law has grown to include topics such as minimum wages, health and safety on the job, unemployment insurance, pension plans, race and sex discrimination, and so forth. A new term, "employment law," has been coined for these laws. But "labor law" still means the law of unions and private employers. (Similarly, the term "labor relations" refers to dealings between employers and unions.)

Today most labor law is federal law. It comprises several statutes enacted by Congress and interpretations of those statutes by the Labor Board and the courts. We will use the term "Labor Act" to refer to these statutes.\*

### COLLECTIVE BARGAINING AND THE LABOR CONTRACT

Labor law provides that if the majority of workers want to be represented by a labor union, collective bargaining replaces individual bargaining. "Collective bargaining" means that *wages and working conditions are established by negotiation between the employer, on the one side, and the union, as the representative of the workers, on the other side*. When negotiation is successful, it results in a *collective bargaining*

\* A brief history of these statutes appears at the beginning of chapter 2.

*agreement or labor contract.* A collective bargaining agreement is usually written, but the written document is only part of the agreement. The agreement also includes established practices in the shop, spoken and unspoken understandings between the parties, and, to some extent, customs of the industry. (In contrast, the written document is the entire agreement between parties to a commercial contract.)

Collective bargaining refers *both* to the negotiation of labor contracts *and* to the administration of contracts. Thus, collective bargaining includes the settlement of disputes that arise while a contract is in effect. For example, suppose a contract is in force and the employer changes a work rule. The union believes the contract prohibits the change. Negotiations toward settling the dispute are part of collective bargaining. If the parties cannot resolve their differences, the dispute might be submitted to arbitration. Arbitration is also part of collective bargaining.

### ARBITRATION

"Arbitration" is *the use of a neutral party to settle a dispute.* Most labor contracts contain grievance and arbitration procedures. In the typical case, a union raises a *grievance* or complaint, alleging that the employer has violated the collective bargaining agreement. The grievance goes through several steps. If it is not resolved, the parties choose an impartial person who is knowledgeable about their industry. This person (the *arbitrator*) holds a hearing in which the parties present their evidence and arguments, and the arbitrator decides whether the grievance is justified. The parties have agreed to obey the decision of the arbitrator. If the loser refuses to obey, the decision can be enforced in court.

### THE NATIONAL LABOR RELATIONS BOARD AND THE FEDERAL COURTS

Courts are the primary institution for enforcing most civil (as distinguished from criminal) law. If A and B enter into a contract, and A performs but B does not, A can go to court in order to force B to

abide by the contract or pay damages. In contrast, the primary institution for enforcing labor law is the National Labor Relations Board (also known as the Labor Board or NLRB). An employer or a union that wants to enforce its rights under the Labor Act must go to the Labor Board. The same is true for a worker (except in regard to the duty of fair representation.\*)

The Labor Board is composed of five members, who are experts in labor relations. They are appointed for five-year terms by the president with the advice and consent of the Senate. Decisions of the board can be appealed to the federal courts, which can enforce, or refuse to enforce, the orders of the board.

### CONCERTED ACTIVITY

The heart of the Labor Act is its section 7. The central idea of section 7 is that workers have the right to engage in collective bargaining instead of individual bargaining. Congress recognized this right because workers as individuals have little bargaining power when they deal with employers, particularly large corporations. The result of this lack of power is that workers can be forced to accept low wages and poor working conditions. But if workers can band together and, as a group, usually through a union, negotiate with their employer, they have a better chance to achieve a living wage and decent working conditions.

To reach these goals, section 7 guarantees employees the right to engage in "concerted activity," which means *the right to act together to improve their working lives*. By definition, one worker cannot engage in concerted activity. It requires two or more workers acting jointly.

Congress recognized that some workers prefer not to engage in concerted activity. Therefore, section 7 also guarantees employees the right to refrain from assisting and joining unions.

\* The duty of fair representation is discussed in chapter 2.

### THE MEANING OF "ORGANIZED"

The term "organized" refers to representation by a union. An *organized worker* is one whose wages and working conditions are determined by collective bargaining, and an *organized shop* is one in which the workers are represented by a union. An *unorganized worker* is one whose wages and working conditions are determined by individual bargaining, and an *unorganized shop* is one in which the workers and the employer engage in individual bargaining.

### UNFAIR LABOR PRACTICES

An "unfair labor practice" is *an action that the Labor Act forbids*. It is an unfair labor practice for an employer or a union to interfere with concerted activity or to discriminate against a worker who is engaged in, or refraining from, concerted activity. For example, it would be an unfair labor practice for Harry's employer to punish him for trying to persuade Mary to support the union, and it would be an unfair labor practice for a union to refuse to process the grievance of a worker who chose not to join the union.

A word about responsibility for unfair labor practices is in order. An "agent" is *someone who acts on behalf of someone else*. Employers and unions are responsible for the actions of their agents. This rule holds whether or not the employer or union is aware of the agent's illegal conduct; the rule holds even if the employer or union has a policy prohibiting the illegal conduct. Thus, if a foreman fires a worker because she favors the union, the employer cannot escape responsibility by arguing that he did not know what the foreman was doing; the company has committed an unfair labor practice. If a business agent of a union threatens to pulverize a worker if he does not join at once, the union cannot escape responsibility by arguing that the union has a policy against intimidation; the union has committed an unfair labor practice.

Only employers and unions (and their agents) can commit unfair labor practices. To say the same thing, the Labor Act regulates only

the actions of employers and unions. Thus, if Harry, acting on his own and without the knowledge of his union, threatens to harm Mary unless she joins the union, he has not committed an unfair labor practice. (He may have broken other laws, however.)

### APPROPRIATE BARGAINING UNITS

The goal of labor law is stability in labor relations (as opposed to industrial warfare) and collective bargaining is the means to this goal. Put simply, bargaining aims to reconcile the competing interests of the employer and the union. But the process is not simple at all. The interests on each side of the bargaining table are complex; each side has objectives that conflict with one another. For example, the employer desires highly qualified workers, but also desires to pay low wages; the union represents some workers who need high take-home pay, and other workers who prefer generous medical insurance or pension benefits. We can rely on the employer to harmonize its internal conflicts. A business is an authoritarian organization whose managers can order their subordinates to pursue a particular bargaining strategy. For example, the shop foreman might say, "This firm needs excellent workers, so we should pay twenty dollars an hour." The accountant says, "We can't afford to pay more than twelve dollars an hour." The chief executive officer says, "I hear you both. Our limit will be fifteen," and fifteen becomes the firm's best offer to the union.

A union is different. It is a democratic organization whose leaders must satisfy the workers it represents. Those workers may be unwilling to compromise and, unlike a business, a union cannot order the workers to agree. Thus, collective bargaining has the potential to be chaotic if a union cannot harmonize its internal conflicts.

The less internal conflict on the union's side of the bargaining table, the better the chances that collective bargaining will succeed. Labor law assumes that the interests of workers are determined, to a significant extent, by their jobs. For example, workers whose jobs require heavy physical labor may want several rest breaks even if the work day is lengthened, whereas clerical workers in an office may need fewer

breaks and prefer a shorter work day. It follows that the more similar the jobs of workers whom a union represents, the less the internal conflict on the union's side of the table and, therefore, the better the chance that collective bargaining will succeed.

As a result, labor law attempts to group similar jobs together for collective bargaining. A *group of similar jobs* is called an "appropriate bargaining unit." Although workers will always find ways to disagree, the workers who hold the jobs in an appropriate bargaining unit have similar issues about their work and should be able to settle on common goals. In consequence, employers need only bargain with unions that represent the workers in an appropriate bargaining unit.

# 1

## LABOR LAW BEFORE THE LABOR ACT

Employers took their labor troubles to court almost as soon as America became independent. We are a nation of many states; each state has its own courts, and they have often disagreed with one another about labor cases. As a result, accurate generalizations about labor law in the eighteenth and nineteenth centuries are hard to make. Nevertheless, most students of early labor law would probably agree that the courts in those days were unsympathetic to unions. Whenever unions devised an effective new tactic against employers (for example, strikes; later, boycotts), the courts responded to employers' complaints with new laws to control labor.

Because the First Amendment to the U.S. Constitution protects the freedom of association, the courts did not outlaw unions as such; but the courts did outlaw the tactics used by unions to improve their members' wages and working conditions. At the beginning of the nineteenth century, a common union tactic was for union members to agree among themselves how much in wages they would accept from their employers; the members also refused to work in the same shop as any other worker who accepted less than union scale. But the courts held that this tactic was a criminal conspiracy, and juries composed of shopkeepers and landowners convicted and fined union members for striking over wages.

By the end of the nineteenth century, prosecutions for criminal conspiracy had become ineffective in controlling labor unions. Several reasons explain this change. First, a criminal case was too slow. The workers could not be punished until after an indictment was issued and the case had gone to trial. This process often took several months, during which the strike or boycott was damaging the employer's business. Second, as the right to vote, which was once limited to property holders, was extended to all men (women were denied the right to vote until 1920), juries were increasingly made up of workers, not merely shopkeepers and landowners; and workers were hesitant to find coworkers guilty of the crime of peacefully trying to improve their wages and working conditions. Third, the law was changing so that in many places a strike was not considered an illegal conspiracy.

Employers, therefore, took their complaints to the civil courts, and here they found the perfect weapon for fighting unions: the injunction. An *injunction* is an order from a court requiring a person to do or not to do specific acts. A person can be sent to jail for violating an injunction. Injunctions are fast: one can be issued the very day it is requested. And injunctions are issued by judges, not juries. In the past, the law permitted judges to issue injunctions against unions freely. For example, the law authorizes an injunction to control violence and intimidation. Courts held that picket lines were "moral intimidation" and issued injunctions against picketing, even though the picketers merely walked back and forth and tried to persuade workers and customers to go elsewhere.

### ROLE OF ANTITRUST LAW

In 1890, Congress passed the Sherman Antitrust Act in order to control monopolies in business, but the wording of the law was so general that it could be applied to labor unions as well. The statute outlawed "every...combination...or conspiracy in restraint of trade or commerce among the several states." Although this act was not used against strikes over wages and hours, it was used to control



union organizing. In the infamous *Danbury Hatters* case, the union sought to organize all the fur-hat makers of America by boycotting the products of nonunion manufacturers. One manufacturer sued, arguing that the boycott was a restraint of trade. The courts found that the boycott did diminish trade among the states and awarded hundreds of thousands of dollars in damages—payable by the individual workers! (The American Federation of Labor later raised the funds necessary to settle the case.)

Twenty-five years later, in 1914, Congress passed the Clayton Act, which stated, “the labor of a human being is not a commodity or article of commerce” and “no...injunction shall be granted in any case between an employer and employees...growing out of a dispute concerning terms or conditions of employment.” Union leaders regarded the Clayton Act as a great victory for organized labor; Samuel Gompers, the first president of the American Federation of Labor, called the Clayton Act “the Magna Carta of labor.” But the courts turned the victory into defeat by holding that Congress did not mean to permit boycotts in support of organizing campaigns. Once again, employers, with willing aid from the courts, found a way to restrict the power of workers.

#### NORRIS-LAGUARDIA ACT

The modern law of labor relations begins with the Norris-LaGuardia Act of 1932, which is still in force today. With some exceptions, this statute restricts the power of federal courts to issue injunctions in cases growing out of labor disputes. One reason for this statute was that federal judges had created so much unfavorable law and issued so many crippling injunctions that the federal judiciary became, in the eyes of labor, the symbol as well as the instrument of antiunionism. Another, perhaps more important reason for the statute was the Great Depression. Unemployment reached 25 percent or more, and today's social insurance programs (such as unemployment insurance and welfare) did not exist then. As a result, workers and their

families suffered terribly. Organized labor spoke on their behalf. The Norris-LaGuardia Act was a step toward recognizing unions as the legitimate representatives of workers.

But Norris-LaGuardia was a small step, and it applied only to the federal courts. State courts were still free to issue injunctions in labor disputes (though some states later passed "little Norris-LaGuardia acts"). Also, both federal and state courts remained free to hold unions liable in civil law suits, for example, for violation of antitrust laws. Perhaps most important, employers remained free to discharge workers who led, joined, or as much as sympathized with unions; and employers had no duty to bargain with unions, even if they represented a majority of workers. Further steps were necessary to empower labor unions.

## 2

### AN OVERVIEW OF THE LABOR ACT

In 1935, Congress recognized unions as legitimate representatives of workers. The National Labor Relations Act (sometimes called the Wagner Act) required *private* employers to deal with unions and prohibited discrimination against union members. (*Public* employers, that is, federal, state, and local governments, are not covered by the Labor Act.) Employers who violated the Wagner Act could be tried before the National Labor Relations Board, which had the power to order them to stop the illegal behavior and compensate the victims for lost pay. As a check on the power of the Labor Board, the law provided that appeals from the board's decisions could be taken to the federal appellate courts. The courts were instructed to respect the board's special expertise in labor affairs.

By 1947, unions had grown in power, and public opinion toward them turned hostile. Perhaps the greatest cause of this hostility was the wave of strikes after the Second World War. During the war, strikes were prohibited, and wages were controlled. Afterward, many unions struck to make up for what they had lost during the war. There was also a steep rise in inflation, which the public blamed on unions. In addition, management organized itself to fight the growing power of unions. The result was the Labor Management Relations Act (often called the Taft-Hartley Act). Its most important feature was that it outlawed certain practices by unions. Starting in 1947, the Labor

Board and the courts had the power to order unions to stop unfair labor practices and to compensate the victims of that behavior.

Taft-Hartley was amended by the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act) and by the Health Care Amendments of 1974, but the basic structure of the law was not changed. In this book, the term "Labor Act" refers to labor law as it stands today.

## COVERAGE OF THE LABOR ACT

### Protected and Unprotected Workers

Most workers who hold (or are seeking) jobs in private firms are protected by the Labor Act. "Protected" means that the law shields these workers against unfair labor practices and guarantees them the right to engage in collective bargaining with their employers.

But not all workers are protected by the Labor Act. The Act protects only workers who fall within its definition of "employee." Workers who fall outside of this definition have no legal right to engage in collective bargaining, may not vote in union representation elections, and are not protected by the law against unfair labor practices. The following classes of workers are not protected:

- employees of federal, state, or local governments
- employees of railroads or airlines
- agricultural workers
- domestic servants working in their employers' homes
- spouses and children of employers
- independent contractors
- American citizens working for American-owned firms in foreign countries
- managers and supervisors.

In some cases, employees who are not protected by the Labor Act are protected by other laws. For example, the Railway Labor Act covers employees of railroads and airlines; a few states have laws that

apply to agricultural employees; and the majority of states and the federal government protect governmental employees. Of course, such laws may differ from the Labor Act; therefore, the rules discussed in this book may not apply to those workers.

Also, some classes of workers, for example, construction workers, health care workers, and guards, are covered by the Labor Act, but special rules apply to them. This book does not include these special rules.

Many issues have arisen concerning who is covered by the Labor Act. Let us consider a few of them.

**Supervisors.** Supervisors are not "employees" under the Labor Act. They are not protected against unfair labor practices, and they have no right to engage in collective bargaining. What makes a worker a supervisor? The statute specifies that a worker is a supervisor if she has the authority, and uses independent judgment (as opposed to following someone else's orders), to do any of the following to another employee:

- hire
- transfer
- suspend
- lay off
- recall
- promote
- discharge
- assign
- reward
- discipline
- responsibly direct
- adjust grievances
- effectively recommend any of the above.

If a worker performs even one of these functions, she is considered a supervisor.

**Professionals.** The Labor Act explicitly protects professional workers, such as engineers and nurses. Professionals, however, usually perform at least one supervisory function, for example, assigning work to another employee. As a result, many professionals must be classified as supervisors, and so they are not protected against unfair labor practices and have no right to engage in collective bargaining.

**Graduate students.** Most universities use some graduate students as research assistants to professors and as teaching assistants in undergraduate courses. Graduate assistants are paid wages (or their tuition is waived, or both) and usually receive benefits such as medical insurance. These students, therefore, play two roles. The Labor Act does not protect them in their role as students; the Act applies to employment relations, not to teacher-student relations. Does the Act protect them in their role as research and teaching assistants? This role, if played by nonstudents, would surely count as employment. That is, if the university secured the services of nonstudents to assist professors in research and teaching, the nonstudents would unquestionably have the right to bargain collectively over the terms of their employment.

As unions have sought to organize graduate assistants, universities have resisted. The parties cannot agree on the issue. Universities assert the issue is, which role predominates? Are the assistants primarily students or employees? Unions assert that the issue is, can the two roles be separated? Can unions bargain with universities over assistants' employment issues (for example, wages) but not over educational issues (for example, curriculum)? The Labor Board seems unable to make up its mind. Sometimes it asks which role predominates, and then holds that graduate assistants are primarily students who have no right to bargain with their universities. Other times it asks whether the roles can be separated, and then authorizes bargaining over employment issues.

Other persons who play two roles are in the same boat as graduate students. For example, medical interns and residents may desire to bargain with their hospitals, and disabled workers may wish to bargain with sheltered workshops. Whether they are protected by the

Labor Act seems to vary with the political party of the majority of the members of the Labor Board.

**Undocumented workers.** The status of undocumented workers is ambiguous. The Labor Board and courts have held that an undocumented worker is an "employee" under the Labor Act and has the same rights and protections as other employees. For example, an undocumented worker may vote in a representation election; a union must represent an undocumented worker fairly and in good faith, and an employer may not discriminate against an undocumented worker because of the worker's support for a union. At the same time, the Supreme Court has held that an undocumented worker who is the victim of an unfair labor practice, for example, is discharged for supporting a union, is ineligible for the usual remedies of reinstatement and back pay. The Court's reasons were that an employer cannot legally rehire an undocumented worker, and these remedies would encourage and condone violations of federal immigration law.

**Salts.** When a union seeks to organize a shop, sometimes union members (they may be organizers paid by the union, or simply workers in the trade) apply for jobs in the shop in order to have easy access to the employees and to vote for the union in an election. This practice is called *salting*, and the union members are called *salts*. Suppose an employer detects that an applicant is a salt and refuses to hire that person. Has the employer committed the unfair labor practice of discriminating against an employee because of the employee's concerted activity?

The answer depends on whether a salt is an "employee" as defined in the Labor Act. Employers argued that a salt who is a paid organizer is an employee of the union, not of the company. Unions argued that a worker may be an employee of two different employers at the same time, for example, a worker who holds a day job in one firm and an evening job in another firm. Employers responded that a salt, whether paid by the union or not, takes orders from, and is loyal to, the union, not the company. Unions replied that a salt has to follow the company's orders during working hours like any other worker. The Supreme Court settled the issue by ruling that a salt is an employee. Therefore,

it would be an unfair labor practice for an employer to refuse to hire or to discharge someone suspected of being a salt.

Recently, however, the Labor Board has raised a second question: Is the salt "genuinely interested" in holding the job? The board's reasoning is that a salt often resigns after a shop is organized and, therefore, has little in common with employees who want to keep their jobs. Accordingly, the board's new rule is that a salt is not protected by the Labor Act (and an employer is legally free to discriminate against the salt) unless it can be proved that the salt intended to keep the job. The courts have not yet reviewed this rule. If they approve it, salting will become less effective.

**Strikers.** What happens if an employee who is protected by the Labor Act goes on strike? If employees refuse to work, it can be argued that they have resigned their jobs and are no longer employees of the struck employer. The Act, however, specifically provides that strikers remain employees, so strikers continue to enjoy the protection of the Act. But strikers lose their status as employees of the struck employer if they abandon the strike and take permanent jobs in other firms.\*

## SECTION 7: PROTECTION FOR CONCERTED ACTIVITY

We mentioned in the introduction that section 7 of the Labor Act protects workers as they engage in concerted activity, and we defined "concerted activity" to mean workers acting together or "in concert" to improve their wages and working conditions. Here we will discuss some of the issues that arise pertaining to concerted activity.

### Organized Workers

The protection of concerted activity in section 7 applies to organized workers on the job. In one case, an employer called a worker into the

\* The rights of strikers are discussed in chapters 4 and 6.



office and accused her of stealing. She asked to have her shop steward present during the rest of the interview; the employer refused. The Supreme Court held that a worker who reasonably believes an interview will lead to discipline, and who asks for union representation, has a right to have a union representative present during the interview. (The Court also held that the employer may choose to cancel the interview and investigate the matter without hearing from the worker, rather than let the union representative attend the interview.) The Labor Board has ruled that a worker has no right to have a union steward present if the purpose of the interview is merely to inform the worker of discipline that the employer has already decided upon.

Labor relations and politics often overlap. Consider, for example, a bill in a state legislature to increase the minimum wage, or a hearing before a committee of Congress on undocumented workers. Is a worker who attends a rally or who circulates a newsletter about these issues engaged in concerted activity? The answer for the newsletter is clear from a case in which a union wrote a flyer that contained four sections. Two sections pertained to union solidarity; the third section encouraged workers to write their legislators and oppose a right-to-work law, and the fourth section criticized the president for vetoing a bill to increase the minimum wage. The union asked the employer for permission to distribute the flyer on company property during nonworking hours; the employer denied permission, and the union filed a charge with the Labor Board. The Supreme Court held that the employer had committed an unfair labor practice. The Court reasoned that the right to act in concert to improve the terms and conditions of employment includes acting through channels outside of the employer-employee relationship, including political channels.

Does the same result apply to workers who, on their own time, attend a political rally that pertains to issues related to employment? The Labor Board and courts have not ruled on this question, but the answer will probably be yes. Businesses use the political process to advance their interests, and workers should also be free to do the same without fear of losing their jobs.

A question that is still unresolved is whether section 7 protects sympathy strikers, for example, workers who refuse to cross a picket line at another employer's place of business. Some courts hold that

sympathy strikers are not engaged in concerted activity because they have nothing in common with the workers of the other employer; therefore, their employer may fire the sympathy strikers. Other courts hold that workers are entitled to make common cause with any other workers; therefore, sympathy strikers may not be fired because honoring a picket line is like going on strike. But even these latter courts limit the workers' protection in two ways. First, workers who refuse to cross a picket line have the same status as the picketers. Thus, if the picketers are on an illegal strike, a worker who honored the picket line could be fired. If the picketers are on a lawful economic strike, a worker who honored the picket line could be permanently replaced.\* Second, if sympathy strikers are covered by a labor contract that specifically gives up the right of workers to engage in a sympathy strike, the employer may fire them for violating the contract. What if the contract generally gives up the right to strike, but does not specifically mention sympathy strikes? Many contracts contain broad no-strike clauses (in which the union promises not to strike during the term of the contract for any reason) but do not specifically refer to sympathy strikes. A conservative Labor Board created a presumption that broad no-strike clauses prohibit sympathy strikes; that is, sympathy strikes are illegal unless other evidence shows the parties specifically intended to permit them. A liberal board reversed that presumption, holding that broad no-strike clauses allow sympathy strikes unless the evidence shows the parties specifically intended to prohibit them.

Section 7 also guarantees the right of employees to engage in collective bargaining through the union of their choice. This right would be violated, for example, if an employer or a union tried to force workers to support union A instead of union B.

### **Unorganized Workers**

So far, the examples of concerted activity have pertained to organized workers, but the right to concerted activity applies equally to unorganized workers. This point is obvious when one realizes that

\* The rights of economic strikers and the difference between being fired and being permanently replaced are discussed in chapter 4.

workers who are attempting to organize themselves into a union, or are just thinking about it, may need legal protection more than anyone else. Also, the right to refrain from concerted activity applies primarily to unorganized workers. Accordingly, the right to engage in, or refrain from, concerted activity is not limited to union members or employees in organized shops.

Unorganized workers have the right to strike. The leading case began on a cold day in Baltimore. The furnace in a plant would not start, and several workers walked out together in protest, for which their employer discharged them. The Supreme Court held that the discharges were illegal. The key point was that the workers were acting in concert in relation to the conditions of their employment.

Concerted activity need not be as dramatic as a strike. Presenting grievances to an employer can also be concerted activity. Thus, an employer committed an unfair labor practice by discharging unorganized workers because they complained together about their working conditions. Indeed, ordinary grouching can be concerted activity. Suppose, for example, a few unorganized workers express to one another their dissatisfaction with the behavior of a supervisor. Or suppose one worker posts on her Facebook page a complaint about her supervisor and invites her coworkers to comment, and they do. These workers are engaged in concerted activity.

The right of concerted activity protects any workers who are acting in concert to improve their working lives. Sometimes, what appears to be an individual act is concerted activity. For example, if Harry tries to persuade Mary to support a union, Harry is engaged in concerted activity (regardless of whether Mary is interested). Similarly, if Harry and Mary agree that their wages are too low, and, with her approval, Harry complains to their employer on behalf of himself and Mary, Harry is engaged in concerted activity. But if Harry goes to his employer alone and complains about only his own wages, he is not engaged in concerted activity.

Many employers have confidentiality policies that prohibit employees from revealing their salaries to one another or discussing their performance evaluations, discipline, and the like. Such policies are illegal when applied to employees protected by the Labor Act. Talking

to coworkers about the conditions of employment is the heart of concerted activity. (In contrast, confidentiality policies that apply to business matters, such as company documents and trade secrets, are lawful.)

Some employers have "nonfraternization" policies that restrict workers' off-duty behavior, for example, a rule against dating coworkers. Such policies are evaluated on a case-by-case basis. A hotel has a strong interest in preserving the professional status of its employees and in maintaining professional relationships between employees and guests; for this reason, a hotel's nonfraternization policy on the premises of the hotel is permissible. But a nonfraternization policy would be unlawful if employees could reasonably believe that it prevents them from engaging in concerted activity, such as discussing their wages and conditions of employment at appropriate times and places.

Recently, mandatory arbitration policies have become common in unorganized firms. These policies apply to rights created by statutes, such as the right to be free from discrimination based on race, sex, age, or disability. For decades, when a worker believed that the employer had violated a worker's statutory right, the worker could take the case to trial in a court of law. Under a mandatory arbitration policy, however, in order to get a job a worker must agree to a trial before a private arbitrator. The courts have approved of these policies regarding the antidiscrimination statutes. Nonetheless, such a policy may not prevent the worker from filing a charge with an agency such as the Equal Employment Opportunity Commission. (Curiously, then, a worker who signs a mandatory arbitration policy may file a charge of discrimination with the commission, but the trial of the case would be held before a private arbitrator.)

Do the same rules apply to the Labor Act? It seems certain that a mandatory arbitration policy may not prohibit a worker from filing an unfair labor practice charge with the Labor Board. But where would the trial of such a charge take place, before the Labor Board or before a private arbitrator? This question has not been answered yet. It is settled that a union may agree in a collective bargaining agreement that it will submit unfair labor practice cases to private

arbitration instead of the Labor Board. A union may also agree that workers will submit their claims of discrimination based on race, sex, age, or disability to private arbitration instead of the courts. Whether these precedents will be followed in the case of unfair labor practice charges by unorganized workers is anyone's guess.

Let us consider one further example of concerted activity by unorganized workers. We mentioned above that an organized worker has the right to request the presence of a union representative at an interview that might lead to discipline. Suppose an unorganized employee, that is, an employee in a nonunion shop, asks for the presence of another employee at such an interview. The right to engage in concerted activity is not limited to organized shops, and one employee's helping another employee would seem to be a concerted act; yet organized and unorganized shops differ in many ways. The Labor Board has changed course on this issue more than once, and the results have followed partisan lines. When Democrats controlled the board, it ruled that an unorganized employee has a right to the presence of another employee at the interview. When Republicans took control of the board, it reversed itself and held that an unrepresented employee has no such right. When Democrats came back into power, the board reversed the reversal; and when Republicans returned to power, they reversed the reversal of the reversal. When the answer to a question of law depends on the political party in power, the legitimacy of an agency such as the Labor Board may be undermined.

### **The Limits of Concerted Activity**

Even workers who are acting together to improve their wages and working conditions can get themselves in trouble if they go too far. Let us consider two examples.

Employees leave work early without permission in order to attend a union meeting. Attending a union meeting is concerted activity; but leaving work without permission is not protected, and the employer could legally discipline these workers.

A union is on strike over wages, and Mary is walking the picket line in front of the shop. When a customer tries to enter the shop, Mary

blocks the door. When her supervisor warns her, she speaks disrespectfully to him. When a delivery truck pulls up, she puts tacks under the tires. Although striking is concerted activity, and the employer may not punish Mary for it, blocking the door, disrespecting a supervisor, and damaging property are misconduct that is not protected by the Labor Act. The employer is free to punish Mary for such behavior.

### EXCLUSIVITY OF REPRESENTATION

The majority of workers in an appropriate bargaining unit decide whether or not all the workers in that unit will be represented by a union. If a majority of workers in a bargaining unit choose to be represented by a union, the employer must bargain with the union regarding *all* the workers, even those who would prefer to bargain individually with their employer. The union becomes the exclusive bargaining agent of the unit; the employer must bargain with this union and none other. But if the majority chooses *not* to be represented by a union, the employer need not bargain with the union, even though many workers might be members of it.

It is important to realize that *representation by* a union is separate from *membership in* a union. Membership is controlled by the union's own rules; the Labor Act says nothing about who may join a union. This fact affects representation in two ways that are illustrated by the following cases. First, Harry is the only person in his shop who is interested in joining a union. The union is free to accept Harry as a member. However, if the union tries to bargain on his behalf with his employer, for example, by trying to get a raise for Harry, the employer may ignore the union because it does not represent a majority of workers in the shop. Second, Mary wants to be a member of union A, but a majority of workers in the shop want to be represented by union B. Mary is free to join union A, and it is free to accept her. However, the employer must bargain with union B regarding all workers, including Mary, because a majority has chosen union B. (Union security is discussed later in this chapter. Here it should be noted that, if the employer and the union agree to a union shop or an agency shop,