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Introduction to Human Rights in Labor and Employment Relations: International and Domestic Perspectives

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Introduction to *Human Rights in Labor and Employment Relations: International and Domestic Perspectives*

**Abstract**
[Excerpt] This volume is intended to collect the best current scholarship in the new and growing field of labor rights and human rights. We hope it will serve as a resource for researchers and practitioners as well as for teachers and students in university-level labor and human rights courses. The animating idea for the volume is the proposition that workers’ rights are human rights. But we recognize that this must be more than a slogan. Promoting labor rights as human rights requires drawing on theoretical work in labor studies and in human rights scholarship and developing closely reasoned arguments based on what is happening in the real world. Citing labor clauses in the Universal Declaration of Human Rights is one thing; relating them to the real world where workers seek to exercise their rights is something else. The contributors to this volume provide a firm theoretical foundation grounded in the reality of labor activism and advocacy in a market-driven global economy.

**Keywords**
workers’ rights, freedom of association, unions, organizing, labor law, enforcement, United States, labor movement

**Disciplines**
Human Rights Law | International and Comparative Labor Relations | Labor and Employment Law

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Separate Tracks

For most of the half-century after the Second World War, labor rights and labor standards were strictly a matter of national law and practice. Small groups of specialists in each country knew of the International Labour Organization and the dozens of "conventions" adopted since the ILO's founding in 1919. ILO conventions are meant to fashion common international labor standards around the world. ILO norms are nonbinding unless and until they are ratified and incorporated into national law, but they set out a marker of international consensus on workers' rights. In many countries, however—and especially in the United States—ILO standards traditionally have had little weight or relevance.

In similar fashion, labor advocates have rarely, if ever, looked to international human rights norms in their promotion of workers' rights. The "international bill of rights," consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and
Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), contains many labor-related clauses. They cover freedom of association, organizing, and bargaining; prohibitions on forced labor and child labor; nondiscrimination and health and safety in the workplace; decent wages and benefits; and other labor subjects. But trade unionists and their allies did not make the connection between international labor standards and their struggles in national settings. Human rights were disconnected from labor concerns and labor discourse.

During this same period, from the end of World War II to the 1990s, the human rights community hardly ever took workers' rights into its field of vision and activism. Human rights activists focused—with good reason—on outrages like genocide, torture, arbitrary arrest and imprisonment, and death squad killings, often perpetrated by U.S.-supported military dictatorships. Human rights supporters saw labor rights and labor standards lying more in the economic arena, not that of human rights. The long list of labor-related clauses in basic human rights instruments just did not translate into action by human rights promoters.

Two Paths Converge

In the 1990s the separate paths of labor rights and human rights advocacy began to converge. Each group came to see that its traditional boundaries were too narrow in a new context of political, social, and economic upheaval captured by the term "globalization." Trade unions looking to national labor law systems for organizing and bargaining gains found themselves undercut by a race-to-the-bottom global economy. Human rights advocates saw that their traditional agenda did not adequately address the consequences of economic globalization and the suffering it unleashed on victims of the "destruction" side of capitalism's creative destruction. Of course, globalization had winners as it rolled on, suffering it unleashed on victims of the "destruction" side of capitalism's creative destruction. Of course, globalization had winners as it rolled on, suffering it unleashed on victims of the "destruction" side of capitalism's creative destruction. 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Political Rights (ICPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), contains many labor-related clauses. They cover freedom of association, organizing, and bargaining; prohibitions on forced labor and child labor; nondiscrimination and health and safety in the workplace; decent wages and benefits; and other labor subjects. But trade unions and their allies did not make the connection between international labor standards and their struggles in national settings. Human rights were disconnected from labor concerns and labor discourse.

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In the 1990s the separate paths of labor rights and human rights advocacy began to converge. Each group came to see that its traditional boundaries were too narrow in a new context of political, social, and economic upheaval captured by the term “globalization.” Trade unions looked to national labor law systems for organizing and bargaining gains found themselves undercut by a race-to-the-bottom global economy. Human rights advocates saw that their traditional agenda did not adequately address the consequences of economic globalization and the suffering it unleashed on victims of the “destruction” side of capitalism’s creative destruction. Of course, globalization had winners as it rolled on, but millions of “losers” faced human rights abuses: child workers, trafficked workers, discriminated-against workers, workers forced into labor at the point of a gun, workers fired, jailed, and killed for trying to form unions, and many more.

One sign of a new connection between labor rights and human rights appeared with the introduction of labor clauses in trade agreements like the North American Free Trade Agreement (NAFTA) labor side accord and other U.S. pacts with trading partners. Although lacking strong enforcement mechanisms, these clauses and their reliance on ILO and international human rights standards created opportunities for labor and human rights advocates to work together filing complaints and backing them up with new forms of cross-border solidarity.

In one notable case filed under NAFTA’s labor agreement in 1997, Human Rights Watch and allied labor and women’s rights groups in Mexico challenged the widespread practice of pregnancy testing by U.S.-based multinational firms in the maquiladora region along the U.S.-Mexico border. Nothing in the NAFTA agreement empowered its trinational commission to order and enforce a halt to the practice, but a verdict in the court of public opinion, generated by the complaint and the joint advocacy campaign by Mexican labor—NGO alliances, put a stop to the practice in many of the factories supplying U.S. companies.

Another signal of a labor-human rights convergence came with other initiatives by Human Rights Watch (HRW). Beginning in 2000, HRW produced book-length reports on violations of workers’ rights in the United States as well as in other countries. The U.S. reports covered household domestic workers, child labor in agriculture, meatpacking industries, Walmart’s interference with workers’ freedom of association, and workers victimized across the country in many industries when they tried to exercise organizing and bargaining rights. Abroad, HRW labor rights reports addressed child labor in Ecuador, women workers in Guatemala, freedom of association in El Salvador, forced labor in Burma, migrant construction workers in the Middle East, migrant domestic workers in Indonesia and Malaysia, and more.

Other human rights groups have similarly taken up labor’s cause. Amnesty International USA created a business and human rights division with extensive focus on workers’ rights. Its parent organization, London-based Amnesty International, created a workers’ rights program and engaged an experienced British trade unionist to direct it. Oxfam International broadened its development agenda to include labor rights and standards, and its Oxfam America group created a workers’ rights program to take up these causes inside the United States. In 2003, Oxfam launched a “national workers’ rights campaign” on conditions in the U.S. agricultural sector. In 2004, the group published a major report titled Like Machines in the Fields: Workers Without Rights in American Agriculture (Oxfam America 2004).

Labor’s Turn to Human Rights

On the labor side, the AFL-CIO has launched a broad-based “Voice@Work” project designed to help U.S. workers regain the basic human right to form unions to improve their lives. Voice@Work stresses international human rights in workers’ organizing campaigns around the country. In 2005, for example, the labor federation held more than 100 demonstrations in cities throughout the United States
and enlisted signatures from 11 Nobel Peace Prize winners, including the Dalai Lama, Lech Walesa, Jimmy Carter, and Archbishop Desmond Tutu, supporting workers' human rights in full-page advertisements in national newspapers.

In 2004, trade unions and allied labor support groups created a new nongovernmental organization (NGO) called American Rights at Work (ARAW). ARAW launched an ambitious program to make human rights the centerpiece of a new civil society movement for U.S. workers' organizing and bargaining rights. ARAW's 20-member board of directors includes prominent civil rights leaders, former elected officials, environmentalists, religious leaders, business leaders, writers, scholars, an actor, and one labor leader (AFL-CIO president John Sweeney). The convergence of these movements is aptly illustrated in the figure of the group's international advisor, Mary Robinson, who is the former United Nations High Commissioner for Human Rights.

Many organizations are also turning to international human rights arguments in defense of immigrant workers in the United States. For example, the National Employment Law Project (NELP) includes an immigrant worker project under its rubric "workers' rights are human rights—advancing the human rights of immigrant workers in the United States." NELP has been a leader in filing complaints to the Inter-American Commission and Inter-American Court of Human Rights on rights violations among immigrant workers in the United States.

Working with Mexican colleagues, NELP sought an Inter-American Court Advisory Opinion on U.S. treatment of immigrant workers. The petition was prompted by the Supreme Court's 2002 Hoffman Plastic decision stripping undocumented workers illegally fired for union organizing from access to back-pay remedies (Hoffman 2002). The Inter-American Court issued the opinion that undocumented workers are entitled to the same labor rights, including wages owed, protection from discrimination, protection for health and safety on the job, and back pay, as are citizens and those working lawfully in a country.

Reaching out to the religious community, Interfaith Worker Justice (IWJ) is a national coalition of leaders of all faiths supporting workers' rights under religious principles. IWJ places divinity students, rabbinical students, seminarians, novices, and others studying for careers in religious service in union-organizing internships. Through a national network of local religious coalitions, IWJ also sponsors projects for immigrant workers, poultry workers, home-care workers, and other low-wage employees. IWJ gives special help when religious-based employers, such as hospitals and schools, violate workers' organizing and bargaining rights.

A new student movement that began against sweatshops in overseas factories has adopted a human rights and labor rights approach to problems of workers in their own campuses and communities, often citing human rights as a central theme. Students at many universities held rallies, hunger strikes, and occupations of administration offices to support union organizing and "living wage" and other campaigns among blue-collar workers, clerical and technical employees, and other sectors of the university workforce.

These initiatives suggest that the human rights and labor communities no longer run on separate tracks. They have joined in a common mission with enhanced traction to advance workers' rights.

Using International Mechanisms

The U.S. labor movement's new interest in international human rights law is reflected in its increasing use of ILO complaints and international human rights mechanisms. In 2002, the AFL-CIO filed a complaint with the ILO Committee on Freedom of Association (CFA) challenging the Supreme Court's Hoffman Plastic decision. In Hoffman, the Supreme Court had held, in a 5–4 decision, that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally fired for union organizing. The five-justice majority said that enforcing immigration law takes precedence over enforcing labor law.

The union federation's ILO complaint argued that eliminating the back-pay remedy for undocumented workers annuls protection of workers' right to organize, contrary to the requirement in Convention 87 to provide adequate protection against acts of anti-union discrimination.

The AFL-CIO's complaint was successful: in November 2003, the CFA announced that the Hoffman doctrine violates international legal obligations to protect workers' organizing rights. The committee concluded that remedial measures left to the National Labor Relations Board (NLRB) in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination. The CFA recommended congressional action to bring U.S. law into conformity with freedom of association principles, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision.

Supervisory Exclusion

In October 2006, the AFL-CIO filed another CFA complaint, this time against the NLRB's decision in the so-called Oakwood Trilogy (Croft Metal, Inc. 2006; Golden Crest Healthcare Center 2006; Oakwood
and enlisted signatures from 11 Nobel Peace Prize winners, including the Dalai Lama, Lech Walesa, Jimmy Carter, and Archbishop Desmond Tutu, supporting workers' human rights in full-page advertisements in national newspapers.

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In its March 2008 decision, the CFA found that the criteria for supervisory status laid out in the Oakwood Trilogy give rise to an overly wide definition of supervisory staff that would go beyond freedom of association principles, and it urged the U.S. government to take all necessary steps to ensure that exclusions are limited to workers genuinely representing the interests of employers.

TSA Airport Screeners

In November 2006, the CFA issued a decision in a complaint filed by the AFL-CIO and the American Federation of Government Employees (AFGE) against the Bush administration's denial of collective bargaining rights to Transportation Security Administration (TSA) airport screeners (International Labour Organization 2006). The administration argued that events of September 11, 2001, and concomitant security concerns made it necessary to strip TSA employees of trade union rights accorded to other federal employees.

Again, the CFA found the United States failing to meet freedom of association standards. The CFA said that persons who are clearly not making national policy that may affect security, but only exercising specific tasks within clearly defined parameters, should be able to exercise organizing and bargaining rights.

North Carolina Public Employees

In 2006, the United Electrical, Radio and Machine Workers of America (UE) filed a complaint with the CFA. The complaint charged that North Carolina's ban on public worker bargaining, and the failure of the United States to take steps to protect workers' bargaining rights, violated ILO's principles that "all workers, without distinction should enjoy organizing and bargaining rights, and that only public employees who are high-level policymakers, not rank-and-excluded from the right to bargain."

In April 2007, the CFA ruled in the union's favor, determining that the NLRB's Oakwood Trilogy strips employees in the new "supervisor" status of protection of collective bargaining rights in violation of Convention No. 98.

Employers Engaging the Human Rights Argument

The employer community recognizes the formidable menace of the labor rights as human rights argument. The Right-to-Work Committee (NRTWC) sees the potential for ILO to advance U.S. labor's cause: in February 2006, a briefing paper titled "Organized Labor's Inter-Transforming Workplace Rights into Human Rights" argued that trade union advocates have brought labor rights ought to be considered not as mere policy, but as international human rights proclaims international bodies. It went on to warn that doing themselves to be influenced by the rulings of the CFA that was concluded that the United States should consider membership because of the ILO's use of ILO conventions 87 and 98. This signaled a reversal of position that these ILO standards do not apply to the United States and cannot ratify them.

Some Critical Voices

We are mindful of the fact that some analysts and trade unions have expressed skepticism about human rights as a strategy for advancing labor as a strategy for focusing on "rights" plays into the hands of critics, for example, the right to refrain from secret ballot elections, or employers' rights. Instead of arguing that labor rights are human rights, critics call for a focus on labor solidarity and industrial relations. These are healthy cautions from serious, critical voices of trade unions and workers' rights needed debate about the role and effectiveness of human rights arguments in support of workplace rights.
**HUMAN RIGHTS**

*Healthcare, Inc.* 2006). In *Oakwood*, the NLRB announced an expanded interpretation of the definition of “supervisor” under the National Labor Relations Act. Under the new ruling, employers can classify as “supervisors” employees with incidental oversight over co-workers even when such oversight is far short of genuine managerial or supervisory authority.

In its complaint to the ILO, the AFL-CIO relied on the ILO conventions, arguing that the NLRB’s decision contravened No. 87’s affirmation that “workers and employers, without distinction whatsoever, shall have the right to establish and ... to join organizations of their own choosing without previous authorization.” The AFL-CIO further argued that the NLRB’s *Oakwood* Trilogy strips employees in the new “supervisor” status of protection of collective bargaining rights in violation of Convention No. 98.

In its March 2008 decision, the CFA found that the criteria for supervisory status laid out in the *Oakwood* Trilogy give rise to an overly wide definition of supervisory staff that would go beyond freedom of association principles, and it urged the U.S. government to take all necessary steps to ensure that exclusions are limited to workers genuinely representing the interests of employers.

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Again, the CFA found the United States failing to meet freedom of association standards. The CFA said that persons who are clearly not high-level policymakers, not rank-and-file workers, should be excluded from the right to bargain.

In April 2007, the CFA ruled in the union’s favor and urged the U.S. government to promote the establishment of a collective bargaining framework in the public sector in North Carolina to bring the state legislation into conformity with the freedom of association principles (International Labour Organization 2007).

**Employers Engaging the Human Rights Argument**

The employer community recognizes the force (and, for some, the menace) of the labor rights as human rights argument. The National Right-to-Work Committee (NRTWC) sees the potential for ILO rulings to advance U.S. labor’s cause: in February 2008, the NRTWC issued a briefing paper titled *Organized Labor’s International Law Project: Transforming Workplace Rights into Human Rights* (Muggeridge 2008). The paper noted that trade union advocates have effectively argued that labor rights ought to be considered not as mere elements of economic policy, but as international human rights proclaimed and monitored by international bodies. It went on to warn that domestic courts may allow themselves to be influenced by the rulings of international tribunals and concluded that the United States should consider withdrawing from ILO membership because of the unions’ use of ILO complaints.

In March 2009, the U.S. Chamber of Commerce and the U.S. Council for International Business issued public statements that Congress should reject the proposed Employee Free Choice Act because it violates ILO Conventions 87 and 98. This signaled a reversal of their long-standing position that these ILO standards do not apply to the United States and that the United States cannot ratify them.

**Some Critical Voices**

We are mindful of the fact that some analysts sympathetic to workers and trade unions have expressed skepticism about promoting labor rights as human rights as a strategy for advancing labor’s cause. Some suggest that a focus on “rights” plays into the hands of anti-labor forces who assert, for example, the right to refrain from union membership, or the right to secret ballot elections, or employers’ right to manage the business. Instead of arguing that labor rights are human rights, these friendly critics call for a focus on labor solidarity and industrial democracy.

These are healthy cautions from serious, committed scholars and defenders of trade unions and workers’ rights. They contribute to a needed debate about the role and effectiveness of human rights activism and human rights arguments in support of workers’ rights. But they do
not convince the editors of this volume that a human rights argument should be jettisoned. The fact that anti-labor forces appropriate “rights talk” does not mean we should leave the field. This is contested terrain, and we should not yield it to anti-labor forces. We should not have to choose between human rights and solidarity as the touchstone of effective advocacy on behalf of workers. We can call for both, insisting that they go hand in hand.

Workers are empowered in campaigns when they are themselves convinced—and are convincing the public—that they are vindicating their fundamental human rights, not just seeking a wage increase or more job benefits. The larger society is more responsive to the notion of trade union organizing as an exercise of human rights rather than economic strength. The human rights argument pries open more space for trade union organizing as an exercise of human rights rather than economic advocacy on behalf of workers. We can call for both, insisting that choices between human rights and solidarity as the touchstone of effective advocacy on behalf of workers. We can call for both, insisting that they go hand in hand.

The fact that international human rights arguments strain for a place in American political discourse is not a reason to shy away from their use. It’s a reason to bring human rights into the discourse to connect with a natural sense of “rights” that all people have. In this spirit, we conceived and bring to press this volume.

The authors of the essays here constitute a diverse and accomplished group of human rights activists, practitioners, and scholars, all of whom have published extensively. James Gross sets the tone for the volume by emphasizing that the growing movement for promoting and protecting economic rights, the wide-ranging consequences of cultural and moral relativism, and doctrines of national sovereignty—and even the supposed absence of a theory of human rights, and sets forth a nuts-and-bolts strategy that includes legal and “extra-legal” means to abolish child labor. Weston contends that “reorienting one’s worldview,” while essential, is not sufficient to bring about broad-based change without the practical measures he proposes.

Tonia Novitz addresses workers’ freedom of association, particularly the conflict between collective action and individual choice. She focuses on two issues: whether the freedom of association encompasses not only the positive entitlement to associate with others but also the negative entitlement to refuse to do so and whether freedom of association extends beyond the ability of an individual to form and join an organization with- out state interference to the ability to have an organization engage in collective action with state support and protection. Novitz discusses these
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the implications of these human rights challenges for labor and employment systems. More specifically, his chapter discusses how the human rights movement challenges and is challenged by traditional conceptions of the sources of worker and employer rights, the philosophy and practice of the unregulated market, the long-standing opposition to the idea of economic rights, the wide-ranging consequences of cultural and moral relativism, and doctrines of national sovereignty—and even the still dominant industrial pluralism theory attributed to "Wisconsin School" pioneer John R. Commons. Finally, Gross describes the gap between U.S. labor laws and international human rights law and standards and explores the implications of these human rights challenges for labor and employment research.

Jeff Hilgert challenges industrial relations and labor economics to articulate a framework of workers' health and safety as a human rights concern. His chapter aims to establish a new foundation for industrial relations scholarship and to build a human rights foundation for labor policy. He uses workers' health and safety to illustrate the contrasts between institutional labor economics and human rights and shows that the human rights worldview offers a fundamentally different perspective than institutional economics particularly in regard to policy evaluation, the role of government and the analysis of government policy, and understanding human rights in a social context. Hilgert concludes that the human rights worldview poses a more significant challenge to the orthodoxy of neo-classical economics than does any other market-based economic philosophy, including the institutional labor economics school.

Bums Weston sees child labor as not only a human rights problem but as a human rights problem that is multidisciplinary, multifaceted, and multisectoral. His chapter is premised on three interrelated propositions: that child labor is exploitive, hazardous, or otherwise contrary to children's best interest and constitutes a "blight on human civility"; that child labor begins to be abolished; that child labor manifests itself in complex ways demanding multidimensional approaches to its eradication; that no form or level of social organization can claim "business as usual"; and that change requires an ongoing commitment to the application of human rights law and policy, which includes the right of children to influence their own lives. Consequently, Weston advocates a rights-based approach that responds to skeptics' arguments, contests the claimed absence of a theory of human rights, and sets forth a nuts-and-bolts strategy that includes legal and "extra-legal" means to abolish child labor. Weston contends that "reorienting one's worldview," while essential, is not sufficient to bring about broad-based change without the practical measures he proposes.

Tonia Novitz addresses workers' freedom of association, particularly the conflict between collective action and individual choice. She focuses on two issues: whether the freedom of association encompasses not only the positive entitlement to associate with others but also the negative entitlement to refuse to do so and whether freedom of association extends beyond the ability of an individual to form and join an organization without state interference to the ability to have an organization engage in collective action with state support and protection. Novitz discusses these
issues in the context of international law (including U.N. covenants, ILO conventions, and the decisions of the ILO's Committee on Freedom of Association) and the legal systems of Canada, the United Kingdom, and the United States. She finds that the laws of those countries do not comply wholly with ILO standards and that in the U.S. and Canada, this noncompliance has prevented ratification of key instruments relative to the freedom of association. Her essay has important implications for determining the most effective ways to gain protection for participation by workers' organizations in collective bargaining.

Rebecca Smith's chapter emphasizes the urgent and compelling need to protect the rights of migrant workers and forced laborers, so many of whom are the victims of wage exploitation, discrimination, and retaliation. She points out that models exist—in treaties, in judicial decisions, in the approaches of some governments, and in migrant communities themselves—that policy makers in the U.S. and around the world could find useful in dealing with these human rights violations. Smith describes a protection scheme that would redress the imbalance between migrant workers (documented and undocumented) and nationals of a country, including labor rights differences, and recommends aggressive measures to identify and protect victims of trafficking. Her conclusions are based on a thorough analysis of the decisions of the Inter-American Court of Human Rights, the ILO Committee on Freedom of Association, the European Court of Human Rights, and various national courts.

Edward Potter and Marika McCauley Sine reject the traditional business view that upholding internationally recognized human rights based on documents and treaties is not part of business activity. They maintain that business cannot thrive adhering to that position in a global economy. According to Potter and McCauley Sine, business cannot ignore its unique role concerning human rights despite the fact that primary accountability remains with government to protect its citizens and to enforce the law. The authors provide a historical perspective on the evolution of how human rights began to find its way into business through self-regulation in the form of codes of conduct that reflect ILO standards. Despite this progress, the authors lament, there is no clear path or pragmatic set of standards articulating the human rights obligations of employers. They also note that human rights topics are still absent from most boardrooms.

Although most discussions of employment discrimination law and policy treat the issue as one of civil rights or work law, Maria Ontiveros takes a different approach, using a human rights perspective to assess the strengths and weaknesses of discrimination law and policy. Her chapter begins with the reasons why employment discrimination is understood as a violation of human rights and then discusses the ILO's principles regarding employment discrimination and its implementation of those principles. Ontiveros also discusses specific topics, namely, racial discrimination and affirmative action; discrimination based on sex, gender, and sexuality; religious discrimination; and discrimination based on national origin, citizenship, and migrant status. Her chapter concludes with a comparative and critical evaluation of U.S. employment discrimination law under human rights principles. Using human rights as the standard of judgment, Ontiveros finds that U.S. law "falls short of providing full protection of the human rights of American workers."

Susanne Bruyère and Barbara Murray explain the transition in focus when considering workers with disabilities from impairment and rehabilitation to the long-overlooked rights of those workers to participate at the workplace and in the world economy. It is a shift from a predominantly medical or welfare approach to a social rights-based model of disability. They emphasize that although the rights of workers with disabilities were ignored even in the International Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), change has come with the adoption of the U.N. Convention on the Rights of Persons with Disabilities (CRPD). In light of this recent human rights development, the authors review and discuss the status of disability laws in the U.S. and the European Union. They underscore the need for change in an overarching philosophy to understand that employment is a key aspect of disability rights policy and empowerment. In addition to a discussion of specific changes that need to be made, the authors provide a valuable discussion of the implications of their work for labor and employment relations professionals and for further research.

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References