

## Changing Concepts of Worker Rights in the Work Place

By THEODORE J. St. ANTOINE

ABSTRACT: Under the traditional doctrine of employment at will, contracts of hire can ordinarily be terminated by either party at any time for any reason. The Wagner Act of 1935 and union contracts provide some protection for employees. In addition, public employees enjoy constitutional and statutory safeguards. But about 70 percent of the total labor force still has no guarantee against arbitrary action by employers. A most significant development of the past decade has been increasing judicial modification of the at-will principle to prevent grosser abuses. Civil rights legislation has outlawed job discrimination based on race, sex, religion, national origin, and age. Other statutes have been enacted to promote the physical safety and economic well-being of workers. Nevertheless, voluntarism remains the distinctive characteristic of American labor relations. Not even an employer's legitimate regard for profit making or the public's justified concern for a productive economy should totally override the workers' claim to a voice in the decisions of ongoing enterprises that will vitally affect their future job opportunities. The law should encourage the trend toward participative management.

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A medieval serf had more legal protections than the average American worker of just half a century ago. Although the serf was attached to the land and could not move freely from job to job, the feudal system required the manor lord to provide for his care and sustenance. Until well into this century, most American employers owed no continuing obligations whatsoever to their employees. Employers could fire, refuse to hire, or discriminate in other ways because the worker was a black, a Jew, a Catholic, or a woman, or because the worker was no longer as young and robust as some fresh new recruit. An employer could also fire anyone who tried to form a labor union to improve the employees' lot.

Under the traditional American doctrine of employment at will, contracts of hire that did not have fixed terms could be terminated by either party at any time for any reason. As a practical economic matter, that meant at the will of the employer. It would not even make a difference if the employee was discharged for refusing to go along with a company's illegal price-fixing scheme, or for refusing to commit perjury on the company's behalf.

#### COLLECTIVELY BARGAINED RIGHTS

All that began to change with the passage of the National Labor Relations (Wagner) Act in 1935. By itself the statute protected employees in only one way. They could not be discriminated against because they combined with their fellows and engaged in "concerted" action, such as a strike, to better their wages and working conditions. The employer could still mistreat workers because of their race or sex, or even dis-

charge them on wholly arbitrary grounds. The protected category of concerted activity was fairly broad, however, and included the right to bargain collectively with an employer, once a majority of the employees was prepared to support a union. If the workers as a group had enough economic muscle, they could negotiate a contract with their employer that would entitle them to higher wages, more favorable working conditions, and freedom from discharge or other disciplinary action, except for "just cause."

During the 50-year span ushered in by the New Deal, a revolution occurred in workers' rights in the work place. There were two main lines of development. The initial approach, which predominated in the first three decades, was the use of collective bargaining to win contractual rights for employees. In the last two decades there has been a shift to more direct governmental intervention to secure employee rights by statute, judicial law, and administrative regulation.

Perhaps the prime contribution of collective bargaining to the welfare of American working people has been the creation of the grievance and arbitration system. This is a formalized procedure whereby labor and management may resolve disputes arising during the term of a union contract, either by voluntary settlements between the parties themselves or by reference to an impartial outsider, without recourse to economic force or court litigation. The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decision making, and outright discrimination in the work place. Almost invariably, however, there will also be an express provision that employees may be disciplined or discharged only for

enumerated offenses, inadequate performance, or other just cause.

Approximately 20 percent of our total labor force of over 100 million is now unionized. This includes about half of the 15 million full-time public employees. In addition, all public employees are entitled to due process or fair procedures under the Constitution, and many others have more specific job rights under tenure statutes and civil service laws. That still leaves as much as 70 percent of the work force without generalized safeguards against abusive or discriminatory discharge. For this group, any word or act that evokes an employer's displeasure can result in instant dismissal, without recourse.

Beginning in the 1960s, federal and state antidiscrimination legislation imposed some restrictions on an employer's freedom of action. For example, Title VII of the Civil Rights Act of 1964 forbids discrimination in employment on the specific grounds of race, sex, religion, or national origin. Persons between the ages of 40 and 70 are now protected by federal law against discrimination based on age. As can be seen, however, these guarantees are generally confined to matters of status, to a person's membership in a particular group. They do not apply to individual employee behavior or expression. An employer could still fire with impunity because of personal animosity or even mere whim.

#### MODIFICATIONS IN AT-WILL EMPLOYMENT

Probably the most significant development in the whole field of labor law during the past decade has been the growing willingness of the courts to modify the common law at-will employment doctrine. Judges in some two

dozen states have been prepared to use either tort or contract theories to avoid the harsher effects of the rule in various circumstances. The simplest case is that in which the discharge conflicts with a clearly established public policy. An employee may have been fired for declining to join an antitrust conspiracy or for refusing to lie on the witness stand in order to cover up employer wrongdoing. Relief has been granted against such retaliatory dismissals. In other cases courts have found that employers were contractually bound not to discharge except for good cause because of oral assurances given at the time of hiring, or because of statements included in an employee handbook or personnel manual.

In the absence of a contract, express or implied, no court has held that the law imposes on an employer an affirmative just-cause requirement before an employee can be dismissed. It is likely that statutes will have to be enacted to ensure such a standard. Bills have been introduced in Congress and six state legislatures, but none has yet passed. The United States thus remains virtually alone among democratic industrialized nations in having no general prohibition of unfair dismissals. The just-cause principle is accepted in a new 1982 Convention of the International Labor Organization and in the laws of over 60 countries, including the European community, Canada, and Japan.

The problem is not simply theoretical. Careful estimates of the number of nonunionized employees who are discharged annually in the United States after completing their probationary periods have ranged between 1 and 1.5 million. Extrapolations from figures on the results of discharge arbitrations in the unionized sector suggest that at least

50,000 and perhaps as many as 150,000 of these workers would have been entitled to a remedy under a just-cause criterion.

#### MODERN SOCIAL LEGISLATION

Foot dragging by the United States in adopting modern social legislation is nothing new. We were, for example, about the last industrial country to provide unemployment insurance and old-age pensions when the Social Security Act was passed in 1935. Three years later came the Fair Labor Standards Act, which prescribed minimum wage rates, required premium pay for overtime work, and limited the use of child labor. After this outpouring of New Deal legislation, however, there was a hiatus during which the government refrained from direct intervention in the determination of terms and conditions of employment, and largely confined itself to regulating the procedures by which unions and employers set those substantive standards.

The Kennedy-Johnson era of the 1960s saw a resumption of federal regulation of the employment relationship. The Civil Rights Act of 1964 has already been discussed. It was preceded by the Equal Pay Act of 1963, which guaranteed women the same pay as men when they did the same job. A presidential executive order also required government contractors to engage in affirmative action to increase the percentages of their minority and female employees. This program raised serious questions of reverse discrimination against white males, but it has undoubtedly been the most effective scheme yet devised for introducing blacks and women into the mainstream of the labor force. So far

several types of affirmative action plans have survived constitutional and statutory challenges in the courts.

Even broader in scope than the civil rights laws and regulations of the sixties was the federal legislation of the seventies dealing with workers' physical and economic well-being. A disastrous 1968 coal mine explosion in West Virginia thrust job safety to the head of organized labor's list of legislative demands. This quickly led to statutes setting safety standards in the mining industry and on federally financed construction projects.

The culmination of the heightened concern over worker safety was the third and most comprehensive statute, the Occupational Safety and Health Act (OSHA) of 1970. The secretary of labor was given broad authority to promulgate safety and health standards covering the many millions of employees in businesses affecting interstate commerce. The secretary's discretion is tempered by various procedural safeguards to be followed in administrative rule making, including notice and public hearing. Enforcement power is lodged in an independent three-person commission appointed by the president.

The Supreme Court has liberally construed the secretary of labor's mandate under OSHA. For example, a particular toxicity standard need not undergo a cost-benefit analysis, under which the extent of the risk to workers would be balanced against the expense of reducing the risk. Instead, OSHA calls for the most stringent standard necessary for health which is "technologically and economically feasible."

What is possibly the most complex and technical regulation of the employment field ever undertaken by Congress is the Employee Retirement Income Security Act (ERISA) of 1974. An un-

usual hybrid of labor and tax law, ERISA applies to two kinds of employee benefit plans: pension plans providing retirement benefits, and welfare plans providing health, accident, and similar benefits. The act does not require any employer to establish a plan, but does require any plan that is established to meet certain minimum standards. These include

- the right of employees to participate without unreasonable conditions on age or length of service;
- a vested interest in benefits on the part of employees after a specified period of work;
- adequate funding of the plan;
- fiduciary obligations applicable to the plan's administrators to protect beneficiaries; and
- plan termination insurance to safeguard pensions if a plan comes to an end.

ERISA led to the demise of thousands of employee benefit plans. Some critics viewed this development with alarm, arguing that it demonstrated ERISA had imposed unrealistically strict requirements. Defenders of ERISA responded that the defunct plans were generally marginal, shaky operations anyway, and their departure was good riddance.

A quite different area of rapidly developing individual rights is that of "employee privacy," a term that encompasses a wide variety of protections for workers. Federal law, for instance, requires employers using consumer investigative reports to inform employees and job applicants of any adverse action taken on the basis of such reports. Employee access to their personnel files

is mandated by legislation in seven states. Over 20 states forbid or restrict the use of lie detectors. A dozen states have enacted some sort of limitation on employers' acquisition of information about prior arrests. Many states have statutes providing miscellaneous safeguards for employee privacy, including the regulation of credit reports, employment references, and the like.

In contrast to the past, a considerable body of law now directly regulates the substantive terms of the employer-employee relationship in this country. Despite this, the distinctive characteristic of American labor relations is still voluntarism. While we have recently begun to emulate Europe's reliance on governmental regulation, our ideal in handling the problems of the work place remains the privately negotiated settlement. The solution that is tailored to the needs of the given plant or shop by the employer and employees themselves, rather than imposed by some distant centralized authority, is likely to be the most creative and best adapted to that particular situation. Not incidentally, it will also be a finer expression of individual freedom.

#### MANDATORY SUBJECTS OF BARGAINING

Unfortunately, the very law that gave such an impetus to collective bargaining, the Wagner Act, also impeded its fullest flowering by artificially confining its scope. The subject matter of bargaining was divided into two types: mandatory and permissive. Mandatory topics cover wages, hours, and working conditions. Permissive topics including everything else, generally matters of so-called management prerogative or internal union affairs. Either union or employer

can insist on bargaining over a mandatory subject and can resort to a strike or other lawful economic pressures to obtain it. Permissive subjects are not negotiable unless both parties are willing.

The most controversial issue that has emerged over the last two decades is the extent to which employers must negotiate about managerial decisions that result in a shrinkage of employee job opportunities. For a long time the National Labor Relations Board held that employers ordinarily did not have to bargain over decisions to subcontract, relocate operations, or introduce technological improvements. During the Kennedy and Johnson administrations, however, a whole range of managerial decisions were reclassified as mandatory subjects of bargaining. These included decisions to terminate a department and subcontract its work, to consolidate operations through automation, and to close one plant of a multiplant enterprise. The test was whether the employer's action would significantly impair the employees' job security or work opportunities.

Today the labor board and the courts seem prepared to require bargaining when the decision relates primarily to the deployment of personnel. An example would be a manufacturer's plan to subcontract maintenance work within its own plant to an outside firm. But a proposed alteration in the company's basic operation or a change in its capital structure is apparently not subject to mandatory bargaining. That would supposedly interfere too much with the employer's freedom to manage his or her own business.

Imposing a duty to bargain about managerial decisions like subcontracting, plant removals, and technological innovation would often delay transac-

tions, reduce business adaptability, and perhaps jeopardize the confidentiality of negotiations with third parties. In some instances bargaining would be doomed in advance as a futile exercise. Nonetheless, the closer we move toward recognizing that employees may have something akin to a property interest in their jobs, the more evident it may become that not even an employer's legitimate regard for profit making or the public's justified concern for a productive economy should totally override the workers' claim to a voice in the decisions of ongoing enterprises that will vitally affect their future job opportunities. A moral value is arguably at stake in determining whether employees may be treated as pawns in management decisions.

#### PARTICIPATIVE MANAGEMENT

Economic considerations and sound industrial policy, as well as ethical and social values, support a more sweeping and wide-open duty to bargain. During the late 1960s American management became alarmed by signs of growing alienation—even militancy—on the part of workers. Although this unrest was much exaggerated, it fueled an effort by many companies to enhance the quality of work life (QWL) by increasing employee participation in job-centered decision-making. The interest in such programs was intensified during the 1970s by glowing accounts of the capacity of Japanese industry to improve both the quantity and the quality of production by fostering an almost filial relationship between employee and employer. Altogether, it is estimated that one-third of the companies in the *Fortune* 500 have established programs in participative management. In certain countries, such

as Sweden and West Germany, worker participation is guaranteed by statute.

More and more studies attest that it is simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise. Even on so-called managerial decisions, like revising the layout of a trim department in an auto assembly plant, experience has shown that worker input can be valuable. The law should not insulate an employer from bargaining merely because some management representatives may reject that lesson.

Expanding the scope of collective bargaining need not stymie business dealing. The duty to bargain does not mean there is a duty to agree. After both union and employer have made an effort in good faith to resolve their differences, and negotiations have been carried to the point of impasse or deadlock, the employer may proceed unilaterally to set or change the terms of employment as it wishes. The period of bargaining may be short if the circumstances warrant, as long as the union and the employees have had their say; the law requires no more.

A generation ago a classic study on industrial relations concluded, "An important result of the American system of collective bargaining is the sense of participation that it imparts to workers."<sup>1</sup> Even earlier, a hard-headed

industrial relations expert, Neil Chamberlain, declared that

the workers' struggle for increasing participation in business decisions . . . is highly charged with an ethical content. . . . legal and economic arguments, technological and political considerations must give way before widely held moral convictions.<sup>2</sup>

If such fervent tones do not sit comfortably in these skeptical times, their underlying message is not negated. As a government task force reported within the past ten years, employee self-identity is intimately bound up with occupation and employer affiliation.<sup>3</sup> It is primarily work and job that define a man or woman. To deny workers a voice in the shaping of that work and job is, in the truest sense, to deprive them of a part of their very being.

#### CONCLUSION

The future of American unionism, as other contributors to this volume indicate, is problematical. But whether through collective bargaining, governmental regulation, or other less formal means, the increasing recognition of employees' rights in the work place—including the right to participate in deci-

1. Sumner H. Slichter, James J. Healy, and E. Robert Livernash, *The Impact of Collective Bargaining on Management* (Washington, DC: Brookings Institution, 1960), p. 960.

2. Neil W. Chamberlain, *The Union Challenge to Management Control* (New York: Harper, 1948), pp. 8-9.

3. *Work in America: Report of a Special Task Force to the Secretary of Health, Education and Welfare* (Cambridge: Massachusetts Institute of Technology, 1973), p. 6.

sions having a vital impact on their industrial lives—displays all the force of historical imperative. The revolution of the last half-century will not be undone. The large unanswered question is whether the principal engine behind further advances will be government, private industry, conventional labor organizations, or new and novel forms

of employee representatives. A promising development of recent years has been the unilateral establishment of grievance and arbitration procedures by a few progressive companies. The cause of worker rights, and the public interest generally, would probably be served best if a variety of groups played a role in charting future directions.