EVOLUTION AND RECENT TRENDS OF LABOR LAW IN THE UNITED STATES

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SUMMARY: I. *Labor standars*. II. *Industrial relations*. III. *Anti-Discrimination Law*. IV. *Immigrant workers*.

A brief description of current political dynamics in the United States is needed to understand developments in US labor law. In general, republican party legislators and executive branch officials, and judges appointed by republican presidents, favor business interests over labor interests (there are exceptions, but the generality holds true). Since republicans have held the White House and majorities in both houses of Congress in recent years, and since most federal judges were appointed by republican presidents Nixon, Ford, Reagan and the two Bushes, most evolution and recent trends of labor law in the United States are seen as harmful by trade unionists and worker advocates.

With this background, the evolution and recent trends of labor law in the United States can be summarized as follows:

1) No new legislation. Basic labor law remains unchanged.

BUT

2) Regulatory changes, labor board decisions, and court rulings have significantly affected labor law. Most of these decisions have favored employers.

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I. LABOR STANDARDS

1. *Minimum wage*

The federal minimum wage under the Fair Labor Standards Act remains at $5.15 per hour. This has been the minimum wage since september 1997. States may set a higher minimum wage but not a lower minimum wage than the federal standard. Twelve states have set a higher state minimum wage, ranging from $6.15 per hour (Delaware) to $7.25 per hour (Alaska).

Based on full-time work, the federal minimum wage yields a monthly income of $892.67 and an annual income of $10,712. This is about one-half the federal poverty level. About 10 million workers labor at the minimum wage or a few cents above the minimum wage.

United States law does not provide for annual or periodic increases in the minimum wage linked to inflation or average wages. Congress must act with new legislation to adjust the minimum wage. Support from the Executive is usually needed as well. Adjusting for inflation, the minimum wage today would have to be almost $9 per hour to equal the minimum wage in 1968. About 30 million work for less than $9 per hour.

Democrats have introduced legislation to raise the minimum wage to $7.00 per hour. However, with republicans in control of Congress and the White House, this proposal has not advanced. Some political analysts believe that the republican-controlled Congress and the White House might approve a smaller increase in the minimum wage, to about $6.00 per hour, to disarm democrats' argument in the Fall political campaigns that republicans are not interested in helping workers.

2. *"Living wage" local laws*

Another important new development is a movement in many municipalities to adopt local "living wage" laws with higher minimum wages than the federal or state standard. Dozens of municipalities have done this.

Most of these local initiatives cover only employees of businesses that contract with the local government, not all workers in the city. However, some local "living wage" laws have general application to all workers in the city.

Some state courts have struck down such laws as beyond the scope of municipalities' power (in New Orleans, for example), but other courts have upheld local wage laws as a legitimate function of local government (San Francisco, California and Santa Fe, New México). In other cities, legal challenges are still making their way through the appeals system to state supreme courts for final judgments.

3. *Overtime*

The Fair Labor Standards Act requires overtime pay of 150% of regular salary for all hours over forty worked in a single week. The universal term used by workers in the United States for overtime pay is "time and a half."

Time-and-a-half after forty hours is the only substantive requirement under US labor law. The United States is practically unique in the world in not having any legislated limits on overtime work (except in specialized occupations like airline pilots). Most other countries limit the amount of overtime that can be demanded of an employee without consent, but US employers are under no such constraints.

Employers can terminate workers who refuse overtime in any amount incidental, reasonable, excessive or intolerable. Only workers with a collective bargaining agreement can limit or condition overtime demands. However, employers so prize the power to compel overtime when they deem it necessary, and enough workers so prize the extra income derived from overtime pay, that few collective agreements put any firm limits on overtime that can be required of workers. Instead, the emphasis goes to daily overtime pay (time and a half after eight hours in a single day, an improvement on the statutory requirement of time and half after forty hours in a week) and equal distribution of available overtime.

The past year saw a big battle in Congress on overtime pay. The law exempts managerial, administrative and supervisory employees from overtime pay requirements. Responding to lobbying by business, the Bush Administration's Department of Labor proposed new regulations redefining managerial, administrative and supervisory jobs in such a way that employers could reclassify millions of workers who now receive overtime pay and instead make them ineligible for overtime pay.

The labor movement and its allies responded with a vigorous lobbying campaign to block the new regulations. They were partly successful; the Labor Department retreated on many aspects of the proposed regulations, which are to take effect august 23, 2004. However, labor and congressional democrats are continuing their efforts to block the regulations and vow to make overtime pay a campaign issue in congressional and presidential elections.

4. *Health and safety*

There are no significant changes in the content of US labor law on workplace health and safety. The most important trend is the Bush administration's failure to effectively enforce the law. The federal Occupational Safety and Health Act of 1970 (OSHA) states: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm". But critical issues of implementation still remain. Five thousand workers die on the job each year in the United States, and five million are hurt on the job.

Immigrant workers, especially mexican immigrants, are especially vulnerable to dangers in the workplace. Immigrants are disproportionately represented in occupations and industries with higher risk of fatality. More than 5,000 immigrant workers have died in US workplaces since 1996. Nearly half were mexican.

An Associated Press investigative report published in march 2004 revealed that mexican workers in the United States are 80% more likely to die in the workplace than US born workers, and nearly twice as likely as the rest of the immigrant population to die at work. Moreover, the rate of mexican workers' deaths at work is increasing dramatically. Just ten years ago, mexican workers were 30% more likely to die on the job than US born workers, about the same as other immigrants. Today, however, the rate of mexican workers' death on the job has nearly tripled.

II. Industrial relations

1. *Collective bargaining*

The average wage increase negotiated in collective bargaining agreements in recent years is about 3%, slightly ahead of the inflation rate. Wage bargaining has not been very difficult. However, bargaining over health insurance costs and benefits has been extremely contentious, giving rise to many bitter strikes.

The United States does not have a national public health care system. Workers' health insurance is employment-based. With costs rapidly increasing, employers are demanding that workers pay more for their health insurance. Most recent bargaining over health insurance ended in contract settlements requiring that workers pay more and/or surrender benefits. Strikes occurred in 2004 in the Southern California supermarket industry, Midwestern telephone industry and others.

2. *Union density*

The rate of union "density" in the United States – the percentage of the labor force covered by collective bargaining agreements – is about 14% overall and about 10% in the private sector. However, several qualifications inform understanding of those figures. For one, the percentage of workers *capable of* collective bargaining who are covered by union contracts is substantially higher than 14 or 10 percent.

Millions of US workers are excluded from labor laws protecting the right to organize and bargain collectively. These include supervisors, managers, independent contractors, agricultural workers in most states, public employees in 27 states where collective bargaining for most public employee is prohibited, and more. In 2002, the Bush administration revoked collective bargaining rights for 200,000 federal government employees in security-related occupations, such as airport security screeners.

There are also significant geographic variations in union density. In northeast industrial states in New England and around the Great Lakes, and in Pacific coastal states (California, Oregon and Washington), union density is nearly twice the national average. Union density in the south, southeast, and southwest is half the national average.

Industrial unions are losing members as the economy changes toward more service-sector activity. For their part, service sector unions are growing and are energetically organizing new workers, especially in the growing health care sector. Service sector unions are now the largest and fastest-growing part of the labor movement. For example, in the past 10-15 years, the Auto Workers union (UAW) fell from 1 million to 500,000 members, while the Service Employees union (SEIU) has grown from 500,000 members to 1.2 million members. The largest union in the country is the teachers' union (NEA) with more than 2 million members. The NEA is not affiliated with the AFL-CIO.

3. *Union organizing*

Basic US labor law (the National Labor Relations Act or Wagner Act) governing workers' right to organize has not changed in recent years. However, significant decisions by the Supreme Court and the National Labor Relations Board have hurt workers' organizing rights.

In a 2002 case involving nurses at Kentucky River Hospital, the Supreme Court expanded the definition of "supervisor" to include those who simply guide the work of other employees with no disciplinary authority over them. Supervisors are excluded from the National Labor Relations Act. This means they cannot bargain collectively, and they can be dismissed for trade union activity with impunity.

In its Kentucky River decision, the Court nullified a 1997 NLRB election in which a majority of the hospital's 110 employees voted in favor of union representation. The employer refused to bargain with the union, arguing that six nurses in the voting group were supervisors. The Supreme Court agreed, saying that charge nurses who oversee the work of lower-ranking nurses and nurses' aides, even with no disciplinary power over them, are supervisors unprotected by the NLRA.

Another case with important consequences for trade union organizing arose at Brown University. The NLRB decided 3-2 (the 3-member majority being Bush appointees) in july 2004 that graduate students who work as research assistants (RAs) or teaching assistants (TAs) at private universities are not "employees" under the NLRA and have no legal protection of the right to organize and bargain collectively.

In recent years, thousands of RAs and TAs joined unions and won NLRB elections for union representation. In a period of declining trade union density, university RAs and TAs were seen as a promising field for potential union growth. The NLRB's *Brown* decision destroys that potential.

Democrats in Congress allied with the labor movement have introduced legislation titled the Employee Free Choice Act (EFCA). The EFCA would let workers choose union representation by privately signing cards by which they join the union and authorize the union to bargain collectively on their behalf. The EFCA would also for the first time establish penalties against employers who violate the NLRA. Under current law, employers face no penalty for violation. They only must promise not to repeat the violations. Finally the EFCA would authorize an independent arbitrator to set the terms and conditions of a first collective bargaining agreement in a newly-organized workplace where the employer fails to bargain.

With republicans in control of Congress and the White House, prospects for approval of the EFCA are negative. However, the labor movement and allied groups have tried to make the EFCA a rallying point in the 2004 congressional and presidential elections, and hope to achieve passage of a labor law reform bill if democrats regain the White House and a majority in the two houses of Congress.

III. ANTI-DISCRIMINATION LAW

Federal Anti-Discrimination Law in the United State is generally known as "Title VII" or "EEO" law, for that section of the Civil Rights Act headed "Equal Employment Opportunity". Title VII prohibits discrimination in employment (including application for employment) based on race, color, religion, sex, or national origin. Other laws that also came under EEO coverage require equal pay for equal work, prohibit discrimination based on age (for workers over 40 years old) and prohibit discrimination because of disability.

These laws have not been amended in recent years. However, EEO law continues to evolve based on administrative rulings and court decisions. Most of these deal with important and procedural questions, such as allocation of the burden of proof in sexual harassment cases.

Prohibited bases of discrimination under federal EEO law are those described above. However, state and local governments can adopt far-

ther-reaching anti-discrimination laws, and some have done so. For example, some state and city laws prohibit discrimination based on sexual orientation or sexual preference, political opinion or activity, lawful activity unrelated to one's employment, and other causes.

The Wal-Mart Case

Probably the most significant recent development in Title VII law is the July 2004 decision by a federal judge to allow a lawsuit to go forward as a class action case on behalf of 1.5 million women workers at Wal-Mart. A small number of plaintiffs sued Wal-Mart for discrimination against women in pay and promotions. They argued that Wal-Mart maintains a company-wide practice of discrimination against all women workers. The federal judge in the case has decided that it can proceed as a class action in which *all* women workers at Wal-Mart are plaintiffs. The case exposes Wal-Mart to potential liability in the hundreds of millions of dollars, perhaps more.

Wal-Mart has appealed the judge's decision, arguing that the case is not susceptible to class-action treatment because each store operates autonomously in pay and promotion decisions. If Wal-Mart wins the appeal, women workers will have to proceed with individual lawsuits, not a single class action lawsuit.

IV. IMMIGRANT WORKERS

Millions of immigrant workers have entered the US labor force in recent years. In the 2000 census, about 12% of the US population were foreign-born, more than 32 million people, compared with 8% of the population in 1990. More than half were from Latin America, and of these more than two-thirds came from Mexico and Central America.

Estimates put the number of undocumented workers in the United States at more than 8 million, possibly as many as 12 million. Nearly 60% of them are migrant workers from Mexico. Many have been in the country for years working long hours for low pay in demanding, dirty and dangerous jobs. They pay taxes, including Social Security taxes from which they will never benefit. They are setting down roots and having children who are US citizens. However, because of their vulnerable immigration status, they live in fear, afraid to seek protection of their rights as workers.

Undocumented workers shrink from exercising rights of association or from seeking legal redress when their workplace rights are violated for fear of having their legal status discovered and being deported. Fully aware of workers' fear and sure that they will not complain to labor law authorities or testify to back up a claim, employers have little incentive against violating their rights.

1. *The Hoffman Plastic Case*

Under international human rights and labor rights standards, all workers —whatever their immigration status— have the same basic rights to organize and to bargain collectively. Yet in 2002, the US Supreme Court issued a decision in Hoffman Plastic Compounds *vs*. NLRB that strips away from millions of undocumented workers in the United States their principal protection of those rights. The decision transformed a crisis in immigration policy into a human rights problem.

The Supreme Court's 5-4 ruling held 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 four dissenting justices said there was not such a conflict and that the "backpay order will not interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent".

2. *International human rights rulings*

Two authoritative international human rights bodies have examined the *Hoffman* ruling and concluded that conditioning remedies for freedom of association violations on immigration status violates workers' human rights. First, in september 2003, the Inter-American Court of Human Rights issued an advisory opinion in a case filed by Mexico in the wake of the Hoffman decision. The IACHR held 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. The Inter-American Court said that despite their irregular status,

> If undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers... This is of maximum importance, since one of the major problems that come from lack of immigration status is that workers without work permits are hired in unfavorable conditions, compared to other workers.
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> Si los migrantes indocumentados son contratados para trabajar, inmediatamente se convierten en titulares de los derechos laborales que corresponden a los trabajadores... Esto es de suma importancia, ya que uno de los principales problemas que se presentan en el marco de la inmigración es que se contrata a personas migrantes que carecen de permiso de trabajo en condiciones desfavorables en comparación con los otros trabajadores.

The IACHR specifically mentioned several workplace rights that it held must be guaranteed international migrant workers, regardless of their immigration status:

> In the case of migrant workers, there are certain rights that assume a fundamental importance and that nevertheless are frequently violated, including: the prohibition against forced labor, the prohibition and abolition of child labor, special attentions for women who work, rights that correspond to association and union freedom, collective bargaining, a just salary for work performed, social security, administrative and judicial guarantees, a reasonable workday length and in adequate labor conditions (safety and hygiene), rest, and back pay.
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> En el caso de los trabajadores migrantes, hay ciertos derechos que asumen una importancia fundamental y sin embargo son frecuentemente violados, a saber: la prohibición del trabajo forzoso u obligatorio, la prohibición y abolición del trabajo infantil, las atenciones especiales para la mujer trabajadora, y los derechos correspondientes a: asociación y libertad sindical, negociación colectiva, salario justo por trabajo realizado, seguridad social, garantías judiciales y administrativas, duración de jornada razonable y en condiciones laborales adecuadas (seguridad e higiene), descanso e indemnización.

In a second major international tribunal ruling in november 2003, the International Labor Organization's Committee on Freedom of Association issued a decision that the US Supreme Court's *Hoffman* ruling violates international legal obligations to protect workers' organizing rights. The Committee concluded that "the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to

ensure effective protection against acts of anti-union discrimination". Las medidas de reparación de que aún dispone la NLRB para actuar en casos de despido ilegal de trabajadores indocumentados son inadecuadas para garantizar una protección efectiva contra los actos de discriminación antisindical.

The ILO Committee recommended congressional action to bring US law "into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision". En conformidad con los principios de la libertad sindical, celebrando extensas consultas con los interlocutores sociales interesados, a fin de asegurar la protección efectiva de todos los trabajadores contra los actos de discriminación antisindical en el contexto posterior a la decisión Hoffman.