The American System For Regulating The Workplace

Elizabeth Tippett[1]
Benjamin Pincus[2]

Abstract

This article provides an overview of the legal system for regulating workers and the workplace in the United States. Broadly speaking, workplace protections are available on a somewhat unequal basis, depending on whether the worker is classified as an employee or an independent contractor. Independent contractors are not protected under various employment laws. For workers that qualify as employees, state and federal laws provide protection relating to discrimination, retaliation, and workplace safety. State and federal law also provide for minimum wage and overtime.

Employees generally do not have additional legal protections relating to wages and hours unless their workplace is unionized. However, union membership in the United States has declined over the last several decades, and now stands at roughly 10.7% of the workforce.[3] Further, employers frequently require non-unionized workers to sign mandatory arbitration agreements, which limits their ability to bring a class action claim against their employer.

Keywords: Employment law, labor law, United States

---

1 Associate Professor, University of Oregon School of Law

2 JD Candidate, University of Oregon School of Law

3 "Union Members Summary," Bureau of Labor Statistics, last modified, Jaunary 19, 2018, https://www.bls.gov/news.release/union2.nr0.htm.

I. Introduction

The American system for regulating the employment relationship is distributed among its three branches of government – the Legislative Branch (Congress), the Executive Branch, and the Judicial Branch.

Congress passes legislation that confers certain substantive or procedural rights on employees. For example, the National Labor Relations Act governs the basic rules around union organizing and collective bargaining.[4] The Fair Labor Standards Act (FLSA) provides employees the right to a minimum wage and overtime pay.[5] Title VII of the Civil Rights Act of 1964 protects employees from discrimination on the basis of race, gender, religion, color and national origin.[6] The Occupational Safety and Health Act of 1970 imposes various requirements relating to health and safety.[7]

The United States operates on a federal system, which gives state and local governments the power to pass laws and issue workplace regulations. Absent federal legislation that evinces a clear intent to preempt laws at the state or local level, federal legislation generally serves as a "floor" – providing a baseline level of protection. State and local governments then have the power to issue more stringent laws. For example, the FLSA provides for a basic minimum wage, but states might require a higher minimum wage.[8] In some cases, cities impose a minimum wage that is even higher than the state

---

4 29 U.S.C. § § 141-187.

5 29 U.S.C. § § 201 – 219. P.L. 115-90.

6 42 U.S.C. § § 2000e – 2000e-17.

7 29 U.S.C. § § 651 et seq.

8 For example, the minimum wage in Washington state is $11.50. See "Minimum Wage", Washington State Department of Labor & Industries, https: //www. lni. wa. gov/ WorkplaceRights/Wages/Minimum/.

or federal minimum wage.[9] Similarly, state law might protect additional groups from discrimination beyond those groups expressly protected under Title VII. For example, many states protect employees from discrimination on the basis of sexual orientation.[10]

The Executive Branch issues regulations interpreting federal legislation, and in some cases enforces those regulations by administrative means. For example, the National Labor Relations Board is heavily involved in interpreting the National Labor Relations Act and setting policy regarding labor relations. Likewise, the Occupational Safety and Health Administration has issued detailed regulations regarding workplace safety and investigates violations of the Act.

However, many employment laws are primarily enforced through the Judiciary Branch. Enforcement of these laws primarily depend on employees bringing private lawsuits against their employer. For example, the Equal Employment Opportunity Commission ("EEOC") is the federal agency responsible for enforcement of Title VII of the Civil Rights Act. Employees are required to file a claim with the EEOC or equivalent state agency before filing a suit in court. However, the EEOC does not resolve the merits of the case, and courts are not required to defer to EEOC determinations regarding the case.

For those employment laws enforced primarily through lawsuits, compliance depends heavily on employers' perceptions of the likelihood they will be sued and the costs associated with litigating and losing such a lawsuit. American employers can often view employment laws in an instrumental

---

9 For example, the minimum wage in Seattle is higher than the state minimum wage. See "Minimum Wage Ordinance", Office of Labor Standards, https://www.seattle.gov/laborstandards/ordinances/minimum-wage.

10 See e.g. New York State Executive Law § 296.

way, weighing the cost of compliance measures against the risk they will be sued and forced to pay. If the lawsuit would only involve a small amount of money, or it is extremely unlikely that the employer will be sued, the employer is less likely to invest in measures to comply with the law.

In recent years, Supreme Court interpretations of the Federal Arbitration Act,[11] have clarified that employers may impose arbitration agreements, which contain class action waivers, on individual employees.[12] These agreements require an employee to use arbitration instead of the court to remedy a claim. Critically, the agreements also prohibit any form of class or collective claim – whether in arbitration or court. Where employers bind employees to these agreements, it alters the employer's decisionmaking regarding compliance, because it removes the threat of a class action lawsuit. Essentially, employers need not worry about employment lawsuits that are not very valuable – for example, unpaid wages less than a few hundred or thousand dollars. Employers know that lawyers do not find it profitable to represent employees in such claims unless they are aggregated into large class actions. In those cases, employers do not view the prospect of a lawsuit to be especially threatening. Thus, the law surrounding arbitration can have a substantial impact on compliance with employment laws.

This article provides an overview of the American system, by describing the types of workers that fall inside and outside the various protections available under federal and state law. In doing so, we will note the types of protections that attach to each type of worker. We begin with a discussion of the employee and independent contractor distinction and how the courts go about making that determination. Second, we summarize the statutory and common law protections available to employees under federal and state law.

11 9 U.S.C. § § 1-16.

12 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

Lastly, we explain the American laws regarding private arbitration, and how they can erode compliance with workplace laws. We conclude with a brief discussion of the additional protections available for unionized workers.

II. Employee and Independent Contractor Distinction

Employment law in the United States is primarily set forth in legislation, rather than through common law rights devised by courts. The coverage of these statutes tends to be defined with reference to "employees", "employers" or "employment." Those who qualify as "employees" are covered by the particular statute and can avail themselves of its protection. Those who fall outside of that definition are not covered and have no legal claim.

Employment statutes, however, generally do not specifically define the term "employee" in a meaningful way. Courts have thus developed multifactor tests for assessing whether a particular worker qualifies as an employee under the applicable statutes. The two most important tests are (1) the common law "control test", which defines employee status absent other indications from the legislature, and (2) the broader "economic realities" test, which applies to wage and hour law.

The "control" test originated from common law conceptions of "agency" and the "master/servant" relationship originating from the United Kingdom. The test seeks to differentiate a worker subject to a high degree of control by the employer from a contractor, who is largely free to define the terms of their relationship with customers providing payment. The common law control test, as defined by the Supreme Court,[13] consists of 10 factors: 1) the level of the worker's skill; 2) whether the instrumentalities and tools are

[13] Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318 (1992).

owned by the worker; 3) the location where the work is performed; 4) the duration of the worker's relationship with the company; 5) the ability of the company to assign more tasks to the worker; 6) the kind of work that the company is engaged in; 7) whether in fact the putative employer is a business or simply an individual who hired the worker; 8) the benefits provided to the worker, if any; 9) the company's tax treatment of the worker; and 10) the method of payment.

Courts apply the control test in a somewhat flexible way, where no single factor is determinative. For example, under the control test, a plumber who owns his own plumbing business would likely qualify as an independent contractor, because he is highly skilled, owns his own tools, performs individual jobs for clients, and is paid a fee based on the completion of the job. Although some factors might favor employee status – for example, that the work is performed at the customer's home – on balance, the factors favor contractor status. However, if the plumber performs the same work for a plumbing company he does not own, the circumstances may favor employee status. Although the plumber remains highly skilled, the tools are likely owned by the company, his relationship with the plumbing company is ongoing, and the plumbing company assigns him to work specific jobs.

An alternative test for determining employee status is known as the "economic realities test."[14] This test has been applied in the wage and hour context. Although the four factors take the putative employer's level of control into account, the test more broadly considers whether the worker is economically dependent on the putative employer, as opposed to running an independent business. Thus, the economic realities test considers: 1) whether the worker is able to profit based on the worker's own managerial skill; 2)

[14] Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987).

owns their own tools or employs their own workers; 3) and whether the work requires a special skill, such as knowledge learned from a prolonged or specialized education. The final fourth factor is the permanency and duration of the worker's relationship with the employer. Independent contractors are typically hired for shorter projects, such as adding a room onto a home or fixing a car. Longer working relationships tend to suggest an employment relationship.

Companies will sometimes misclassify workers as independent contractors, rather than employees. They may do so inadvertently – believing that the worker meets the requirements for contractor status – or intentionally, as a means of avoiding the costs of complying with employment laws. Workers may be unaware that they are misclassified as independent contractors, and may believe statements in their agreement with the employer to the effect that they are not employees. However, the company's designation of a worker as an "independent contractor" is not especially meaningful under the legal rules. The court will instead apply the applicable test, which in many cases places no weight on whether the parties have designated the individual as a contractor.

Detection of worker misclassification can be inconsistent. State workers' compensation entities and unemployment insurance entities have strong incentives to audit and catch employers for misclassification, because they depend on revenue associated with insurance premiums paid by employers. However, agencies enforcing other laws, like discrimination violations or wage and hour laws, have a weaker incentive to investigate these employers.

Absent government intervention, employer misclassification practices are primarily enforced through private rights of action, where individual employees classified as independent contractors by their employer sue for a legal right available only to employees. For example, a hotel custodian

classified as an independent contractor might sue the hotel for wage and hour violations, claiming she should have been treated as an employee and paid minimum wage and overtime.

III. The Nonunion Context: Administrative Remedies, the Courts, and Arbitration

Workers who qualify as employees under applicable legal rules are entitled to certain baseline protections. These protections are available to all employees, regardless of whether the employees are part of a labor union.

A. Antidiscrimination Protections

First, Title VII of the Civil Rights Act protects employees against discrimination, as long as their employer has 15 or more employees.[15] Title VII prohibits employers from taking an employee's protected status into account when making important personnel decisions, such as hiring, firing, promotion, compensation, and discipline. The term "protected status" refers to an employee's gender, race, religion, color or national origin. Title VII protections are not limited to minority or underprivileged groups, and instead prohibit all decisions that take an employee's race, gender, religion etc. into account. For example, Title VII would prohibit refusing to promote a man because he is a man, even as it would also prohibit a refusal to promote a woman because she is a woman. Since the prohibition on discrimination relates to the employer's intentions when making the decision, proving that the employer's decision was in fact motivated by discriminatory animus can be difficult. Title VII also protects employees from retaliation by the

[15] 42 U.S.C.A. § 2000e-5(e)1.

employer for complaining about discrimination.

Title VII is primarily enforced through private lawsuits. Prior to bringing a lawsuit, an employee must first exhaust her administrative remedies with the Equal Employment Opportunity Commission ("EEOC").[16] The EEOC inves-tigates the claims and can demand records from the employer in connection with its investigation. The EEOC might undertake a mediation process to help the parties reach a voluntary settlement.[17] In rare cases, the EEOC will take on litigation on the employee's behalf, although this is typically limited to representative test cases of important public significance. Otherwise, the employer issues a Notice of Right to Sue.[18] This notice tells the court that the plaintiff has exhausted his EEOC remedy, and may proceed in court.

Other federal non-discrimination statutes are structured in a similar manner to Title VII, including:

- the Age Discrimination in Employment Act, which protects workers 40 years old or older;[19]
- the Uniformed Services Employment and Reemployment Rights Act, which protects former and current members of the United States military;[20]
- the Genetic Information Nondiscrimination Act, which protects employees from discrimination based on their genetics;[21] and

---

16 42 U.S.C.A. § 2000e-5(e)1; Williams v. Pennsylvania Human Relations Commission, 870 F. 3d 294, 298 (3rd Cir. 2017).

17 "What you Can Expect After You File a Charge," U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/employees/process.cfm.

18 *Id*.

19 29 U.S.C. § § 621-634.

20 38 U.S.C. § § 4301-4335.

- the Pregnancy Discrimination Act, which protects employees from discrimination involving pregnancy, childbirth or related medical conditions.[22]

Similarly, the Equal Pay Act ("EPA") requires employers to provide equal pay for equal work on the basis of gender.[23] That statute presumes that paying employees different rates for substantially equivalent jobs violates the EPA. However, the EPA also provides the employer with an affirmative defense, if the employer can establish that the pay differential is based on "(i) a senority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex." [24]

Additionally, the Americans with Disabilities Act ("ADA") protects employees from discrimination on the basis of their disability, and is designed to include a broad range of physical and mental impairments that substantially limit an individual in a major life activity.[25] The ADA also requires employers to provide reasonable accomodations to disabled employees that would enable them to perform the essential functions of their job. The ADA further requires employers to engage in an interactive process to discuss possible accomodations with the disabled employee.

B. Wage and Hour Law

Another federal statute central to employment protections is the Fair Labor Standards Act of 1938 ("FLSA").[26] The FLSA requires employers to

---

[21] 42 U.S.C. § 2000ff.

[22] Pub.L. 95-555 (codified at 42 U.S.C. § 2000e).

[23] 29 U.S.C. § 206(d).

[24] *Id*.

[25] 42 U.S.C. § 12101.

pay minimum wage (currently $7.25) for each hour worked.[27] Under the FLSA, the employer is required to pay overtime in the amount of 1.5 times the employee's regular rate of pay for each hour worked beyond 40 hours in a workweek.[28] The FLSA includes some exceptions for workers paid on a salary basis, and who meet certain duty-based requirements, for example, managers supervising two or more employees, and professionals, such as doctors and lawyers. There is no administrative exhaustion requirement under the FLSA, which means that employees can file their claim directly with courts.

Many states have additional wage and hour rules that require employers to provide a higher minimum wage or overtime premium. State rules might also specify that wages must be paid within a specified period, prohibit deductions from wages, or require that employees be provided with certain meal or rest breaks.

C. Workplace Safety

The federal Occupational Safety and Health Act of 1970 protects an employee's basic right to safety in the workplace.[29] This statute is enforced by the Occupational Safety and Health Administration, which issues detailed regulations, which vary by industry, and enforces those regulations through investigations and fines.

Workers are also protected against injury through state workers compensation laws. State workers compensation laws generally require employers to obtain insurance to compensate employees for injuries

---

[26] 29 U.S.C. § § 201 – 219. P.LO. 115-90.
[27] 29 U.S.C. § 206.
[28] 29 U.S.C. § 207.
[29] 29 U.S.C. § § 651 et seq.

sustained in the course of their employment. An employee injured on the job then makes an administrative claim through the state for compensation, which the employer or the state can dispute. In general, the workers compensation scheme makes it relatively easy for employees to receive compensation as long as they can prove the injury is job related. However, the amount employees can recover through workers' compensation is quite limited, and generally consists of the employee's medical costs, plus some fraction of the employee's wages.

D. Leave and Benefits

Federal law provides few protections relating to employee leaves of absence. The Family and Medical Leave Act provides for up to 12 weeks of unpaid leave for an employee's own serious medical condition, the care of a family member's serious medical condition, or to care for a newborn or adopted baby.[30] However, the law only applies to employers with 50 or more employees, and is available only to employees who have worked at the company for a specified period of time. Some state laws provide additional leave, or partial wage replacement during employee leave.

Federal law does not require vacation days, sick days, or holidays, although some state laws provide for sick leave. Under the Affordable Care Act (also known as "Obamacare"), employers with 50 or more full time employees must make affordable healthcare coverage available to full time employees, or are required to pay a tax penalty.[31]

The federal Employee Retirement Income Security Act of 1974 ("ERISA") regulates employer benefits.[32] However, ERISA does not require employers

[30] 29 U.S.C. § 2611 et seq.
[31] 29 U.S.C. § 4980H.
[32] 29 U.S.C. § § 1001 et seq.

to provide benefits. Instead, it regulates how employers manage and pay those benefits when promised by the employer.

E. Contractual Rights

Under federal, and most state law, employees have very few rights with respect to protections from termination. The default rule in the American system is of "at-will employment", which assumes that an employee can be terminated for any reason or no reason, with or without notice. The previously discussed statutes serves as a very limited exception to this principle. For example, an employer cannot fire an employee for a reason that was motivated by the employee's race or gender, as that would violate Title VII of the Civil Rights Act. However, an employer is largely free to simply terminate an employee without notice, and without cause, so long as a termination decision is not discriminatory or retaliatory.

The same is generally true for the terms and conditions of employment. Unless a particular term of employment is inconsistent with a statutory requirement – for example offering to pay an employee less that minimum wage – the employer can offer terms of its choosing. The at-will principle also permits employers to change those terms at any time.

However, if the employer makes certain promises related to employment, such as a promise to only terminate an employee for "cause" or to pay an employee severance upon termination, then those promises will be enforceable under contract law.

F. Arbitration Agreements

An employee's contract may also specify how disputes will be resolved with the employer. Companies frequently include arbitration provisions in their employment contracts. Such contracts are enforceable under the

Federal Arbitration Act ("FAA"), which "ensure[s] that private arbitration agreements are enforced according to their terms[.]"[33] The arbitration agreement defines many of the specific characteristics of the arbitration process, including the forum, jurisdiction, and location of the arbitration proceedings. While the arbitration process resembles a traditional legal proceeding, the federal rules of evidence are often not used.[34] In addition, the FAA provides very few bases upon which to appeal an arbitrator's ruling, making the arbitrator's ruling effectively final.

Recent Supreme Court interpretations of the FAA provide that arbitration agreements will be enforceable even if they contain a class or collective action waiver.[35] These waiver provisions have the effect of removing claims that are only viable as a class action. Consequently, arbitration provision limit some types of claims to a much greater degree than others. For example, an employee who was terminated for a discriminatory reason may find that her prospects are largely unaffected by an arbitration agreement. If she has a reasonably strong claim, she will be able to find an attorney willing to represent her on a contingency fee basis. Through a contingency fee arrangement, the attorney will receive a portion of the employee's damages – perhaps 25 or 30%. Because the employee's discrimination claim may be worth tens of thousands of dollars, or perhaps even more, the contingency fee provides adequate economic incentive for the attorney to pursue in individual arbitration.

By contrast, an employee with a state or federal wage claim may have much greater difficult pursuing a claim in arbitration. Suppose, for example,

---

[33] Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 478 (1989).

[34] *See* Winograd, M., Rules of Evidence in Labor Arbitration, 55-May Disp. Resol. J. 45, 46-47 (2000).

[35] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

the employee did not receive her final paycheck, which could be a violation of state wage laws. Under the state law, that particular employee's claim is only worth a fraction of the employee's final check, plus a penalty for the delay. Such a claim would not be economical for the attorney to pursue because potential damages would be insufficient to compensate the lawyer for her time. For this reason, many wage and hour claims are brought as class or collective action, which allows the lawyer to aggregate the claims of a large number of employees, along with the potential damages. However, this option would be unavailable where workers have signed an arbitration agreement containing a class action waiver. Without the threat of a class action, companies have less incentive to comply with wage and hour laws, and other low-value employment violations.

IV. Unionized Employees

As previously discussed, non-unionized employees have limited rights in the workplace beyond anti-discrimination and retaliation protections, basic wage and hour and workplace safety laws, and whatever contractual promises they can individually extract from the employer. For that reason, some workers opt to join a union, which empowers them to bargain collectively with employers.

The federal law setting forth employee rights regarding unionization is the National Labor Relations Act of 1935 ("NLRA").[36] This law gives employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

[36] 29 U.S.C. § § 151-169.

or other mutual aid or protection."[37] The NLRA also prohibits employers from engaging in "unfair labor practices", such as interfering with an employee's exercise of their rights, or retaliating against an employee for engaging in union-related activities.[38]

The NLRA provides for a procedure for employees to vote for or against unionization by secret ballot. The National Labor Relations Board ("NLRB") is responsible for overseeing such election. Once a union is certified at a worksite, both parties have a duty to bargain in good faith over a collective bargaining agreement between the union and the employer.[39] This includes bargaining over terms like wages, benefits, and the general employee terms and conditions of employment.[40] If the parties cannot reach an agreement, the union may call a strike, or the employer might order a lockout. Since strikes can be disruptive, the employer may demand a provision in the collective bargaining agreement that the union agrees not to hold any strikes during the term of the agreement.

Parties also bargain over how they will resolve grievances when they arise. The usual method for settlement of grievances in the collective bargaining agreement is labor arbitration. Labor arbitration is different from the private arbitration previously discussed in that the same parties arbitrate each time: the union (on the employee's behalf) and the employer. In this context, the collective bargaining agreement serves as a constitution, of sorts, and the arbitrator is charged with interpreting it.[41] As the parties arbitrate cases over time, the parties develop a shared interpretation of the agreement, based on the body of interpretations developed by the arbitrator over time.

---

37 29 U.S.C. § 157.

38 29 U.S.C. § 158. Section (a) for ULP by employer. Section (b) for ULP by union.

39 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

40 In re Barnard College, 340 N.L.R.B. 934 (2003).

41 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

Labor arbitration thus serves to create a common-law type system to help solve future problems in the workplace.[42]

The National Labor Relations Board ("NLRB" or the "Board") oversees the relationship between employer and employee/union. The NLRB enforces regulations prohibiting unfair labor practices and investigates charges brought to their attention. Both unions and employers have obligations to refrain from unfair labor practices.

After an initial charge is filed, the NLRB's regional office conducts an investigation to determine whether formal action should be taken. Before filing a formal complaint with the NLRB, the regional office may ask for a temporary restraining order with the district court, as the situation warrants. Such injunctions and are issued "to protect the process of collective bargaining and employee rights under the Act, and to ensure that Board decisions will be meaningful."[43] The matter then proceeds to an administrative hearing, where the case is presented before an Administrative Law Judge (ALJ). The ALJ either issues an order to cease and desist the unfair labor practice or dismisses the complaint. However, the ruling of the ALJ is advisory and not binding on the NLRB. The final decision is left to the Board who may dismiss the complaint, order the cease and desist and remedy, or remand the case back to the ALJ. NLRB rulings can be appealed to the United States Court of Appeals.

Union membership is generally beneficial to employee interests. Studies have found, after accounting for distinguishing characteristics, the wages of union workers are on average 10% - 30% higher than nonunion workers.[44]

---

42 *Id*.

43 29 U.S.C.A. § 160 (j).

44 Mayer, G. (2004). *Union membership trends in the United States*. Washington, DC: Congressional Research Service.

Despite those numbers, union membership in the United States is on a downward trend. In 2016, the Bureau of Labor Statistics calculated that there were 14.6 million members, down from 17.7 million members in 1983.[45]

V. Conclusion

American employment protections are highly uneven. Independent contractors have no protection, and employers have strong incentives to misclassify their employees as independent contractors. Workers who qualify as employees are provided basic protections regarding discrimination and retaliation, and very limited protections relating to wages, hours, and employee leave. However, some state laws provide more generous protections, such as sick pay, a higher minimum wage, or paid leave. Some employees also have additional protections pursuant to individually negotiated employment contracts. Unionized workers generally benefit from better pay and benefits than non-unionized workers because the union can negotiate better terms on their behalf. However, unionization rates remain low in the United States.

45 "Union Members Summary," Bureau of Labor Statistics, last modified, Jaunary 19, 2018, https://www.bls.gov/news.release/union2.nr0.htm.