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## Should American Labor Law Be Applied to Small Business - Introduction

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## Symposium:

### SHOULD AMERICAN LABOR LAW BE APPLIED TO SMALL BUSINESS?

#### INTRODUCTION

HENRY H. PERRITT, JR.†

This symposium considers application of American labor law to small businesses. Many people do not realize that small businesses are largely exempt from labor law, both the law of collective bargaining and the law protecting individual employee rights. Small business exemptions have been justified on the ground that small enterprises cannot bear the cost of complying with labor and employment regulation. Historically, drafters and proponents of legislation have not insisted on small business coverage either because small businesses were not a particularly important influence in major sectors of the economy or because exempting small business was the political price for enacting new legislation.

About half of all American employees work for small businesses. Yet, many of these small businesses are exempt from workplace regulation because of statutory exemptions based on enterprise size, administrative agency policy decisions to concentrate enforcement resources on larger enterprises and the practical difficulties of small business compliance with complex regulations.

It is difficult to formulate a principled argument why socially desirable workplace entitlements like prohibitions against race discrimination, prescription of minimum wages and maximum hours, occupational safety and health standards and employee benefits protection should not be equally available to all employ-

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ees. But it also is widely acknowledged that small businesses, or at least some small businesses, are unable to bear the burdens of modern workplace regulation. The symposium presented in this issue of the *Law Review* explores this dilemma.

The labor policies of small business superficially seem to be a narrow subject, rather remote from the mainstream of current workplace issues. However, a look at how public policies are applied to small employers reveals much that is ignored in policy debates about specific changes in the National Labor Relations Act or the wisdom of enacting a new plant closing law or increasing the minimum wage. The fact is that the consistent trend in national labor policy for the last two decades has been to neglect collective bargaining and to concentrate on expanding statutory and regulatory protections for individual employees. This emphasis on direct regulation has appeal because it appears to reduce some of the costs associated with collective bargaining: levels of employee protection depending on economic bargaining strength, subordination of minority employee interests and the potential for economic disruption when strikes or walkouts occur.

An examination of the practical difficulties of direct regulation of the employment policies of small business reveals some important limitations of the direct regulatory approach. Costs of compliance can be greater than an enterprise can bear; enforcement resources almost certainly are insufficient to enforce all laws and regulations with equal emphasis in all workplaces; and conventional perceptions of the administrative and litigation processes deemphasize the need to accommodate policy goals with the realities of particular industries or particular enterprises.

Collective bargaining should be reexamined as a mechanism for setting standards and for enforcing them. The panel discussion among the symposium participants focused on such an expanded role for collective bargaining.

The question of small business coverage deserves revisiting for a number of reasons. First is the perception that the small business sector of the American economy is the most important creator of new employment opportunities. Second is a possible migration of market share and associated work opportunities from large enterprises to smaller enterprises. Third is the intellectual reality that the cost-benefit trade-off of labor and employment regulation is not necessarily different depending upon the size of the enterprise.

This volume of the *Law Review* contains articles prepared for

this symposium. The articles are somewhat unusual for a law review in that they address economic and policy issues as well as narrow or legal issues.

Dr. Dunlop's article questions some widely held assumptions. Dr. Dunlop points out that the conditions of employees in small enterprises generally are worse than the conditions in large enterprises. Yet, many small enterprises are virtually exempt from workplace regulation, either because of statutory exemptions, or because of the practical difficulties of applying typical regulatory programs to small business. Dr. Dunlop reviews the limitations of direct regulation as a way of achieving national policy goals respecting employment and thereby sets the stage for much of the panel discussion which is contained in the Symposium Proceedings printed in this volume.

Mr. Kilberg's article notes that the expansion of labor and employment law threaten the existence of small business, which plays an important role in creating jobs and advancing technology. He also observes, however, that small businesses, "[g]enerally are unable to provide their employees with a compensation package equivalent to that offered by larger businesses."

Mr. Kilberg disagrees with the proposition that labor and employment law do not apply to small business. He identifies a number of statutes that have no small business exemption and observes that statutory exemptions for employers with few employees or a low sales volume actually exempt only the smallest and most embryonic of businesses. Furthermore, even when federal statutory coverage exemptions exist, state laws typically fill the regulatory void.

Nevertheless, administrative enforcement agencies exhibit considerable flexibility when dealing with small employers. Typically, enforcement agencies target their enforcement resources to benefit the maximum number of employees, which leads them to focus on larger enterprises. In addition, agencies have authority to pursue litigation priorities and settlement policies that accommodate the special needs of small business. Trade unions also pursue policies that accommodate the special needs of small business.

Despite these accommodative approaches, which Mr. Kilberg finds desirable, the litigation under a variety of federal and state theories threatens small employers because of the likelihood that

juries will find them liable and award punitive and emotional distress damages.

Mr. Kilberg also expresses concern about proposed legislation specifically focused on small employers requiring them to provide employee health benefits and parental leave. Moreover, an increase in the minimum wage would tend to eliminate the disparity in wages and working conditions that currently exists between small and large employers.

Mr. Kilberg fears that pursuit of social policy objectives by placing ever larger economic burdens on employers disproportionately disadvantages small employers. "As a matter of social and legal policy, it might well be remembered that all businesses, unlike their owners and employees, are not created equal or are they equally able to bear the new and unexpected burdens created by the changed legal system."

Dr. Droitsch's article notes the difficulty agencies face in addressing the special needs and problems of small businesses, beginning with the lack of a workable definition of small business. Nevertheless, more than fifty percent of American workers are employed in industries dominated by small businesses. Therefore, if workplace regulatory programs are to be effective in advancing the welfare of employees, they must effectively address small business.

One major impediment to effective regulation of small business is the enormous volume and complexity of detailed regulations. Dr. Droitsch reviews initiatives by recent administrations to accommodate the special needs of small business. Some of the initiatives, however, have made the problem worse because they have increased the complexity of the regulatory process.

Dr. Droitsch reviews a number of empirical studies which conclude that modern regulation has a different impact on small businesses than on larger businesses. The relative burden of regulation is greater for small firms than large firms. There also is evidence that compliance by small businesses is far less. He concludes by proposing better priority setting by agencies, development of rules which have primarily small businesses in mind, direct compliance assistance to small business, greater reliance on performance-oriented regulation instead of specification standards and better use of new information technologies to help small business comply.

Mr. Mitchell reframes the question of whether American labor law should be applied to small business. He suggests that the

relevant inquiry is whether it is appropriate for the government to intervene in any labor markets. He notes that the market indirectly pursues essentially the same goals as direct regulatory programs. He argues that government should not limit the freedom of employers and employees to enter into whatever contracts they feel are in their respective interests. "An employer should not be forced to recognize a union if he chooses not to nor should he be prohibited from hiring, firing, promoting or demoting whomever he wants, for whatever reason he wants." He agrees that there is something inequitable about small businesses being exempt from regulations that are applied to larger businesses. Such an arrangement creates distortions in an economy by altering relative prices. Mr. Mitchell's answer to this problem, however, is not to bring small business under the unworkable regulatory umbrella. Instead, he believes, there is a compelling argument that larger employers should be freed from the controls of regulations under which they currently labor.

Mr. Brown's article begins by observing that the patchwork of exemptions for small business is mostly a happenstance of lobbying clout and the historical environment out of which specific regulatory programs emerged, rather than a product of coherent policy. There is no reason why laws providing for union representation, minimum wages and hours, job health and safety, pension security and banning discrimination should not protect all employees and thus apply to all employers. The only question, Mr. Brown observes, is whether such standards can be tailored to small business in a fashion that imposes less cost on the employer while not abandoning the employee. He suggests that there is much evidence to suggest that collective bargaining accomplishes just this result.

American labor law regulating collective bargaining deals mainly with process and does not directly impose any cost. The government engages in only minimal scrutiny of the bargaining process and the resulting terms of the bargain. Thus, with its emphasis on process rather than content, this branch of labor law adequately accommodates the needs of small business. The realities of an employer's market and the union's labor market permeate the bargaining and govern the real cost of unionism in small enterprises. Moreover, the labor laws, by broadly prohibiting secondary boycotts and recognizing multi-employer bargaining, protect small employers confronting powerful unions.

Mr. Brown regrets ideological employer opposition to trade

unionism, motivated, he suspects, by self-interest of some segments of the organized bar. Small business is less able to pay the legal bill for regulatory exemption or relaxation through litigation than it is to participate in collective bargaining. "A major impulse under the Wagner Act was dissatisfaction with the legalistic approach to labor disputes prior to 1935. . . . A return to the vision of administration instead of litigation would be in the long term benefit of both unions and small business."

My article is the last because it raises a slightly different issue from the other articles. My article considers labor law coverage for the ultimate small business: an independent contractor with no employees. This possibility raises essentially the same policy issue as the more general small business question, but distinctly different legal issues. Looking at how the perimeter of labor law is drawn so as to exclude "independent contractors" raises explicitly the question if labor law is so burdensome that it should not be applied to certain actors in the workplace, is it perhaps too burdensome for the actors to whom it is applied? Or, conversely, if current labor law represents the right policy choices and the right implementation strategy choices, why should it not be extended to all actors, regardless of whether they are "small business" or "independent contractors"?

In the Symposium Proceedings following the presentation of the papers, I presented a hypothetical scenario to the participants which involved essentially eliminating much of the present scheme of direct government regulation which is aimed at finding and enforcing individual employee rights, and replacing it with a significantly enhanced role for collective bargaining.

During the ensuing discussion, the participants agreed that limited enforcement resources require that the Labor Department set priorities, which probably should be different in different industries. They also discussed how collective bargaining and trade unions can supplement enforcement resources, and how labor and management can help adapt regulations to the realities of workplaces.

A new administration will take office about the time this symposium issue is released. Regardless of party, the new President and his labor management policy advisors almost certainly will chart a new course in labor and employment policy. Even if this policy subject is not a priority for the new administration, significant tightening in labor markets resulting from the demographic decline in potential employees thought of as being in the prime

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age group will enhance union economic power and force public and private sector decisionmakers to scrutinize the appropriateness and effectiveness of workplace regulation.

