Employment Law

Aspen Casebook Series

Employment Law

Private Ordering and Its Limitations

Fourth Edition

Timothy P. Glynn
Senior Associate Dean and
Andrea J. Catania Endowed Professor
Seton Hall Law School

Charles A. Sullivan
Professor of Law and
Senior Associate Dean of Finance and Faculty
Seton Hall Law School

Rachel S. Arnow-Richman
Chauncey Wilson Memorial Research Professor and
Director, Workplace Law Program
University of Denver Sturm College of Law

Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-0106-4

Library of Congress Cataloging-in-Publication Data

Names: Glynn, Timothy P., 1967- author. | Sullivan, Charles A., author. | Arnow-Richman, Rachel, 1970- author.
Title: Employment law : private ordering and its limitations / Timothy P. Glynn, Senior Associate Dean and Andrea J. Catania Endowed Professor, Seton Hall Law School; Charles A. Sullivan, Professor of Law and Senior Associate Dean of Finance and Faculty, Seton Hall Law School; Rachel S. Arnow-Richman, Chauncey Wilson Memorial Research Professor and Director, Workplace Law Program, University of Denver, Sturm College of Law.
Description: Fourth edition. | New York : Wolters Kluwer, [2019] |
Series: Aspen casebook series | Includes bibliographical references and index.
Identifiers: LCCN 2018056064
Subjects: LCSH: Labor laws and legislation—United States. |
LCGFT: Casebooks (Law)
Classification: LCC KF3455 .G59 2019 | DDC 344.7301—dc23
LC record available at https://lccn.loc.gov/2018056064

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

For My Parents
T.P.G.

For Jack Paul
C.A.S.

For My Students, Past, Present & Future
R.S.A.R.

Summary of Contents

Contents

Preface

Few institutions receive greater attention in Americans' private lives and in public policy debates than employment. Employment is everywhere: It is the means by which most Americans make their living; it is, for many, where they spend the majority of their waking hours and develop most of their interpersonal relationships; and it provides the primary economic input ("human capital") firms and government agencies rely on to produce their goods and services.

Because of its pervasiveness and importance, employment-related issues, such as outsourcing to foreign countries or whether to raise the minimum wage, receive significant public attention. More profoundly, many of the fundamental policy disputes of the day—immigration, health care, civil rights, environmental regulation, information privacy, globalization, social security, and tax policy—are either inherently entangled with employment or heavily influenced by employment-related considerations.

Thus, the institution of employment is paramount not just for individual workers and employing firms and government agencies, but also for society as a whole. Correspondingly, then, the legal rules governing the employment relationship have profound implications beyond the two parties to that relationship. This book will introduce you to the core aspects of this body of law and its implications.

As you work your way through the book, you will discover that the structure of employment law is complex and varied. It derives from multiple sources, including contract, tort, agency law, state and federal statutes, and, at least for government workers, federal and state constitutions. In addition, its application varies greatly depending upon a number of factors, including type of worker (e.g., employee v. nonemployee, unionized v. nonunionized, white collar v. blue collar, disabled v. nondisabled); type of employer (large v. small, public v. private); type of industry; and jurisdiction (state v. state). Moreover, because American employment law leaves fundamental aspects of the relationship largely for the parties to determine, the "law" governing the American workplace is subject to immense individual variation. Indeed, for many workers, the most important terms of their relationship—including wage levels, benefits, hours, job security, and privacy considerations—are far more likely to be determined by market forces than by externally imposed legal mandates. Finally, like the structure of the workplace itself, the law of employment is ever-changing.

Given its intricate and dynamic nature, employment law is challenging to understand and apply. This is what makes your study of it so critical. Workers and firms must rely heavily on counsel for advice on how to (1) structure working relationships to protect their interests and minimize their risks and (2) advocate on behalf of these interests when disputes arise. Similarly, employment policy makers need a solid understanding of the legal doctrines that govern employment, their implications and limitations, and how the varied aspects of the law interact with one another. This need for employment law expertise extends well beyond those engaged in employment-related work since employment and its legal rules have implications for a wide range of other areas and disciplines.

This text provides an accessible and comprehensive introduction into the study of employment law. Following the Introduction, the book contains seven parts with thirteen chapters exploring various employment law topics. You will be introduced immediately to our unifying theme of private ordering and its limitations—that is, the core tension in the law between the terms the parties themselves establish and publicly imposed mandates. In pursuing this theme through the various subtopics that make up our discipline, not only will you master (sometimes abstruse) doctrine but you will also be asked repeatedly to consider the law from transactional, counseling, litigation, and policy-making perspectives.

We have included standard cases to provide you with a solid background in each topic area. These are supplemented with more recent decisions addressing cutting-edge issues in the twenty-first century, including the growth of outsourcing and contingent (semi- or nonpermanent) work arrangements, the role of new whistleblower protections such as those in the Sarbanes-Oxley and Dodd-Frank laws, privacy in the workplace, new developments with regard to noncompetition agreements, important changes in antidiscrimination law, the law's role in facilitating the work/family balance, and the growth in various risk-management techniques by employers. We also provide extensive notes and commentary that offer further background and probe deeper into the compelling and difficult employment developments of the day. Finally, each chapter contains problems designed to expose you to the real-world challenges employment counsel face as both planners and litigators. If you want to sample even more recent developments in employment law, visit the casebook's website at http://law.shu.edu/private_ordering.

We believe this text offers a cohesive, thorough, and fascinating first look at employment-law theory and practice. We hope you enjoy it.

A Note on Editing

In cases and law review excerpts, all omissions are indicated by ellipses or brackets, except for footnotes and citations, many of which have been deleted or shortened to enhance readability. The footnotes that remain retain their original numbers.

Timothy P. Glynn
Charles A. Sullivan
Rachel S. Arnow-Richman

December 2018

Acknowledgments

Like all casebooks, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS builds on the experiences of its authors in wrestling with the problems of employment law with their law students at Seton Hall and the University of Denver. At each of these law schools, colleagues provided important insights in the formation of our pedagogic approaches. In a more focused way, we are indebted to the late Mike Zimmer of Loyola Chicago (emeritus at Seton Hall) and Rebecca Hanner White, former Dean of Georgia, for their generosity in allowing us to abridge portions of CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (Aspen, 8th ed. 2012) and to Mike Zimmer and to Deborah Calloway of the University of Connecticut for permitting us to draw on a precursor to the present book, CASES AND MATERIALS ON EMPLOYMENT LAW (Aspen, 1993). Despite these deep intellectual debts, PRIVATE ORDERING is a radical departure from earlier efforts, offering a new understanding of employment law as both a scholarly discipline and a vibrant field of practice.

This casebook would not have been possible without the support of Barbara Roth, Carol McGeehan, Richard Mixter, Troy Froebe, Kathy Langone, Sylvia Rebert, Dana Wilson, and Sarah Hains. Moreover, we all want to thank Mike Zimmer and Judd Sneirson, who were brave enough to teach out of the first edition as it was being written and provided us with invaluable feedback. Professor Arnow-Richman particularly acknowledges the support of Melissa Hart, Martin Katz, Nantiya Ruan, and Catherine Smith. We are also grateful to the unidentified professors who Aspen retained to review chapters as they emerged from the three authors. While we do not know who these reviewers are, they will see our responses to their critiques throughout this work.

Then there are the individuals who helped us turn this project into reality. They include Teresa Rizzo, Ana Santos, Silvia Cardoso, Beth Krauzlis, and Latisha Porter, Professors Sullivan's and Glynn's administrative assistants at Seton Hall, and the following Seton Hall research assistants for both Professors Sullivan and Glynn: Carmella Campisano and Andrew Raimondi, Seton Hall class of 2020; John Dumnich and Angela Raleigh, Seton Hall class of 2016; Michael Amalfe, Kelly Bradshaw, Mark Heftler, Temenouga R. Kolarova, Renee Levine, Steven Morris, and Caitlin Petry, class of 2012; Alison Andolena, class of 2011; Michele Austin, Christina Bae, Joseph Fanning, Robert Flanagan, Angela Kopolovich, Gregory Reid, and Allison Scaduto,

class of '08; Lauren DeWitt, Rawan Hmoud, and Mohamed Shiliwala, class of '07; Julie Yoo, class of '06; and Monica Perrette, Shulamit Shvartsman, and Lauren Walter, class of '05. Professor Arnow-Richman would like to thank Melissa Brand, Lindsay Burleson, Keenan Jones, Crystal Littrell-Miller, Lindsay Noyce, Marlys Hartley Roehm, and Cristel Shepherd from the University of Denver; James Boyer and Ralph Powell from Temple Law School; and her fall 2005 Law of the Workplace students.

As the copious citations to scholarship indicate, we have benefited greatly from the many scholars who have focused their research on employment issues. We have collected the citations in a Table of Selected Secondary Authorities at page 1011, but we acknowledge more directly the following for permission to reprint parts of their work:

Price Fishback & Shawn Kantor, *The Adoption of Worker's Compensation in the United States, 1900–30*, 41 J.L. & Econ. 305, 315-19 (1998). Reprinted with permission.

Ethan Lipsig et al., Planning and Implementing Reductions in Force, C922 ALI-ABA 1165, 1231-36 (1994). Reprinted with permission.

Introduction

Private Ordering and Its Limitations

For most of its history, employment law in the United States has been a constant struggle between private ordering and government mandates. The term "private ordering" refers to the rules the parties themselves establish to govern their relationship. Such ordering may occur by the parties' express agreement, such as in a collective bargaining agreement or an individual employment contract. Absent formal agreement, such terms may be implied from the circumstances. In addition, private ordering may occur in absence of any express or implied agreement through a "default rule" establishing terms unless the parties "opt out" by an agreement to the contrary. As you will explore in later chapters, the most prominent default rule in American employment law is the notion that the relationship is "at will"—that is, that it may be terminated by either party at any time for any reason.

In contrast to a pure private-ordering regime, public mandates are government-imposed limitations that directly set terms and conditions of employment or affect such terms and conditions indirectly. Mandates range from flat commands—such as the requirement that employers pay a minimum wage, grant leave for certain family and medical needs, or provide compensation for workplace injuries—to rules creating procedural mechanisms to govern the workplace. Unionization and collective bargaining are the prime examples of the latter. Mandates are often negative: Employers must not discriminate on the basis of race, sex, or religion. But sometimes they are positive: Employers must reasonably accommodate disabilities if doing so would not cause an undue hardship. Mandates are often distinctive to employment law—such as the requirement that mass layoffs be conducted only with sufficient advance warning. However, they also come from more general sources of law; for instance, the U.S. Constitution provides federal and state government workers some protections that their private sector counterparts lack. A critical aspect of true mandates is the inability of workers to waive the substantive rights provided.

From the 30,000-foot level, the law governing the employment relationship has moved away from purely private ordering and toward greater government regulation. During much of the nineteenth century, laissez faire and "freedom of contract" prevailed in employment—with the striking exception of the law being largely constitutive of the subordination of African Americans and women (indeed, often removing both groups from "employment").

Thus, in the post-Civil War era, the law tended to view employers and employees as equals, whose participation in "market transactions" would result in employment contracts—often "at will"—that the courts would then neutrally enforce. The reality of this view was always dubious. Many scholars have pointed out that cases such as *Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding a state statute barring women from the practice of law), and the use of antitrust laws to repress unions showed that the law was far from a neutral arbiter and often placed a heavy thumb on the side of the scale favoring employers and the interests of capital. Nevertheless, the prevailing ideology during the nineteenth century and well into the twentieth was one of the supremacy of private ordering, reflected most dramatically by "*Lochner* Era" court decisions that struck down public mandates regulating work in the name of freedom of contract. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (regulation of bakers' working hours); *Coppage v. Kansas*, 235 U.S. 1 (1915) (prohibition on agreements barring employees from joining unions); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wage mandate for female workers).

Even as *Lochner* was decided, however, change was in the air. In the next two decades, workers' compensation regimes would supplant the minimal protections tort law accorded to workers injured on the job. Perhaps critically, this statutory inroad for workers involved a trade-off of more certain liability for lower recoveries and therefore was also in the interests of employers who thereby avoided the risks of a developing tort regime. In any event, as the twentieth century proceeded, workers' rights became increasingly recognized in the law. The Great Depression brought the New Deal, and the New Deal brought, among other initiatives, the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151-69 (2018), protecting the right to unionize and bargain collectively, and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-19 (2018), establishing a federal minimum wage and regulating overtime and child labor practices. The demise of *Lochner* in the wake of President Roosevelt's court-packing proposal, *see West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled for many the beginning of the end of private ordering.

Fast-forward 30 years, private ordering suffered another assault, beginning with a legislative response to the Civil Rights movement. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2000e-17 (2018), ushered in, for the first time on a national level, federal regulation effectively limiting employers' ability to hire and fire at will, by prohibiting discrimination on the basis of race, sex, national origin, and religion. That statute was followed within three years by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (2018), and, after two more decades, by the Americans with Disabilities Act ("ADA") of 1990, 42 U.S.C.A. §§12101-12213 (2018). As a result of these three laws, most employers no longer have free rein in their hiring and firing decisions, and states, even in what had been the Deep South, added their own legislation prohibiting discriminatory employment practices to reach many employers too small to be covered by the federal antidiscrimination laws.

The 1970s saw two further federal inroads on private ordering in employment, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001-1381 (2018), and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§651-78 (2018). ERISA was a response to horror stories of employers firing workers to avoid paying their pensions or otherwise reneging on promises of long-term benefits. The statute was designed to provide both carrots and sticks to ensure an equitable private retirement system. OSHA, more directly command-and-control, was intended to be proactive in protecting worker safety. While the workers' compensation regimes

enacted decades earlier ensured payment for injuries suffered, OSHA was designed to prevent injuries in the first place through a series of explicit administrative regulations and corresponding agency enforcement.

On top of these statutory limitations on private ordering, state courts were busy cutting back on what they viewed as the excesses of the at-will rule. This movement produced two major strands—one contractual, the other tort-based. First, drawing on general contract principles, the courts in most states expanded protections for job security beyond formal, written employment contracts to include oral agreements and terms implied from the circumstances. They also began to enforce job security provisions in personnel manuals and read individual agreements or circumstances to provide something more than at-will status. Second, drawing in part on the statutes that proscribe certain reasons as illegitimate bases for employment decisions, the courts began to formulate a tort-based "public policy" exception to the at-will doctrine. That is, while employers remained generally free to fire an employee for most reasons, there were certain reasons that the courts declared to be impermissible. Unlike earlier efforts in this direction that condemned specific reasons for termination (e.g., antiunion animus, race), the newer decisions were more open-ended. An actionable termination was one which offended "public policy," a term whose meaning depends upon judicial interpretation. While employers still did not need a "good" reason to fire someone, they could not act from "bad" reasons, and the list of bad reasons was no longer confined to statutory prohibitions like the antidiscrimination laws.

Thus, by the mid-1980s, public mandates appeared to be winning the day, and private ordering correspondingly seemed in eclipse. But this view was accurate, if at all, only at the 30,000-foot level. Closer to the ground, the picture was significantly different. The NLRA, for example, legalized unions and put the power of the federal government behind collective bargaining. But statutory amendments and court and National Labor Relations Board decisions limited the economic power of unions. In part as a result of these subsequent legal developments, union representation of the private-sector workforce has experienced a steady and dramatic decline over the past half century. Similarly, the FLSA provides for a minimum wage and overtime protection, but it has always contained significant exemptions, and the failure of Congress to increase minimum wage levels to keep pace with inflation means that the federal floor provides very limited, and arguably inadequate, protection. In the antidiscrimination arena, legislative expansion has been countered by judicial contraction, with judicially crafted doctrines and proof problems blunting the thrust of the antidiscrimination laws. This was particularly true of the ADA whose definition of "disability" was subject to such narrow interpretations by the Supreme Court that Congress reacted with the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), Pub. L. 110-325, 122 Stat. 3553, to try to provide rights to workers with a broader range of physical and mental impairments. Finally, both OSHA and ERISA have been harshly criticized as ineffective. Indeed, ERISA has come to be seen as a barrier to workers' rights. An example is a decision striking down a Maryland law requiring very large employers, such as Wal-Mart, to provide health insurance for their workers. The court held that the law was preempted by ERISA, which regulates, but does not require, employers to provide any benefits to its workforce. *Retail Indus. Leaders Ass'n v. Fielder*, 435 F. Supp. 2d 481 (D. Md. 2006), *aff'd*, 475 F.3d 180 (4th Cir. 2007). In reality then, despite substantial federal regulation, many aspects of the most important terms of the employment relationship—job security, wages, and benefits—are left to private ordering between employers and employees.

In addition, in recent decades there has been a retreat from mandates and a corresponding increased commitment to private ordering at the state level. While the public policy tort for wrongful discharge has survived, its reach has been narrowed in many states. Further, progressive state contract-law decisions on employee handbooks have been largely negated by judicial approval of employer-drafted disclaimers of contractual liability. In the privacy area, state common-law protections that had emerged in the 1970s have largely disappeared as a practical matter, except where embodied in a few state statutes. Meaningful federal protections are scarce as well, contained only in a few discrete statutes like the Employee Polygraph Protection Act, 29 U.S.C. §§2001-2009 (2018), and the Genetic Information Nondiscrimination Act of 2008 ("GINA"), Pub. L. 110-233, 122 Stat. 881 (May 21, 2008) (codified in various sections of 26, 29, and 42 U.S.C. (2018)).

Other recent developments in employment-law mandates have been mixed as well. For example, in enacting the Family and Medical Leave Act ("FMLA") in 1993, 29 U.S.C. §§2601-54 (2018), Congress finally responded to the calls for protection for employees who want to balance work and family demands. Yet the protection provided is limited both in substance (eligible workers receive only unpaid leave) and scope (only larger employers are covered). Similarly, there has been a substantial growth in statutory whistleblower protections at the state and federal levels, the most prominent examples being the Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. No. 107-204, 116 Stat. 745, the health care reform law, Pub. L. 111-148, 124 Stat. 119, and the Dodd-Frank financial reform statute, Pub. L. 111-203, 124 Stat. 1376. All of these statutes provide whistleblower protections for employees who report behavior by their employers that violates the substantive provisions of those laws. But these protections, too, tend to be fairly narrowly drawn, leaving workers with perhaps less protection in reality than they might think.

Finally, employers are becoming increasingly creative in augmenting their baseline rights through contract. This can be seen in the widespread reliance on noncompetition clauses and other restrictive covenants. In addition, employers are developing robust forms of private ordering, including various liability and forum management provisions (e.g., arbitration clauses, severance agreements, and forum-selection provisions) that, despite meaningful limitations, fundamentally alter the law's control over private ordering, leaving employers freer to protect their interests and minimize their liability risks.

In short, employment law is a story of private ordering and its limitations. But today, more than ever, it is a complex story, and one in which neither private ordering nor government mandates have achieved unqualified primacy. Importantly, the tension between these competing conceptions generally plays out not at the 30,000-foot level but on the ground in particular employment law practices and disputes. Because the practice of law is largely done from a close-up perspective, it is important to understand what is left to private ordering and what is not and to recognize that today's sphere of free enterprise may be tomorrow's field of government regulation (or vice versa).

The Importance and Elusiveness of Employment Law

This struggle between private ordering and public mandates within American employment law occurs in the context of a universally important relationship. Almost every adult in the United States is or has been an employee. The employment

relationship is not only the vehicle through which most Americans make their living, but the workplace is also the place where they spend most of their waking hours and develop many of their interpersonal relationships. For many, personal identity is bound up not only with what they do but with where they do it. Professor Paul Weiler summarized this reality:

> The job rather than the state has become the source of most of the social safety net on which people must rely when they are not employed—that is, when they are sick, disabled, or retired. And the plants and offices in which we work are the places where we spend much of our adult lives, where we develop important aspects of our personalities and our relationships, and where we may be exposed to a variety of physical and psychological traumas.

Paul Weiler, Governing the Workplace: The Future of Labor and Employment Law 3 (1990). The stakes today are perhaps even higher. The development of communications and other technologies has tended to push the "workplace" further into what was previously personal time and space, and aspects of the employment safety net have eroded, making access to "quality" employment (in terms of stability, flexibility, accommodations, wages, benefits, and prospects for intra- or inter-firm mobility, etc.) even more important to workers.

From the employer's perspective, the employment relationship is the means by which firms produce most of their value and government agencies provide most of their services. Indeed, in the modern economy, employers' success often depends more on the quality of their workers—their creativity, cooperation, adaptability, and productivity—than on other assets: "However rich its natural resources, however costly and sophisticated the capital technology, a firm or an economy which does not have a skilled or committed work force will not be able to transform those physical assets into efficient and productive enterprises." *Id*.

Thus, the institution of employment matters a great deal to individual workers, employing firms, government agencies, and society as a whole. Naturally then, the legal rules that govern this relationship have profound, wide-ranging implications.

Yet despite the overview laid out above, employment law is not easy to define or summarize. Even the threshold question of what constitutes "employment"—as opposed to one of several different kinds of relationships in which human beings work with and for others—is uncertain. Unlike other disciplines such as constitutional law, the law of employment does not flow from a single source, nor does it derive from a single doctrinal regime like contracts or torts. Rather, because employment law governs a relationship that is both pervasive and variable, it draws from many sources, for example, contract, tort, agency law, constitutional law, and federal and state statutes.

Just as the sources of employment law vary, so too do its rules. Different legal doctrines apply depending on the state in which an employee works, whether the workplace is unionized, and whether the employer is a public or private entity. Even federal statutes do not provide complete uniformity, but rather govern some employment relationships and not others. This is due to limitations on coverage (small employers are typically exempted, with "small" being defined differently in different statutes) and various codified exemptions (certain "professional" employees, for instance, are excluded from the maximum hours provisions of the FLSA and many agricultural and transportation workers are excluded from coverage completely). The governing law therefore depends on factors such as the type of occupation and the

size of the employer. In application, it may also depend on more nebulous factors such as the autonomy and economic vulnerability of the worker, key considerations in determining whether a worker is an employee protected by federal employment statutes.

In addition, as suggested above, many of the terms governing a particular relationship may be established by, and therefore are unique to, the parties in that relationship. The "law" in the American workplace, as it is currently constituted, leaves ample—some would say, too much—room for individual variation in its most important terms, including wage levels, benefits, hours, job security, and privacy protections. All of these critical terms and conditions of employment are far more likely to be determined by the parties' reactions to market forces than by legal constraints. Again, for example, the federally mandated minimum wage is too low to have a direct effect on most workers' negotiating for compensation because both employers and workers start compensation discussions at a point far in excess of that wage. In light of its patchwork nature, understanding when and how the law constrains or promotes these terms, either directly or indirectly, is a formidable challenge.

Finally, the law of employment is dynamic because the workplace is ever-evolving; indeed, the pace of technological, organizational, and market-based changes that affect work and workers is accelerating. Tomorrow's workplace will be very different than today's, and so will tomorrow's law—a law you will help shape after you graduate. At best, then, we can say that employment law embodies the legal rules and standards that govern the employment relationship, but those legal rules and standards vary enormously in kind, substance, and application.

The breadth and variability of employment law poses significant challenges to workers and firms trying to understand their rights and obligations. There is in fact much misunderstanding regarding both, especially among workers. One particularly important example is that most workers believe that the law provides them with greater job security than it actually does, as you will explore in Chapter 2. This misperception can affect worker behavior, for instance, lulling them into thinking they need not seek greater protections, whether through unions, individual contracts, or otherwise. In addition, uncertainty in the law can inflict real costs on employers, not only ex post (litigation expenses and unexpected liabilities) but also ex ante (in terms of risk aversion and investments in planning and compliance).

The maze of employment-law doctrines also creates enormous difficulties for counsel seeking to advise parties on how to comply with the law, protect their interests, and avoid liability and other risks attendant to employment relationships. Given the increasing importance of human capital in our information- and technology-driven economy, a basic understanding of the law of the workplace and its implications is essential even for lawyers practicing in other areas. For example, employment law needs to be understood by attorneys in other fields—from corporate law to intellectual property to health law to privacy and cyber security. And social and cultural trends and conflicts almost always have direct implications for the law of the workplace—the #MeToo movement is the primary contemporary example. Indeed, surveys of corporate general counsel and other practitioners frequently show that, among legal areas, labor and employment litigation and risks rank at or near the top. *See e.g.*, Aebra Coe, *The Four Hottest Practice Areas for 2018*, Law360 (Jan. 1, 2018), available at https://www.law360.com/articles/992014/the-4-hottest-practice-areas-for-2018 (discussing how #MeToo and other phenomena make labor and employment law among the four hottest practice areas). This concern is especially pointed in

tough economic times, like the Great Recession, when employers are more likely to lay off workers and terminated workers are less able to find replacement employment. The year 2010 saw the largest number of filings on record at the EEOC—nearly 100,000—although a variety of other factors besides the economy may explain this surge. *See* Nathan Koppel, *Claims Alleging Job Bias Rise with Layoffs,* WALL STREET JOURNAL, Sept. 24, 2010, at A6.

The nature and scope of employment law mean that a single course cannot cover every legal issue and doctrine that may govern or affect the workplace. Largely for this reason, most law schools offer other courses addressing areas of employment law, including courses in Employment Discrimination, Labor Law, Workers' Compensation, Employee Benefits, and even more particularized disciplines, such as Disability Discrimination and Labor and Employment Arbitration. In addition, some of these areas, most notably Labor Law (which governs unionization and collective bargaining), are sufficiently distinct doctrinally that they are best left to separate study, except to the extent they provide context for broader inquiries.

Private Ordering and Its Limitations as a Framework

So how should one approach learning employment law? Despite employment law's disparate sources and wide variability, there is, as we suggested at the outset, a theme common to the law of the workplace. Employment law is, at its core, a course about *private ordering and its limitations.* This description not only captures the core historical conflict over employment regulation but also provides a framework for analyzing the key pressure points in the various aspects of what we call "employment law" today. It is the lens through which we can not only begin to discuss what the law is and what it ought to be in a multitude of contexts but also explore various legal risks and incentives of the parties and the extent to which these may be altered by planning.

This tension between public ordering and private mandates is scarcely unique to employment law. Yet, because the employment relationship is consensual, pervasive, and of profound importance to individual stakeholders and society, this relationship is one of the primary contexts—both qualitatively and quantitatively—in which the law seeks to balance contractual freedoms and market forces with countervailing social interests. Indeed, this tension runs through each doctrinal area in employment, from formation (i.e., whether worker and firm have an "employment" relationship or some other kind of legal status or relationship defined purely by contract) to job security to issues of worker autonomy (e.g., privacy) to discrimination to accommodations for workers' personal needs to employment compensation to how and where employment disputes are resolved.

How to resolve this conflict is therefore a paramount issue in employment law. Unsurprisingly, it is the source of ongoing political, judicial, and scholarly controversy. Whether or not you have seen the term "private ordering" before, you undoubtedly have seen or heard of the conflict between private ordering and its limitations playing out in public policy debates. It is a central theme in the cyclical debates over whether to increase the minimum wage. It also appears frequently in discussions of the "hot" employment issues of the day, including whether to mandate certain types of employer health care coverage, whether to require employers to provide paid parental leave, the extent to which employees ought to be protected from intrusive employer monitoring or oversight, whether to expand whistleblower and other related protections for

employees, and whether employers should be able to compel private arbitration of employment disputes.

Some scholars have argued that the various terms of employment should be almost exclusively the product of private ordering. They claim that leaving the terms of employment to individual bargaining ultimately will produce socially optimal arrangements, and that various market forces (such as workers' supposed ability to freely reject or abandon employment) will generally prevent abuse. Indeed, perhaps most famously (or infamously, depending on one's perspective), Professor Richard Epstein has urged that we ought to abandon antidiscrimination laws because market forces ultimately will do a better job of correcting the effects of status-based discrimination. *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

Of course, the scholarly responses to these types of arguments have been legion. Private ordering raises two different sets of concerns. First, scholars have identified a number of "market failures" in labor markets, which they argue justify greater mandated protections for workers. Many have pointed out that individual workers, often due to economic and social vulnerabilities, lack the power and resources to bargain effectively on their own behalf. Other scholars have contended that, even when workers are not economically powerless to protect themselves, they may suffer from informational disadvantages and cognitive constraints in assessing proposed terms of employment. Still others argue for public mandates because, in their view, employer preferences often are based on factors or biases that are not rational in an economic sense, leading to inefficient, discriminatory, or otherwise problematic decisions about who to hire, retain, or promote, and under what terms and conditions. Some of these critiques of private ordering have marshaled empirical evidence to support their claims.

In addition, there is the question of the extent to which private ordering must be constrained because of the negative impact the parties' actions may have on third parties or society as a whole. Few would question whether the public has an interest in protecting itself from employee/employer conduct that inflicts direct and substantial social harm. Indeed, the NLRA was in large part a response to the economic (and sometimes physical) warfare between unions and management that impeded the flow of goods and services to the public. The current debate centers on when such harm exists, when it is sufficient to justify public intervention, how the law ought to intervene, and which decision makers ought to resolve these issues. Indeed, as you work your way through this book, you will see the potential tensions between the interests of worker, firm, and the public, as well as the differing views on when and how to address these competing interests, play out again and again.

This casebook will help you identify the role of private ordering and its limitations in each area and demonstrate how the law currently strikes a balance between them. You will be challenged to think critically about that balance and its effects on workplace incentives and risks from a policy perspective. At the same time, the focus on private ordering means that this casebook is designed to assist you in learning how to be an employment-law practitioner—someone whose decisions help create and structure, that is "order," work relationships. Of course, the lawyer's role includes understanding how to develop persuasive legal arguments in litigation and other employment disputes on behalf of both employees and employers. But, at least as importantly, it also includes assessing and managing risk. The defining aspect of private ordering is the ability of employees and employers to structure their work

relationships to protect their interests and reduce legal risks—transactional skills that are becoming more and more dominant in the practice of employment law.

Employment Law in the Twenty-First Century

Now that you have been introduced to the challenges of learning and practicing employment law and the core tension that binds aspects of this discipline together, it is worth taking a moment to appreciate where the law is today. What we now think of as "employment law" in the United States reflects a relatively new development having its roots in the Industrial Revolution. Before that, "employment" in this country took a variety of forms, including indentured servitude, slavery, self-employment, personal service, and family work (primarily on farms). Employment as we know it was not the primary means of earning a living.

After the Civil War, the United States rapidly industrialized and agriculture became increasingly less important. The population of employees grew, including, for the first time, large numbers of women working outside the home/farm and domestic service. By the dawn of the twentieth century, industry became the rule rather than the exception, and employment typically became not merely another option but the only choice. As a result, workers became increasingly dependent on their ability to obtain and retain positions working for others in order to survive. While "contract" theoretically ordered the relationship between these workers and their employers, the increasing economic dependency of employees severely diminished their bargaining power, thus tending to erode their rights.

Although some workers obtained greater protection by virtue of individual employment contracts specifying the terms and conditions of their work, most employers refused to enter into such arrangements with most workers. Employers preferred to be free to hire and fire as they wished, and the common law accommodated this desire by characterizing employment relationships as "at will" unless the parties were especially specific in providing otherwise.

While facially neutral, the at-will rule generally favored employers since they could easily replace an employee who quit; in contrast, a fired employee's options in a period of limited geographic mobility were typically very limited and often very unpalatable. The unrestrained power of employers sometimes manifested itself in starvation wages, unsanitary and dangerous working conditions, long hours, child labor, and little or no job security for many employees.

As sketched above, these conditions led to attempts to deal with the problem of unrestricted industrial power in sweeping ways. In addition to federal approaches to curbing abuse of industrial power, such as antitrust laws, state legislatures made some early attempts to deal directly with the exercise of such power as it affected employment, such as laws regulating maximum hours of work. Again, prior to the New Deal, *Lochner* Era courts repeatedly found such regulation unconstitutional. Still, there were some early reform successes, most notably the widespread creation and adoption of workers' compensation regimes during the Progressive Era.

Also during this period, the American union movement began to make some headway in securing rights for employees despite organized employer resistance and government hostility. The rallying cry of unions was the plight of the workers who were subjected to the unbridled power of employers. The "union solution" was to create countervailing power through the aggregation of workers in the hope

that the resultant conflict would produce a balance in the interests of both workers and employers. *See generally* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).

Unions were concerned with compensation, hours, job safety, and job security. Job security served unions not only by protecting individual members but also as a means to other ends (e.g., eliminating competition between union members to avoid weakening unity and protecting against employer retaliation). As a result, unions typically tried to negotiate contracts with employers limiting the power to discharge individual workers to situations involving "just cause" and specifying how employees should be treated in economic reductions in force, typically by requiring that workers be selected for layoff in reverse order of seniority.

Other initiatives also worked to strengthen job security, albeit among particular subgroups of workers. One was the civil service movement in government employment, which preserved employment "during good behavior" for those who qualified. While civil service protections originated in the nineteenth century, the growth of government during the twentieth century resulted in these systems covering significantly more employees. In addition, advocates of academic tenure (and the job security it provides) were also likewise successful not only for the college and university professors for whom tenure was originally devised, but also for teachers in public elementary and secondary schools. From an economic perspective, both civil service and academic tenure were originally viewed as a tradeoff between lower compensation, on the one hand, and less pressure combined with greater job security on the other.

The Great Depression ushered in leaders more interested in expanding government power and addressing the plight of the common worker. The revised view of government power brought on by the Depression enabled federal and state legislation according employees' basic rights to survive constitutional attack. New Deal legislation was in two forms: first, statutes protecting and supporting employees' efforts to bargain collectively with their employers, and, second, legislation providing the first effective national regulation of some terms and conditions of employment.

Regarding the first category, the NLRA granted workers the right to engage in "concerted action" by protecting such action from employer retaliation. The statute also established a structure for the recognition of unions as "exclusive bargaining representatives" for workers and imposed on employers a duty to bargain with them. This federal labor legislation (and subsequent state efforts aimed at the public sector) did not impose any particular terms and conditions on employers. Rather, it dealt with workplace problems indirectly by establishing a procedure whereby such problems could be resolved by bargaining between the parties. Where unions were strongest, the result was collective bargaining agreements that provided detailed regulation not only of wages and hours, but of many other aspects of employment, including job safety and job security. In its most developed form, this regulation is implemented by a quasi-judicial system of arbitration of disputes between labor and management.

In the short run, unionization became a dominant mode of regulating the employment relationship. Prior to the NLRA, the unionized percentage of the American workforce was less than 15 percent. By the mid-1950s, the number had increased to nearly 40 percent. But, over the next several decades, especially in the 1980s, the union movement faltered. Unions now represent a smaller percentage of American workers—under 11 percent overall and less than 7 percent in the private sector—than before the NLRA was passed. The causes of the decline of the union

movement are contested, although, as described previously, less favorable statutory, judicial, and agency treatment has certainly played a role. The merits of unions and collective bargaining remain disputed, but the decline in unionization is undeniable. Thus, for better or worse, although most employees enjoy protections for concerted actions under the NLRA, the vast majority are not employed under or governed by a collective bargaining regime.

The second form of regulation that emerged during the New Deal and thereafter directly regulated the terms and conditions of private employment. The FLSA, setting a minimum hourly wage, is one example. During this period, the federal government also regulated the terms and conditions of "unemployment" by fostering unemployment compensation.

Perhaps in part due to the notion that collective bargaining would address most problems, there was little new direct regulation of terms and conditions of employment for almost 40 years. The 1970s saw Congress enact both OSHA and ERISA: again, despite their differences—OSHA was designed to protect worker safety through a traditional New Deal-style command-and-control approach while ERISA embodied a carrot-and-stick approach to promoting and then protecting employee benefit plans—both regimes remain the subject of significant controversy and criticism. It is worth noting that ERISA was primarily intended to ensure pension benefits for workers, but it also addresses welfare benefits including employer-provided health insurance. It has been expanded over the years by some important amendments, and it now guarantees continuation of health coverage in most terminations of employment—assuming the temporary employee had health benefits to begin with and assuming she is able to bear the group-rate costs of the insurance. However, as discussed previously, this has come at a price since ERISA's preemptive effect has served as a barrier to state-level benefits reforms, most notably in the health care context.

None of these statutory regimes deals primarily or directly with job security; rather, they regulate various aspects of employment. Nevertheless, job security is implicated in most of these laws, at least to the extent that they contain provisions barring employers from retaliating against employees who exercise their statutory rights. A different approach to regulating employer abuses emerged most dramatically in the 1960s—beginning with Title VII and thereafter supplemented by the ADEA, the ADA, and other statutes. The centerpiece of these laws was not direct regulation of terms and conditions of employment; rather, they ruled out certain reasons for employer actions (race, sex, age, disability). Employers, at least in theory, remained free to hire and fire and structure their workplaces for any reason—good or bad—so long as these defined reasons did not influence their decisions. The states were also active during this period, enacting antidiscrimination laws that sometimes went beyond the protections provided by the federal government. One notable example is the numerous state laws prohibiting discrimination based on sexual orientation, which most courts still believe is not prohibited per se under Title VII or any other federal statute.

In sum, by the 1970s, a variety of different legal regimes addressed different aspects of the employment relationship. With respect to job security, individual employees with sufficient bargaining power could negotiate contractual protection. In addition, there were statutes encouraging "procedural" solutions for all workers (such as regulating unionism and the collective bargaining process) and statutes directly providing job security for civil servants and academics. Finally, there were statutes providing some degree of job security by prohibiting certain reasons for firing

employees. With respect to terms and conditions of employment, workers were protected by the same set of laws, supplemented by additional statutes directly regulating certain matters (e.g., minimum wages, maximum hours) for private and public, unionized and nonunionized employees.

Although some may have thought this collection of protections adequate, others perceived more exceptions than rules. Certainly, the average worker (employed by a nonunionized, private, nonacademic employer) had relatively narrow protections. Such a person was unlikely to have a personal employment contract and thus was an "at will" employee. Beyond the floor protections provided by minimum wage laws, workers' compensation, OSHA, and prohibitions on status discrimination, a worker would have very little in the way of legal protections.

This reality triggered state common-law efforts to limit employer power and expand employee rights by carving away at the at-will principle through a more expansive view of contract protections and through the public policy tort. While some of these decisions have become a permanent part of the employment landscape, there has also been significant judicial retrenchment in these areas. Similarly, while new state statutory whistleblower and related protections have codified and even expanded the common law developments of the 1970s and 1980s, major new legislation seemed stalled until, in response to examples of corporate misfeasance, SOX provided employee protections, although admittedly not as an end in themselves but rather as a means to ensure an honest securities market. In the wake of the Great Recession, there has been a new spate of whistleblower protections on the federal level as part of the stimulus package and the comprehensive legislation dealing with health care and financial institution regulation. Like SOX, the goal of these provisions is not to protect employees per se but to encourage employees to report violations of the laws' substantive provisions.

Compounding the ferment in the law was a radical restructuring of the economy. As the twentieth century was coming to a close, changes in the nature of the American economy, the workforce, and the structure of the workplace brought new issues to the fore and, correspondingly, presaged new legal developments. For example, consistent with the growing number of households in which all employable adults work, there has been a growing awareness of the need for accommodation of workers' familial and personal needs. Legislative reforms along these lines have been modest, but they include the FMLA, which provides limited protections for employees' life needs in the form of mandated unpaid leave due to a personal medical condition or that of a family member. A very few states provide paid leave or more generous unpaid leave. Similarly, the ADA requires "reasonable accommodation" of disabled individuals in many circumstances and the enactment of the ADAAA promises to revive the significance of this requirement.

Moreover, as discussed previously, as the American economy has transformed into one dominated by services, information, and technology, the value of certain employees has increased. In significant sectors, firms are becoming more dependent on employee creativity, information, and innovation, resulting in a heightened concern among *employers* about protecting themselves. Some find it more than a little telling that a pure at-will regime is now being challenged not merely by advocates of employee interests but also by employers who find themselves increasingly at risk. There has been a rise in litigated conflicts between employers and (often former) employees in such areas as trade secrets, copyrights, and ownership of employee inventions, and claims to business good will, customer lists, and various types of confidential

information. Because the default protections for employer interests—employee fiduciary duties and employer intellectual property and trade secrets protections—are limited and often difficult to enforce, there has been dramatic growth in the use of restrictive covenants in recent years. These covenants—including noncompetition, nondisclosure, nonsolicitation, and holdover agreements—are becoming more common, as are questions about the limits the law ought to place on them. Because the stakes on both sides are higher than in past decades, the validity and extent of such agreements are much more frequently litigated.

The governing employment law regime itself, market forces, and other factors have also wrought dramatic changes in the structure of the American workplace. Among the most important is the growth in the outsourcing—both domestic and foreign—of various aspects of production to independent firms or suppliers of labor and the rise of nontraditional working relationships, including growth in independent contracting and part-time work. Undoubtedly, firms take advantage of such nontraditional work structures to avoid some of the legal requirements of "employment" and reduce risks associated with having "employees." By avoiding "employment" relationships and opting instead for independent contractors or other work structures, firms can avoid most statutory protections—which apply only to "employees" and "employers"—along with other legal consequences of an employment relationship, including such things as respondeat superior liability and obligations under immigration laws. The corresponding rise in what some have called the "contingent workforce" may have significant social consequences because these workers, on average, are more likely to be both on the economic margins and less likely—for both legal and practical reasons—to be able to enforce whatever work-related rights they may have.

Yet another change in the workplace is the shift from a fairly hierarchical structure to less formal, more team-oriented workplaces. While hierarchy remains alive and well in many settings, the past decades have seen a flattening of hierarchies as tiers of management are replaced with more collaborative working arrangements. The result is, in one sense, fewer bosses and, in another, more bosses. Such structural changes pose a variety of challenges for the law, especially in areas like sexual harassment.

Finally, sweeping technological innovations are changing the workplace and, correspondingly, creating new legal issues and challenges. The rise of social media, for example, not only has altered the way workers and firms interact with one another, but also has raised new concerns about employer intrusions into worker interests in privacy and free expression. In addition, the deployment of new tools for utilizing data, big data and artificial intelligence are promising to enable enterprises to operate more efficiently, but methods of collection and, increasingly, utilization by managers and human resources professionals raise a host of potential legal concerns, from worker privacy to discrimination to fair wage and hour treatment.

All of these trends are being affected, in one way or another, by the Great Recession from which the country is slowly emerging. Unemployment has dropped to 4% but wage growth has remained remarkably stagnant despite a recent uptick. Although it is still too early to say precisely how economic conditions will affect employment going forward, one does not need a crystal ball to predict that, should we again have a large number of qualified unemployed or underemployed workers hanging over the market, there would be dramatic effects on employment practices.

In short, the law continues to struggle to address these fundamental changes, both as a matter of doctrine and of on-the-ground enforcement. Despite the growth of regulation, the law leaves many decisions regulated only in skeletal ways. Nevertheless,

the intersection of various legislative regimes and common-law doctrines means that few employment-related decisions are entirely immune from legal challenge. This reality has produced one final, burgeoning area of employment law, counseling, and litigation. Recent years have seen the rise of "second-level" risk management techniques, usually used by employers, to control or minimize the risks of downstream employment-related conflicts or liabilities. These techniques include internal compliance practices such as the implementation of sexual harassment policies and internal investigations, mandatory pre-dispute arbitration agreements, a rise in substantial severance pay in exchange for releases of claims upon termination, and the inclusion of choice-of-law and choice-of-forum clauses in employment contracts. The substantive law governing these various approaches to risk management differs, as does their success in shifting risk from employers to employees. However, as long as the law of the employment relationship remains uncertain, risk management techniques and the legal rules that constrain them will continue to play a central role in the life of the employment lawyer.

As you can see from this short tour of employment law, the American legal approach to employment in the twenty-first century is a crazy quilt of regulation and laissez faire. For many employees and employers, this means market forces remain far more important than "law" in determining the most important terms of their relationship, including whether "employment" exists at all and how long such a relationship lasts. But there are some significant legal constraints that frame the parties' choices. Understanding this patchwork of laws governing workplace relationships—a combination of contract-law principles operating against a backdrop of tort law rules and general and employment-specific statutes and regulations—presents serious challenges for workers, firms, policy makers, legal counsel, and, of course, law students.

The Organization of This Book

This casebook is organized in 7 parts containing 13 chapters. Part I addresses issues of formation of an employment relationship; that is, whether there is an "employment" relationship at all—as opposed to some other type of relationship—and the consequences that flow from that determination. The 2 chapters in Part II then address how employment terms are set or limited by contract, particularly terms related to job security. They explore the contours of the at-will rule and its exceptions and the interpretation and enforcement of express agreements that vary from this rule and set other important terms of employment, such as compensation.

Part III then turns to tort-based protections for employees: Chapter 4 explores the public policy exception, state statutory antiretaliation and whistleblower provisions modeled on the public policy decisions, and federal approaches, focusing on SOX. Chapter 5 covers traditional workplace torts, including intentional interference with the employment relationship, defamation, intentional infliction of emotional distress, and fraud. The 2 chapters in Part IV then shift the focus to worker autonomy interests, that is, privacy and speech. In both of these contexts, the disparate sources of potential protection are considered (in both the public and the private employer settings) as well as the balance the law strikes between legitimate employer interests and the autonomy interests of workers.

Part V turns to workplace property rights and related interests of employers. Chapter 8 explores various legal safeguards for these interests, including those flowing from fiduciary duty, trade secrets, and intellectual property protections. It also addresses employers' attempts to supplement these legal protections through contract—for example, restrictive covenants such as noncompetition, nonsolicitation, and holdover agreements—and the limits the law places on the scope and enforcement of such provisions.

Part VI contains 4 chapters addressing the principal statutory regimes that govern directly or indirectly various terms and conditions of employment: Chapter 9 explores antidiscrimination mandates; Chapter 10 examines required accommodations for aspects of workers lives, including workers' disabilities, health, pregnancy, and family caregiving needs. Chapter 11 discusses regulation of employee wages, and Chapter 12 reviews legal regimes addressing workplace safety and health. These chapters cover not only the primary federal statutes addressing these matters—such as Title VII, the ADEA, the ADA, the FMLA, the FLSA, and OSHA—but also state workers' compensation regimes (Chapter 12) and state efforts to supplement federal antidiscrimination, accommodation, and wage protections and enforcement.

Finally, Part VII offers a fitting conclusion to the study of employment law by exploring various methods of managing the risks and costs of potential liabilities of employment—liabilities arising from the contractual, common-law, and statutory aspects of employment law you will have explored in earlier chapters. In other words, Chapter 13 addresses the second-level private ordering techniques that employers commonly utilize to control the risks and costs of employment disputes by minimizing liability exposure or choosing the forum within which such disputes are resolved. They include policies for preventing and correcting discriminatory harassment, internal investigations of misconduct, release and severance agreements, arbitration agreements, liquidated damages provisions, liability insurance, and bankruptcy protection. Of course, this survey discusses not only the content of these practices and contractual provisions but also the limitations the law imposes them.

Part One

THE BENEFITS AND BURDENS OF EMPLOYMENT

1 The Stakes of "Employment"

A useful starting point in the study of employment law is this fundamental question: Why does the existence of an "employment" relationship matter? Organizations, both governmental and private, structure their activities in a wide variety of ways, and the individuals who perform work or provide services for these institutions may have various kinds of legal relationships with them and with one another. For example, a person who works on a firm's behalf may be its sole proprietor, a partner, an employee, or an independent contractor. In addition, firms engage other firms to perform some of their activities, leaving to the second firm the task of engaging workers to perform these tasks. For instance, growing attention has been focused on outsourcing various services across international borders and, in the domestic context, on utilizing "contingent"—that is, temporary or nonpermanent—workers.

Distinguishing between employment and other types of relationships is important because each offers its own mix of risks and benefits, both legal and nonlegal—what we call the stakes of employment. For example, many well-known legal protections for workers apply only to "employees." While firms owe duties to employees that they do not owe to other workers, they may benefit from their employer status in various ways. The nature of the work relationship also has important consequences for third parties, who are far more likely to be able to hold firms or government entities liable for injuries caused by their employees than by independent contractors.

To understand the stakes of employment, you must have a basic grasp of the potential rights and obligations arising from the employment relationship and of how they differ from those arising from other relationships. Thus, in this chapter we explore the definitions of "employee" and "employer," the distinctions between employment and other types of legal relationships, and the consequences of employment for employees, employers, and third parties. Workers may prefer to be employees for some reasons and in some circumstances but not others; similarly, firms and government agencies may seek to avoid being employers for certain purposes but may benefit from employer status in other ways. And third parties and the public may have an independent interest in treating some workers as employees but not others.

As you work your way through these preferences and interests, think about the role private ordering should play—that is, the extent to which worker and firm ought

to be able to define the nature of their relationship through contract. Should such agreements be enforceable and dispositive, or should the law limit parties' ability to decide whether theirs is an "employment" relationship?

Before reading the cases and notes in this chapter, take a moment to consider the following problem:

PROBLEM

1-1. Compliance Boom. Worldwide Compliance Education, LLC ("WCE"), is a small company that provides training and continuing education to compliance professionals in the financial services industry. WCE's founders and owners, Faith and Ethan Morales, historically have provided onsite, live training programs for compliance professionals within large enterprises, often tailored specifically to that client's needs. Through their efforts, WCE has become very successful and is known as an industry leader in compliance training. WCE now employees eight people (in addition to Faith and Ethan), including assistant trainers and support staff.

As a result of the strength of WCE's brand and the continuing increase in compliance risks, both domestically and abroad, Faith and Ethan have decided to expand the business. After consulting with their principal clients and a business adviser, and securing outside financing, they have decided to begin producing compliance and ethics training videos for sales, brokerage, and other noncompliance personnel working for financial services firms. In Phase I of the expansion, they plan to produce and market both client-specific training modules (tailored to a firm's particular compliance needs) and standard, off-the-shelf modules any company in the finance and insurance industries can purchase. Because they intend to deliver the videos through the web, as well as maintain assessment and interactive components, they will need to develop internet and human resources infrastructure for delivering and hosting the trainings. In Phase II, they intend to develop more advanced modules as well as modules focusing on new developments.

Until now, Faith and Ethan have directly overseen all aspects of WCE. With the new expansion, they will no longer be able to do so. They will have to devote significant time to developing the content of the videos, as well as continuing to serve their clients' live training needs. In addition, the video training venture will require IT, production, and marketing expertise they do not have. WCE will also be moving into a larger office space in a new building it just purchased.

Going forward, Faith and Ethan will continue to manage the entire operation, but they will need to utilize the services of the following people:

- An office manager
- A part-time accounting assistant to handle billing and accounts receivables
- A software engineer and/or information technology expert who will design the web-based system, and—whether the same person or not—an IT professional to maintain and expand the system once it is in operation
- A marketing expert to develop and implement a marketing plan for the videos

- A salesperson who will engage in customer relations and eventually take responsibility for most of WCE's video marketing and sales
- At least two production specialists to create the training videos in Phase I, and then, on the basis of need, a specialist to create and update videos in Phase II and beyond
- On a short-term or "need" basis, various other workers to assist in video production, including script writers, script readers, graphic designers, and editors
- One or more workers to provide maintenance and janitorial services for the new building

Consider this hypothetical from the following perspectives. First, why might WCE decide to treat these workers as employees or independent contractors, or, alternatively, to hire an independent firm to supply the labor or perform particular tasks? Second, why might some of the workers prefer employment with WCE while others may prefer a different relationship? Finally, might the public or third parties have a preference, and, if so, when should their interests override the interests of the parties? And, relatedly, to what extent should WCE's or a worker's expectations, or an agreement between WCE and a worker, determine the nature of the relationship? Continue to consider these questions as you read the material in this chapter.

A. DISTINGUISHING "EMPLOYEE" FROM "INDEPENDENT CONTRACTOR"

By far the most commonly litigated issue in defining the employment relationship is whether a worker is an employee or an independent contractor. This is true for three reasons. First, most workers—that is, participants in the production of firm goods and services—are either employees or independent contractors (as opposed to, inter alia, sole proprietors, corporate directors, or partners or some other type of co-owner).

Second, a host of legal consequences flow from the workers' status, often making this issue worth litigating. For example, most of the federal statutory protections for workers studied in this course cover only "employees." These include federal labor, wage, hour, and benefit protections, *see, e.g.*, Labor Management Relations Act of 1947, 29 U.S.C. §152(2)-(3) (2018); National Labor Relations Act, 29 U.S.C. §158(b)(4)(i) (2018); Employee Retirement and Income Security Act, 29 U.S.C. §1002 (5)-(6) (2018) ("ERISA"); Fair Labor Standards Act of 1938, 29 U.S.C. §201(2) (2018); Family Medical Leave Act of 1993, 29 U.S.C. §2611(3) (2018), as well as most federal prohibitions on status discrimination, s*ee, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §630(f) (2018); Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e(f) (2018); Americans with Disabilities Act of 1990, 42 U.S.C. §12111(4) (2018). They also include state employment law regimes, including workers compensation laws, and state wage and antidiscrimination protections. There are exceptions, including 42 U.S.C. §1981, which prohibits

race and alienage discrimination in most contractual relations, *see Runyon v. McCrary*, 427 U.S. 160 (1976), and the various tort-based protections. But the vast majority of employment law protections—the bulk of those discussed in Chapters 4 through 13—cover only employees.

Third, distinguishing between employees and independent contractors is difficult. As the cases that follow will illustrate, drawing this line is a formidable challenge in terms of both factual and policy analysis. Governing legislation itself rarely offers much meaningful guidance. Indeed, in virtually all of the foregoing statutes, Congress failed to define meaningfully "employee" or "employer," offering only the unhelpful and circular statement that an "employee" is "an individual employed by an employer." Thus, in determining the meaning of "employee" and "employer" in these regimes, the Supreme Court has often held that Congress intended to describe the master-servant relationship as understood by common-law agency doctrine. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (ERISA); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (Copyright Act). Regulatory definitions of "employee" from other areas, such as tax law, intellectual property law, and state laws likewise offer variations on the common-law definition.

As we will see in the first two cases, however, reliance on the common-law definition is highly controversial for various reasons. One is that the original purpose of the common-law definition was to determine liability under the doctrine of respondeat superior, which provides that an employer is vicariously (hence strictly) liable for torts committed by its employees within the scope of their employment; the definition was not designed to determine how far labor and employment regulations and protections ought to extend. Nevertheless, given its historical prominence and continued importance, the common-law definition is typically where the employee/independent contractor analysis begins.

As summarized in the Restatement (Second) of Agency, which continues to dominate court discussions despite the promulgration of the Third Restatement of Employment Law (discussed below), a "master" or employer is "a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service." RESTATEMENT (SECOND) OF AGENCY, §2(1) (1958). Correspondingly, a servant or employee is "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." *Id.* §2(2). In contrast, an independent contractor is one "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." *Id.* §2(3). The Restatement goes on to provide a more detailed definition of "servant," a term that has since been displaced by "employee," containing a nonexclusive list of factors for determining servant/employee status:

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

See also Restatement (Third) of Agency §7.07 (3)(a) (2006) (for purposes of employer vicarious liability, "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work").

In contrast, the new Restatement of Employment Law, which is not primarily concerned with employer liability to third parties, frames the inquiry somewhat differently. It provides that an employment relationship exists whenever a worker acts, at least in part, to serve the interests of the employer; the employer consents to receive the services of the worker; and the worker is not rendering services as an independent business, which means that the worker does not exercise entrepreneurial control over the manner and means of the work. *See* Restatement (Third) of Employment Law §1.01 (2015). Although "control" remains central in this formulation, the test is framed in the negative: namely, that a worker is an employee *unless he or she exerts entrepreneurial control,* which means "control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to service other customers." *Id.* Keep in mind, however, that the ultimate impact of this new Restatement will remain unknown for some time. Although it has been approved by the American Law Institute ("ALI"), no jurisdiction has yet adopted it. Nevertheless, as you read the following cases, consider whether such a formulation is consistent with the analysis or outcome in any of the cases and, if so, whether it is better or worse than existing approaches.

FedEx Home Delivery v. NLRB

563 F.3d 492 (D.C. Cir. 2009)

Brown, *Circuit Judge*:

FedEx Ground Package System, Inc. ("FedEx"), a company that provides small package delivery throughout the country, seeks review of the determination of the National Labor Relations Board ("Board") that FedEx committed an unfair labor practice by refusing to bargain with the union certified as the collective bargaining

representative of its Wilmington, Massachusetts drivers. The Board cross-applies for enforcement of its order. Because the drivers are independent contractors and not employees, we grant FedEx's petition, vacate the order, and deny the cross-application for enforcement.

I.

. . . FedEx Home delivers packages of up to 75 pounds, mostly to residential customers. The Wilmington terminals are part of FedEx Home, a network that operates 300 stand-alone terminals throughout the United States . . . . FedEx Home has independent contractor agreements with about 4,000 contractors nationwide with responsibility for over 5,000 routes.

In July 2006, the International Brotherhood of Teamsters, Local Union 25, filed two petitions with the NLRB seeking representation elections at the Jewel Drive and Ballardvale Street terminals in Wilmington, neither of which boasts many contractors. The Union won the elections . . . and was certified as the collective bargaining representative at both. FedEx refused to bargain with the Union[, disputing] the preliminary finding that its single-route drivers are "employees" within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3). . . .

II.

To determine whether a worker should be classified as an employee or an independent contractor, the Board and this court apply the common-law agency test, a requirement that reflects clear congressional will. *See NLRB v. United Ins. Co.*, 390 U.S. 254 (1968). . . . While this seems simple enough, the Restatement's nonexhaustive ten-factor test is not especially amenable to any sort of bright-line rule, a long-recognized rub. Thus, "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive," *United Ins. Co.*, always bearing in mind the "legal distinction between 'employees' . . . and 'independent contractors' . . . is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute." *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) ("*NAVL*").

This potential uncertainty is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors. . .

For a time, when applying this common law test, we spoke in terms of an employer's right to exercise control, making the extent of actual supervision of the means and manner of the worker's performance a key consideration in the totality of the circumstances assessment. Though all the common law factors were considered, the meta-question, as it were, focused on the sorts of controls employers could use without transforming a contractor into an employee. . . . For example, "efforts to monitor, evaluate, and improve" a worker's performance were deemed compatible with independent contractor status. [*NAVL*, 869 F.2d at 599.] . . . "[E]vidence of unequal bargaining power" also did not establish "control." *Id.*

Gradually, however, a verbal formulation emerged that sought to identify the essential quantum of independence that separates a contractor from an employee, a process reflected in cases like *C.C. Eastern* [*Inc. v. NLRB*, 60 F.3d 855 (D.C. Cir. 1995)] and *NAVL* where we used words like control but struggled to articulate exactly what we meant by them. "Control," for instance, did not mean all kinds of controls, but only *certain* kinds. Even though we were sufficiently confident in our judgment that we reversed the Board, long portions of both opinions were dedicated to explaining why some controls were more equal than others. In other words, "control" was close to what we were trying to capture, but it wasn't a perfect concurrence. It was as if the sheet music just didn't quite match the tune.

In any event, the process that seems implicit in those cases became explicit—indeed, as explicit as words can be—in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002). In that case, both this court and the Board, while retaining all of the common law factors, "shift[ed the] emphasis" away from the unwieldy control inquiry in favor of a more accurate proxy: whether the "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'" (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522, 332 N.L.R.B. No. 144, at 6 (Dec. 19, 2000)). This subtle refinement was done at the Board's urging in light of a comment to the Restatement that explains a " 'full-time cook is regarded as a servant,'"—and not "an independent contractor"—" 'although it is understood that the employer will exercise no control over the cooking.'" *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY §220(1) cmt. d). Thus, while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism. *Id.*

Although using this "emphasis" does not make applying the test purely mechanical, the line drawing is easier, or at least this court and the Board in *Corporate Express* seem to have so hoped. . . . In *C.C. Eastern*, for instance, we decided drivers for a cartage company who owned their own tractors, signed an independent contractor agreement, "retain[ed] the rights, as independent entrepreneurs, to hire their own employees" and could "use their tractors during non-business hours," and who were "paid by the job" and received no employee benefits, should be characterized as independent contractors. We also noted the company did not require "specific work hours" or dress codes, nor did it subject workers to conventional employee discipline. Conversely, in *Corporate Express*, emphasizing entrepreneurialism, we straightforwardly concluded that where the owner-operators "were not permitted to employ others to do the Company's work or to use their own vehicles for other jobs," they "lacked all entrepreneurial opportunity and consequently functioned as employees rather than as independent contractors." . . .

The record here shares many of the same characteristics of entrepreneurial potential. In the underlying representation decision, the Regional Director found the contractors sign a Standard Contractor Operating Agreement that specifies the contractor is not an employee of FedEx "for any purpose" and confirms the "manner and means of reaching mutual business objectives" is within the contractor's discretion, and FedEx "may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance"; "contractors are not subject to reprimands or other discipline"; contractors must provide their own vehicles, although the vehicles must be compliant with government regulations and other safety requirements; and "contractors are responsible for all the costs associated

with operating and maintaining their vehicles." They may use the vehicles "for other commercial or personal purposes . . . so long as they remove or mask all FedEx Home logos and markings," and, even on this limited record, some do use them for personal uses like moving family members, and in the past "Alan Douglas[] used his FedEx truck for his 'Douglas Delivery' delivery service, in which he delivered items such as lawn mowers for a repair company." Contractors can independently incorporate, and at least two in Wilmington have done so. At least one contractor has negotiated with FedEx for higher fees.

Tellingly, contractors may contract to serve multiple routes or hire their own employees for their single routes; more than twenty-five percent of contractors have hired their own employees at some point. "The multiple route contractors have sole authority to hire and dismiss their drivers"; they are responsible for the "drivers' wages" and "all expenses associated with hiring drivers, such as the cost of training, physical exams, drug screening, employment taxes, and work accident insurance."… The drivers' pay and benefits, as well as responsibility for fuel costs and the like, are negotiated "between the contractors and their drivers." In addition, "both multiple and single route contractors may hire drivers" as "temporary" replacements on their own routes; though they can use FedEx's "Time Off Program" to find replacement drivers when they are ill or away, they need not use this program, and not all do. Thus, contrary to the dissent's depiction, contractors do not need to show up at work every day (or ever, for that matter); instead, at their discretion, they can take a day, a week, a month, or more off, so long as they hire another to be there. "FedEx [also] is not involved in a contractor's decision to hire or terminate a substitute driver, and contractors do not even have to tell FedEx [] they have hired a replacement driver, as long as the driver is 'qualified.'" "Contractors may also choose to hire helpers without notifying FedEx at all; at least six contractors in Wilmington have done so. This ability to hire "others to do the Company's work" is no small thing in evaluating "entrepreneurial opportunity." *Corp. Express.*

Another aspect of the Operating Agreement is significant, and is novel under our precedent. Contractors can assign at law their contractual rights to their routes, without FedEx's permission. The logical result is they can sell, trade, give, or even bequeath their routes, an unusual feature for an employer-employee relationship. In fact, the amount of consideration for the sale of a route is negotiated "strictly between the seller and the buyer," with no FedEx involvement at all other than the new route owner must also be "qualified" under the Operating Agreement, with "qualified" merely meaning the new owner of the route also satisfies Department of Transportation ("DOT") regulations. Although FedEx assigns routes without nominal charge, the record contains evidence, as the Regional Director expressly found, that at least two contractors were able to sell routes for a profit ranging from $3,000 to nearly $16,000.

In its argument to this court, the Board, echoed by the dissent, discounts this evidence of entrepreneurial opportunity by saying any so-called profit merely represents the value of the vehicles, which were sold along with the routes. But if a vehicle depreciates in value, it is not worth as much as it was before; that is tautological. Here, buyers paid more for a vehicle and route than just the depreciated value of the vehicle—in one instance more than $10,000 more. Therefore, as the Regional Director did, we find this value is profit. The *amount* of profit may be "murky," as it may be as high as $6,000 and $16,000 or as low as $3,000 or $11,000, respectively, but the profit is real. That this potential for profit exists is unsurprising: routes are geographically defined,

and they likely have value dependent on those geographic specifics which some contractors can better exploit than others. For example, as people move into an area, the ability to profit from that migration varies; some contractors using more efficient methods can continue to serve the entire route, while others cannot.

It is similarly confused to conclude FedEx gives away routes for free. A contractor agrees to provide a service in return for compensation, i.e., both sides give consideration. If a contractor does not do what she says, FedEx suffers damages, just as she does if FedEx does not pay what is owed. Servicing a route is not cheap; one needs a truck (which the contractor pays for) and a driver (which the contractor also pays for, either directly or in kind). To say this is giving away a route is to say when one hires a contractor to build a house, one is just giving away a construction opportunity. All of this evidence thus supports finding these contractors to be independent.

The Regional Director, however, thought FedEx's business model distinguishable from those where the Board had concluded the drivers were independent contractors. For example, FedEx requires: contractors to wear a recognizable uniform and conform to grooming standards; vehicles of particular color (white) and within a specific size range; and vehicles to display FedEx's logo in a way larger than that required by DOT regulations. The company insists drivers complete a driving course (or have a year of commercial driving experience, which need not be with FedEx) and be insured, and it "conducts two customer service rides per year" to audit performance. FedEx provides incentive pay (as well as fuel reimbursements in limited instances) and vehicle availability allotments, and requires contractors have a vehicle and driver available for deliveries Tuesday through Saturday. Moreover, FedEx can reconfigure routes if a contractor cannot provide adequate service, though the contractor has five days to prove otherwise, and is entitled to monetary compensation for the diminished value of the route. These aspects of FedEx's operation are distinguishable from the business models in [two other NLRB decisions.]

But those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship. In other words, the distinctions are significant but not sufficient. FedEx Home's business model is somewhat unique. The service is delivering small packages, mostly to residential customers. Unlike some trucking companies, its drivers are not delivering goods that FedEx sells or manufacturers, nor does FedEx move freight for a limited number of large clients. Instead, it is an intermediary between a diffuse group of senders and a broadly diverse group of recipients. With this model comes certain customer demands, including safety. . . . And once a driver wears FedEx's logo, FedEx has an interest in making sure her conduct reflects favorably on that logo, for instance by her being a safe and insured driver—which is required by DOT regulations in any event. *See Representation Decision*. . . .

Likewise, "an incentive system designed 'to ensure that the drivers' overall performance meets the company standards' . . . is fully consistent with an independent contractor relationship." *C.C. Eastern* (quoting *NAVL*. At the same time, a contractual willingness to share a small part of the risk—for instance, by providing fuel reimbursements when prices jump sharply, or by guaranteeing a certain minimum amount of income for making a vehicle available—does not an employee make.

The Regional Director also emphasized that these "contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages," and that few have seized any of the alleged entrepreneurial opportunities. While the essential nature of a worker's role is a legitimate consideration, it is not

determinative in the face of more compelling countervailing factors, otherwise companies like FedEx could never hire delivery drivers who are independent contractors, a consequence contrary to precedent. . . . And both the Board and this court have found the failure to take advantage of an opportunity is beside the point. Instead, "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor." *C.C. Eastern*.

III.

Our dissenting colleague reads our precedent differently than we do, and thus reaches a different conclusion. . . .

The dissent, for instance, argues that emphasizing entrepreneurialism has only truly begun with this case, and suggests we are doing so here for reasons apart from allegiance to precedent. Lest any be confused, we again quote *Corporate Express*: "[W]e uphold as reasonable the Board's decision, at the urging of the General Counsel, to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'" . . . We retained the common law test (as is required by the Court's decision in *United Insurance*), but merely "shift[ed our] emphasis to entrepreneurialism," using this "emphasis" to evaluate common law factors such as whether the contractor "supplies his own equipment," *id*. *Corporate Express* is thus doctrinally consistent with *United Insurance* and the Restatement. . . .

But even if *Corporate Express* never happened, the result here is unchanged. While on some points *C.C. Eastern* and *NAVL* are distinguishable . . . the overwhelming majority of factors favoring independent contractor status are the same, and, importantly, this case is particularly straightforward because only here can the contractors own and transfer the proprietary interest in their routes. Moreover, all contractors here own their vehicles, something that cannot be said in *NAVL*, where not even the *majority* did. True, these drivers—who need not be, and not always are, the same persons as the contractors—must wear uniforms and the like, but a rule based on concern for customer service does not create an employee relationship. . . .

IV.

We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status. The ability to operate multiple routes, hire additional drivers (including drivers who substitute for the contractor) and helpers, and to sell routes without permission, as well as the parties' intent expressed in the contract, augurs strongly in favor of independent contractor status. Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views. . . .

GARLAND, *Circuit Judge*, dissenting in part.

In *National Labor Relations Board v. United Insurance Co. of America*, the Supreme Court held that Congress intended "the Board and the courts" to "apply

the common-law agency test . . . in distinguishing an employee from an independent contractor" under the National Labor Relations Act (NLRA). 390 U.S. 254 (1968). In this case, the National Labor Relations Board (NLRB) applied that multi-factor test and concluded that FedEx Home Delivery's drivers are the company's employees. My colleagues disagree, concluding that the drivers are independent contractors.

This is not merely a factual dispute. Underlying my colleagues' conclusion is their view that the common-law test has gradually evolved until one factor—"whether the position presents the opportunities and risks inherent in entrepreneurialism"—has become the focus of the test. Moreover, in their view, this factor can be satisfied by showing a few examples, or even a single instance, of a driver seizing an entrepreneurial opportunity.

. . . I detect no such evolution. To the contrary, the Board and the courts have continued to follow the Supreme Court's injunction that "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *United Ins.* The common-law test may well be "unwieldy," but a court of appeals may not " 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *United Ins.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). While the NLRB may have authority to alter the focus of the common-law test, this court does not. . . . Accordingly, on the existing record, I cannot join in condemning the Board's determination. . . .

I.

A.

[The dissent recounted the common-law agency test and the Board's application of it over the years, noting that, in doing so, the Board has looked to the Restatement (Second) of Agency for the relevant factors.] . .

B.

My colleagues contend that "[g]radually," both this Court and the Board shifted away from "the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.' " . . . .

The cases, however, do not evidence this gradual evolution to a test that emphasizes entrepreneurial opportunity. [While *NAVL* and *C.C. Eastern* listed entrepreneurial opportunity as a relevant factor, even though "it is not expressly mentioned in either *United Insurance* or the Restatement (or in any comment to the Restatement. . . .)," both decisions "explicitly stated that entrepreneurial opportunity was only one of multiple factors to consider—and not the most important one."]

My colleagues cite only one case from this (or any) Circuit, our 2002 opinion in *Corporate Express*, for the proposition that entrepreneurial opportunity has "explicit[ly]" become the emphasis of the independent contractor test. . . . . But *Corporate Express* did not purport to overrule Supreme Court, Circuit, and Board precedent. Indeed, in

affirming as reasonable the *Board's* determination that the owner-operator drivers in that case were *not* independent contractors, the court not only agreed that they lacked entrepreneurial opportunity, but also acknowledged that the Board may have correctly determined that the employer controlled the way in which they performed their jobs. *Corporate Express.* Hence, *Corporate Express* can also be read as merely holding that the Board was reasonable in determining that entrepreneurial opportunity tipped the balance in *that* case—a logical result given that the court thought the vector of the other common-law factors somewhat unclear, while finding that the "owner-operators lacked *all* entrepreneurial opportunity" (emphasis added). . . .

There was certainly nothing in the NLRB's opinion in *Corporate Express* to suggest that entrepreneurial opportunity had become the focus of the Board's own analysis. To the contrary, the Board simply followed its traditional approach of examining the common-law factors—including, inter alia, both entrepreneurial opportunity and employer control. After doing so, it concluded that, "*weighing all of the incidents of their relationship* with the Respondent, we find that the owner-operators are employees and not independent contractors" (emphasis added).

. . . . Until the Supreme Court or the Board tells us differently, we must continue to apply the multi-factor common-law test as set forth by the Supreme Court and applied by the Board.

II . . . .

A.

In a lengthy and considered opinion, the [NLRB's] Regional Director found the following facts to favor a determination that FedEx Home Delivery's drivers, whom the company calls "contractors," were employees:

> [A]ll the FedEx Home contractors perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages. . . . [A]ll contractors must do business in the name of FedEx Home[,] . . . wear[] FedEx Home-approved uniforms and badges, . . . [and] operate vehicles that must meet FedEx Home specifications and uniformly display the FedEx Home name, logo, and colors. . . . No prior delivery training or experience is required, and FedEx Home will train those with no experience. . . .
>
> . . . [C]ontractors are not permitted to use their vehicles for other purposes while providing service for FedEx Home. The contractors have a contractual right to use their FedEx Home trucks in business activity outside their relationship with FedEx Home during off-hours, provided they remove all FedEx Home markings, but only one former multiple route contractor . . . and no current contractors at either Wilmington terminal have ever done so. . . .
>
> . . . FedEx Home exercises substantial control over all the contractors' performance of their functions. FedEx Home offers what is essentially a take-it-or-leave-it agreement. . . . [It] retains the right to reconfigure the service area unilaterally. All contractors must furnish a FedEx Home-approved vehicle and FedEx Home-approved driver daily from Tuesday through Saturday; they do not have discretion not to provide delivery service on a given day. While all contractors control their starting times and take breaks when they wish, their control over their work schedule is by the requirement that all packages be delivered on the day of assignment. . . .

> . . . FedEx Home provides support to all its contractors in various ways that are inconsistent with independent contractor status. . . . FedEx Home provides extensive support to contractors by offering the Business Support Package and arranging for the required insurance, thus providing an array of required goods and services that would be far more difficult for contractors to arrange on their own. . . .
>
> FedEx Home also offers to arrange for approved substitute drivers for its contractors by virtue of the Time Off Program. FedEx Home provides contractors who maintain sufficient vehicle maintenance accounts with $100 per accounting period to help defray repair costs[, and] requires contractors to permit FedEx Home to pay certain vehicle-related taxes and fees on their behalf and to have the payments deducted from their settlement.

. . . My colleagues nonetheless reject the import of many of these facts, arguing that they merely "reflect differences in the type of service the contractors are providing rather than differences in the employment relationship." In particular, the court rejects the import of the following requirements imposed by FedEx: that drivers wear a recognizable uniform; that vehicles be of a particular color and size range; that trucks display the FedEx logo in a size larger than Department of Transportation regulations require; that drivers complete a driving course if they do not have prior training; that drivers submit to two customer service rides per year to audit their performance; and that a truck and driver be available for deliveries every Tuesday through Saturday. The courts and the Board, however, have repeatedly regarded the presence or absence of these very factors as important in determining whether a worker is an employee or independent contractor.

One factor that the Regional Director emphasized was that the drivers "perform a function that is a regular and essential part of FedEx Home's normal operations, the delivery of packages" to homes. Although my colleagues acknowledge that "the essential nature of a worker's role is a legitimate consideration," they minimize it as "not determinative." But that is true of every factor in the common-law test. Moreover, the cases have repeatedly cited this particular factor in concluding that workers are employees. . . .

B.

In accord with court and agency precedent, the Regional Director also considered whether FedEx Home Delivery's drivers have significant entrepreneurial opportunity for gain or loss. For the following reasons, she concluded that the evidence of entrepreneurial opportunity was weak:

> The contractors' compensation package also supports employee status. With [one] exception . . ., FedEx Home unilaterally establishes the rates of compensation for all contractors. . . . [T]here is little room for the contractors to influence their income through their own efforts or ingenuity, as their terminal manager determines, for the most part, how many deliveries they will make each day. . . . A contractor's territory may be unilaterally reconfigured by FedEx Home. FedEx Home tries to insulate its contractors from loss to some degree by means of the vehicle availability payment, which they receive just for showing up, and the temporary core zone density payment, both of which payments guarantee contractors an income level predetermined by FedEx Home, irrespective of