Work Law

Cases and Materials

Fourth Edition

2023 Supplement

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Update Memorandum

To: Faculty Adopters, WORK LAW: CASES AND MATERIALS (4th edition, 2020)

From: Marion G. Crain, Pauline T. Kim, Michael Selmi, & Brishen Rogers

Re: Summer 2023 Update

Date: August 9, 2023

There have been a few important doctrinal developments over the last year, which we summarize in this memorandum. This is meant as an addition to the 2022 supplement. You are welcome to distribute this memorandum to students if you wish, or to use it as background for your own teaching. As always, please let us know if you have any questions or comments.

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Chapter 1 – Origins

C. The New Deal Labor Legislation

1. The Labor Laws – NLRA Remedies (materials on page 31 of 4th ed.)

The NLRB recently clarified the scope of its power to order make-whole relief. In typical cases, offending employers have been required to make wrongfully terminated employees whole through backpay and reinstatement. But in *Thryv, Inc*., 372 N.L.R.B. No. 22 (2022), the Board made clear that its standard remedy for make-whole relief should compensate employees for all direct *or foreseeable* pecuniary harms they suffered as a result of the employer's unfair labor practices. This additional consideration of consequential damages was thought to more fully account for the harms incurred by the victims of unfair labor practices and restore them to where they would have been but for the unlawful conduct. The Board further instructed that such relief must be specifically calculated: the General Counsel must present evidence "demonstrating the

amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice. The respondent, in turn, will have the opportunity to present evidence challenging the amount of money claimed, argue that the harm was not direct or foreseeable, or that it would have occurred regardless of the unfair labor practice." While the Board did not detail the specific categories of such consequential damages, employers who fire employees in violation of the Act may now be liable for employee job search and interim employment expenses, out-of-pocket medical expenses, interest or late fees on credit cards incurred to cover living expenses, penalties incurred by having to prematurely withdraw money from a retirement account to cover living expense, and loss of a car or a home because of an inability to keep up with loan payments. *See id*.; Gen. Couns. Memo. GC 21-07 (Sept. 15, 2021) (detailing the types of consequential damages suffered by victims of unlawful conduct); Gen. Couns. Memo. GC 21-06 (Sept. 8, 2021) (same).

Further, in *Noah's Ark Processors, LLC*, 372 N.L.R.B. No. 80 (2023), the Board reaffirmed its power to impose a wide range of potential remedies in cases involving parties who "have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct." It then provided a non-exhaustive list of such remedies, including an explanation of rights, a reading of rights aloud to the employees, an explanation of rights mailing, the presence of managers or supervisors at the reading of rights, a requirement that responsible representatives of the offending party sign the Board's notice, the publication of notices and explanations-of-rights in local publications, an extended posting of notices and explanations of rights, and visitation by the Board to inspect bulletin boards to ensure that the required postings are in place.

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Chapter 6 – Employee Mobility

A. **Covenants Not to Compete** (materials begin on p. 289 of 4th ed.)

In January 2023, the Federal Trade Commission ("FTC") proposed a rule that would effectively ban noncompete agreements (and may, if adopted in its proposed form, also reach certain non-disclosure and non-solicitation agreements). If finalized as originally proposed, the Rule would effectively adopt California's long-standing ban on non-compete agreements while permitting, as California does, such agreements in the context of the sale of a business. The proposed Rule would also require employers to rescind existing agreements within 180 days and require employers to send notices to affected employees. The proposed rule is available at https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

The FTC received more than 27,000 comments and it appears that a final Rule will not be voted on until sometime during the Spring of 2024. Whatever Rule the FTC adopts is almost certain to be subjected to extensive litigation—and the way such things work these days, it is likely to be enjoined somewhere rather quickly. The FTC has asserted the authority to ban such agreements because they are anti-competitive.

There have also been some developments at the state level (the proposed FTC Rule would effectively pre-empt state laws), including in Washington D.C. (a non-state but relevant) where a ban on most noncompete agreements went into effect in October 2022. The DC law excludes what are defined as highly compensated employees – those making more than $150,000 unless they are a medical specialist where the threshold is $250,000. The DC law may provide a window into a possible ultimate final Rule from the FTC. When the DC law was originally passed in 2020, it banned all noncompete agreements but the business community's objections led to an amendment to provide the highly compensated employee exemptions (for some reason babysitters are also exempt from the ban).

In still another effort to limit the widespread use of noncompetes, the NLRB's General Counsel issued a memorandum taking the position that the proffer, maintenance, and enforcement of non-compete agreements that prohibit employees from accepting certain types of jobs or operating certain types of businesses after the end of their employment can violate Section 8(a)(1) of the Act. Gen. Couns. Memo. GC 23-08 (May 30, 2023). Her memo reasoned that non-compete agreements interfere with employees' efforts to improve working conditions by blocking their ability to concertedly resign, carry out concerted threats to resign, concertedly seek or accept employment with local competitors to obtain better working conditions, solicit coworkers to work for local competitors as part of a broader course of concerted activity, or to seek employment in order to engage in concerted activity elsewhere. The Board has yet to weigh in on the General Counsel's approach to non-compete agreements.

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Chapter 8 – Employee Voice

E. Collective Voice Protections – the NLRA

2. NLRA Section 7 Rights in the Non-Union Workplace (materials begin on p. 518 of 4th ed.)

Please OMIT the material in the Case Supplement for Note 3, page 536 (on pages 20-21 of the Case Supplement). Instead use the following text:

In *General Motors, LLC*, 369 N.L.R.B. No. 127 (2020), the Trump Board established a new standard to assess the impact of offensive speech such as profanity or abusive words, uttered in the context of otherwise protected concerted activity. In 2023, the Biden Board overruled *General Motors*, rejecting application of the *Wright Line* test and returning to its setting-specific standards for determining whether employers have unlawfully disciplined employees engaged in abusive conduct in connection with protected concerted activity. *See Lion Elastomers, LLC*, 372 N.L.R.B. No. 83 (2023). In the context of concerted activity on social media posts, this means a return to the totality-of-the-circumstances test applied in *Triple Play* and earlier cases.

3. Employer Policies Restricting Collective Action (materials begin on p. 537 of 4th ed.)

In August 2023, the Biden Board overturned the Trump Board's *Boeing* standard regarding employer work rules, finding that it gave too little weight to the chilling effect that overbroad work rules could have on employees' exercise of section 7 rights. In *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (2023), the Board rejected *Boeing's* categorical approach to work rules, and adopted the following test, which it characterized as a test that "builds on and revises" the *Lutheran Heritage Village* test. First, the General Counsel must establish that a challenged rule has a reasonable tendency to chill employees from exercising section 7 rights. If the General Counsel does so, the rule is presumptively unlawful. The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that a more narrowly tailored rule would not advance that interest. The Board explained:

> To begin, the current standard fails to account for the economic dependency of employees on their employers. Because employees are typically (and understandably) anxious to avoid discharge or discipline, they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity. In turn, *Boeing* gives too little weight to the burden a work rule could impose on employees' Section 7 rights. At the same time, *Boeing's* purported balancing test gives too much weight to employer interests. Crucially, *Boeing*

> also condones overbroad work rules by not requiring the party drafting the work rules—the employer—to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights.
>
> The standard we adopt today remedies these fundamental defects. We adopt a modified version of the basic framework set forth in *Lutheran Heritage*, which recognized that overbroad workplace rules and polices may chill employees in the exercise of their Section 7 rights and properly focused the Board's inquiry on NLRA protected rights. . . . However, although *Lutheran Heritage* implicitly allowed the Board to evaluate employer interests when considering whether a particular rule was unlawfully overbroad, the standard itself did not clearly address how employer interests factored into the Board's analysis. The modified standard we adopt today makes explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests. . . . Because we overrule *Boeing*, *LA Specialty Produce*, and the work rules cases relying on them, including those that placed rules into an "always lawful" category based simply on their subject matter, we reject Boeing's categorical approach, instead returning to a particularized analysis of specific rules, their language, and the employer interests actually invoked to justify them. As under *Lutheran Heritage*, our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

Id. at 1-2.

Would the work rules discussed on page 539 of the text be permissible under the new approach announced in *Stericycle*?

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Chapter 9 – Employment Discrimination – Religious Accommodation

The Fourth edition contains limited coverage of the prohibition on religious discrimination and the accommodation requirement that religious practices may require of employers. However, the Supreme Court decided a case last Term that may warrant additional coverage or at least mention, particularly if you plan to cover the materials on the ADA in Part F.

Title VII prohibits discrimination because of religion, and the EEOC interpreted that to mean that employers are required to accommodate the reasonable religious needs of employees whenever that accommodation would not work an "undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(a)(2) (1967); 29 C.F.R. § 1605.1 (1968). In 1972, Congress adopted that language, providing that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employees' religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1970 ed., Supp. II).

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court ruled that Title VII did not require a collectively bargained seniority system to yield to a junior employee's religious practices. *Id*. at 83 & n. 14. In that case, the plaintiff's religious faith required him to observe the Sabbath by not working from sunset on Friday until sunset on Saturday, but this conflicted with his work schedule and he lacked sufficient seniority under the collective bargaining agreement to avoid work during the Sabbath. Noting that Title VII expressly provides special protection for "bona fide seniority . . . system[s]," *id.* at 81-82, the Court concluded that the statute does not require an accommodation that involuntarily deprives other employees of seniority rights. *Id.* at 80. Since Hardison's co-workers were not willing to take his shift voluntarily, the Court found that compelling them to do so would have violated their seniority rights. And leaving Hardison's department short-handed would have adversely affected TWA's essential mission. *Id.* Although the Court briefly considered other accommodations, it found them not feasible, although it did not determine at what point the increased costs associated with them might rise to level of an undue hardship. Instead, it concluded simply that "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Id. at 84. Lower courts subsequently took this statement literally and tended to deny even requests for minor accommodations.

In *Groff v. DeJoy,* 143 S. Ct. 2279 (2023), a unanimous Court reaffirmed its ruling in *Hardison* but clarified the standard for a showing of undue hardship, rejecting the *de minimis* cost standard and offering a more flexible contextual standard that should make accommodations easier to obtain. Gerald Groff is an Evangelical Christian who believes that Sunday should be

devoted to worship and rest. His employer, the US Postal Service, entered into an agreement with Amazon in which the US Postal Service undertook to facilitate deliveries on Sundays, which in turn led to a Memorandum of Understanding (MOU) between the US Postal Service and the union representing Groff, the National Rural Letter Carriers' Association. The MOU established how Sunday and holiday parcel delivery service would be handled. Groff fell into a category of workers required to perform work on Sundays on a rotating basis. When Groff refused, the US Postal Service redistributed Groff's work to other employees, some of whom complained and at least one of whom filed a grievance under the collective bargaining agreement. *Id.* at n.1. The Postal Service progressively disciplined Groff for refusing to work on Sundays and he eventually resigned.

The Court reviewed its decision in *Hardison*, including the language suggesting that anything more than a *de minimis* cost would relieve the employer of the obligation to accommodate the employee's religious needs. Brushing aside this earlier statement, the Court clarified that "undue hardship" requires an employer to show that "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." This fact-specific inquiry should take into account "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'" (quoting Brief for the United States). Coworker impacts that affect the conduct of the business are relevant, although a coworker's dislike of or animosity toward a particular religion or religious practices cannot in and of itself be considered "undue." Finally, the Court specifically rejected Groff's suggestion to incorporate more plaintiff-friendly case law under the ADA, which also imposes a reasonable accommodation standard subject to an undue hardship defense. The opinion is available at https://www.supremecourt.gov/opinions/22pdf/22-174_k536.pdf

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G. Contemporary Workplace Issues

2. Diversity in the Workplace – Affirmative Action Cases (materials begin on p. 667 of 4th ed.)

Last Term, the Supreme Court invalidated the race-conscious admissions programs at the University of North Carolina and Harvard University (whether the Court banned the use of race in admissions is a more difficult question). The opinion in the consolidated cases is available at https://www.supremecourt.gov/opinions/22pdf/20-1199_l6gn.pdf. Whether and how the opinion might affect the workplace is a matter primarily for speculation. The Court's opinion turned on the Equal Protection Clause, which applies only to public employers and Title VI, which, for the

most part, does not reach private employers (Title VI applies to entities that receive federal funds). That said, there have already been some developments that would suggest opponents of affirmative action are turning to workplaces and, in particular, efforts that fall under the broad umbrella of Diversity, Equity and Inclusion. For example, following the Supreme Court's decision, thirteen state attorneys general wrote to executives at 100 of the largest United States companies warning them about using race in hiring or other aspects of employment. https://www.latimes.com/world-nation/story/2023-07-15/gop-attorneys-general-shift-the-battle-over-affirmative-action-to-the-workplace Twenty Democratic Attorneys General then sent a rebuttal letter to the same executives. https://joshbersin.com/wp-content/uploads/2023/07/dem-letter2.pdf.

For a discussion of the possible implications of the Supreme Court's affirmative action decision in the workplace, see this discussion with co-author of this casebook Pauline Kim https://www.vox.com/politics/2023/7/9/23787408/affirmative-action-in-the-workplace-diversity-equity-inclusion-in-hiring

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Chapter 13 – Arbitration of Workplace Disputes

B. The Uses and Limits of Mandatory Employment Arbitration Agreements

2. State Contract Law Principles (materials begin on page 909 of 4th ed.)

In Note 8, p. 924, the text notes that California passed legislation in 2019 (AB 51) purporting to prohibit employers from requiring job applicants or workers to sign arbitration agreements as a condition of employment. After lengthy litigation, the Ninth Circuit struck the statute down as preempted by the FAA, reasoning that even though the statute did not specifically bar arbitration agreements, the law had the effect of imposing severe burdens on arbitration agreements that do not apply to contracts generally. *Chamber of Commerce v. Bonta*, 62 F.4th 473 (9th Cir. 2023).