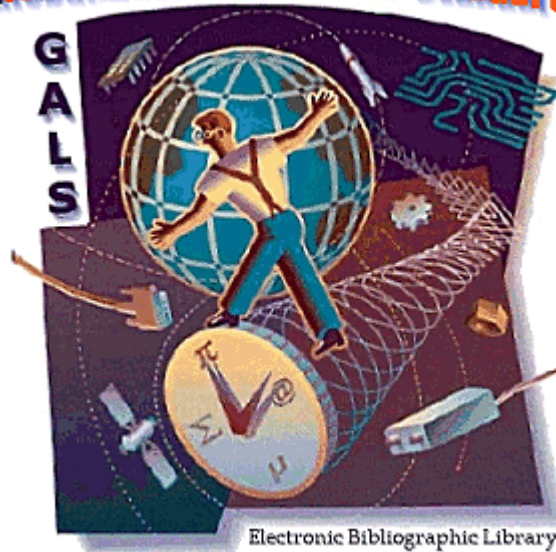


Globalization and Labor Standards



GALS Newsletter

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Short Takes

**Brief updates on labor law developments
in different parts of the world**

**The Constitution and Collective Bargaining in the United States: An Analysis of
Labor Relations in Wisconsin**

Recent legislative attacks on unions in Wisconsin and four other states provide a rare illustration of the value to employees of National Labor Relations Act (NLRA) protection and

preemption. Under the U.S. Constitution's Supremacy Clause, state laws that conflict with federal law are preempted—meaning they are unconstitutional. Thus state laws that conflict with the NLRA, which affords certain employees the right to form unions and collectively bargain, are preempted. Employers often invoke NLRA preemption to thwart union-friendly state laws, preferring the NLRA's protracted administrative hearings and more limited remedies for employer abuses. Recently, however, NLRA preemption has become a more attractive tool to employees, because a deluge of pro-business funding has yielded a bumper crop of anti-union state laws. Specifically, two state legislative actions illustrate the value of NLRA preemption to employees and the harm that results in its absence.

Lack of NLRA Protection and Preemption in Wisconsin

The NLRA exempts state public employees from its protection, leaving their collective bargaining rights to the whims of state governments. This lack of protection has prompted the recently-elected Republican Governor Scott Walker and Republican majority in the Wisconsin state legislature to propose legislation eliminating the state-created collective bargaining rights of most public employees. Currently, only five other states lack collective bargaining rights for public employees.

Walker and his fellow Republicans justify the proposed legislation on the ground that stripping public employees of collective bargaining rights is necessary to prevent future budget deficits. Yet, this justification is belied by the Governors' bad faith bargaining, the proposed legislation's under-inclusiveness, and the Republicans' fiscal irresponsibility. First, Governor Walker has publicly refused to negotiate with the affected unions and has begun sending layoff notices to public school teachers. He has also rejected the unions' concessions to his demands for reduced pension and healthcare benefits, as well as a compromise suggested by a member of his own party that would suspend collective bargaining rights for only two years. Second, the legislation is under-inclusive because it exempts the public employee unions that donated to Walker's gubernatorial campaign from the ban on collective bargaining. Finally, Wisconsin Republicans have refused to raise revenues, even as they support a privatization measure that could raise costs in the future. The Republicans have rejected two viable alternatives for raising revenues: increased taxes and federal aid. Simultaneously, they have buried within the legislation a provision that allows the state, at its discretion, to privatize or lease any state-owned heating, cooling, and electricity facility.

In short, as President Obama noted recently, Wisconsin's proposed legislation is more an "assault on unions" than a rational measure to prevent a future budget deficit.¹ Recognizing that Wisconsin's legislation will gut unions, which provide a crucial Democratic voting bloc, all fourteen Democratic state senators fled Wisconsin to avoid a vote. Since February 15, 2011, protestors have gathered at the capital to oppose the legislation, which is also viewed unfavorably by more than 60% of Americans. The battle over the future of collective bargaining in Wisconsin has inspired similar actions by Democratic minorities and protestors to oppose legislation in Indiana, Ohio, and New Jersey.

NLRA Preemption of Four States' Constitutional Amendments

While the absence of NLRA protection leaves the fate of public employees in Wisconsin up in the air, employees' right to unionize in Arizona, South Carolina, South Dakota, and Utah is

¹http://news.yahoo.com/s/dailycaller/20110217/pl_dailycaller/obamacallsscottwalkersspendingplanforwisconsinanassaultonunions_1

more likely to be protected. On January 14, 2011, the National Labor Relations Board (NLRB) announced that it may seek to enjoin these states' constitutional amendments that limit employees' methods for choosing a union. The NLRB stated that it would refrain from such costly litigation if the states stipulated to the amendments' preemption by federal law. All four states have refused to do so.

The Supreme Court has interpreted the NLRA to provide two methods of choosing a union: (1) a secret election in which a majority of voters favor the union; or (2) employer voluntary recognition based on evidence that a majority of employees support the union, often referred to as "card check." Because federal law provides these two methods for choosing a union, state laws that eliminate either of these methods are preempted.

The four state amendments, passed in November 2010, are deceptively phrased so as to appear to preserve, rather than limit, the methods of choosing a union. Arizona's ballot initiative, for example, amends the state constitution to declare that the "right to vote by secret ballot . . . shall be guaranteed where local, state or federal law permits or requires an election, designation or authorization for employee representation."²

As the NLRB explains, these amendments conflict with federal law because they eliminate one of the methods by which employees can choose a union – card check – by instead guaranteeing a secret election where state or local law permits one. The states respond that there is no conflict because the amendments only provide for a secret election *if the other method for choosing a union is not available*, that is, if an employer refuses to voluntarily recognize a union through card check. In short, the states contend that the amendments are simply redundant to the federal law.

The states' argument is belied by the donor profiles of the ballot initiatives that passed these amendments, which reveal that the initiatives were funded by anti-union organizations and opposed by unions and Democrats. Furthermore, the states' efforts to avoid preemption are unlikely to prevail given that the Supreme Court recently reaffirmed the broad scope of federal labor law preemption in *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008). The states' seemingly deliberate obtuseness may nonetheless serve the desired purpose of forcing the NLRB to engage in wasteful litigation, thus diverting NLRB resources from other worthwhile endeavors at the same time the federal Congress seeks to cut the agency's budget.

Employment Discrimination

Katerina Linos, "Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union," 35 Yale J. Int'l L. 115 (2010).

This article argues that the United States' race-blindness frame, which holds that *no* socially-relevant attributes are intrinsically connected to race, and the European Union's sex-consciousness frame, which posits that *certain* socially-relevant attributes *are* intrinsically connected to sex, have resulted in two major differences in these jurisdictions' employment

² <http://www.azsos.gov/election/2010/Info/PubPamphlet/english/Prop113.htm>

discrimination jurisprudence. For example, in the EU, statistics alone can establish that a facially-neutral employment practice is discriminatory, whereas, in the US, plaintiffs must also show a causal connection between the challenged employment practice and the statistical disparity. Further, in the EU, courts have held that classifications based on traits closely linked to a protected status (such as pregnancy) are *not* facially neutral because *only* members of that protected class (women) have that trait, whereas in the US such classifications *are* facially neutral because *some* members of that protected class (non-pregnant women) lack the trait. Although US legislation has abrogated these holdings regarding pregnancy, they remain valid for classifications based on traits other than pregnancy. As a result of these and other differences, US plaintiffs have fewer cognizable discrimination claims based on protected status than EU plaintiffs. Women seeking equal pay between male- and female-dominated professions, women seeking expansive childcare-related accommodations, and immigrants alleging discrimination based on citizenship are more successful under EU law. However, the EU has also extended broader defenses against discrimination claims than are available in the US. Thus, women seeking employment in male-dominated fields, men seeking to prioritize childcare, older persons seeking to work past traditional retirement ages, and physically disabled persons seeking physically demanding jobs, are all better served under US law.

Westlaw:

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Domestic Work

Labadie-Jackson, Glenda, “Reflections on Domestic Work and the Feminization of Migration,” *Campbell Law Review* v. 31 no1 (Fall 2008) p. 67-90

Abstract:

This article begins by describing the modern trend whereby women in countries that lack policies to help facilitate a work-life balance pass household responsibilities onto domestic workers. Domestic workers, in turn, pass their own domestic and reproductive labor onto close female relatives. The author notes that due to a seemingly universal view of domestic labor as feminine, men are largely missing from this “global care chain.” The article then summarizes how modern globalization has fueled a recent surge in immigration, particularly female labor migrants. In analyzing conditions of domestic work, the article depicts some common traits: low pay, low hours, physical and psychological abuse, isolation, and job insecurity. Reasons for such poor labor conditions, according to the author, include: perceptions of domestic work as a “private matter,” casual employment conditions, and failure to regulate domestic labor on a domestic and international level. The article concludes by stressing the need to implement

current international worker protections, as well as develop domestic protections that would cover domestic workers.

Subjects: Employment Law, Immigration, Industry-Specific Case Studies, Women's Rights

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Industry-Specific Case Studies

Bomba, Margaret, "Exploring Legal Frameworks to Mitigate the Negative Effects of International Health Worker Migration," *Boston University Law Review* v. 89 no3 (June, 2009) p. 1103-1135

Abstract:

This article focuses on the problem of health workers migrating en masse from the developing world to wealthy countries. In Part I, the author describes the problem and presents reasons why health workers are migrating at such an alarming rate. In Part II, the article details the debate about global health-worker migration between (1) those who wish to keep things as they are, (2) those who recognize a problem, yet advocate against control over health worker migration, and (3) those who recognize a problem and advocate for regulation of health-worker migration. Part III examines the evolving framework of immigration laws in the U.S. as they relate to doctors, in particular. The laws initially required foreign doctors to return home after training in the U.S., but now create possibilities for those doctors to remain in the U.S. Part IV then examines a number of national and international attempts at curbing Global North-to-South health-worker migration. Finally, Part V examines the efficacy of different solutions and concludes that codes of ethics for international recruitment of health workers, as well as bilateral and multilateral international agreements, are the most promising.

Subjects: Codes of Conduct, Immigration, Industry-Specific Case Studies

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Conference Announcement

CALL FOR PAPERS/EXTENDED DEADLINE

7th ILERA (former IIRA) Regional Congress of the Americas 5th Brazilian Conference of Labor and Employment Relations Work in the Americas: Challenges and Opportunities São Paulo, Brazil - August 22-25, 2011

Extended deadline for submission of abstracts: March 15th, 2011 (up to 1,000 words)

Papers can be submitted in any of four tracks:

Track 1: Informal work, contingent work, and other forms of non-regular work

Track 2: Technological frontiers of the Economy and labor relations

Track 3: New actors and new flows in international trade and labor relations

Track 4: Labor and employment relations system - the role of social actors and of social dialogue in labor market regulation

Papers from all continents that relate to the track themes are very welcome See directions at www.irca2011.com.br<<http://www.irca2011.com.br><<http://www.irca2011.com.br>/>>

Links to Related Projects

The International Labour Organization's (ILO) Informal Economy Resource Database:
<http://www.ilo.org/dyn/infoecon/iebrowse.home>

The Informal Economy Resource Database contains a myriad of ILO activities, research or tools directly or indirectly related to the informal economy and decent work. This source is a "living" and dynamic inventory of information on labour issues relating to the informal economy, such as access to finance, data and statistics, employment, gender equality, policy, rights, social protection and working conditions. It is a valuable tool for anyone undertaking research or working on labour issues and the informal economy.

International Labour Organization's (ILO) Conditions of Work and Employment Laws
<http://www.ilo.org/travdatabase>

The Program maintains a Database of Conditions of Work and Employment Laws, which provides information on laws from around the world. The database covers measures on minimum wages, working hours and holidays, and maternity protection and provides information on around 130 countries from all regions.

Asian Law Center: <http://www.law.unimelb.edu.au/alc/bibliography/browse.asp?s=45>

The Asian Law Centre, an initiative of the University of Melbourne Law School, devoted to the

development of understanding of Asian law, offers an extensive bibliography of Asian labor law articles and reports.

Centre for Employment and Labour Relations Law: <http://www.law.unimelb.edu.au/celr/>

Centre for Employment and Labour Relations Law is a research and teaching center devoted to the development of an understanding of labor law at the University of Melbourne. The Center's website describes the activities of the Center and contains links to several databases that are of interest to labor law scholars and practitioners. For example, the Center's Work Relations Law Project contains extensive information about Australian labor law that can be accessed directly at <http://www.austlii.edu.au/au/special/industrial/>.

ETUI Labourline: <http://www.labourline.org/Etui>

ETUI Labourline is a database of European labor information resources covering European, international and comparative aspects of industrial relations and health and safety issues, developed by the Documentation Centres of the European Trade Union Institute and the European Trade Union Institute for Health and Safety(Brussels). The consolidated bibliographic database contains more than 20,000 references to documents focusing on industrial relations, and more than 15,000 references to documents on health and safety issues.

Globalization Bulletin: <http://www.rci.rutgers.edu/~dbensman/bulletin.html>

The Globalization Bulletin is a weekly e-newsletter providing linked access to the latest articles, research, and web resources on a range of global labor issues—ranging from union organizing and labor markets to immigrations and trade agreements. The Bulletin is produced by the Globalization Task Force of the New Jersey Division of the United Nations Association-USA and the Department of Labor Studies and Employment Relations School of Management and Labor Relations, Rutgers University. To subscribe, email David Bensman at dbensman@smlr.rutgers.edu.

International Social Security and Workers Compensation Journal:

<http://www.business.curtin.edu.au/business/research/journals/international-journal-of-social-security-and-workers-compensation>

The International Social Security and Workers Compensation Journal is an on-line journal that focuses on international scholarship in the areas of social security, workers compensation, and occupational health, and disability support. It is published by the School of Business Law, Curtin Institute of Technology in Perth Australia. The IJSSWC contains inter-disciplinary articles in fields such as law, occupational medicine, health economics, and disability studies.

Labor and Global Change Database: <http://www.ilir.umich.edu/lagn/>

The Labor and Global Change Database provides bibliographies, citation information and (where available) web links to the full text of research exploring connections between labor and globalization. The database aims to provide researchers with an easy means to make the results of their work widely available to other scholars and the interested public. The database is run by

and continually updated by the Labor and Global Change Program of the University of Michigan.

LabourWeb: <http://www.lex.unict.it/eurolabor/en/>

The Labour Web is a comprehensive documentation center for information about European labor law, social law, industrial relations and the welfare state. It contains up-to-date versions of European Union law, directives, pending directives, EU news, press releases, economic statistics and decisions of the European Court of Justice. It also contains a Working Papers series and subject matter reports (dossiers) on issues concerning European integration. The site also provides links to other websites that contain working papers, statistical reports, and other information about social, economic and industrial relations affairs in the European context. It is run by the Massimo D'Antona Centre for the Study of European Labour Law, at the Faculty of Law of the University of Catania.

The Marco Biagi Centre for International and Comparative Studies:

<http://www.csmb.unimo.it>

The Marco Biagi Centre for International and Comparative Studies at the University of Modena and Reggio Emilia, Italy, functions as policy resource center on comparative labor issues. Besides publishing books and law journals, the Center provides a clearinghouse of international law journals, including the International Journal of Comparative Labour Law and Industrial Relations (<http://www.csmb.unimo.it/journal.html>). Currently only in Italian, the Center's website will soon offer an English version.

Trade Unions and Labor Relations Database: <http://www.polwiss.fu-berlin.de/tu/english/>

The database, produced by the Institute of Labor Relations of the Otto-Suhr-Institute of the Freie University of Berlin, contains almost 7,000 citations of books, articles, working papers, brochures, proceedings etc. The bulk of the citations address aspects of labor relations in Germany, but there is a substantial body of literature in the database covering the EU and Eastern Europe.

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