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The Union As Broker of Employment Rights

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8. The union as broker of employment rights

Stewart J. Schwab

Most employment-law rights are mandatory. Individual workers cannot decline the protections the law gives them. For example, a nonexempt worker must get at least \$7.25 per hour and time-and-a-half for overtime, even if she would agree to less. A worker's pension must vest within five years. If she is injured on the job, a worker is entitled to compensation through a state system and cannot opt out in advance.

Interestingly, in these examples and others like them, the law forces its protection only on nonunionized workers. Unions in a collective bargaining contract can bargain away these rights, acting as broker in return for something more valuable to their workers.

This chapter examines the choice between waivable and mandatory employee rights and, in particular, whether some rights should be mandatory for individual workers but subject to negotiation by labor unions. Section I sets the stage with two examples. Section II explores why most employee rights are mandatory. Section III asks whether unions should be allowed to waive (or broker, to use a more palatable term) employee rights even when individuals cannot. Section IV documents the large degree to which current employment law already has this feature of mandatory individual rights that unions can broker. Section V then explores whether unions and society should welcome the role of union as broker.

I. OPENING EXAMPLES OF UNION AS BROKER

Let me give two contrasting examples of union as broker to set the stage. The first example clearly shows the value of union waiver in some settings. The second example is the arbitral versus judicial forum, which is a more problematic use of union waiver.

Example 1: Union waiver of the eight-hour day for miners. Consider the gold-mining industry on the California-Nevada border. Mining is brutal work, so in 1909 the California legislature passed a statute prohibiting work shifts longer than eight hours for underground miners.¹ While this statute may make sense in general, it did not optimally serve miners in San Bernardino County. Most miners there live far from the mines and commute three hours a day on narrow, winding roads to get to work. Because of the dangerous and tiring commute, they prefer a shorter workweek with 12-hour shifts compared to a longer workweek with eight-hour shifts. In 1983, the legislature amended the statute to permit 12-hour shifts if agreed to in a collective bargaining contract.² The unionized mines soon adopted 12-hour shifts, and the nonunion mines found themselves at a competitive disadvantage. After unsuccessfully petitioning the state labor agency for a waiver, they filed suit asking the federal court to strike down the more lenient treatment the statute gives for unionized mines. The district court held that the National Labor Relations Act (NLRA) preempts the state double standard; but the Ninth Circuit

reversed and upheld the state statute allowing unionized mines to have 12-hour shifts while nonunion mines could have only eight-hour shifts.³ In rejecting an equal protection challenge, the appellate court emphasized the greater bargaining power of unions, declaring that the legislature could rationally have believed that unionized workers have greater power to ensure safe working conditions than workers with individual employment agreements.

Four messages come from the example. First, one need not criticize the general law (here, the eight-hour shift rule) in order to see a valid role for union brokering of the law as applied to particular situations (here, to mines in a particular county with unique commuting patterns). Second, it illustrates that legislatures hesitate to allow individual workers to waive rights, for fear that their lack of bargaining power will force them to waive without any gain. Third, the example shows how unions can use legislative waivers to make unionized firms more competitive, benefiting their firms and their members. Finally, in this case the waiver was in the overall social interest as well as the workers' and the union's interest, but this point needs to be examined for particular statutes.

Example 2: Union or individual waiver of the right to court. Title VII of the Civil Rights Act of 1964 was a landmark anti-discrimination statute, giving employees the right to go to federal court (after filing a charge with the Equal Employment Opportunity Commission) to complain of discrimination on the basis of race, color, sex, religion, or national origin. Title VII was the model for other anti-discrimination statutes protecting workers against, among other things, age and disability discrimination. The hallmark of these statutes was the right to haul the employer into federal court. Employers complained (Olson, 1997) as the number of discrimination claims skyrocketed (Clermont & Schwab, 2004). One response of employers to the burden of discrimination cases has been to create arbitration procedures for these claims, whether through the union grievance-arbitration system or, in a nonunion setting, through contracts with individual employees.

Whether unions or individual workers can waive the right to go to court over discrimination and other statutory claims (or, inversely, whether a pre-dispute arbitration agreement is enforceable) has a winding legal history and remains hotly contested. In its *Alexander v. Gardner-Denver* (1974) decision, the Supreme Court held that a unionized employee could bring a statutory discrimination claim to court, even though the employee had already lost an arbitration claim of unjust termination brought through a union grievance-arbitration procedure created by a collective bargaining agreement. *Gardner-Denver's* effect was that a union could not waive an individual employee's right to go to court. In its later *Gilmer* (1991) and *Circuit City* (2001) decisions, the Supreme Court distinguished the union context of *Gardner-Denver* and enforced an agreement of individual employees to bring all statutory claims to arbitration, waiving their right to court. The Court emphasized a "tension between collective representation and individual statutory rights" that is not present when individuals agree to arbitration (*Gilmer*, 500 U.S. at 22).

More recently, the Court revived the union as broker of the right to a judicial forum. In *14 Penn Plaza v. Pyett* (2009), the Court upheld a collective bargaining agreement in which the union had agreed to arbitrate all employment discrimination claims arising under the ADEA. Finding nothing in the statute to preclude this choice of arbitral

forum and satisfied that arbitration would protect the employees' substantive right to be free from discrimination, the Court refused to interfere in the bargained-for exchange between employer and union.

Both union and individual waivers of the right to go to court are controversial and in flux. Bills in Congress are afoot to reverse *14 Penn Plaza* and deny unions the power to waive their members' right to a judicial forum. Other bills propose to go further back in Supreme Court jurisprudence and reverse *Circuit City* and *Gilmer* by denying individual workers the power to waive a judicial forum to vindicate discrimination claims.⁴ Indeed, the Franken Amendment now forbids government contractors from requiring workers to arbitrate title VII claims and other sexual harassment claims, although the language of this recent statute does not clearly cover collective agreements as well as individual agreements.⁵

All this turmoil invites two sets of questions, for individual waiver and union waiver: (1) Should individual workers want the power to waive a judicial forum for discrimination claims, and is it good public policy for individual workers to have this power; and (2) should unions want the power to waive a judicial forum for its members' discrimination claims, and should their members and public policy want unions to have this power?

On the individual-waiver questions, it is hard to distinguish whether individual workers should want the power from whether it is good public policy to allow it. In either case, as we will see, the concern is that an individual worker has little bargaining power and may have limited information and cognitive biases that prevent an appropriate decision.

On the union-waiver set of questions, the union may want this power as another chip in its bargaining arsenal. On the other hand, as we will explore, unions may feel that having the option to waive weakens their bargaining position or is not worth the exposure to costly duty of fair representation lawsuits if they do not arbitrate every case or make mistakes in the arbitral process. (It is worth pointing out that the union in *14 Penn Plaza* argued against letting the collective bargaining agreement waive a judicial forum, although it is hard to reconcile this litigation position with their actual bargaining behavior.) But even if unions want this power, it may not be in all of their members' interest, particularly minority members who may more highly value the right to go to court with discrimination claims than most members, who do not think much of this right. Unions have a long, albeit complicated, legacy of selling out the position of minority members. Finally, it is a distinctly third question whether public policy supports allowing union waiver in this context.

II. THE MANDATORY NATURE OF EMPLOYEE RIGHTS

A. The Rationale for Employment Laws

At its nineteenth-century, common-law, laissez-faire zenith, employment law gave most rights to employers, subject in principle to contractual waiver of the pro-employer default. For the last 100 years, workers have turned to the legislature (and more recently to the common-law courts) to change the rules. Employment laws often impose

substantial costs on employers, and employers have vociferously complained. Various types of arguments justify employment laws, and often more than one for any particular law.

The usual rationale is that employment laws further some public policy. Society does not like the results of the “unregulated” labor market and so it intervenes. Within the broad category of intervention in the name of public policy are two types of intervention. First, the legislature may think that market imperfections lead to inefficient results that need correcting. Second, the legislature may think the market reaches results that are unfair, regardless of their efficiency.

An example of the first type – intervening to improve the efficiency of labor markets – may be the Employee Retirement Income Security Act (ERISA) (Freeman, 1976). A competitive labor market may provide too few pensions, in the sense that workers would prefer more of their compensation to be in the form of pensions than current wages. In a competitive market, employers look at the behavior of persons just deciding whether to work in determining the value of their pension package (i.e., firms look at whether employees are queuing up for the job or whether it is difficult to fill). But these new entrants are often younger workers, who value pensions less than most workers in the existing workforce. The older workers are trapped in their firms, however, and cannot easily signal their dissatisfaction with the level of pensions by quitting. In short, the market will be inefficient because pension rates are set according to the preferences of incoming workers who, relative to their older counterparts, prefer more in current wages and less in pensions. To remedy this, Congress enacted ERISA to encourage a higher level of pensions that workers could count on.

Probably more employment legislation is enacted because unregulated labor market outcomes are deemed too harsh rather than inefficient. Some of this legislation has distributive aims; the goal is to favor some or all workers, regardless of whether the overall pie grows or shrinks (Jolls, 2000). Some legislation is paternalistic. Even if workers are willing to trade safety for higher pay, for example, society is unwilling to allow it. The flip side of paternalism is that individuals may believe they could make themselves better off with their individual bargains than with the legislation. Where that is the case, the costs imposed by the legislation are greater than the benefits (measured by willingness and ability to pay) of the legislation. As I will show below, this means that people believe they can make themselves better off by rejecting the legislation.

Not all employment legislation is enacted with noble public policy as the goal, whether efficiency-enhancing or distributive. The public-choice theory of legislation emphasizes the coercive power of law and suggests that self-interested groups lobby for legislation that furthers their interests – rather than some larger public interest (Macey, 1986; Eskridge, Frickey & Garrett, 2000). A favorite employment-law example of public-choice theorists is the minimum wage provision of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 206). Such legislation sets a floor on competition between workers for jobs. Although few union workers are directly affected by increases in the minimum wage, many empirical studies suggest that skilled or semi-skilled unionized workers are one of the prime beneficiaries of the minimum wage law, as the law prevents low-skilled workers from offering to work at a wage low enough to make them attractive compared to the higher-skilled and higher-priced workers (Burkhauser, Couch & Wittenburg, 2000; Card & Krueger, 1997; Welch, 1974).

B. Why Make Employee Rights Mandatory?

It is not the purpose of this chapter to critique or assess the rationales described above for employment rights. I can assume (but don't have to assume for my argument) that the employment law in question has an appropriate overall social purpose. Whatever their reasons for intervening on behalf of employees, policymakers must still implicitly or explicitly decide whether to make the rights inalienable, which should turn at least in part on whether alienability is consistent with the rationale for the law in the first place.

Inalienability of individual employment rights can be defended on a few different grounds. First, some laws are enacted not to protect the affected workers but to protect others. Thus, the rights are forced on the affected workers regardless of what they individually want. The FLSA's wage and overtime provisions, for example, are sometimes explained as an attempt to prevent those workers who are willing to work long hours at low wages from undercutting.⁶ If this is the purpose of the law, it is undercut by allowing workers to opt out, because the opting-out, undercutting workers harm the workers we want to protect. In a similar vein, suppose workers care about their relative income, not just how well off they are individually. In that case, worker A, by agreeing to work in a dangerous factory for an extra \$10,000, hurts the relative income ranking of worker B. Occupational Safety and Health Administration (OSHA) regulations mandating safety can prevent this prisoner's dilemma by mandating safe factories. Each worker prefers a safe factory to an unsafe factory but only if the others do not sell their safety for higher wages. If OSHA regulations were waivable, the rat race would continue (Akerlof, 1976; Frank, 1985; McAdams, 1992).

The protection of a workplace public good is another rationale for making employment rights mandatory. A workplace public good is often underproduced because it is inherently non-excludable and nonrival (Samuelson, 1954). When the employer provides the benefit to one worker, it necessarily provides the benefit to other workers at little or no extra cost. For example, workplace safety is generally a public good, in that other workers at the same plant benefit at little or no cost once a single worker has, say, clean air, adequate lighting, or a safe production-line speed. An employee who initiates an OSHA inspection also benefits other workers from the abatement of the health and safety risk, but often bears the cost of initiating the inspection (the wrath of the employer) alone. An individual worker may rationally decline to bear the costs of a non-mandatory public good, hoping that another employee will bear the costs and all will benefit. For employment rights that secure public goods, making them waivable would reinstate the collective action problem the law sought to address.

A third rationale for making employment rights mandatory emphasizes the limited information workers have about the costs and benefits of many workplace goods. Individual employees often lack the necessary information to make an informed choice on whether to waive an employment right. Sometimes the information rationale for mandating rights is strongly paternalistic.⁷ Policymakers believe misguided workers do not know what is in their best interest and so will foolishly waive a protection if allowed to do so. Additionally, workers may not understand the legal effect of a waiver and believe there is no harm in signing one (Kim, 1995; 1997). In other cases, particularly where employment protections involve technical data (e.g., OSHA health rights)

or rights stretching out for decades (e.g., pension rights), the information rationale is weakly paternalistic. In these situations, the argument for inalienability is that workers cannot process the information or intelligently assess the risks, but if they could, they themselves would demand the protection.

Behavioral decision theory provides additional reasons for making employee rights inalienable. Workers are often risk optimists, underestimating the dangers of their work and overestimating their own ability to avoid hazards. People are particularly bad at accurately assessing low-probability events, which characterize many workplace risks such as the risk of workplace fatalities or wrongful discharge. Workers are myopic and thus have particular difficulty assessing the value of far-off events like retirement pensions (Rachlinski, 2003; Sunstein, 2002; Weiss, 1991).

Perhaps the most common reason for mandating rights is the weak bargaining power of individual workers. The fear is that workers would waive an alienable right without getting anything in return, making the legislation pointless (Schwab, 1988). For example, suppose an employee has accepted a job paying \$50,000 with 10 days' vacation. Now the legislature enacts a vacation law that says a worker gets 15 days' vacation unless he or she waives the right. Will the law have any effect? The argument of no effect is that the employer will ask, and the employee will agree, to initial a vacation-law waiver and then sign the same contract for \$50,000 and 10 days' vacation. People renting automobiles, for example, seem to initial waivers all the time without much hesitation or much in return for the waiver.

Counter-arguments exist to the view that giving an alienable employment right to a worker without bargaining power is giving nothing at all. Perhaps the worker will hesitate to initial a waiver, worrying that the statute reflects the approach that suits most people.⁸ Cognitive biases such as anchoring effects, framing effects, and endowment effects mean that initial presumptions in statutes matter. Richard Thaler and Cass Sunstein (2009) have argued that policymakers can effectively use default rather than mandatory rules to nudge people in a wide range of situations to further "libertarian paternalism." We do not have to resolve the debates here, and can simply conclude that in many cases where workers have little bargaining power, a waivable right may not be much of a right at all.

Policymakers in such cases are left with a tradeoff in creating an employment right. If they are confident workers and the world are better off with their intervention, then rights can be made mandatory. But wise policymakers are often less sure of the appropriate outcome, or recognize that policymakers themselves are subject to cognitive biases and other limitations that sometimes make their policy prescriptions less than ideal (Rachlinski & Farina, 2002). Further, the appropriate outcome for some workers often is inappropriate for others, but legislators might have difficulty creating laws tailored to individual situations. Indeed, rules (as opposed to standards) by definition apply broadly to parties in many situations, not all of whom benefit from the rule. If the over-inclusiveness and under-inclusiveness of the rule is too great, policymakers may prefer a presumption, allowing parties to opt out if the policy is not appropriate for their circumstances. But as just discussed, allowing opt-outs may undercut the rationale for the employment right in the first place, if the right is a public good, or if limited information or cognitive biases prevent workers from accurately assessing the value of the right, or if individual workers have no bargaining power to get something in exchange for opting out.

III. THE UNION AS BROKER

An intermediate solution exists to the dilemma of overly wooden mandates, on the one hand, and waiver by powerless individuals with limited information, on the other. That solution is to create a right that is mandatory at the individual-worker level but allows workers collectively through the union to waive the protection in favor of other benefits.

We identified above five dangers associated with allowing individual workers to waive rights: (1) undercutting or rat-race problems; (2) workplace public goods; (3) limited information; (4) cognitive biases; and (5) weak bargaining power. Let's now examine the dangers in turn to see if union brokers can overcome them.

The rat race occurs when an individual worker can get ahead of other workers by waiving a costly employment benefit such as workplace safety or maximum hours, even if each worker prefers the safety or shorter hours as long as others get them also. If the rat race occurs within the collective bargaining unit, a union can alleviate it. For example, suppose the rat race takes the form of a contest where the most productive line worker is promoted to foreman. Each worker takes on more and more hours in hopes of a promotion. An hours law limiting the workweek to 40 hours will have no effect if individual workers can waive the limitation and work an hour more than other workers, thereby setting off a rat race. But what if 40 hours is below the optimal amount for a particular worksite, all things considered, even if 40 hours is the optimal number for a national law? A union could prevent the local rat race by negotiating a collective bargaining agreement that calls for 45 hours, which workers locally might prefer to 40 hours. Without the union, the rat race might escalate to 50 or 60 hours to the detriment of workers. Union brokering cannot prevent a rat race when some of the rats in the race are beyond the collective bargaining unit. In that case, a mandatory right rather than union-broker right is needed to solve the issue.

In a similar vein, union brokering does not undermine workplace public goods in the same way that individual waivers do. An individual worker, considering whether to exercise or waive a public-good right, may waive the right even when the overall benefits to workers exceed costs, hoping to free ride on others who exercise the right. Avoiding this problem was the public-goods argument for a mandate. But the role of the union in bargaining is to consider the costs and benefits to all workers of exercising or brokering the right for something better. By internalizing the benefits to all workers in its calculus, it avoids the free-rider issue of workplace public goods.

Inadequate information is also a lesser problem for unions than individual workers, because unions have more information at their disposal and thus can make more informed decisions. Individual workers have great difficulty knowing about safety records, legal rights, and other items critical to deciding between jobs. Unions have research departments and are repeat players on many issues, learning from experience. Further, the National Labor Relations Act commands employers to bargain in good faith, with a subsidiary duty to provide the union with information to substantiate claims made during negotiations.⁹

What about the cognitive limitations that make individual waiver so problematic? Can a union avoid making the same kinds of erroneous judgments that their members might, given that unions are composed of those very same people? Unions likely have a psychological perspective on workplace risk that differs from that of the individual in

two ways: First, unions lack the personal investment in avoiding injury that seems to give rise to an excess of optimism. Unions thereby can see problems from an outsider's perspective, which can reduce cognitive errors in judgment (Kahneman & Lovallo, 1995). Second, unions see workplace risk as a repeated issue that comes up in the aggregate, not one case at a time. Psychologists have found that looking at problems in an aggregate or frequentist perspective (e.g., 10 out of 100) can reduce the influence of some kinds of cognitive errors in judgment (Gigerenzer, 1991). Unions have a broader perspective on the tradeoffs than do individual workers. Workers operate from the inside while unions can step back and take an outsider's view. In doing so, unions can avoid cognitive problems that arise from taking problems one at a time (Rachlinski, 2000).

Finally, unions have bargaining power and, unlike individual workers, will not be coerced into waiving rights without getting something in return. The give and take of collective bargaining is far different from the form contracts and shopping among job offers that characterize "bargaining" in the individual context. In collective bargaining, a presumption favoring the union could strengthen its negotiating posture even if the presumption is waivable. With the presumption favoring the union, management must raise the issue if it wants change. Speaking first often weakens one's bargaining position. The idea is that unions will broker rights while individual workers waive rights. Unions will keep the rights that workers value most highly and trade less-valued rights for other benefits, while individual workers might receive nothing in return for their waiver (Schwab, 1987).

In sum, unions are often in a better position relative to individuals when it comes to brokering employment rights. Unions can prevent local rat races and promote local public goods, have more resources to gather and disseminate relevant information, are not subject to the full array of cognitive biases to which individuals are prone, and have superior bargaining power.

IV. EXISTING EXAMPLES OF UNION BROKER OF WORKER RIGHTS

In contrast to the harsh attitude employment law takes toward individual workers waiving rights, the law often allows unions to broker rights of their members. Union waiver of rights is simply not as suspect as waiver by individual workers. This power for unions to waive rights gives unions a potential role as broker of employment-law rights.

This section outlines the various ways that current law allows unions to broker rights on behalf of members. The section's overall purpose is to show that "union as broker" is a current role of unions and not a wild-eyed dream. The section has two parts. First, I review the principles underlying union waiver of labor-law rights, to set the stage with a union brokering role that is familiar to the labor-law community. Second, I examine the current role of unions in brokering employment-law claims. This has two parts: first I review § 301 preemption of unionized workers' employment-law claims. Then I scan the broad array of employment laws in which unions currently can act as brokers – ranging from ERISA and FLSA to state wage law.

Previous commentators have extensively analyzed union waiver of labor law rights, as

distinct from employment rights – that is, the waiver of rights of workers to form unions, strike, and bargain collectively or to refrain from doing so (Brosseau, 1980; Harper, 1981a; 1981b; Westman, 1974). More recently, commentators have analyzed § 301 pre-emption, whereby workers with rights under a collective bargaining agreement enforceable under federal law may be preempted from bringing similar claims under state law. Largely uncharted in the academic literature is the degree to which employment rights by their own terms apply differently to unionized workers (early efforts include Schwab, 1989; Estreicher, 1996).

A. Union Waiver of Labor-Law Rights

A prime purpose behind the National Labor Relations Act (NLRA) of 1935 was to increase the bargaining power of workers through collective action. Individual workers, it was thought, had no strength to resist employer demands and would be coerced into relinquishing, in the name of freedom of contract, any putative rights the law might give them. As Senator Wagner, chief sponsor of the Wagner Act, put it:

We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery by contract.¹⁰

In the early days of the NLRA, the Board and courts made clear that individual workers could not waive certain basic rights the Act gave them (Phillips, 1986). Thus the infamous “yellow dog” contracts – whereby individual workers promised never to exercise their right to join a union – were held to be unenforceable; even to propose such a contract was an unfair labor practice.¹¹ Individual contracts regulating how workers would select a union have likewise been held void because they differed from the Act’s procedures.¹² Nor can individual workers (or the union) waive their § 8(a)(4) right to file charges before the Board without retaliation.¹³

In contrast to the prohibition against individual workers contracting away their labor-law rights, the NLRA readily countenances waiver of some Section 7 rights by unions. The preferred status of unions in waiving rights was emphasized in *NLRB v. Allis-Chalmers Mfg. Co.* (1967). The issue was whether a union-imposed fine on members who crossed the picket line during a lawful economic strike violated individual members’ § 7 rights not to assist unions. The Court ruled the union did not violate its members’ rights. In the Supreme Court’s words, the Act “extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.” Justice Black, dissenting, bemoaned that allowing union waiver means that “by joining a union an employee gives up or waives some of his § 7 rights.”

Unions routinely bargain away labor-law rights of their members, both when negotiating contracts and processing individual grievances.¹⁴ Indeed, unions regularly treat rights that are central to labor law as bargaining chips to be traded for employer concessions on other issues.¹⁵ The clearest example is the typical no-strike clause in a collective bargaining contract. At the heart of the National Labor Relations Act is its protection

of the right of workers to strike. Section 8(a)(1) of the Act makes firing workers for striking an unfair labor practice and § 13 specifically declares that “nothing in this act shall be construed as to diminish in any way the right to strike” (29 U.S.C. § 163 (1988)). Nonetheless, unions commonly waive the right of their members to strike,¹⁶ sometimes even waiving the right to strike in protest against employer unfair labor practices.¹⁷ We think nothing of this waiver; indeed, much of federal labor law is designed to encourage unions to waive the right to strike.¹⁸

Besides the right to strike, unions routinely waive other labor-law rights. Most important is the very right to bargain collectively. The mere existence of a certified union denies workers the right to bargain collectively with their employer in any other group, without any formal waiver of bargaining rights. An employer that bargains with any other group commits an unfair labor practice.¹⁹ Further, a union often waives its own right to bargain during the term of a collective bargaining agreement through express “zipper” clauses or “management rights” clauses, through bargaining history, or through inaction.²⁰

A more esoteric waiver of rights occurs when unions waive their members’ *Weingarten* rights. In *NLRB v. J. Weingarten, Inc.* (1975), the Supreme Court held that the NLRA granted employees the right to have a union representative present during interrogations they reasonably believe may result in discipline. After some confusion, it is now clear that a union can waive this right in a collective bargaining agreement.²¹ The Board has flip-flopped on a parallel right for nonunion workers to have a coworker present at a disciplinary interview, although the current rule gives no *Weingarten* right to nonunion workers (Higgins, 2006, pp. 225–35). All indications are that nonunion workers cannot waive whatever *Weingarten* rights they have under prevailing Board law. In the eras when all workers have the right, it is an example where unions can waive a right that nonunion employees cannot waive. An employer who feels strongly about conducting disciplinary interviews in private would be better off, all else equal, with a unionized workforce that could put such a waiver into a collective bargaining contract. If the union were a good broker who got more value in return for the waiver, employees would be better off as well.

In addition to bargaining away rights during contract negotiations, unions frequently waive rights when processing grievances or settling unfair labor practice charges. Courts sometimes acknowledge openly that they tolerate union settlements more readily than when individual workers settle cases. For example, in *Oil, Chemical and Atomic Workers v. NLRB* (1986), a union filed unfair labor practice charges on behalf of workers who were permanently replaced when they stopped work to protest unsafe working conditions. The NLRB eventually approved settlements between the employer and individual employees whereby the employees received small cash payments but waived all legal claims, including any right to reinstatement. Upon the union’s petition for review, the court of appeals reversed the Board’s approval of individual settlements. In an opinion by Judge Harry Edwards, a former labor law professor, the court recognized that the Board often encourages settlements between a union and the employer as furthering the collective bargaining and arbitration process. No such collective policy was furthered, however, when an individual employer settled unfair labor practice complaints with individual workers. The court remanded for further reasons why the Board should approve individual settlements.

Not all labor-law rights are waivable by unions. Unions cannot waive the rights of members freely to discuss and choose their representative. At a basic level, this means sensibly that a union cannot lock itself in as representative by waiving the right of workers to vote for another or no union. But the employees' right to choose their representative is broader than just the right to vote; for example, the union normally cannot validly waive the rights of members to distribute union literature at work (*NLRB v. Magnavox*, 1974). Nor can a union waive statutory rights that benefit third parties, such as the Act's prohibitions on hot-cargo agreements and secondary boycotts, on closed shops, and on hiring halls that favor union members.²²

It is hard to articulate an overarching principle governing when a union can waive labor-law rights (Brousseau, 1980; Harper, 1981a; 1981b). Whatever the specific line between waivable and inalienable NLRA rights, three lessons are clear. First, labor policy encourages unions to waive rights, even "fundamental" rights like the right to strike. Second, the basic reason for accepting union waiver is that unions have the bargaining power that individual workers lack. Third, labor policy becomes skittish about union waiver when the union waives rights important for the democratic nature of the union, particularly the right of dissidents to challenge union leadership.

Unions can fairly portray their power to waive labor-law rights as a "win-win" situation for the unionized workplace. The average worker benefits from waiver because the union will not broker rights without receiving something preferable in return. Employers benefit because they can escape certain costly restraints or conditions. The mere existence of a union prevents bargaining with splinter groups of workers, and channels and filters worker demands and complaints. By contract, the union can waive other labor-law rights, the most important being the right to strike, the right to bargain continuously over mandatory subjects, and the right to route unfair labor practice complaints to the Board rather than through private arbitration. Overall, union waiver of labor rights is commonplace and beneficial to workers, assuming the union adequately represents the interests of its members.²³

B. Union as Broker of Employment-Law Rights

As outlined earlier, workers have a panoply of employment rights under federal and state statutes and the common law. This section surveys this panoply to illustrate where unions have a role in brokering rights, usually by negotiating language in a collective bargaining agreement that alters what would otherwise be the employment rights of covered workers.

1. Section 301 preemption of unionized workers' employment rights

A collective bargaining agreement regulates many aspects of the employer-employee relationship, and typically creates a grievance-arbitration procedure to resolve disputes about this regulation. This regulation often overlaps with statutory or common-law employment rights of workers. For example, suppose a collective bargaining agreement creates disability insurance for injured workers, complete with a union-management panel to resolve disputes. A worker upset with erratic disability payments wants to bring a tort action complete with punitive damages alleging bad-faith handling of his insurance claim. May the worker sue in tort, or is his sole avenue the grievance-arbitration

procedure established by the collective bargaining procedure? These are the facts of *Allis-Chalmers Corp. v. Lueck* (1985), and a unanimous Supreme Court held that the tort claim was preempted.

The rationale for preemption comes from § 301(a) of the Labor-Management Relations Act (LMRA), which gives the federal courts jurisdiction to enforce collective bargaining agreements (29 U.S.C. § 1985(a) (1988)). The Supreme Court had earlier held that the LMRA requires a uniform body of federal common law to govern § 301 cases (*Textile Workers Union v. Lincoln Mills*, 1957). State-law claims that might upset the uniformity of interpreting collective bargaining agreements must be preempted. In *Lueck*, the Court required preemption of state claims where “resolution of the state-law claim is substantially dependent upon analysis of the terms of [a collective bargaining agreement]” (id. at 220).

Section 301 does not preempt all state claims with fact patterns amenable to grievance arbitration, as the Supreme Court made clear in *Lingle v. Norge Division* (1988). Lingle, working under a collective bargaining contract that protected her against being fired without just cause, was fired after she filed a workers’ compensation claim. The union filed a grievance on her behalf, and ultimately the arbitrator ordered reinstatement with back pay. Meanwhile, Lingle filed a tort suit in Illinois state court for retaliatory discharge.²⁴ The Supreme Court held that § 301 did not preempt the tort claim even though the state court must analyze the same facts as the arbitrator. Rather, the issue is whether the state claim is “independent” of the collective bargaining agreement in that it “can be resolved without interpreting the agreement itself.”

The employee in *Lingle* had argued a more expansive theory of non-preemption that, if accepted, would have eliminated differential treatment of employment claims by union workers in most cases. The employee had emphasized that, under Illinois law, the right to be free from retaliatory discharge is nonnegotiable and applies to union and nonunion workers alike. The employee argued that nonnegotiability by individuals should by itself mean that the state right could not be preempted by a collective bargaining contract. The Court rejected this analysis, however, declaring that neither nonnegotiable rights nor rights given to all state workers would ensure non-preemption. Further, the Court emphasized that union waiver of individual, non-preempted state law rights was a separate issue from § 301 preemption and left open the possibility of such union waiver if it were “clear and unmistakable.”

Whether unions could waive state-law rights was touched on in a later Supreme Court case on § 301 preemption, *Livadas v. Bradshaw* (1994). When Livadas, a unionized worker, was fired, she demanded to be immediately paid the wages owed her, as guaranteed to all California workers by state law. Her store manager refused to pay immediately, however, saying company policy required that the last paycheck be mailed from the central office. Livadas complained to the California Labor Commissioner but the agency refused to process her complaint because she was covered by a collective bargaining agreement with an arbitration clause. She sued the Labor Commissioner, complaining that this policy against pursuing state-law claims of unionized workers was preempted as interfering with the federal right to bargain collectively. The Labor Commissioner defended by arguing that state processing of wage claims based on a collective bargaining agreement would itself be preempted by § 301. The Supreme Court agreed with the employee and held that the Commissioner could not refuse to vindicate

unionized workers' state-law claim to prompt payment of wages simply because they worked under a collective bargaining agreement.

Most importantly for us, however, the Supreme Court made clear that state statutes creating employment rights could have opt-out provisions for unionized workers ("These 'opt-out' statutes are thus manifestly different in their operation (and their effect on federal rights) from the Commission's rule that an employee forfeits his state-law rights the moment a collective bargaining agreement with an arbitration clause is entered into." *Id.* at 131–2). Several amici had emphasized the broad array of state and federal laws that allow unions to waive protection for their members. The Court recognized the validity of opt-out statutes but distinguished them from the *Livadas* statute, which covered all employees without regard to union status, and noted there was no indication the union purported to bargain away the protections of the state statute merely by creating a grievance-arbitration procedure. Merely having a collective bargaining agreement with an arbitration procedure is insufficient to infer a waiver. We discuss these opt-out statutes in the next section.

The AFL-CIO argued for this distinction between state laws that allow unions to opt out and state laws that mandate a right only for nonunion workers. In the *Livadas* case, the AFL-CIO amicus brief urged a narrow holding, cautioning that "courts have just begun to consider preemption challenges raised in relation to state minimum standard laws that distinguish between unionized and nonunionized workplaces." Still, the AFL-CIO suggested support for a "nuanced" state law that allowed unionized workers to opt out if they bargained for "similar but not necessarily identical protections," because such an opt-out law "facilitates collective bargaining rather than punishes its exercise," even though it argued for preemption of the California policy that processed wage-payment claims only of nonunionized workers.

Since the Supreme Court decisions in *Lueck* and *Livadas*, lower courts have preempted dozens of state-law claims by unionized employees under § 301 while recognizing others, depending on whether the claim would require interpretation of the collective bargaining contract (see Higgins, 2006).²⁵ The line is not simply between tort and contract or between negotiable and nonnegotiable state-law rights, although both those lines have been articulated in the cases. Section 301 preempts most common-law claims with a contractual foundation, even if they sound in tort, including breach of the covenant of good faith and fair dealing, fraud and misrepresentation, tortious interference with contractual relations, and mishandling of health insurance or medical leave. They also include many privacy claims including improper drug testing (see Kim, 2006), which typically claim the employer created and then violated zones of privacy and thereby require interpretation of the collective bargaining contract and workplace norms it created. But the range of preempted claims is vast, ranging from wrongful discharge to misappropriation of trade secrets.²⁶

Some courts have gone a long way toward preempting state-law claims based on general or boilerplate language. In *Jackson v. Liquid Carbonic Corp.* (1988), for example, a unionized employee was terminated after failing an employer drug test. He sued in state court for violation of the state constitutional right to privacy and a state privacy statute. The First Circuit held that § 301 preempted the state-law claims. The collective bargaining agreement had a general clause giving management the right "to post reasonable rules and regulations from time to time." Because this clause might give the employer

the right to institute a drug test, the court would have to interpret the collective bargaining agreement in judging the state-law claim, something that § 301 forbids. Other courts require more specific language to trigger preemption.

Unions can use § 301 preemption to broker rights. By agreeing to specific language in the collective bargaining agreement that addresses state-law rights, presumably in return for worker benefits elsewhere in the agreement, the union shields the employer from a bevy of state-law claims. But § 301 preemption is an unpredictable blunderbuss, difficult to aim and uncertain in result. In particular, preemption based on the mere existence of a collective bargaining agreement is dangerous for unions and for workers, because it is unlikely the union received anything in return for the elimination of a state right. If the very existence of a collective bargaining agreement deprives workers of rights that nonunion workers enjoy, that is hardly a selling point for unions. This is why the AFL-CIO argued in *Livadas* for preemption of state laws that give rights to nonunion but not union workers, while arguing for the legitimacy of opt-out statutes whereby all workers have the state-law right unless language in the collective agreement alters the right.

C. Employment Statutes with Collective Bargaining Opt-Outs

If § 301 preemption is a blunderbuss with unpredictable net benefits for unionized workers, opt-out statutes can be an effective tool with win-win benefits for workers and employers. Many employment laws, both federal and state, by their express terms apply differently to unionized workforces. Others allow unions to opt out or alter the general protections given workers. This section cannot catalogue all the state and federal employment laws with this feature. Rather, the goal here is to highlight important opportunities for union brokering and also to describe a few esoteric laws to give a sense of the dazzling variety of employment laws where union brokering can occur. The unifying theme in these union-waiver provisions is the legislative belief that unionized workforces do not need the full array of mandatory protections afforded weaker, nonunion workers.

State laws A slew of state laws create employment rights that allow unions to opt out of the claims. Section I described the California law that mandates eight-hour work shifts for miners but allows a collective bargaining agreement to agree to shifts as long as 12 hours. Such opt-outs are a common feature in state statutes regulating wage payments, maximum hours, overtime, meal and rest requirements, and the like.²⁷ For example, in Vermont, employers must pay weekly wages within six days, but if a collective bargaining agreement calls for it, the paycheck can relate back 13 days.²⁸ Oregon mandates that employers immediately pay a terminated employee all earned wages unless a collective bargaining agreement provides otherwise.²⁹ Nevada mandates overtime pay after eight hours per day or 40 hours per week unless a collective bargaining contract says otherwise.³⁰ Illinois mandates a 20-minute meal break after five hours of work in a seven-and-a-half hour day unless different meal periods are established by a collective bargaining agreement.³¹ Collective bargaining agreements can alter state law requirements regulating health insurance and personnel files.³² In Montana, collective bargaining agreements can opt out of mandatory health and safety devices.³³ In

Arkansas, a collective bargaining agreement is not bound by the minimum-wage provisions of state law.³⁴

ERISA The Employee Retirement Income Security Act (ERISA) of 1974 is a complex statute regulating employer- and union-provided pension and other benefit plans (29 U.S.C. §§ 1001–461). One goal of ERISA is to encourage employers to extend benefits beyond top employees to contingent or lower-paid workers. The pension vesting requirements are a major way that ERISA attempts to protect workers who do not spend a career with a single employer.³⁵ ERISA requires that pension benefits completely vest (i.e., become non-forfeitable) after five years of service.³⁶ Compared to the lengthy requirements typical before ERISA, five-year vesting ensures that transient workers can accrue pension benefits.

Some unionized workers, however, are subject to less protective ten-year vesting requirements. In a provision added in 1986,³⁷ ERISA allows a multiemployer plan established by one or more collective bargaining agreements to have ten-year cliff vesting,³⁸ meaning that a worker can be required to wait ten years before earning any non-forfeitable pension benefits. This late-vesting exception for unionized workers is an important example of the brokering potential for unions. Apparently, both management and labor saw the provision as a potential weapon for unions when the exception was debated in Congress. Ironically, but consistent with the thesis that unions can benefit from brokering opportunities, unions pushed for lesser vesting protection for their members, while management feared giving unions this waiver opportunity.³⁹ Congress apparently bought the union argument that unionized employees did not need the rapid vesting schedule because they could take care of themselves through collective bargaining. Business interests opposed the relaxed vesting standards for multiemployer union plans because it would give unionized firms a competitive edge.⁴⁰ These anti-union analysts recognized that unions could benefit their firms – and thus “skew” decision-making on whether management should oppose unions – by brokering short-vesting rights that are onerous to management and not particularly useful to their members. In short, these anti-union analysts feared empowering the “union as broker” by allowing more lax regulation of unionized firms.

ERISA also gives lesser protection to unionized workers in its nondiscrimination requirements. The nondiscrimination requirements, which are perhaps the most technical sections in a technical statute, are designed to encourage employers to spread pension benefits to lower-paid workers. If the employer wants its pension and benefits plans to receive the tax breaks that ERISA gives a “qualified” plan⁴¹ (and all employers want this), it must not discriminate in favor of highly compensated employees.⁴² For example (and simplifying grossly), wage earners cannot receive lower pension benefits in percentage terms than high-paid salaried workers. ERISA excludes from the discrimination analysis “employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining . . .” (26 U.S.C. § 410(b)(3)(A)). Thus, unions can waive the right of its wage-earning members to receive as generous a pension as highly compensated officials of the company.⁴³

Congress enacted this provision for two primary reasons: to allow employees

represented by unions to pursue other (presumably more desirable) forms of compensation as an alternative to mandated pension benefits, and to make it more likely that non-union employees will benefit from membership in a qualified plan.⁴⁴ Unionized workers are sufficiently protected, under ERISA policy, by the procedural requirement that the union consciously bargain about retirement benefits.

Another ERISA provision, added in the Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA), prohibits employers from initiating certain pension plan terminations where the action would violate the terms of an existing bargaining agreement (29 U.S.C. § 1341).⁴⁵ This might seem to discourage employers from dealing with a collective bargaining representative, but the legislative history indicates that the provision exists merely to codify prior court cases in which union contracts were construed as denying the employer the right to terminate unilaterally.⁴⁶

FLSA The Fair Labor Standards Act also allows unions to waive rights that are mandatory for nonunion workers. The Act prohibits employers from imposing a workweek longer than 40 hours unless hours in excess of 40 hours are compensated at “one and one-half times the regular rate” (29 U.S.C. § 207(a)(1) (1988)). However, the Act allows special workweek arrangements where collective bargaining agreements are involved. Employers need not pay time-and-a-half where union contracts provide for no more than 1,040 hours of work during a 26-week period,⁴⁷ or under certain circumstances where union workers are required to work no more than 2,240 hours during a period of 52 weeks.⁴⁸

Congress apparently enacted the special workweek provisions for union-negotiated contracts to allow more flexible scheduling for industries such as mining and timber, which found it more efficient to employ workers for longer hours over discrete periods of time because of the remote location of their operations.⁴⁹ However, evidence of actual inclusion of such provisions in collective bargaining agreements is sparse indeed,⁵⁰ and early decisions showed that courts would give the special provision a narrow scope (see *Cabunac v. National Terminals Corp.*, 1944).

The Walsh-Healey Act provides another example of union waiver of overtime provisions (41 U.S.C. § 35 et seq.). The Walsh-Healey Act sets employment standards for federal contracts exceeding \$10,000. The Act limits the workweek of employees of these contractors to 40 hours (41 U.S.C. § 35(b)). However, the section also cross-references the union-waiver provision of the Fair Labor Standards Act, thereby allowing longer workweeks as long as the employees do not exceed the maximum number of hours under FLSA for 26 weeks or 52 weeks (41 U.S.C. § 35(b)).

WARN Act The Worker Adjustment and Retraining Notification (WARN) Act requires employers to give 60 days’ advance notice before a mass layoff or plant closure. The warning procedure is technical and generally requires that the employer individually notify in writing every employee that might be affected (29 U.S.C. § 2102(a)(1)). If the employees are represented by a union, however, written notice to the union is sufficient (29 U.S.C. § 2102(a)(1)). Thus, a unionized employer can give WARN Act notice to workers for the cost of a stamp, while nonunion employers must go through the greater administrative expense of individual notification.

V. ASSESSING THE UNION AS BROKER OF EMPLOYMENT RIGHTS

Let's get out of the weeds of individual examples and survey the swamp.

A. Do Unions Want the Brokering Role?

Whether unions want a brokering role for employment rights is ultimately a question of bargaining power. If the union has sufficient bargaining power, it can decline to waive a valuable right but agree to negotiate over rights of less value. This power to negotiate should make its members better off. This chapter has documented instances where unions have embraced the brokering role, such as in the eight- versus 12-hour miners' day discussed in Section I. Overall, the chapter suggests that it would be in unions' interest to seriously consider the brokering role when lobbying over other employment statutes.

Still, unions often hesitate to take on this brokering role. For example, in the second example in Section I, we noted that the union in *14 Penn Plaza* argued against the brokering role that the Supreme Court ultimately endorsed – by which a collective bargaining agreement could force workers' statutory discrimination claims into arbitration and waive their right to go to court. Why would unions want to eliminate the possibility of trading rights? Under the perspective of this chapter, this is like asking when unions might willingly bind themselves to the mast like Odysseus.

One reason for unions rejecting the brokering role is that it may be complicated to justify a waiver to the membership. In the course of lengthy negotiations, it may be difficult to point to or quantify what was received in return for the waiver. For example, the union may have waived the right to an eight-hour day, but what did it get in exchange? Indeed, dissatisfied members who think the union sold them out might bring a lawsuit claiming a breach of the union's duty of fair representation, a costly and embarrassing lawsuit for a union to defend.

More generally, the value of the brokering role comes in finding win-win bargaining solutions with the employer. This requires flexibility, trust, and compromise. A union can easily be tarred as being conciliatory or even a company-controlled union if it concedes a right without a clear quid pro quo. Additionally, flexibility sometimes reduces bargaining strength. If the union burns its bridges, management knows the union cannot concede and so management may be more conciliatory. Unions attempt such postures today, with rallying cries such as "No backward steps." By the same token, unions may be in a stronger bargaining position overall if they can simply keep certain issues off the table as being inalienable. This is especially true when workers clearly value the right more than it costs employers. It may complicate bargaining with no payoff to the union to make a right formally waivable where members would never be better off from a waiver.

This suggests that unions should want a statute-by-statute approach to waivers. When a right is clearly worth more to workers than it costs employers, there is little to gain from bargaining, and the union should not want the statute to permit union brokering. But when it is less clear that workers value the right so highly, or the right clearly costs management a great deal to provide, the union may gain if the statute permits a brokering role.

B. Does Society Want the Union as Broker?

Even when the union benefits from a brokering role, is it good public policy to allow unions to opt out of employment rights? This question has no single answer. First, if unions cannot be expected to faithfully represent their members, the legislature should balk at allowing unions to waive their members' rights. Whether and when the interests of union leaders and members are aligned is a big issue, worthy of a separate inquiry (Schwab, 1992). Second, even if the union democratically reflects the interests of its median member, some statutes are designed to protect the rights of individual or minority workers against majority control. The antidiscrimination laws immediately come to mind. It would be folly to allow a collective bargaining contract to waive the protection of Title VII for its members. Even if unions represent the majority, that majority might well agree with the employer to sell out the minority. Thus, public policy calls for some rights to be inalienable to union brokering. Some would argue that allowing unions to agree to arbitration of discrimination claims is in this category.

Laws enacted to protect third parties outside the workplace should also be immune from union brokering. Thus, a union's waiver of the right of its employees to sue for violation of public policies extending beyond the workplace would harm society at large. Common-law protections guard against discharge for the refusal to commit an unlawful act, fulfilling a public obligation, or whistleblowing. In *Nees v. Hocks* (1975), for example, the Oregon Supreme Court recognized the wrongful-discharge claim of an employee fired for being absent because of jury service, reasoning that the public policy of protecting the jury system outweighed the employer's private interest. A union waiver of the right against discharge because of jury service (which it is a little hard to imagine that a union would do) would likewise thwart the will of the community and harm the jury system, and so the waiver should not be given force. A similar rationale would prevent unions from waiving whistleblower rights of its members arising from statute or the common law. Employees are often in unique positions to know of illegal activity within their firm – for example, the illegal dumping of toxic wastes. Such illegal acts do not merely affect the one whistleblower, or even just the firm; they harm third parties or the public at large. As unions are the exclusive representatives of their bargaining unit, and not society, laws protecting third parties should not be subject to brokering.

On the other hand, many employment rights solve public-goods problems in the workplace as distinct from the larger society. The paradigmatic example here is workplace safety standards, where providing a safe speed for one worker on the assembly line provides it for all. We discussed earlier that a union can alleviate the underproduction of workplace public goods within its brokering role. Safety laws that allow unions to negotiate or opt out of otherwise mandatory standards are therefore consistent with good public policy.

Union brokering is good public policy for many other employment rights. As outlined earlier, union waiver does not suffer from problems that make individual waiver so problematic. One problem was the unequal bargaining power of the individual worker. Unions can provide that equality. Other problems were the lack of information and expertise and the cognitive biases that individual workers have in processing information on many issues. Unions, with their research staffs and institutional memory, can provide that information and expertise.

CONCLUSION

Most employment laws create rights for workers that are inalienable. This chapter has argued that, in certain contexts, it may be beneficial to unions, employees, and employers to allow unions to broker or opt out of rights that are inalienable for an individual employee. Most employment rights are mandatory for individual workers, whether to solve rat races or public goods in the workplace or to protect against information deficits, cognitive biases, or lack of bargaining power. The union as a collective body is less susceptible to the particular weaknesses of the individual – a union has the power and resources to broker a right in favor of employees into even greater value for the workers it represents, the employer it bargains with, and society as a whole. In short, unions can provide the nuance in regulation necessary for an efficient market, while still protecting the interests of workers, employers, and society at large.

Union brokering should be subject to strictures. First, legislatures should require a clear and unequivocal waiver of a specific entitlement, to prevent a far-reaching interpretation of general contract language. Second, union brokering should be proscribed when laws are meant to protect third parties (that is, parties who are not represented during collective bargaining) or meant to protect minority interests not well represented by the union.

The critical question is whether important aspects of workplace policy are best decided centrally in Washington or Sacramento, through contract between individual worker and employer, or through collective bargaining between union and employer. A long tradition suggests that this intermediate level of inquiry, collective bargaining, is optimal on many issues. The union as broker is a modern adaptation to that long-time message.

NOTES

1. CAL. LAB. CODE § 750 (West 2009).
2. CAL. LAB. CODE § 750.5 (West 2009) states: “The provisions of Section 750 shall not prohibit a period of employment up to 12 hours within a 24-hour period when the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement where the agreement expressly provides for the wages, hours of work, and working conditions of the employees.” In 1995, the California legislature again amended the statute to allow an additional exception “when a 2/3 majority of the employees who work for a particular employer vote, in an election conducted at the expense of the employer pursuant to prescribed procedures, to adopt a policy that authorizes a regular workday of more than eight hours in a 24-hour period.” CAL. LAB. CODE § 750(b) (West 2009).
3. *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. 1995), reversing *Viceroy Gold Corp. v. Aubry*, 858 F. Supp. 1007 (N.D. Cal. 1994).
4. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (reversing *Penn Plaza*); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007) (reversing *Gilmer* and *Circuit City*).
5. Franken Amendment to the Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118 § 8116, 123 Stat. 3409, 3454-55 (2010).
6. *See* *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (“The first purpose was to prevent workers willing (maybe out of desperation . . .) to work abnormally long hours from taking jobs away from workers who prefer to work shorter hours. . . . The second purpose was to spread work and thereby reduce unemployment, by requiring the employer to pay a penalty for using fewer workers for the same amount of work as would be necessary if each worker worked a shorter week.”).
7. For a discussion of strong and weak paternalism, see Sunstein (2006, p. 249) (describing responses to cognitive error as consisting either of “weak paternalism, through debiasing and other strategies that leave people free to choose as they wish . . . [or] strong paternalism, which forecloses choice”).

8. Schwab (1988, p. 260) describes a “hesitation effect” of contract presumptions:

Parties are often uncertain which clause will suit them best, particularly when the clause deals with remote contingencies. The parties may believe that contract presumptions reflect the standard, widely accepted solution to a contracting situation. . . . A nominal beneficiary, then, aware of his uncertainty about the value of various clauses, must be induced to take the risk that waiving the standard clause is in his interest. For this reason, beneficiaries will demand more when waiving an entitlement than they would pay to purchase the entitlement. If so, we should see that contract presumptions distribute wealth toward the beneficiary. These explanations would suggest that parties in general hesitate (that is, demand extra compensation) to waive presumptions. Let me term this the “general hesitation effect” of contract presumptions.

9. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (holding that employer violated its section 8(a)(5) duty to bargain in good faith when it refused to give union financial information backing its claim it could not afford a 10 cent per hour wage increase).
10. 78 CONG. REC. 3679 (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 20.
11. Atlas Bag & Burlap Co., 1 N.L.R.B. 292 (1936) (yellow-dog contracts interfere with § 7 right to organize); Fanny Farmer Candy Shops, Inc., 10 N.L.R.B. 288, 306 (1938) (yellow-dog contracts are “invalid and of no effect”).
12. R.C.A. Mfg. Co., 2 N.L.R.B. 159, 178 (1937) (“the Board’s power is an exclusive one and not in any way dependent upon, or affected by . . . agreements between private parties”).
13. Ingram Mfg. Co., 5 N.L.R.B. 908 (1938).
14. *See* International News Service Div., 113 N.L.R.B. 1067, 1070 (1955) (“The Board has said repeatedly that statutory rights may be waived by collective bargaining.”); American Freight Sys., Inc. v. NLRB, 722 F.2d 828, 832 (D.C. Cir. 1983) (“It is well settled that a union may lawfully waive statutory rights of represented employees in a collective bargaining agreement.”).
15. A student commentator aptly summarized the waiver doctrine, “[t]he Supreme Court has interpreted the [NLRA] in such a way as to make inviolable only a limited few of the rights granted therein. . . . Other rights are not, in this sense, treated as ‘rights,’ but rather as ‘bargaining chips,’ which have been granted to labor upon its being organized, and which may (and in the Court’s view were *intended* to be) bargained away in exchange for employer ‘concessions’ during contract negotiations.” Note (1986, p. 846; emphasis in original).
16. *See* NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79–80 (1953) (upholding discharge of union member who engaged in sympathy strike in violation of no-strike clause); Teamsters Local 174 v. Lucas Flour, 369 U.S. 95 (1962) (right to strike implicitly waived by arbitration clause in collective bargaining agreement); Metropolitan Edison v. NLRB, 460 U.S. 693 (1983) (rejecting union’s argument that right to strike may not be waived where employer had imposed sanctions on union leaders after a sympathy strike, but finding no valid waiver because the general no-strike clause in the contract did not indicate “clear and unmistakable” waiver); International Brotherhood of Electrical Workers, Local 803 v. NLRB, 826 F.2d 1283 (3d Cir. 1987) (holding that the right to engage in a sympathy strike was waived by a general no-strike clause in a collective bargaining agreement).
17. *See, e.g.*, Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 727–8 (D.C. Cir. 1990) (holding that unfair labor practice strikes are waivable, since “merely bargaining away the right to strike does not impermissibly infringe the ‘full freedom of association’”).
18. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (“Congress [in enacting the Labor Management Relations Act of 1947] was also interested in promoting collective bargaining that ended with agreements not to strike”).
19. Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) (affirming that once an exclusive bargaining representative is designated, attempts to compel separate bargaining are not protected by § 7 of the NLRA).
20. *See* Federal Labor Relations Authority v. Internal Revenue Service, 838 F.2d 567, 568 (D.C. Cir. 1988); *see generally* Higgins (2006, at pp. 1006–07).
21. Prudential Insurance Co., 275 N.L.R.B. 208 (1985) (“the Weingarten right, like the right to strike, is subject to being waived by the union”); *see generally* Craver (1977).
22. Plumbers & Pipefitters Local Union 520 v. NLRB, 955 F.2d 744 (D.C. Cir. 1992) (Edwards, J.).
23. Whether unions appropriately represent the interests of their members is itself a huge question, usually discussed under the topic of union democracy. I wrote an article on the subject some years back, initially conceived as a predicate to the current chapter. Schwab (1992).
24. Illinois was a leader in creating this type of tort of wrongful discharge against public policy – firing an employee for exercising a statutory right. *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978).
25. “Since *Allis-Chalmers*, lower courts applying the standard in that case have held that Section 301

- preempts claims for fraud and misrepresentation, invasion of privacy, defamation, intentional infliction of emotional distress, negligence, tortious drug testing, tortious interference with contract, violation of an implied covenant of good faith and fair dealing, fraud, violation of worker compensation law, race and sex discrimination under state law, breach of a trust agreement, breach of contract, violation of state wage and hour laws, and retaliation under state workers compensation and other laws,” citing some 53 preempted cases and 22 contrary, non-preempted cases. Higgins (2006, pp. 2389–93).
26. *Byrd v. VOCA Corp.*, 962 A.2d 927 (D.C. Ct. App. 2008) (preempting wrongful discharge claim of employee fired for reporting health and safety violations, because assessing the validity of the discharge would require interpretation of the management-rights and just-cause clauses in the collective bargaining contract); *Frederick v. Federal-Mogul, Inc.*, 185 LRRM 3172 (E.D. Mich. 2008) (preempting employee’s claim that employer misappropriated his invention for improved manufacturing process, because claim required interpretation of job duties specified in collective bargaining agreement).
 27. See Brief for Employers Group as Amici Curiae at B1-B6, *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (listing 22 state laws with opt-out provisions for collective bargaining agreements).
 28. VT. STAT. ANN. tit. 21, § 342(b).
 29. OR. REV. STAT. § 652.140.
 30. NEV. REV. STAT. § 608.018(2)(f).
 31. Ch. 820 ILL. COMP. STAT. § 140/3.
 32. MD. CODE ANN. art. 48A, § 490L (employer-provided health insurance can not charge different copayments for mail-order pharmacies, unless insurance policy is issued pursuant to a collective bargaining agreement); WASH. REV. CODE §§ 48.44.310 & 48.44.340 (group health insurance policies shall offer coverage for chiropractic care and mental health care on same basis as any other care, unless collective bargaining agreement says otherwise); ALASKA STAT. § 23.10.430(b) (employees have right to inspect personnel file, but this requirement does not supersede the terms of a collective bargaining agreement); ch. 820 ILL. COMP. STAT. § 40/2 (employees have right to inspect personnel records twice a year, unless otherwise provided in a CBA); WIS. STAT. ANN. § 103.13(2) (same).
 33. MONT. CODE ANN. § 50-71-201.
 34. ARK. CODE ANN. § 11-4-205.
 35. Congress intended the vesting requirements “to broaden the number of employees who are eligible to participate in their employer’s pension plan,” and “to reduce the loss of pension rights by employees who terminate their employment prior to retirement age.” 1974 U.S.C.C.A.N. 5,177, 5,178 (statement of Sen. Williams regarding conference report on ERISA). When Congress shortened the vesting period in 1986, the Senate Report explained that “present law does not meet the needs of many workers who change jobs frequently. In particular, women and minorities are disadvantaged by the present rules because they tend to be more mobile and thus more likely to terminate employment before vesting . . . [M]ore rapid vesting would enhance the retirement income security of low- and middle-income employees.” S. Rep. No. 313, 99th Cong., 2d Sess. 589–91 (1973) (Finance Committee report regarding Tax Reform Act of 1986).
 36. ERISA § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A). The five-year requirement is cliff vesting, whereby the plan can completely forfeit pension benefits for an employee who leaves before five years of service. Alternatively, the plan can delay 100 percent vesting until seven years by following an ERISA schedule of partial vesting that begins with 20 percent vesting after three years. ERISA § 203(a)(2)(B), 29 U.S.C. § 1053(a)(2)(B).
 37. When enacted in 1974, ERISA mandated ten-year cliff vesting or graduated vesting schedules ranging from five to fifteen years. Employee Retirement Income Security Act of 1974, ch. 18, 88 Stat. 854–5 (1974). In 1986, Congress reduced the minimum vesting standards to allow a choice between five-year cliff vesting and three- to seven-year graduated vesting. At this time, Congress created a special provision allowing ten-year cliff vesting for multiemployer plans created by a collective bargaining agreement. Tax Reform Act of 1986, ch. 1, § 1113, 100 Stat. 2, 446–7 (1986).
 38. ERISA § 203(a)(2)(C)(ii)(I). Multiemployer plans are common in the garment industry, where there is a strong union and many small employers, and in industries such as construction where workers frequently stay within a small geographical area but frequently move from employer to employer (Conison, 1993).
 39. In Congressional hearings, the AFL-CIO promoted the relaxed vesting standards because (1) employees in industries characterized by multiemployer plans already benefit from pension portability, and shortening the vesting requirements would needlessly increase the costs of administering multiemployer plans, and (2) in these industries, the workforce size and the viability of employers tend to be very unstable, and collective bargaining is a better way to obtain better vesting: “The bill properly exempts multiemployer plans . . . In industries characterized by multiemployer plans, the typical worker is employed by dozens, even hundreds of different employers during his or her working years. In these industries, multiemployer pooled plans have evolved which allow workers to obtain pension credits despite frequent shifts from one employer to another. This is why any vesting standard will cost a multiemployer plan more . . . In

addition, the conditions of employment are inherently unstable in [such industries]. Contributors to these plans often include hundreds or even thousands of small companies. The incidence of business failures is relatively high and large fluctuations in the size of the work force are not uncommon. Given such conditions in these industries, collective bargaining, because of its flexibility, is the best way to achieve the goal of more liberal vesting.” The Retirement Income Policy Act of 1985 and the Retirement Universal Security Arrangements Act of 1985: Hearing Before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 99th Congress, 2d Sess., 345 (letter from Robert McGlotten, AFL-CIO).

40. For example, the Chamber of Commerce complained that, while faster vesting increases costs and reduces actual retirement security, relaxed regulations for multiemployer union plans “would skew employer decisionmaking about the type of plan with which to be involved and would disadvantage many non-unionized companies with single employer plans that compete with unionized companies [with] multiemployer plans”). *See id.* at 85 (statement of John N. Erlenborn, U.S. Chamber of Commerce; The National Manufacturers Association made essentially the same argument, *id.* at 98 (statement of James A. King, National Association of Manufacturers).
41. *See generally* Congressional Budget Office, Tax Policy [. . .] Pensions and Other Retirement Savings (1987) (explaining the tax advantages associated with qualified pension plans).
42. The relevant tax advantages for qualified plans may be found in 26 U.S.C. § 401(a). ERISA requires that a pension plan benefit “such employees as qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of highly compensated employees.” 26 U.S.C. § 410(b)(2)(A)(i) (1988).
43. In a similar vein, ERISA’s nondiscrimination requirements for “cafeteria plans” do not apply to plans maintained under a collective bargaining agreement. I.R.C. § 125(g)(1) (“For purposes of this section [on cafeteria plans], a plan shall not be treated as discriminatory if the plan is maintained under an agreement which the Secretary finds to be a collective bargaining agreement between employee representatives and one or more employers”).
44. During the passage of the original ERISA bill, the House Committee on Ways and Means reported that “[f]irst, [the provision] recognizes that employees who are represented in collective bargaining agreements may prefer other forms of compensation, such as cash compensation, to coverage in a plan; and second, it makes it possible for employees who are not covered by a collective bargaining agreement to receive the advantages of coverage in a qualified plan where some employees of the same firm have elected through collective bargaining agreement not to be covered by the plan.” H.R. Rep. No. 779, 93d Cong., 2d Sess. 17 (1974), reprinted in Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 2606 (1976). The problem before 1974 was the requirement that a qualified plan had to cover at least 70 percent of employees, or that it be nondiscriminatory. *See* 26 U.S.C. § 410(b). Without the exemption in 26 U.S.C. § 410(b)(3)(A), when a union decided to exchange pension benefits for other compensation, nonunion employees of the same employer would not likely get to participate in a qualified plan. Specifically, in 1974 some 50 percent private-sector non-agricultural workers were not covered by pension plans. H.R. Rep. No. 779, 93d Cong., 2d Sess. 17 (1974), at 11. So the exclusion of union employees from the analysis seeks to increase pension coverage among nonunion workers and to give union employees the choice between pension benefits and other compensation.
45. 29 U.S.C. § 1341, part of Subtitle C of ERISA’s Pension Benefit Guarantee Corporation authorization, allows two types of plan terminations: “standard” and “distress” terminations. 29 U.S.C. § 1341(a)(3), however, provides that “the corporation shall not proceed with the termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement.” The provision was added in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act of 1985. COBRA, Pub. L. No. 99-272, § 11007, 100 Stat. 244 (1986).
46. The provision was “an endorsement of judicial decisions such as *Terones* [v.] *Pacific States Steel Corp.*, 526 F. Supp. 1350 (N.D. Cal.] 1981), holding that a company cannot unilaterally terminate a collectively bargained pension plan when such termination is in violation of the terms of any agreement between the parties.” 132 CONG. REC. 3,792 (1986) (Rep. Clay, discussing conference report on the budget bill). *See generally* H.R. Rep. No. 300, 99th Cong., 1st Sess. (1985) (report by House Committee on the Budget regarding Omnibus Budget Reconciliation Act of 1985). *Terones* merely interpreted a collective bargaining agreement and concluded that it did not allow unilateral termination by the employer. Therefore, the effect may simply be to affirm a strong policy interest in preventing terminations, to which *Terones* alludes.
47. 29 U.S.C. § 207(b)(1) exempts from the workweek requirements employees employed “in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the [NLRB], which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks.”
48. 29 U.S.C. § 207(b)(1)–(2). 29 U.S.C. § 207(b)(2) provides, in singularly cryptic terms, that employers need

not follow the § 207(a)(1) overtime requirements for employees employed “in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the [NLRB], which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate”

49. When Congress passed the original version of the FLSA in 1938, Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060, 1063 (1938), § 7(b)(1) exempted from the normal workweek requirements collective bargaining agreements allowing no more than 1,000 hours of work for a 26-week period, and § 7(b)(2) exempted similar agreements allowing no more than 2,000 hours for a 52-week period. However, time-and-a-half was still required for any hours above 12 per day or 56 in a week. Evidence from a conferee’s explanation of the conference report suggests that the provision attempted to satisfy employers whose peculiar operations required longer workweeks. “[T]he conference agreement contains general exemptions to allow for further flexibility. . . . [The 26-week period/1,000 hour exemption] will take care of the peculiar situation which exists in isolated mining and lumber camps which are located in some cases 75 or 100 miles from civilization. . . . [The 52-week period exemption provides] an exemption from the basic maximum hours for employers who have adopted the annual wage plan.” 83 CONG. REC. 9,257 (1938) (Rep. Norton, explaining conference committee report). *See also* 83 CONG. REC. 9,164 (1938) (Sen. Thomas, explaining that § 7(b) is a compromise between the alleged rigidity of the House bill and flexibility of the Senate bill; “general exceptions . . . are so drawn as to encourage under proper safeguards continuity or regularity of employment”).

In 1941, Congress raised the maximum annual total for agreements covering 52-week periods to 2,080 hours. Act of Oct. 29, 1941, ch. 461, Pub. L. No. 283, 55 Stat. 756 (1941). In 1949, Congress raised the 26-week maximum to 1,040 hours; for 52-week periods, the limit was set at 2,240 hours. Act of Oct. 26, 1949, ch. 736, Pub. L. No. 392, 63 Stat. 913 (1949). That bill also added the modern language requiring a guarantee of at least 1,840 hours for annual agreements, and the modern overtime requirements for such agreements. The bill’s purpose was “to provide for greater flexibility.” 95 CONG. REC. 14,875 (1949) (summary of conference committee report). It also sought to conform the maximum hours under § 7(b) exemptions to an average of 40 hours per week. When employees work more than the equivalent of 40 hours per week, employers are required to pay the overtime rate. 95 CONG. REC. 14,875 (1949) (summary of conference committee report). *See also* 1949 U.S.C.C.A.N. 2,256 (conference committee report: “[new § 7(b)(1)] would permit employment under such agreements for an average workweek of 40 hours during any 26-week period”; “[new § 7(b)(2)] provide[s] for greater flexibility”).

For general analysis of the legislative history of the FLSA, see generally Forsythe (1939, p. 486) (original union exemption intended to reach industries that need to send workers to remote areas, to work long hours for short periods of time); Cooper (1939, p. 346) (explaining the original language and early interpretations).

50. The overtime pay provisions in collective bargaining agreements typically conform to the normal FLSA requirements in 29 U.S.C. § 207(a)(1). Occasionally, an agreement is negotiated which arguably falls outside the normal workweek requirements and may be valid under the § 207(b) exemptions. *See, e.g.*, Agreement, Apr. 1, 1988, State of Alaska-Inlandboatmen’s Union 20–23 (providing for a workweek of seven consecutive 12-hour workdays, with seven consecutive days off following each completed workweek, and time-and-a-half for hours worked during the scheduled week off).

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