Law and the Workplace

The Rightless American Worker
First Amendment in the Workplace
Minimum Wage Policy

ALSO IN THIS ISSUE:
Learning Gateways
Teaching Legal Docs
Law Review
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Law and the Workplace

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Insights on Law & Society is published three times each year by the American Bar Association Division for Public Education. The mission of the Division is to educate the public about law and its role in society. Insights helps high school teachers of civics, government, history, and law; law-related education program developers; and others working with the public to teach about law and legal issues. Funding for this issue has been provided by the American Bar Association Fund for Justice and Education. We are grateful for this support.

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Each of these headlines addresses one of the many workplace issues facing American workers today. This issue of Insights is dedicated to workplace law. While many high school students have already entered the workforce, others will do so at some point in the near future, either as summer employees, part-time or full-time employees, or interns. We hope this issue helps to ignite a robust and informed discussion of the rights, responsibilities, and legal landscape that shape today’s workplace.

Jeannette Cox (University of Dayton School of Law) discusses the parameters of free speech in the workplace, including misconceptions on how far the First Amendment extends. Jerold Waltman (Baylor University) takes a look at minimum wage policy, an issue much in the news as states and municipalities increasingly explore setting their own wage floors above the federal requirements. Sophia Z. Lee (University of Pennsylvania Law School) traces the history of workplace rights and analyzes the trends in an ever-changing legal landscape.

Teaching Legal Docs provides an opportunity to acquaint students with a form that will likely be an important annual part of their lives, the W-2. Law Review takes a look at a compelling case currently before the U.S. Supreme Court that seeks to clarify the responsibility of employers when their workplace policies clash with the religious practices of an employee or a job applicant. Rounding out the issue is a Profile of Dan Naranjo, a lawyer and former U.S. magistrate judge with 15 years of experience as an arbitrator and mediator. To help connect this content to your classroom, our Learning Gateways features instructional strategies to engage students in reflecting on policies that impact the workplace.

There is more to this magazine than what appears on these pages. Visit us on the web at www.insightsmagazine.org to find more rich content and resources to help you bring the law alive in your classroom. The website offers teachers additional instructional supports, including ready-to-use handouts, articles, and opportunities for discussions. Also don’t forget to check out our resources at www.lawday.org to help you implement the 2015 Law Day theme this May 1: “Magna Carta: Symbol of Freedom and Liberty.”

We welcome your feedback and ideas for Insights. Please suggest topics you would like to see addressed in future issues. We also hope you will share innovative classroom strategies you have developed that we can pass on to other teachers. As always, we appreciate your interest in this magazine and in law-related education.
Today, most workers in the United States can be fired or disciplined for almost any reason or no reason at all. A boss can, for instance, fire an employee because he “liked” a pro-life or gay-rights group on Facebook or his child did better than hers in a school sport. For that matter, she can fire him just because she feels like it. And in most workplaces, she doesn’t owe him a chance to convince her she’s wrong about the facts or is acting unfairly. If she searches his locker, finds out personal information by tracking his keystrokes on his work computer, or uses his business phone’s GPS to track him outside of work, the law probably doesn’t protect him either. Employers, of course, may have reasons not to do these things even though the law lets them. They may want their workers to be happy, for example, so that they are more productive and don’t quit. But this is up to each employer; the law puts few limits on how they treat their employees.

American workers’ general lack of legal protections is surprising. First, it’s surprising in that studies suggest most workers do not realize they lack these protections. It’s also surprising because the other industrial democracies in the world have laws that protect their workers far more: laws that require employers to have good, business related reasons for firing or disciplining their workers; laws that give workers an opportunity to show that the employer’s reason is not true or not legally appropriate; laws that give workers more privacy. But it’s also surprising because if you traveled back in time to the middle of the 20th century, it looked likely that workers in the United States today would have far more legal protections than they do. Indeed, after decades of struggle and limited progress, workers’ legal protections exploded in the mid-20th century, galvanizing new efforts to expand them even further. How did the United States come to have an explosion in workers’ rights, and more importantly, how did we get from there to here?

The Rise of the Rightless Worker

At the nation’s founding, there were some skilled craftsmen who owned their own tools and contracted to provide a good or service. But most work was done as part of a household run by a patriarch. The law reflected this fact. The law governing these workers was
part of domestic relations law (what we would today call family law) and had a name that codified their low place in the household hierarchy: master and servant law. “Servants” were often hired for many years at a time under contracts that were hard to break. For instance, young children might be indentured to work for a master until they reached adulthood. Slaves, also governed by domestic relations law, had even fewer legal protections.

The Civil War and industrialization changed the nature and law of work dramatically. Slavery was formally abolished. Paid work shifted out of the household and into factories where it was now compensated by the piece or by the time worked. Servants became “employees,” and the legal profession removed the law governing them from domestic relations law, recasting it as just like any other type of contract. Instead of securing long-term agreements, employers increasingly opted for what was known as “at-will” employment: a relationship that either employer or employee could end at any time and for any reason. Work could be quite harsh. Industrial labor was notoriously dirty, unsafe, and meagerly paid, whether laying railroad track across the frontier, sewing in cramped tenements, or shoveling ore into a fiery furnace. In the South and West, former slaves, poor whites, Mexican migrant workers, and Asian immigrant workers often found themselves indebted to and thus at the mercy of landowners or labor contractors.

Workers tried to use the law to protect themselves but with little success. Industrial workers formed unions and tried to win through their collective strength contracts that provided more security, better wages, and improved working conditions. But the law did not look kindly on these “combinations” or their tactics. As a result, unionizing efforts were often met with everything from lawsuits to violent repression. State and federal troops quelled the Great Railroad Strike of 1877, for instance, and a hat manufacturer who did not want his employees to unionize successfully sued their union for...
leading a nationwide boycott of his hats in 1902. Some people pushed for local, state, and federal governments to enact laws to protect workers, whether minimum-wage laws, workplace safety laws, or laws barring child labor. But the courts struck many of these laws down, finding that they actually violated workers’ legal rights, here their constitutional right to contract for whatever working conditions they chose (known as their “freedom of contract”).

Even during this period of relative rightlessness, however, workers won some important protections. Industrial labor was extremely dangerous and many workers were injured or killed on the job. In the early 20th century, most states enacted laws requiring employers to compensate these employees. Courts also allowed laws protecting the wages, hours, and working conditions of those considered particularly vulnerable, including women and miners.

Workers Get a New Deal
During the New Deal, the exceptional legal protections of the previous decades became the rule. For the first time, the federal government laid down basic rules and protections that covered most workers in the United States. These included a national minimum wage, an overtime pay guarantee, and a ban on child labor. And the courts allowed these laws, rejecting the freedom of contract and other constitutional objections that had killed earlier such laws.

Congress and President Roosevelt also adopted laws granting workers entirely new rights. A law generating unemployment insurance programs in all states followed the model of earlier laws: basic guarantees provided to most workers. But many New Dealers believed that rather than have the law prescribe detailed requirements, the best way to protect workers was to help them form unions. While not everyone agreed on the best model, the winning approach gave workers the right to picket, to organize, and to form a union. It also required employers to bargain with a union that had sufficient support among employees. This marked a sea change from the time when unions could be sued or violently suppressed for these actions. At its most basic level, the idea was that if the law gave workers the right to unionize and speak out, they would come together and negotiate with their employers for the wages and protections that made the most sense for their particular workplace.

Many supporters of these labor laws expected them to transform the workplace. They assumed that unions would spread across the entire economy. Those unions would negotiate contracts that not only addressed wages and hours but also brought democratic and constitutional principles into the workplace. Allowing employees to participate in their unions and elect representatives would turn employment autocracies into democracies, the reasoning went. Also, according to an old legal rule, only the government had to respect people’s constitutional rights to things such as free speech or due process. New Dealers hoped that union contracts would provide similar protections in the private-sector workplace, ensuring that workers would only be fired or disciplined for good reason, for instance, and that they would have an

Law in the Workplace, a Timeline

1916
The Federal Compensation Act, providing benefits to workers who are injured or contract illnesses in the workplace, is signed into law by President Woodrow Wilson. The act establishes the Office of Workers’ Compensation Programs.

1921
Congress approves The Railway Labor Act (RLA) to mend the tension between rail laborers and management. Administered by the National Mediation Board, an independent federal agency, the success of the RLA led to its expansion in 1936 to cover airline workers.

1935
The National Labor Relations Act defines unfair labor practices and protects workers’ rights to strike and collectively bargain. The National Labor Relations Board is created to enforce the new law.

1938
The Fair Labor Standards Act establishes the first minimum wage and the 40-hour week.

1963
As part of his New Frontier Program, President John F. Kennedy signs into law the Equal Pay Act, which guarantees that men and woman be given equal pay for equal work.

1964
The Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin, is signed into law by President Lyndon B. Johnson.

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opportunity to challenge any accusations the employer made against them.

Despite this explosion of workplace rights during the New Deal, some legal protections were notably lacking. Most glaringly, none of these laws addressed discrimination by employers or unions. In fact, they generally excluded agricultural and domestic work, precisely the types of employment mostly women and racial minorities held. And discrimination was a big problem. Work was highly segregated by race and sex. For black workers, this usually meant the dirtiest and most dangerous jobs as well as those with the least pay. For some women, this meant work was discouraged altogether. When it was not, they were often shunted into lower status jobs that required so-called feminine qualities. For black women, this generally meant domestic labor, while white women might hope for factory jobs in textile mills or garment trades. While some unions fought to break down these barriers, others enforced them, excluding African Americans or bargaining to keep women out of preferred jobs. Also, New Dealers thought unions would be little democracies, but no laws required this.

### Expanding Workers’ Rights

By 1940, it seemed like unions would deliver on their promise of extending protections to most workers. In the wake of the New Deal labor laws, union membership exploded, so much so that by 1954, about 35 percent of nonagricultural workers belonged to a union. As government grew after the New Deal, so did government employment. During the 1950s and 1960s, many of these government employees—teachers, police officers, and sanitation workers for example—formed unions, bringing more workers under the protection of union contracts.

But the New Dealers’ hope for unions was never completely fulfilled. Employers resisted with increased vigor and coordination, spawning by the 1970s an industry of consultants whose firms bore bland names such as Modern Management Methods and were devoted to helping employers prevent unionization. Changes in the domestic and global job market also weakened unions by hurting industries where they were strong, such as manufacturing, and shifting jobs to service, technology, and knowledge sectors where organizing unions were not as prevalent. As a result, 1954 turned out to have been a peak; thereafter, unionization rates steadily declined, reaching about 22 percent in 1980. Even where unions existed, stiffer employer resistance meant that the contracts they bargained for did not provide all the employee benefits that New Dealers had imagined. For instance, in the 1950s and 1960s, employers increasingly refused to adopt provisions protecting workers from being fired without good cause.

Workers and their allies turned to new sources of law to ensure and expand protections to workers. In the 1970s and 1980s, they got many state courts to use contract and tort law to extend to more employees the right not to be fired without good reason and the chance to contest employer discipline and discharge. For instance, in 1977, the Michigan Supreme Court found that the manual a company distributed to its employees created a binding contract.
Because the manual promised to treat them fairly, the court held, it protected them from being fired without good cause. By the late 1980s, Montana had even adopted a statute giving this right to all employees in the state and a similar law was introduced in Congress. Meanwhile, courts in the 1960s and 1970s gave some bite to the constitutional rights public-sector employees held against their government employers. They found, for instance, that a college professor could not be fired for speaking out against his college’s administration.

And what about those workplace rights left out of the New Deal? Black workers and civil rights activists wanted Congress to pass a law barring racial discrimination by employers and unions, but in the 1940s and 1950s their efforts went nowhere. Instead, they turned to the Constitution. At the same time, employers and some workers who disliked the New Deal labor laws wanted to change the law so that no one’s job would require him to join a union or pay union dues. These advocates secured what they termed “right-to-work” laws in a number of states during the 1940s, but thereafter their legislative campaign stalled. They too looked to the Constitution to provide this right.

Turning to the Constitution for missing workplace rights was a tricky proposition. After all, there was that old rule saying that the Constitution only restricted the government.
employers, not the government. The laws also treated unions as private associations or corporations, no different from the local Elks Lodge. As a result, at first, courts said that black workers could not claim that the Constitution protected them against workplace discrimination and that opponents of the New Deal labor laws could not claim a constitutional right to work free of union membership, dues, or fees. For instance, in the 1930s black coach-car cleaners claimed the Constitution protected them from being represented by an all-white union, but the courts dismissed their case.

But constitutional law transformed in the mid-20th century, and there was good reason to expect transformation here as well. Even as the courts rejected freedom of contract, they began to interpret other constitutional rights as a robust check on government action, from public schools' segregation to their mandatory flag salutes. And the civil rights and right-to-work movements were well equipped to extend this trend to private-sector workplace rights. The civil rights movement, after all, toppled the decades-old separate-but-equal doctrine in the 1954 landmark decision Brown v. Board of Education. The right-to-work movement, for its part, had deep-pocketed and powerful supporters, such as the beloved movie mogul and radio personality Cecil B. DeMille.

By the early 1960s, both movements had met with notable success. Civil rights advocates had convinced the National Labor Relations Board, the main federal agency in charge of private-sector unions, that the Constitution required it to ensure nondiscrimination in the workplaces it oversaw. Right-to-work litigants, meanwhile, had won their constitutional claims in the lower courts and gotten the Supreme Court to find that, at least in the railroad industry, it was illegal for unions to collect certain fees from objecting workers.

From here, however, the two movements' paths diverged, even as each continued to expand workers' legal rights. In the 1960s, civil rights advocates broke the logjam in Congress. Over the next thirty years, Congress passed a number of laws prohibiting racial discrimination by employers and unions, as well as sex discrimination and discrimination on the basis of religion, disability, age, and national origin. This roll culminated in the Family and Medical Leave Act of 1993, which guaranteed unpaid medical leave to full-time employees of large employers.

The right-to-work movement could not point to similar legislative successes, and it never got the courts to extend the Constitution to private-sector workplaces. But right-to-work advocates did get the courts to expand to more workers the protections they had recognized in the 1960s for railroad employees. Hundreds of Detroit teachers went to court and, in 1977, secured a big victory when the Supreme Court found that public-sector workers did not have to contribute to a union's political activities. In the 1980s, the Supreme Court extended this right to opt out of certain union dues to the vast majority of private-sector workers whose unions were overseen by the National Labor Relations Board.

The Return of the Rightless Worker?

Since 1990, workers' protections have diminished on just about every front. The share of workers protected by a union contract has continued to plummet—currently unions represent about 11 percent of all workers and less than 7 percent of those in the private sector. Since 1970, the federal minimum-wage law has not kept pace with inflation. As a result, it protects fewer and fewer workers. Federal overtime laws have never protected managers. But the late-20th-century shift to a knowledge and service economy blurred the lines between management and wage work, leaving even some low-paid workers without overtime protection (think here of the assistant manager at your local discount retailer who may work upwards of 60 hours a week for low pay). Increasing numbers of jobs moved outside the United States, as global technological and workforce advancements made offshore production appealing to employers. This further eroded workers' bargaining power. Across the nation, some state courts never adopted the contract and tort law doctrines that gave workers limited job security; those that did have made it harder for employees to win under them. Instead, contract law has mostly worked against employees as courts have allowed employers to require agreements in which employees waive their legal rights altogether or their right to pursue them in court. And as early as the 1980s, the Supreme Court began weakening constitutional protections for public-sector workers, arguing that the lack of such protections in the private sector justified doing so.
Rights in the Workplace

This lesson discusses what rights employees have, and do not have, in the workplace. It addresses rights such as minimum wage, overtime, regular pay, breaks, workers’ compensation, workplaces free from discrimination, and the concept of “at-will employment.” Consider inviting a local employment lawyer into the classroom to discuss these issues with students.

Materials:
- Photos of workers from the early 20th century, readily available from the Library of Congress
- Fair Labor Standards Act of 1938, available from the National Archives
- Workplace Rights Scenarios, copies of one scenario per small group

Part I
1. Ask students how many of them have jobs, or have had jobs. Allow students to discuss where they work, how many hours they work each week, etc.

2. Project for, or show students, a few photographs of workers from the early 20th century, including adults and children in potentially unsafe environments. Ask students to discuss their impressions of the photos.

3. Ask students to discuss the following questions:
   - Do the situations depicted in the photos still happen in the United States today?
   - Why are the children in the photos working and not in school?
   - Are any of you working 12-hour shifts? Why not?

4. Project for, or show students, the Fair Labor Standards Act of 1938. Explain that it was legislation passed by Congress in 1938 that prohibited a variety of workplace activities, including child labor, and provided for overtime beyond a 40-hour work week and a minimum wage.

Part II
1. Explain to students that they will be learning about some of their rights in the workplace. Organize students into groups of four. Half of the students in each group can pretend to be lawyers, while the other half can pretend to be workers. They will be discussing potential legal violations in the workplace.

2. Distribute one Workplace Rights Scenario to each group. Ask the “workers” to explain their problems to the lawyers, and the lawyers to assess whether there appears to be a claim. After each group presentation, allow the class to discuss the scenario; then let the group know whether the claim is valid based on the law presented.

   Note: Remind students that the laws discussed are federal laws. Discuss any state or municipal laws that might also be enforceable in the students’ location.

3. To wrap up, discuss other mechanisms that might be in place to govern rights in the workplace, including unions and contracts.

Workplace Rights Scenarios

Sally has a job at the local grocery store. The owner of the store pays Sally $4.00 per hour, and she often works 50 hours each week. Her paychecks are usually $200 per week before taxes. Sally hears something about the minimum wage and overtime and wonders if they would apply to her.

Sally is entitled to be paid at least the federal minimum wage per hour, which is $7.25, compared to her current rate of $4.00. The minimum wage in her state may be higher. She also has the right to overtime pay after 40 hours of work, so those usual extra 10 hours would be paid at a rate of 1.5 times the hourly rate. Sally’s paychecks should be closer to $326 before taxes.

Tim works as a delivery driver for a pizza company in town. While delivering a pizza, he is involved in a car accident that is not his fault. He is injured and is now unable to work. The owner of the pizza company tells Tim that since he was driving, there is nothing the owner can do. But Tim thinks this is unfair since he was injured on the job.

Tim has a right to pursue a worker’s compensation claim for his on-the-job injury.

Alexandra recently took a job at a clothing store at the mall. She wears a head scarf, in accordance with her religious beliefs. Her boss regularly makes comments about the scarf and recently pulled her from the sales floor because “she looks like a terrorist.” He later cuts her hours and tells her it is because she wears the head scarf.

Alexandra may be a victim of workplace discrimination, which is prohibited by federal law. If her boss’s actions can be shown to be on the basis of religion, ethnicity, or gender, she may pursue a workplace bias claim.
Corina works on the sales floor of a local department store. She often works 8-hour shifts and gets one 20-minute break for lunch. While Corina can eat in 20 minutes, she doesn’t think it’s right.

Corina has a right to a 30-minute lunch break during an 8-hour shift, in addition to shorter rest breaks. There may be state laws that provide for breaks in addition to the federal laws.

Stan buses tables at a local restaurant. His boss told him he would be paid each week, but Stan hasn’t received a paycheck in three weeks. The boss says there is no money to pay employees, but Stan was really counting on that weekly paycheck.

Stan has the right to regular paychecks. He may report this rights violation to the U.S. Department of Labor as well as any state authorities.

Sophia likes her job at the local shoe store. She takes regular breaks during her shift, which means clocking in and out on time. Sometimes, Sophia’s boss makes her work during her break, after she is off the clock.

It is a violation of Sophia’s rights to insist that she work during her unpaid breaks. Her breaks should be that—breaks.

Will and Robert are cooks at a local fast food restaurant. One day, their boss says that someone has been stealing from the cash register and promises to search lockers for the thieves. Will and Robert are upset.

Will and Robert are at-will employees, which means that they may be hired and fired “at will” for an array of reasons that are all legal. Nothing in this scenario suggests a rights violation.

Antidiscrimination and right-to-work protections have suffered, or at best held pace. Despite decades of lobbying, Congress has never expanded federal antidiscrimination laws to include discrimination on the basis of sexual orientation or gender identity. And where antidiscrimination laws exist, the courts have whittled away at them, limiting the kinds of discrimination they bar and making it harder for workers claiming discrimination to get their day in court. The Family and Medical Leave Act is supposed to advance sex equality in the workplace. Because it doesn’t require that leave be paid and covers only full-time workers at larger employers, however, it has left low-income employees and those who work part-time or for small employers unprotected. The right-to-work movement has had recent successes in state legislatures and garnered the vocal support of some Supreme Court justices. But even here, worker litigants have made little real progress since the 1980s.

The Future Law of the Workplace

Today, adults in the United States spend a large part of their waking hours at work. But they seem to have a limited understanding of the laws that govern this critical relationship. At the least, understanding how the law has regulated the workplace in the past can help illuminate the law of the workplace today. What people do with this knowledge is up to them, but ignorance should not be anyone’s solution. Some argue that workers’ limited rights are best for business and thus best for workers; legal protections are costly, they argue, taking money away from jobs and making businesses uncompetitive. But for those who think more legal protections are warranted, history provides many ideas for where to look. It could be fighting for unions that can negotiate protections for members, pressing legislatures for laws that benefit all workers, or convincing the courts to extend existing laws to new worker-friendly uses. Indeed, as those in the civil rights and right-to-work movements have found, oftentimes the most successful strategy is one that combined some or all of these approaches.

This is a lesson today’s fast-food workers know well. Their current fight for a $15-an-hour minimum wage combines union organizing, legislative lobbying, and lawsuits. These workers draw inspiration from the civil, women’s, and labor rights movements. These movements helped shape the laws that regulate today’s workplace. The “Fight for 15” campaign is a reminder that understanding the history of workplace laws may also inspire and guide today’s workers as they shape the law of tomorrow’s workplace.
Can your boss fire you for expressing your views on social policy, participating in a political party, or donating money to an unpopular political cause? Polls indicate that many Americans believe the answer is no. After all, the right to free speech is among our most deeply ingrained civic values. We repeat, and cherish, the aphorism: “I can say what I like. It’s a free country.”

In reality, however, American employees’ free speech rights may be more accurately summarized by this paraphrase of a 1891 statement by Oliver Wendell Holmes, Jr.: “A employee may have a constitutional right to talk politics, but he has no constitutional right to be employed.” In other words: to keep your job, you often can’t say what you like.

Lynne Gobbell knows this firsthand. She drew media attention in 2004 when her employer, a vocal Bush supporter, fired her from her insulation-packing job because he disapproved of the John Kerry bumper sticker on her car. Similarly, Michael Italie lost his job as a machine operator because he appeared on a local radio program in which he discussed his socialist views and his wildly impractical bid for Miami mayor on the Socialist Workers Party ticket. Even more bizarrely, Tim Torkildson, an instructor at an English-language school, lost his job in 2014 when his boss mistakenly concluded that a blog post he wrote to explain homophones (words that sound alike but are spelled differently) would associate the school with “the gay agenda.”

Although these examples are extreme, they reflect the broad power many employers possess to terminate employees for speaking their minds. In each of these situations, the termination occurred in a jurisdiction where the employer’s action was legal.

If this use of economic power to punish speech sounds un-American, remember that the First Amendment limits only the government’s ability to suppress speech. It provides that “Congress shall make no law . . . abridging the freedom of speech.” Courts have extended this prohibition to all federal, state, and local government officials but have consistently emphasized that the First Amendment’s strictures do not apply to private-sector employers. Accordingly, the only people who enjoy First Amendment protection vis-à-vis their employers are people employed by the government.

Historically, unions protected many private-sector workers from speech-related terminations because they negotiated contracts that limited employers’ abilities to terminate workers without a performance-related rationale. However, because union membership has been steadily declining, the vast majority of private-sector workers now are “employment at will,” which means that they do not have a contract that limits the reasons for which they may be fired. Accordingly, most workers have no protection from speech-related termination unless they can prove that their employer’s motive for firing them violates a federal, state, or local law. The available statutory protections form an incomplete, and often indefinite, patchwork that leaves large amounts of employee speech and political activity unprotected.

At first glance, a federal civil rights statute enacted as part of the Civil Rights Act of 1871 would appear to help some employees, such as Lynne Gobbell, who was fired for her John Kerry bumper sticker. It prohibits two or more people to act pursuant to a conspiracy...
to use force, intimidation, or threats to prevent an individual from supporting or advocating for a federal candidate. So if Lynne Gobbell’s boss enlisted other persons to help him terminate Gobbell, it would appear that he violated the statute. Unfortunately, however, in more than half of the country, including Gobbell’s home state, courts conclude that the statute’s conspiracy requirement cannot be satisfied when the coconspirators are employees of the same corporation. Additionally, even in the jurisdictions where corporate conduct can satisfy the conspiracy requirement, the statute only covers a narrow category of speech related to supporting federal candidates. It does not protect speech supporting state or local candidates and speech advocating an issue or idea rather than a candidate.

State statutes limiting speech-related terminations are similarly incomplete. At the protective end of the spectrum, five states (California, Colorado, Montana, New York, and North Dakota) prohibit employers from punishing employees for legal off-duty activities that do not conflict with the employer’s business-related interests. Nine additional states more narrowly protect employees who engage in political activities and five states similarly protect individuals who sign initiative, referendum, recall, or candidate petitions.

These limited protections for off-duty political speech are not available to approximately half of the U.S. population that works in the remaining 31 states. Accordingly, the majority of American workers have legal protection for their speech only when it relates to a narrow category of topics protected by federal, state, or local law. A brief survey of these laws reveals that they frequently require the employee to thread a needle: they must speak about the right topic, in the right way, and to the right person.

For example, the National Labor Relations Act (NLRA), enacted in 1935, which protects employees’ abilities to unionize, protects certain types of speech that relate to group efforts to improve working conditions. Importantly, the National Labor Relations Board, which enforces the NLRA, has emphasized that employee conduct rules that prohibit employees from posting comments criticizing their employer on social media may violate the NLRA. Nonetheless, the NLRA’s protection has significant limitations. While the NLRA protects work-related complaints that an individual makes on behalf of other employees or in an attempt to initiate group action, it does not protect work-related complaints made solely by and on behalf of the individual employee herself. And because the NLRA focuses solely on group efforts to improve workers’ terms and conditions of employment, it protects political speech only to the extent that the speech relates to unionization and other work-related issues.

Whistle-blower protections have similar limitations. Although numerous federal and state statutes protect workers who report their employers’ wrongdoing, the statutory coverage adds up to an incomplete patchwork that leaves many whistle-blowers unprotected. Importantly, about half of the states’ whistle-blower statutes cover only government employees. Additionally, many statutes require that the employee report the wrongdoing to an appropriate government agency; reports made to the employee’s supervisor or to the media may not qualify for protection. Many statutes require that the alleged wrongdoing be clearly illegal instead of simply unethical. In some states, the wrongdoing must be a felony or an illegal act that poses a significant threat of harm to public health or safety.

Although workers who complain to their employers or appropriate state and federal agencies about potential violations of employment discrimination law typically enjoy broader retaliation protection, they still, like all whistle-blowers, face the difficult task of proving that their employer fired them for reporting wrongdoing instead of one of the innumerable legal reasons for firing an at-will employee. This can be difficult because few employees have completely spotless records and many employers have monitoring technology.

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that enables them to identify employee infractions after the fact.

Even government employees, who have First Amendment protection, face significant difficulty when challenging speech-based terminations. First, thanks to the Supreme Court's 2006 decision in *Garcetti v. Ceballos*, the First Amendment does not protect speech that government employees make as part of their job duties. This means that speech revealing government wrongdoing, incompetence, or waste frequently does not receive First Amendment protection because a worker able to detect these problems often has job responsibilities that require him to report them.

Accordingly, government employees must look to the incomplete patchwork of whistle-blower statutes to find protection for their work-related speech.

Second, the First Amendment's protection of government employee speech is limited to speech that addresses a matter of public concern, which means that a court must judge the speech to be a subject worthy of public attention. While letters to the editor about political or social issues typically qualify, personal grievances and many forms of nonpolitical self-expression typically do not qualify.

Finally, even government employee speech that meets these requirements—it involves a matter of public concern and is not part of the employee's job duties—may fall outside the First Amendment's protection if the speech has potential to disrupt operational efficiency. In many cases, courts conclude that the government’s interest in the smooth functioning of the workplace outweighs the government employee's First Amendment speech rights. For example, in *Connick v. Meyers* (1983), the Supreme Court concluded that the First Amendment did not protect an assistant district attorney’s discussions with her coworkers about pressure she and her coworkers felt to work on political campaigns. The Court rea-
limited off-work hours, forfeiting our engaging in political speech during their sleep and recreational activities over age of our lives at work. Accordingly, even multiple jobs mean that we spend Americans working longer hours and lic discourse. This is cause for concern.

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In sum, the fragmented body of law that governs speech-related termination leaves all American workers vulnerable, albeit to varying degrees. Although typically invisible, this vulnerability creates a chilling effect that both dampens individual self-expression and inhibits public discourse. This is cause for concern.

First, the increasing numbers of Americans working longer hours and even multiple jobs mean that we spend a large and an ever-increasing percentage of our lives at work. Accordingly, because most people tend to prioritize sleep and recreational activities over engaging in political speech during their limited off-work hours, forfeiting our speech rights at work often means that we forfeit our speech rights altogether. This not only reduces each individual employee’s expressive activities but also reduces the quantity and quality of civic engagement.

Second, the threat of speech-related termination results in lost opportunities for the type of coworker dialogue that has potential to foster understanding across social boundaries and spur positive social change. Unfortunately, due to the increasing polarization and fragmentation of American society, the workplace constitutes the primary remaining forum in which adults with different political, social, and religious backgrounds have sustained opportunities to debate the issues of the day. But, unfortunately, recent studies indicate that even though Americans are working longer hours and are spending more time with their coworkers than in the past, workplace conversations have become more superficial.

Finally, in many jobs, technology and the potential for employers to monitor its use blurs the line between work and personal activities. The possibility that employers will technologically “overhear” off-work employee speech creates a chilling effect for discussing controversial topics that extends into employees’ private lives.

Admittedly, a certain degree of employer control over employee speech is inevitable and appropriate. For example, few people would dispute an employer’s right to prohibit workers from discussing trade secrets and other proprietary information with persons outside the company. Similarly, few people would question an employer’s right to prohibit bullying and harassing speech in order to foster a productive work environment and avoid liability under employment discrimination law. Additionally, many people would agree that individuals who represent the public face of the company, such as a corporate spokesperson or CEO, may justifiably lose their jobs for public comments that they reasonably should have known would damage the company’s reputation.

In most circumstances, however, the average employee’s speech poses little risk of harm to the employer. The harm to the employee created by an employer’s ability to punish speech, by contrast, is significant. Particularly in times of economic insecurity, the threat of speech-related termination creates a powerful economic pressure for self-censorship. In the aggregate, this self-censorship compromises the free exchange of ideas necessary for a functional and inclusive democracy.
Learning Gateways

Free Speech, Public Employees, and the Supreme Court

*Students explore six cases involving speech by public employees in the workplace that went before the U.S. Supreme Court. Consider inviting a local employment lawyer into the classroom to discuss these issues with students.*

**Materials:**
- Definitions of public-sector and private-sector employees, copies or projected
- Free Speech in the Workplace Cases, copies of each case study per group

**Procedure**
1. Ask students how many of them have jobs, or have had jobs. Allow students to discuss where they work, how many hours they work each week, etc.
2. Explain to students that they will be discussing speech in the workplace, or how the First Amendment affects workers. Allow students to discuss the following questions:
   - Do you think you could say anything that you want at your job? Why?
   - How do you think the First Amendment might protect things that you say at work?
3. Project, or distribute, copies of the definitions of public-sector and private-sector employees. Share definitions with students, and ask them to brainstorm examples of both public- and private-sector employees.

   **Public-sector employee:** someone who works for the government; includes local, state, and federal government employees, and most employees who work for organizations managed by local, state, or federal government.

   **Private-sector employee:** someone who works outside of government; includes corporate workers, and most nonprofit personnel.

4. Remind students that for the First Amendment to be implicated there must be some sort of government action. Most private-sector jobs do not involve a government action, so the First Amendment does not apply. Therefore, court cases concerning these matters tend to affect public-sector employees, since they are employed by the government.
5. Explain to students that they will be learning about Supreme Court cases concerning free speech in the public-sector workplace. Organize students into six small groups, and distribute one Free Speech in the Workplace Case to each group. Each group should prepare to report on their case to the rest of the class, and include the following:
   - Summarize the facts of the case, including name and year
   - Explain how the Court ruled and why the ruling was significant

6. Reassemble the class and ask each group to report on its case. After each group presentation, allow students to discuss the scenario and whether they agree or disagree with the ruling.
7. After reviewing all of the cases, help students to identify trends in the decisions. For example, the Court has been cautious to restrict public employers’ freedom to terminate employees, limiting protection to speech that is on “matters of public concern.”
8. To wrap up, discuss examples of private-sector workplace policies that might legally restrict free speech. Examples might include policies concerning harassment or bullying, proprietary information, or social media.

**Free Speech in the Workplace Cases**

**Pickering v. Board of Education of Township High School District 205, Will County (1968)**

Marvin Pickering was a teacher in Will County, Illinois. He wrote a letter to the editor of a local newspaper, critical of a proposed tax increase that would raise funds for two new schools. The Board of Education subsequently terminated Pickering, citing his letter as “detrimental to the efficient operation and administration of the schools of the district.” Pickering argued that his First and Fourteenth Amendment rights had been violated. The Court decided in favor of Pickering, ruling that “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”
Mount Healthy School District Board of Education v. Doyle (1977)

Fred Doyle was a high school teacher in Mount Healthy, Ohio, when he learned that his contract would not be renewed with the school district, denying him tenure and future employment with the district. The superintendent cited two specific incidents displaying a “lack of tact”: one involving an obscene gesture to students, and another involving Doyle’s sharing of a district dress code for teachers with a local radio station. Doyle argued that both of these actions were within his First Amendment rights and petitioned for reinstatement. In an unanimous decision, the Court ruled that Doyle could not be fired simply for a “lack of tact” and his communication with the local radio station was protected speech. The Court remanded the case, or instructed the lower courts to revisit the case, whereupon the school district would need to show additional evidence for terminating Doyle. In its ruling, the Court introduced the Mount Healthy test in cases where public employees assert First Amendment rights while employers make other claims. Under the test, the employee must demonstrate that his or her actions are protected under the First Amendment. Then the employer must show by a preponderance of evidence that they would have cause to discipline the employee for conduct outside of the protected actions.

Connick v. Myers (1983)

Harry Connick was the District Attorney for Orleans Parish, including New Orleans. He informed one of the assistant district attorneys, Sheila Myers, who for five years had been a very capable worker, of his intention to transfer her to another office within the parish. Myers objected to the transfer and prepared a survey, which she distributed to her coworkers, asking them to rate office morale, discuss their feelings toward the office transfer policy, and provide their views on whether or not they thought a committee to hear grievances would be a worthwhile addition to the office. Connick learned of the survey and terminated Myers for her refusal to accept the transfer and the “insubordination” of the survey. Myers claimed that her actions were protected by the First Amendment. The Court ruled that because Myers’s actions did not involve matters of public concern, Connick was justified in firing her for actions he believed would “disrupt the office, undermine his authority, and destroy close working relationships.”

Branti v. Finkel et al. (1980)

Aaron Finkel and Alan Tabakman worked as assistant public defenders in Rockland County, New York. The Rockland County Public Defender was appointed by the New York legislature, and the defender then hired nine assistant defenders to work in the office. Finkel and Tabakman, both Republicans, were hired by the Rockland County Public Defender, a Republican. In 1978, a new public defender was appointed, Peter Branti, a Democrat. Branti subsequently sought to terminate Finkel and Tabakman solely because they were Republicans instead of Democrats. Finkel and Tabakman argued that their First Amendment rights to speech and expression prohibited termination on these grounds. The Court ruled in their favor and upheld a court order prohibiting their termination.

Rankin v. McPherson (1987)

Ardith McPherson worked as a secretary in the Office of the Constable of Harris County, Texas. On March 30, 1981, McPherson and her coworkers were listening to the radio, when they learned about an attempt on the life of President Ronald Reagan, who, they would later learn, had been shot by John Hinckley, Jr., in Washington, D.C. McPherson began discussing her displeasure with some of Reagan’s policies and remarked, “if they go for him again, I hope they get him.” Another worker overheard the remark and reported it to McPherson’s boss, Constable Rankin, who proceeded to interview McPherson about her feelings toward the President. Rankin fired McPherson, who sued, arguing that her First Amendment rights had been violated. The Court ruled in favor of McPherson. Because her remark took place in a setting not usually open to the public, and did not pose any danger in disrupting the flow of public work, and because McPherson’s own work did not concern any law enforcement matters that might be affected by her statement, her termination was found to be not justified in the interest of Texas. In a concurring opinion, Justice Powell wrote, “The undisputed evidence show that McPherson made an ill-considered—but protected—comment during a private conversation, and the Constable made an instinctive, but intemperate, employment decision on the basis of this speech.”


Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney’s Office. While investigating a case, he determined that certain documents filed with his office contained “serious misrepresentations.” Ceballos spoke with the deputy sheriff who filed the document but was not satisfied with the officer’s explanation. He then reported his concerns to his supervisors, all of whom reported to District Attorney Gil Garcetti. Ceballos claimed that following these discussions, he was subjected to a series of retaliatory actions, including reassignment to another courthouse. Ceballos sued his employer, alleging that retaliatory actions in response to his speech on the job violated his First Amendment right. The Court ruled in favor of Ceballos, calling his “allegations of wrongdoing protected speech under the First Amendment.”
Getting to Know the IRS W-2 Form

Near the beginning of each year workers in the United States receive from their employers a “Wage and Tax Statement” commonly known as the W-2, after the Internal Revenue Service’s classification of the form. This annual form is, as its name suggests, a statement of taxable wages earned and taxes paid throughout the previous year. Here, Teaching Legal Docs offers some background and explanation about this seemingly ubiquitous document that is very much a part of the American workplace.

Current Tax Payment Act of 1943

The W-2 form traces its origins back to the beginning of America’s modern income tax policy, a result of the Current Tax Payment Act of 1943. In 1943, the Act introduced the pay-as-you-go income tax, in which a sum of money is withheld by an employer from an employee’s paycheck each pay period in accordance with tax liability. Prior to the pay-as-you-go system, American workers paid an annual lump sum tax payment. Not all American workers paid the annual tax on their income. In fact, most did not. Just four percent of workers in the United States, mostly wealthy, paid the annual income tax. The pay-as-you-go system was introduced in 1944 as an alternative to the annual payment. It was described as more affordable to middle class workers as well as more equitable—all workers would be paying the tax each pay period relative to their income level. “We must assure each citizen the necessities of life at prices which he can pay,” declared Franklin Roosevelt during his 1943 annual budget message. “[I]t is more important than ever before to simplify taxation both for taxpayers and for those collecting the tax, and to put our taxes as far as feasible on a pay-as-you-go basis.”

The pay-as-you-go system of income tax withholding from workers started on July 1, 1943, with the first “Withholding Tax Statements” issued to workers in 1944. In the end, the federal government would collect more tax revenue than ever before, from every American worker, directly from employers.

The Boxy Document

As a document, the W-2 is distinctive. It looks boxy—shaped like a rectangle with smaller rectangles with all information contained in rectangles. Traditionally, it is mailed to workers by January 31 of each year, though modern technology allows it to be downloaded faster than the mail. Assuming it is received in the mail, the form is approximately 7½” wide by 13” long, with perforations at approximately every 3” down the form. It consists of a general statement of wages and taxes, followed by three identical copies, each including a standardized version of the same statement. The general statement is meant to be retained by the employee, while the additional copies are meant to be filed with the employee’s federal, state, or local tax return. The reverse of the document offers an explanation of the information presented, as well as information about filing an income tax return.

Like American tax policy, the W-2 has grown more complex over time. Despite these changes, the form is still a relatively straightforward document.

Two major moments in W-2 evolution occurred within a 15-year span in the 20th century. In 1965, the formal name of the document changed from “Withholding Tax Statement” to, as we know it today, “Wage and Tax Statement.” The modern look of the document, with information presented in numbered boxes, was introduced in 1978. Subsequent revisions of the form have been minor and took place in 1994 and 2002.

The information contained in the numbered boxes of the W-2 varies slightly with individual workers, but all W-2s contain these basic components.

Boxes A–F

Employee information, including name, address, Social Security number. Employer information is also listed, including name and tax identification number.

Box 1: Wages, Tips, and Other Compensation

Amount of taxable income that an employee has earned over the course of the statement year. In some cases, this is the employee’s total income for the year. In other cases, the number may be less than the employee’s total income because this box includes only “taxable” income, which excludes money set aside to pay for insurance premiums or contributions to employer-sponsored retirement plans.

Box 2: Federal Income Tax Withheld

Amount of money an employer withheld from an employee’s paychecks during the statement year to cover the employ-
ee’s income tax liability. If the amount withheld is larger than the employee’s liability, the employee will receive an income tax refund.

**Boxes 3–6: Social Security and Medicare Wages and Tax Withheld**

Amount of an employee’s income subject to social security and Medicare tax, and amounts that an employer withheld to cover that tax liability. The wage amount may be higher than that shown in Box 1 because certain payments, such as contributions to a retirement plan, are taxable in this case. The Medicare tax was introduced in 1966, a result of legislation.

**Boxes 7 and 8: Social Security Tips and Allocated Tips**

If an employee has a job that includes substantial compensation from tips, these boxes may be used. Box 7 shows the total amount of tips that an employee reported to the employer. This amount is also included in Box 1.

**Boxes 9–14**

Box 9 is always blank. It used to reflect a certain type of tax payment that an employer could make on behalf of an employee that is no longer allowed by law. Boxes 10–14 are used for a variety of items and will only be filled in if an item applies to an employee. They report things like dependent-care benefit payments, retirement or pension plan contributions, union dues, or education payments.

**Boxes 15–20: State and Local Tax Information**

If an employee paid any state or local taxes during the statement year, those amounts are reflected here. Boxes 16 and 18 reflect taxable income, which will likely match Box 1; while Boxes 17 and 19 reflect state and local tax withheld during the statement year.

**Very Much a Wage and Tax Statement**

For many workers, the content of the W-2 might be overlooked, or its reception signals a need to file an income tax return. But it is important to realize that the W-2, and the information contained on it year after year, has come to exist as formal proof of income for a variety of federal and state agencies and other matters. The information on the W-2 is reported annually to the IRS, for example, at the same time that it is provided to an employee. This allows the IRS to track income tax returns, filed or not, to ensure that an employee’s tax liability is met each year. In addition, the information on the W-2 is submitted to the Social Security Administration, which uses it to track annual earnings to calculate payments for workers. An employee’s W-2 might also be used as proof of income in personal matters, such as applying for federal financial aid for college, court proceedings, or credit applications for certain purchases.
The federal minimum wage was established by the Fair Labor Standards Act of 1938 (FLSA), the last major domestic reform of President Franklin D. Roosevelt’s New Deal. As is often the case in American public policy, though, states adopted and experimented with minimum-wage laws before the federal government.

Early State Laws
The first minimum-wage law was passed in Australia, in the state of Victoria in 1896. The idea immediately caught on elsewhere, and agitation for minimum-wage policies became part of the programs of reform being advanced at the time in virtually all industrial countries. In the United States, however, advocates of minimum-wage legislation faced two constitutional barriers, erected by the Supreme Court’s interpretation of the commerce clause and the due process clauses of the Fifth and Fourteenth Amendments.

The commerce clause provides that “Congress shall have power . . . to regulate commerce among the several states.” The problem was that in cases such as United States v. E.C. Knight Co. (1895), the Court had insisted that the term “commerce” be read very narrowly, specifically that manufacturing was not part of commerce. This stance was reiterated some years later in Hammer v. Dagenhart (1918), when the Court struck down a congressional statute banning child labor. The enforcement strategy Congress selected attempted to bypass the Knight ruling by banning the shipment of goods made by child labor in interstate commerce. However, the Court said this was merely a charade for attempting to do what Congress could not do, regulate manufacturing.

The two due process clauses, the Fifth Amendment’s applying to the federal government and the Fourteenth’s to the states, say that no one shall be “deprived of life, liberty, or property without due process of law.” In the late 19th and early 20th centuries, the Court read into these provisions a “liberty of contract,” or the liberty of workers to bargain their own employment conditions. This meant that laws that regulated working conditions, such as New York’s attempt to limit bakers to 60 hours a week, would be struck down by the Court (in New York’s case in Lochner v. New York [1906]).

Given these two frameworks, minimum-wage laws seemed doomed. However, a door opened in 1908 when the Court decided Muller v. Oregon. Influenced by a mountain of statistics that demonstrated the significant adverse effects long working hours had on women’s health, the Court allowed to stand a law mandating a maximum work day of 10 hours for women. Seizing this opportunity, Massachusetts passed the nation’s first minimum-wage law in 1912. It applied only to women and minors in certain industries and had anemic enforcement provisions, but it was an important first step. Other states soon followed suit, and by 1923, 14 states had minimum-wage laws. In 1918, too, Congress had passed a similar statute for the District of Columbia.

However, 1923 proved a high-water mark for minimum-wage laws. The Supreme Court ruled in Adkins v. Children’s Hospital that even though the D.C. law applied to women, it inter-
fered with the liberty of contract. Soon afterward business interests secured either the repeal or emasculation of the state laws.

**Passage of the Fair Labor Standards Act**

When the Depression struck in 1929, though, the movement for minimum-wage laws reemerged. The Roosevelt administration’s first attempt to fight the Depression, the National Industrial Recovery Act, envisaged each industrial sector drafting a code of fair competition. A key component of the codes was to be payment of a minimum wage to workers. Although the act proved cumbersome to administer and was struck down by the Supreme Court (*United States v. Schechter Poultry Co.* [1935]), the minimum wage provisions of it were its most popular aspect. The 1936 Democratic platform called for a general federal minimum wage, and soon after his overwhelming victory in that election, President Roosevelt declared “The people, by overwhelming vote, are in favor of a floor below which wages shall not fall.”

Meanwhile, in a pair of important decisions in 1937, the Supreme Court inched away from its rigid commerce clause and due process clause holdings. In *West Coast Hotel Co. v. Parrish*, it upheld a Washington state minimum wage law for women. Then, in *National Labor Relations Board v. Jones and Laughlin Steel Co.*, the Court took a more flexible view of congressional authority under the commerce clause.

The administration promptly drafted a minimum-wage bill, coupled with a ban on child labor and a maximum-hours provision. An intense political struggle followed, but the measure finally passed, setting a minimum wage of 25 cents per hour with a scheduled rise of five cents per year until 40 cents was reached. There were vast exemptions (such as for retail establishments and agricultural pursuits), but no differentials were allowed (ones had been proposed for geography, types of industries, and age, for example). When challenged in the courts, the law was upheld in *United States v. Darby Lumber Co.*

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(1941) as a valid exercise of Congress's power under the commerce clause.

**Evolution of the FLSA**

The first major change in the minimum-wage portions of the FLSA came in 1949. The rapid inflation that had accompanied the war and the immediate postwar years had seriously eroded the value of the 40 cent minimum wage. President Truman achieved an increase of the rate to 75 cents per hour, but his opponents managed to effect a change in the definition of who was covered by the law. The result was that while a number of workers did get a raise, around one million workers lost protection of the act.

In 1955, President Eisenhower proposed raising the rate to $1.00 and expanding coverage to retail businesses. He obtained the former but not the latter. In 1961, the incoming Kennedy Administration placed increasing the minimum wage and dramatically expanding its coverage near the top of its priorities. After a bruising battle in Congress, the president got a raise to $1.25 an hour and an extension of the law’s coverage to retail businesses, which grossed over $1 million in sales. In the bargaining process, he had to give up his proposed coverage for laundries, automobile dealers, and cotton gins; however, the new retail coverage was a major victory for the administration,

**Today, almost all American workers are covered by the minimum wage, although enforcement is difficult in some industries, especially those where undocumented persons may be employed.**

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*Sources, clockwise from top: Flickr Commons, 2013; U.S. Department of Labor, 2014; Wikimedia Commons, 2013; and Library of Congress, 1930.*
bringing an estimated 3.6 million additional workers within the act’s purview.

President Johnson’s War on Poverty should have been fertile ground for an expanded and increased minimum wage. In a sense it was, as the president was backed by a huge sympathetic majority in Congress. However, the central focus of Johnson’s inner circle was on new social welfare expenditure programs, and the minimum wage got pushed to the side. Nevertheless, in 1966 Congress passed a milestone minimum-wage law. It added hospitals, elementary and secondary schools, and colleges to the ranks of covered establishments. It reduced the “sales test” to $250,000 and added restaurants, hotels, and laundries to the list of covered retail enterprises. For the first time, coverage was extended to certain agricultural workers; even though this provision was severely limited, it was a major breakthrough. As for the rate, it was scheduled to rise to $1.60 over three years.

Congress passed a bill in 1973 raising the wage to $2.20 and extending coverage to domestic workers, state and local government employees, and a few more agricultural workers. To achieve these goals, proponents had to agree to a “youth differential” amounting to 85 percent of the minimum wage for certain young workers. President Nixon vetoed the bill, urging the need for a blanket youth differential. A year later, his political standing dramatically reduced, the president signed an almost identical bill raising the rate to $2.30. In 1977 President Carter proposed making the rate $2.65 but adding an automatic indexing feature (tying future increases to the average manufacturing wage). The indexing feature was voted down and the retail exemption was raised to $362,500, but the bill emerged carrying an increase to $3.35.

The 1974 amendment that added state and local employees to the act was temporarily stymied by a Supreme Court ruling, National League of Cities v. Usery (1976). Allowing Congress to mandate the wages of those employed in “traditional governmental functions,” the justices said would violate fundamental principles of federalism. In 1985, though, the Court overturned this decision in Garcia v. San Antonio Metropolitan Transit Authority, feeling that the states had adequate political safeguards to protect themselves against any possibility of federal overreach.

While Ronald Reagan steadfastly opposed any increase in the minimum wage, President George H. W. Bush seemed more accommodating. However, he insisted that any increase must
A Job With a Living Wage

In this activity, students analyze a political cartoon; discuss the recent debates to raise the minimum wage at municipal, state, and federal levels; and research minimum wage levels in their own municipality and state. An extended activity offers students an opportunity to write op-eds explaining their thoughts on the contemporary minimum wage debate.

Discussion Questions:
1. Why do you think the cartoonist used the term “living wage” instead of “minimum wage”? Are they the same thing? Or, how are they different?
2. Why do you think the cartoonist depicted the woman in a McDonald’s uniform?
3. Do you think the woman has an audience, even though we cannot see one? Why?
4. Why do you think the cartoonist depicted this speech as a reference to Martin Luther King Jr.’s “I Have a Dream” speech? Do you think questions about minimum and living wages are civil rights issues? Are they aspirational or difficult to achieve?
5. Do you agree or disagree with what the cartoonist is saying?

Extended Activities
Students might research the minimum wage in their state, or municipality, if applicable. They could compare it to the federal minimum wage and discuss whether they see the minimum wage in their location as a living wage. They might also research recent debates, and any local participation efforts, to raise the minimum wage, at all levels of government. Students might be assigned to write op-eds outlining their thoughts on the wage level and any debates to change it.

be accompanied by a broadened differential, one covering all new workers, not only young ones. (In fact, the one then on the books was so difficult to utilize that few employers opted for it.) When Congress passed an increase without the requested differential, Bush promptly vetoed it. In 1989 he eventually agreed to sign a bill with a subminimum “training wage” allowed for three months for teenagers only (set to expire in 1993). The new general rate was to be $4.25.

A protracted political battle occurred over the minimum wage in 1996, protracted partly because the Senate majority leader, Bob Dole, was running for president. In the end, Dole resigned and the wrangling produced a substantive stalemate. The rate was raised to $5.15, but the only other real change was the reinstitution of the subminimum, now applicable to workers under 20 during their first 90 days of employment.

The last increase in the minimum wage passed in 2007, when it was raised to $7.25 (by 2009 in three steps).

Today, almost all American workers are covered by the minimum wage, although enforcement is difficult in some industries, especially those where undocumented persons may be employed. As can be seen from the table on page 23, though, even with the increases, the real value of the federal minimum wage has gone down since 1968.

From a political perspective, there is another conclusion to be drawn: Even though the policy has been in effect nearly eight decades, it has remained and still remains as controversial as ever. For example, President Obama’s suggestion during his recent State of the Union address to raise it evoked cheers on one side of the aisle and a studied silence on the other.

Modern State and Local Minimum-Wage Policies
As the real value of the federal minimum wage stagnated in the 1980s, states once
again began taking up the slack. Today, 29 states and the District of Columbia have minimum-wage rates that exceed the federal law.

One interesting aspect of the state laws is how the rate is often updated. In many states, it has been statewide referenda that have pushed the rates up. Interestingly, these almost always pass, usually by significant margins. In several states, the rate is automatically updated to keep pace with inflation. Washington and Oregon pioneered this approach, and it keeps their minimum wages the highest in the country.

We might note that other countries have adopted other expedients to update their minimum wages. In Australia, for example, a quasi-judicial body (now called the Fair Work Commission) reviews the minimum wage annually and has the legal power to raise it. Before the commission makes a decision, interest groups of all sorts are allowed to present evidence and arguments to them. The United Kingdom has a Low Pay Commission that also hears evidence and arguments annually. Their power is only to recommend increases, though. The government has to formally adopt them for them to take effect. Practically, though, their recommendations are usually followed.

In much the same vein as the states, local governments have been active on the minimum-wage front also. In 1994 Baltimore became the first municipality to pass a “living wage” ordinance. It applied only to firms who did business with the city, an idea that was adopted by a number of other cities. In other cases, cities have adopted general minimum-wage laws applicable to all employers. The most recent of these passed in Seattle, which set the minimum wage at $15 per hour, a level to be reached in several increments.

Who Works for the Federal Minimum Wage?
The Bureau of Labor Statistics provides data on those working at or below the federal minimum wage. Their numbers would not include people resident in those states with minimum wages that exceed the federal level, however. The snapshot the BLS provides, nonetheless, gives important insights.

Only 24 percent of minimum-wage workers are teenagers. Considering all minimum-wage workers, 62 percent are women, and half of these are over 25. Regarding the full-time/part-time divide, 64 percent of all minimum-wage workers work part time. As for economic sector, unsurprisingly, 47 percent are employed in food preparation and service, while another 21 percent work in sales and office occupations.

Economics and Politics
A voluminous amount of research has been done on the economic effects of the minimum wage. A recent exhaustive survey of all the minimum-wage research conducted both in the United States and abroad (Dale Belman and Paul Wolfson, What Does the Minimum Wage Do? [2014]) concluded, “Considered together, increases in the minimum wage raise the hourly wage and earnings of workers in the lower part of the wage distribution and have very modest or no effects on employment, hours and other labor market outcomes.” (p. 406) Nevertheless, economists continue to debate virtually every facet of the minimum wage.

The politics of the minimum wage are rather unusual. The public always overwhelmingly approves of increasing the minimum wage. The latest poll, for example, (Hart Research, January 2015) found 75 percent of the public favor raising the wage to $12.50 over a five-year period. Every regional, demographic, income, and partisan grouping endorses it by over 50 percent. For instance, 66 percent of those who make over $75,000 are in favor, as are 53 percent of Republicans. This pattern is typical of polls conducted since the 1950s. But this does not translate into political consensus among members of Congress. Support tends to be shallow, that is, people seldom vote on this issue alone (although they often say they do). Furthermore, the groups most affected by the minimum wage, the young and the poor, are the least politically organized, while business interests who oppose the increase are organized and powerful.

In sum, the minimum wage has been and is a significant component of both economic and social policy. However, it remains as controversial as it was when first enacted.
When 17-year-old Samantha Elauf applied for a sales job at a store owned by Abercrombie & Fitch, she had no way of knowing that she was at the start of a religious-discrimination claim that, seven years later, would land at the United States Supreme Court.

After she was denied the position, Elauf, a devout Muslim, learned she had not been offered the job because she wears a head scarf, and that the apparel store had taken the position that her doing so was a violation of the employee dress code, which bans “caps.” Abercrombie’s dress and appearance rules are intended to signal to customers that its stores sell “a classic East Coast collegiate style of clothing.” The decision came as a surprise to Elauf, given that the topic of her head scarf was never broached at the interview. She lodged a religious-bias claim with the Equal Employment Opportunity Commission (EEOC), which then filed suit against the retailer.

The question at the heart of EEOC v. Abercrombie & Fitch is a simple one with important implications in employment law: Is the burden always on the employee or job seeker to request an accommodation for a religious belief or practice, or, in some instances, such as where the need for accommodation appears to be apparent, is the burden on the employer to raise the topic?

“This case provides teachers the opportunity to have a meaningful discussion about both what the law is and what it should be, given differentials in information and power,” said Rachel Paulose, a former U.S. attorney and the author of an article on the case for ABA Preview of United States Court Cases. “In a religiously pluralistic society which thrives on free enterprise, who should bear the burden of beginning what may be an uncomfortable discussion on the need for a religious exception to a company policy? How can we protect the right to religious expression while recognizing the rights of the private market to regulate its own workplace? How can we best encourage employers to hire qualified people from diverse backgrounds while respecting a company’s investment in its individualized ‘brand’?” (Paulose’s Preview piece is available for download as a web-extra on www.insightsmagazine.org.)

Religious-bias claims have skyrocketed, doubling in a little more than a decade. The number of religious-bias claims filed with the EEOC reached about 4,000 in both 2011 and 2012, the highest reported number of incidences ever, according to a Wall Street Journal report in October 2013. Facing an ever-increasing diversity of faiths in the workforce, employers are likely to have to deal with accommodation claims more and more.

The Abercrombie case has collected an array of amicus (or friend-of-the-court) briefs. (Amicus briefs are submitted by third parties that want to have the Court consider their view of the applicable law, policies, and/or principles at stake.) The American-Arab Anti-Discrimination Committee and other organizations supporting the civil rights of American Muslims have weighed in favor of Elauf. So have the American Jewish Committee, the Anti-Defamation League, and other groups that advocate against religious discrimination, seeing this as an important issue that transcends the concerns of any particular denomination. On the other side of the issue, groups such as the Chamber of Commerce (representing business interests) and the National Conference of State Legislatures (supporting the interests of public employers) have filed briefs supporting Abercrombie’s position that the onus is on the employee or job applicant to establish a need for religious accommodation. They argue, among other things, that putting the burden on employers to broach sensitive faith issues in some instances will potentially open them up to suits by disgruntled employees and job applicants.

Look Policy

Elauf began wearing a headscarf (or hijab) when she was 13 and has worn one every day since. She believes that her wearing of the hijab is required by the Quran.

In 2008, Elauf applied for a sales position at Abercrombie Kids in Tulsa, Oklahoma. Abercrombie Kids is owned...
by Abercrombie & Fitch Stores, Inc., which classifies its retail sales people as “models” and maintains a “Look Policy.” The policy includes rules for its employees clothing, jewelry, facial hair, and footwear. In addition to banning the wearing of caps, which it says are “too informal” for the image that the stores wish to project, the policy prohibits the wearing of black clothing. The policy does not contain a definition of “cap.”

Although she was not aware of the “Look Policy” when she applied to Abercrombie Kids, Elauf asked a friend who worked at the store whether her wearing of a head scarf would be permissible attire at the store. Her friend raised the issue with an assistant manager. The assistant manager, who had previously worked at an Abercrombie store where an employee had been allowed to wear a white yarmulke, said he did not see a problem with wearing the head scarf, particularly if it was a color other than black.

When Elauf came in for her interview for the job, she wore the black head scarf she typically wore, along with clothing that was consistent with the Abercrombie brand. The assistant manager who interviewed Elauf later said that the head scarf signaled to her that Elauf was a Muslim. During the interview, Elauf did not talk about the head scarf or her Muslim beliefs, nor did she request any sort of accommodation from Abercrombie’s dress rules. The assistant manager conducting the interview also made no mention of the head scarf or her Muslim beliefs, nor did she request any sort of accommodation from Abercrombie’s dress rules. If Elauf had not been hired because of her head scarf.

Federal Suit Filed
The EEOC, which brings Title VII enforcement actions, filed suit in the U.S. District Court, alleging that Abercrombie violated Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination based on race, color, religion, sex, and national origin. Abercrombie sought summary judgment, arguing that Elauf had not explicitly informed it that her wearing of the head scarf was a religious practice or that she required an accommodation from Abercrombie’s dress rules.

Under a 1973 U.S. Supreme Court case, *McDonnell Douglas Corp. v. Green*, a plaintiff seeking to set forth a prima facie case of religious discrimination (i.e. a case that is legally strong enough to survive summary judgment) in the hiring process must demonstrate three things:

1. He/she had a bona fide religious belief that conflicts with an employment requirement (in this case the “Look Policy”)
2. He/she informed the employer of this belief, and
3. He/she was not hired for failing to comply with the employment requirement.

Abercrombie contended that Elauf had failed to meet the second *McDonnell Douglas* factor.

After reviewing the facts of the case, the U.S. District Court declined to grant Abercrombie summary judgment. Even though Elauf never verbally discussed her head scarf and its religious significance during the interview, the court concluded that the second factor had nevertheless been satisfied because Abercrombie had enough information to put it on notice that a conflict existed.

“This case provides teachers the opportunity to have a meaningful discussion about both what the law is and what it should be, given differentials in information and power.”

—Rachel Paulose, a former U.S. attorney and author of Preview article on the Abercrombie case

“[The Supreme Court has evidenced] a clear trend toward protecting religious practices against counter-veiling government interests.”

—John Marshall Law School Professor Steve Schwinn
between Elauf's religious practice (i.e. wearing the head scarf) and the company’s “Look Policy.” The case went to trial, and a jury ultimately awarded Elauf $20,000 in compensatory damages.

10th Circuit Overturns Verdict

On appeal, the 10th U.S. Circuit Court of Appeals reversed, concluding in a 2-1 panel decision that Title VII does not prohibit an employer from taking action against an applicant (or an employee) unless that person has given the employer explicit, verbal notice of a religious conflict.

“In sum, we hold that, in order to establish the second element of their prima facie case under Title VII’s religion-accommodation theory, ordinarily plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice, due to a conflict between the practice and the employer’s work rules,” wrote Judge Jerome A. Holmes for the majority.

In a dissenting opinion, Judge David M. Ebel said that in this case, the employer, not the employee, was in the best position to realize that there was a potential clash between the employee’s religious practice and a company policy.

“I am … not suggesting, as the majority appears to be, that a job applicant must initiate a general discussion of her religious beliefs during the job interview just in case her religious beliefs and practices might conflict with some unstated policy or work rule of the employer,” Ebel wrote. “The EEOC has shown here that it was the employer, Abercrombie, which had superior knowledge of a possible conflict between its Look Policy and Elauf’s apparent religious practice of wearing a hijab. Under those facts, established after viewing the evidence in light most favorable to the EEOC, Abercrombie had a duty to initiate a dialogue with Elauf by informing her that Abercrombie’s Look Policy prohibited its sales models from wearing head wear and then inquiring whether she could comply with that policy, or whether Abercrombie could accommodate her belief in some reasonable way.”

The ruling created a split in the federal circuits on the issue of whether or not the burden is always on the employee to notify the employer when a company policy is in potentially conflict with a religious practice or belief.

On October 2, 2014, the U.S. Supreme Court accepted review of the case.

Religious Practice vs. Workplace Policy

Taking a cue from the 10th Circuit dissent, the EEOC argues in its brief that while employees and prospective employees may have superior knowledge of their religious beliefs, the employer has the superior knowledge of its own policies. “Thus, as this case illustrates, employers sometimes identify religious conflicts not known to applicants,” the EEOC observes. “Moreover, the [10th Circuit majority] was mistaken in thinking its limitations on Title VII were necessary to ensure that employees do not feel obligated to routinely inquire into the sensitive area of religious practices. Employers who suspect a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would be unable to comply.”

The EEOC further contends that reversing the 10th Circuit ruling and placing the burden on employers to delve into a potential conflict when they suspect a workplace policy clashes with an employee or job applicant’s religious grooming requirements that employers may readily identify as religious practices,” the EEOC observes. “Employers who observe these practices will know whether they conflict with the employer’s own expectations for garb and grooming. Yet at the application stage, job seekers will often not know all of an employer’s rules. … Permitting an employer to decline to hire job applicants based on their perceived religious practices, in these circumstances of informational asymmetry at the initial, critical stage of the employment process.”

In an amicus brief supporting the EEOC, the American-Arab Anti-Discrimination Committee and other organizations supporting civil rights for American Muslims point out that although Muslims make up less than 2 percent of the U.S. population, they made up one quarter of the 3,386 religious discrimination claims filed with the EEOC in 2009. The committee and the other organizations also dispute Abercrombie’s argument that allowing a sales clerk to wear a hijab would compromise the consistency of its brand. “The ‘Classic East Coast collegiate style of clothing’ is not exclusive of Muslim hijabi women,” they write.

Abercrombie first contests the EEOC’s argument that enforcement of its Look Policy against Elauf has a disparate impact on her because of her religious practice (i.e. wearing a head scarf). Rejecting Elauf because she wears head gear is treating her the same as other applicants, not treating her differently from other applicants, Abercrombie argues.

Abercrombie also contends that reversing the 10th Circuit ruling and placing the burden on employers to delve into a potential conflict when they suspect a workplace policy clashes with an employee or job applicant’s religious
Other Recent Religion-Related Rulings

The Supreme Court has in the last year issued three major rulings regarding the interplay of religious expression and conflicting rules, policies, and laws. One of those, Burwell v. Hobby Lobby, pertained to workplace rights. All three rulings were in favor of allowing the religious practice to proceed, but two of the cases, including Hobby Lobby, were decided by the narrowest of margins:

• In Holt v. Hobbs, decided Jan. 20, 2015, the Court held 9-0 that an Arkansas prison policy that prevented a Muslim prisoner from growing a half-inch beard in accordance with his religious beliefs violates the Religious Land Use and Institutionalized Persons Act. The state had argued that the no-beard rule was a necessary security precaution to keep prisoners from hiding small weapons. In an opinion written by Justice Samuel Alito, the Court concluded that the state had failed to establish that its security concerns could not be met by simply searching the prisoner’s beard. The presence of a less restrictive alternative meant that the state’s security interest did not override the prisoner’s interest in practicing his religion, the Court found.

• In Town of Greece v. Galloway, decided May 5, 2014, the Supreme Court ruled that a town’s practice of opening its town board meetings with a prayer offered by members of the clergy did not violate the Establishment Clause of the First Amendment. In a 5-4 opinion, the Court observed that the practice is consistent with the tradition long followed by Congress and state legislatures. The Court also noted that the town allowed adherents of any faith, and even atheists, to offer the opening invocation, thereby not promoting any one particular faith or belief over another. This was true, the Court found, even though in practice, the majority of the town’s invocations were being performed by Christian clergy.

• In Burwell v. Hobby Lobby, decided March 25, 2014, the U.S. Supreme Court held 5-4 that a closely held corporation had the right under the Religious Freedom Restoration Act to reject the Department of Health and Human Service’s mandate to offer female employee’s no-cost coverage for certain forms of contraception. Central in the case was the question of whether a for-profit corporation was entitled to rights under the act designed to protect religious practices and beliefs. The Supreme Court ruled in the affirmative, concluding the mandate was not enforceable against the company, which was owned by an Evangelical Christian family.

—Mark A. Cohen

The outcome of any Supreme Court case is difficult to predict, but this one is particularly so. There are strong policy arguments on both sides.

John Marshall Law School Professor Steve Schwinn noted the Supreme Court has decided three other cases significantly rules on religious rights in the last two years. In all three cases, which pitted religious rights against a conflicting rule or policy, the party asserting the religious right prevailed. (See sidebar above for a summary of the holdings.)

“'Abercrombie comes to the Court under a different statute [than those cases did], to be sure. But it also comes to the Court amid this clear trend toward protecting religious practices against counter-veiling government interests,” Schwinn said.

However the Supreme Court ultimately rules, this case provides an excellent entry point into a classroom discussion of the balance courts must strike when faith and values conflict with workplace policies.

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Not all parties will agree, no matter how effective a mediator is. For those parties, arbitration is another available process. Arbitrators are also unbiased, independent third parties brought into a dispute when the parties are unable to reach an agreement on their own. However, unlike mediators, arbitrators do adjudicate, which they are able to do because they are usually subject-matter experts. Arbitration is often a more cost-effective and less-time consuming method of dispute resolution than going to court. Parties who select to go to arbitration rather than to court also have the benefit of being able to select their judge (the arbitrator) instead of having their judge selected for them.

Q: What have been some of the most interesting disputes you have mediated?
I have successfully mediated numerous disputes, including alleged breach of music-recording contracts and a wrongful death case involving seven individuals who died as a result of an illegal alien smuggling incident in the Rio Grande Valley.

Q: What is something you have learned from your many years in ADR?
After having mediated and arbitrated over 3,500 disputes, I have learned that a dispute/conflict consists of many variables, and the intensity of the dispute/conflict varies. In some instances, if left unresolved, a conflict will escalate. Therefore it is best to seek an early resolution of the dispute; moreover, early resolution will preclude the need to spend funds in needless discovery.

Q: What do you find most rewarding about this work?
I find that working in ADR is most rewarding because I am able to share my ADR knowledge with the community as a whole. I founded the “Peacemaker Project” for the San Antonio Bar Association, so as to fund peer mediation projects in 175 public schools in San Antonio. The Peacemaker Project Awards celebrate local heroes who have made consistent commitments to improve the lives of citizens in their area. These awards inspire our community to make a difference in the lives of those less fortunate. The goal is to reduce gang violence and teach children valuable problem-solving and mediation skills.
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