

Who's an Employee?

Working Toward a Principled Approach

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Attorney General's
Advisory Task Force on
Worker Misclassification

*The views expressed are those of the
author as a private individual and do
not reflect the policy or position of
the University of Minnesota.*

August 20, 2024

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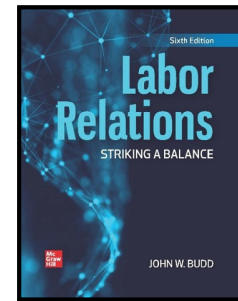
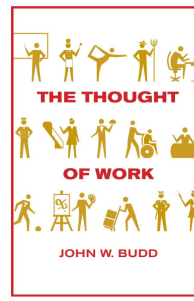
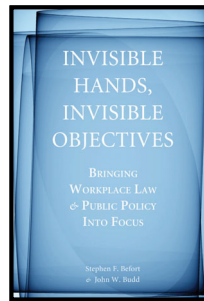
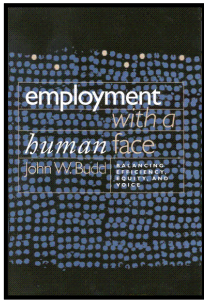
About Me

- University of Minnesota professor since 1991
- Ph.D. in Economics from Princeton...
- ...but an Industrial Relations scholar
 - A multidisciplinary approach to studying/improving all aspects of work that embraces institutions
- President-elect, Labor and Employment Relations Association
- Public member, Governor's Committee on the Compensation, Wellbeing, and Fair Treatment of Transportation Network Company Drivers (2023)
- Teach labor relations; personnel economics; Race, Power, and Justice in Business

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About Me

- Empirical journal articles on effects of labor unions, labor×politics, etc.
- Conceptual books



- Historical evolution + thinking about alternative perspectives and fundamental objectives

Why I'm Here / Outline

- Goal: Provide a broader context around work and its regulation to help the task force develop a principled approach for thinking about misclassification
 - Not a goal: Presenting deep expertise on employee status tests
- Outline
 - The Purposes of Work
 - The Emergence of Employment
 - Regulating the U.S. Employment Relationship
 - Three Perspectives, Three Eras
 - Final Thoughts

Starting Definitions

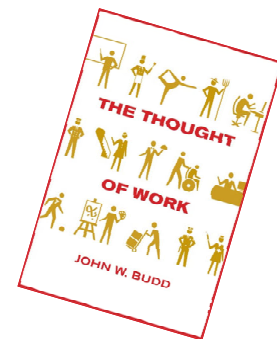
- Work
 - Purposeful human activity involving physical or mental exertion that is not undertaken solely for pleasure and that has economic or symbolic value
 - Can be paid or unpaid
 - Can occur in or out of the home
- Employment
 - Selling work effort in return for pay

The Emergence of Employment

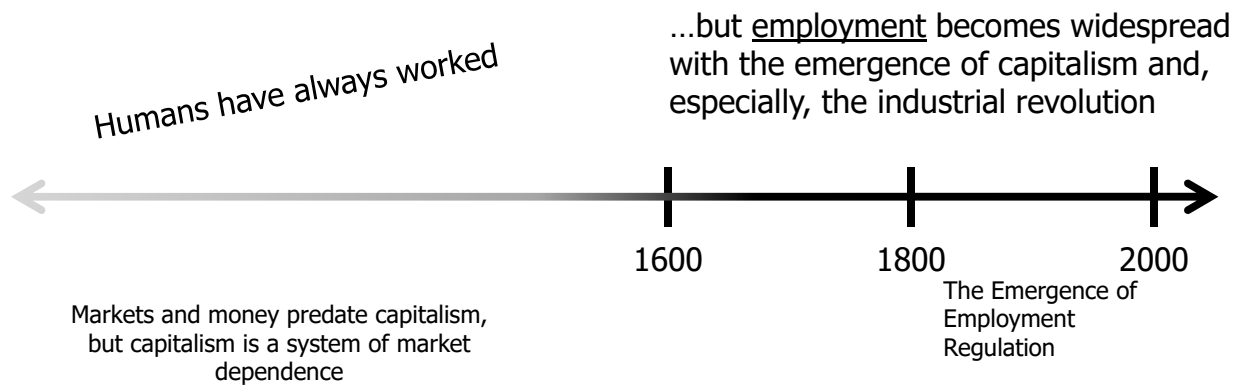
Humans have always worked

For diverse reasons...

- Survive
- Provide
- Personally care for someone
- Feel good about oneself
- Fulfill a norm; be accepted as a member of a community
- Be free / independent
- Compulsion by an entity with greater power
- Build culture and permanence
- Serve a tribe, nation, or God(s)



The Emergence of Employment



Employment Regulation: Preview

Three (clashing) perspectives

Neoliberalism

Pluralism

Unitarism

3 (differing) goals

- Exchange
- Balance
- Alignment

Three (layered) regimes

- Laissez faire, contract law
- Labor law, social insurance, and mandated standards
- Employment law

Capitalism and Employment: (Supportive) Foundational Ideas

Neoliberalism

- Property rights
 - Including owning your labor
- Market competition
- Free choice / autonomy



- Optimal allocation of scarce resources (efficiency)
 - Incentives
- Lack of exploitation
- Legal and economic equality
- Opportunities
- Things are rewarded according to their (market-determined) value
- Individual freedom

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Regulating the Employment Relationship: The Free Market Approach

- Employment at will
 - “all may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.”
 - “it is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.”
 - *Payne v. Western and Atlantic R.R. Co.*, 81 Tenn. 507, 518-520 (1884), overruled on other grounds, *Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915)

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Regulating the Employment Relationship: The Free Market Approach

- Employment at will
- Employment laws ruled to violate economic due process (property rights and the freedom to contract) (circa 1880s-1920s)
 - The U.S. Supreme Court invalidated federal and state laws...
 - Limiting working hours in bakeries to 10 hours per day
 - Specifying minimum wages
 - Prohibiting wages paid in company scrip
 - Restricting child labor

Who's an Employee in the 19th Century Free Market Era?

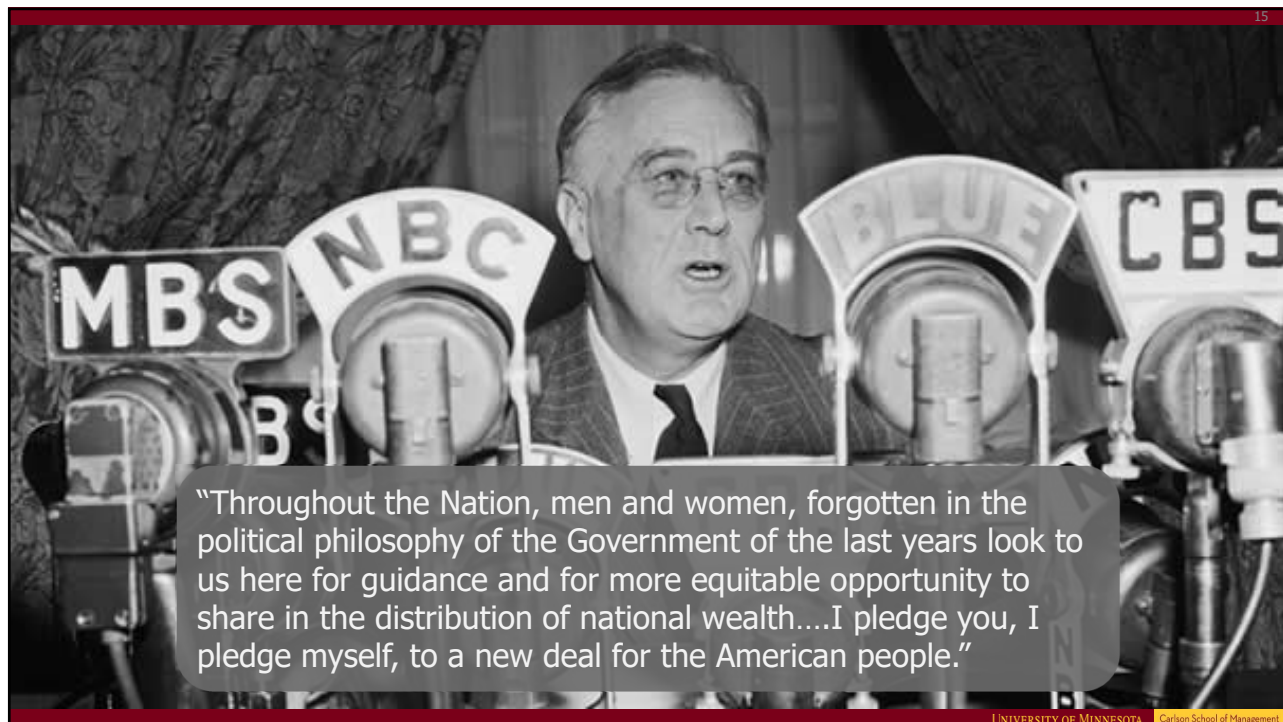
- Minimal legal definitions or jurisprudence under employment/labor law when there is no employment/labor law!
- But...respondeat superior [common law]
 - Master is responsible for wrongful acts (torts) of their servant
 - Don't need actual control because has right to control
 - "Independent calling" → not liable → legal invention of "independent contractor"
- When employment gets more complicated, questions of actual degree of control become important
 - Thus, common law control tests

Who's an Employee in the 19th Century Free Market Era?

- "indefinite relation," "statutory purpose" and "economic reality" tests also emerge (circa late 1800s)
 - Respondeat superior cases
 - Workers' compensation

Recall: the labor market is largely unregulated until the 1930s

But the laissez-faire labor market didn't always work as theorized



A New Deal → A New Paradigm

~~Neoliberalism~~

- A "pluralist" perspective
 - Labor is more than a commodity (recall diverse reasons for working) → workers and their families deserve human dignity
 - Labor markets are destructively competitive, not perfectly competitive
 - Employers have greater bargaining power than individual employees
 - The employment relationship is pluralistic: diverse, conflicting interests that are all legitimate
 - Including employers' interests being legitimate

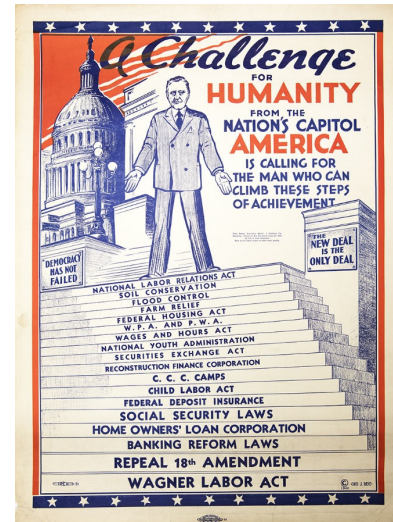
A New Deal → A New Paradigm

~~Neoliberalism~~

- A “pluralist” perspective



- Need to “save Capitalism by making it good” (John R. Commons, 1934)
 - Need institutional supports (“guardrails”)
 - Labor standards
 - Social insurance
 - Promotion of labor unions to better balance bargaining power

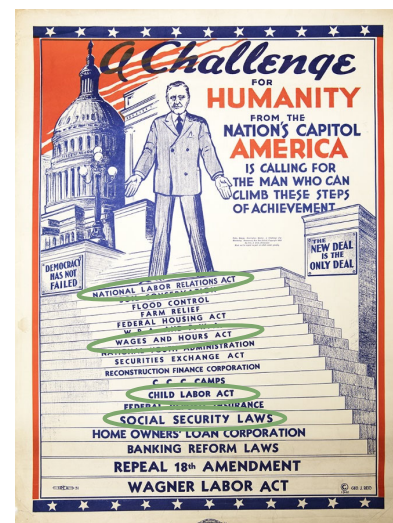


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New Deal Labor Legislation

Pluralism

- Not just mandating labor standards
- Look through a pluralist lens with an emphasis on balancing bargaining power
 - Put a floor under employer bargaining power (minimum wages)
 - Allow workers to hold out for better alternatives (unemployment insurance)
 - Promote collective worker power (and voice) via unionization (National Labor Relations Act)

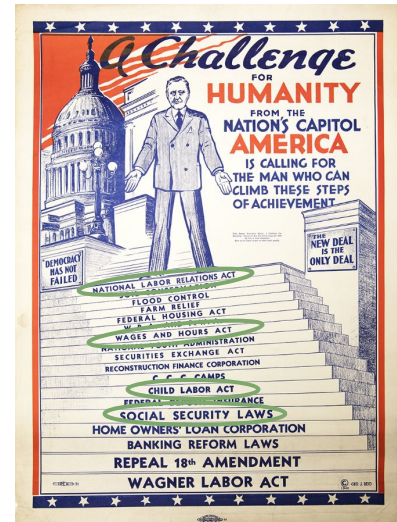


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New Deal Labor Legislation

- Covered private sector workers (with some glaring exceptions like domestic service and agriculture)
 - “Employee” includes any individual employed by an employer (FLSA)
 - The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer... (NLRA)
 - The term employment means any service, of whatever nature, performed within the United States by an employee for his employer (Social Security Act)

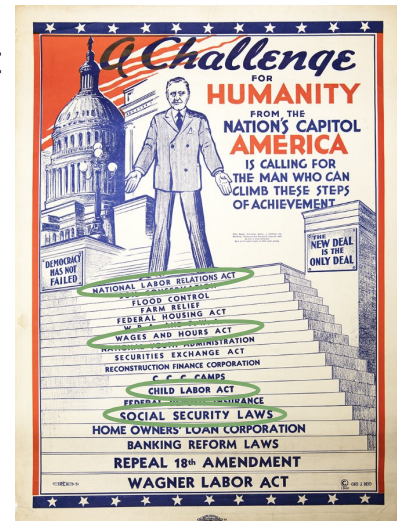
Pluralism



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Litigating “Employee” Under the New Deal Labor Legislation

- Employers now have a lot more at stake so want to exclude people, but no clear legal guidance
- “Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” [*NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 121 (1944)]
- End up with diverse, complicated tests



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Litigating “Employee” Under the New Deal Labor Legislation

- Post-*Hearst*, the Taft-Hartley Act (1947) explicitly excludes independent contractors from the NLRA
- Suspicion: Reflects a broader goal of reining in the NLRB and labor unions, rather than a principled support of independent contracting

Litigating “Employee” Under the New Deal Labor Legislation

- Why weren't the same New Deal benefits and protections created for contractors?
 - By some accounts they were, but common law and conservative judges provide the means for a profit- or ideologically-motivated retreat

Contract Law vs. Labor Law/Social Insurance Neoliberalism vs. Pluralism

- | | |
|---|--|
| <ul style="list-style-type: none"> • Employment is fundamentally an economic transaction • Parties are economic and legal equals (choices are truly free) • Primacy of freedom / individual responsibility | <ul style="list-style-type: none"> • Labor is more than a commodity • Employers have greater bargaining power (worker choices are limited) • Diverse, conflicting, legitimate interests that need balancing |
|---|--|
-
- A pragmatic divide (definitions of “employee”)
 - A foundational divide

Postwar Employment Law



- ~~Social insurance~~
- ~~Independent labor unions~~
- Reinforces workers' dependence on employers
 - Internal Revenue Code of 1954 (making corporate payments for employee health insurance benefits tax exempt)
 - ERISA (minimum requirements for employee benefit plans if offered)
 - Civil Rights Act, Equal Pay Act, Americans with Disabilities Act
 - OSHA
 - FMLA

Postwar Employment Law → A 3rd Paradigm

- Employers' and employees' interests can be aligned
 - Conflict reflects poor practice, not the structural nature of employment
 - Organizational leaders should be trained to design win-win policies and adopt win-win practices
- In this perspective, society should rely on (enlightened) organizations to serve employers' and employees' interests

Unitarism

employees. Minneapolis workplaces do not need an advisory board to mediate their relationships or dictate the terms of their operations. Instead, we need to maintain the autonomy that lets employers customize their hiring, benefits and workplace culture to address the unique opportunities and challenges of each organization.

- In this perspective, society should rely on (enlightened) organizations to serve employers' and employees' interests

SATURDAY &
EARLY SUNDAY
August 17th, 2024

StarTribune

No to the Labor Standards Board and top-down mandates

While the intention of the Minneapolis proposal may be to protect workers, strong partnerships between employers and employees already exist.

Opinion editor's note: This article was submitted on behalf of several leaders of business and trade organizations. Their names are listed below.

In Minneapolis, we have all seen firsthand the powerful impact of collaboration between employees and employers. The city thrives on the mutual respect and shared goals that drive our local economy forward. It's been proven time and again that we can work together to create a vibrant, inclusive and prosperous community. However, a new City Council proposal for the creation of a Labor Standards Board may be fast-tracked for approval, potentially disrupting this balance.

The proposed Labor Standards Board seeks to impose new regulations and standards on businesses across the city that could regulate everything from benefits and working hours to worker training. While the intention behind this proposal may be to protect workers, it fails to recognize the strong partnerships that already exist between employers and their employees. Minneapolis workplaces do not need an advisory board to mediate their relationships or dictate the terms of their operations. Instead, we need to maintain the autonomy that lets employers customize their hiring, benefits and workplace culture to address the unique opportunities and challenges of each organization.

In June, Minneapolis hotels set a monthly

record for guest room revenue for the first time since 2018, due to major events like the U.S. Olympic gymnastics trials. This surge provided a much-needed boost to the economy, aiding long-time businesses and communities in their efforts to rebuild the vibrancy of downtown and create opportunities for events and visitors to enjoy the city where we work and play.

Minneapolis' success is built on the ground-up relationships within our community, not top-down mandates. Every day, employers and employees come together to ensure that Minneapolis remains a dynamic place to live, work and visit. This collaborative spirit is the cornerstone of economic vitality and should not be undermined by unnecessary bureaucratic layers. Decisions about businesses' futures are best made by those directly involved — the people who understand their own needs and challenges.

The Labor Standards Board proposal also has a far-reaching impact. From retail, restaurants and construction to financial services and health care, the city could create complicated new regulations of all organizations in any industry sector. We hope all Minneapolis employers and employees realize the importance of letting Minneapolis officials know that we are already working together effectively to create a better Minneapolis. Our city already has some of the most robust worker protections in the country, and we do not need additional regulations to maintain this productive collaboration. Instead, we need to protect the collaborative frameworks we have established through years of hard work and mutual understanding.

A Labor Standards Board could complicate efforts to continue Minneapolis' recovery, create

Postwar Employment Law → A 3rd Paradigm

- Employers' and employees' interests can be aligned
 - Conflict reflects poor practice, not the structural nature of employment
 - Organizational leaders should be trained to design win-win policies and adopt win-win practices
- Largely a laissez faire policy agenda
 - But some might see a need for legislated minimum standards to promote positive competition and protect "high road" employers
 - See the employment law era

Unitarism

Regulating Employment: The Big Picture

Three (clashing) perspectives

Neoliberalism

Pluralism

Unitarism

3 (differing) goals

- Exchange
- Balance
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Three (layered) regimes



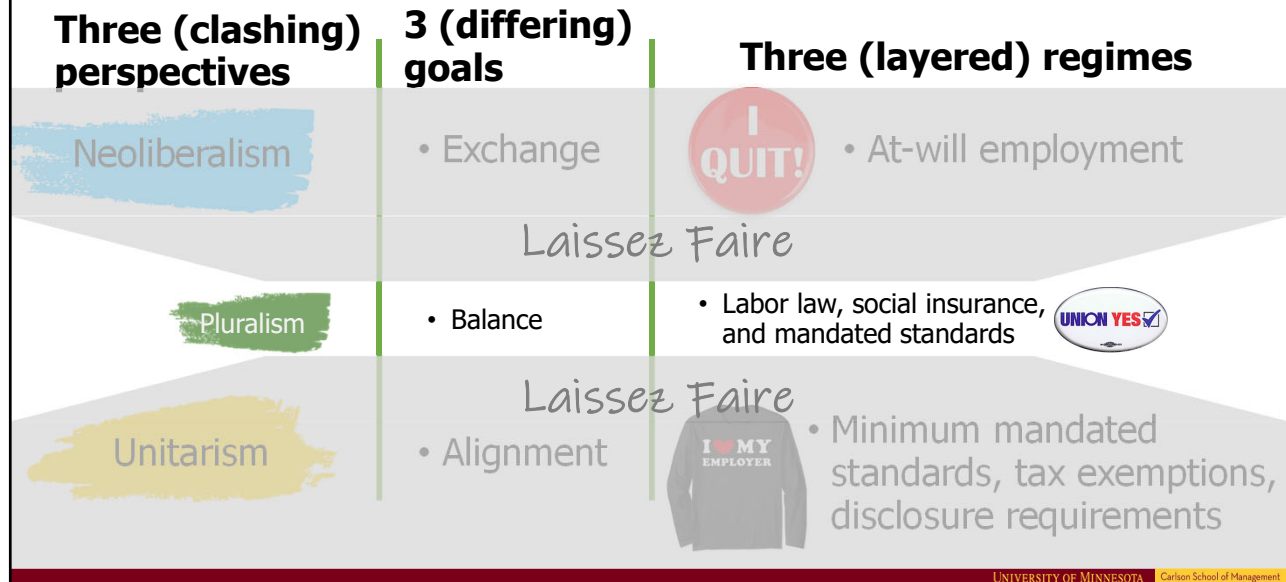
- At-will employment

- Labor law, social insurance, and mandated standards



- Minimum mandated standards, tax exemptions, disclosure requirements

Regulating Employment: The Big Picture



Those who don't buy into the need for a law...

- Lobby to change it
- Ignore it / Break it
- Challenge its legitimacy
- Try to get out of it → misclassification

Final Thoughts: So Who Should Be Covered?

- Determining who a law includes “must be read in the light of the mischief to be corrected and the end to be attained” [*Warner v. Goltra*, 293 U.S. 155, 158 (1934), determining whether “seaman” is narrow or broad under the Merchant Marine Act of 1920; also quoted in *Hearst*]
- But neoliberalism and unitarism...
 - Do not look beyond common law to correct “mischief”
 - Do not see statutory law as necessary for achieving desired ends
 - Favor tests where it is easier to have non-employees

Final Thoughts: So Who Should Be Covered?

- Pluralism: Employment regulation stems from...
 1. The deep importance of **work**
 - Living standards
 - Social inclusion
 - Health of communities
 - Physical and psychological well-being
 - Quality of care for the vulnerable
 - Democratic and civic participation
 2. Employer power / economic dependency
 - So tests need to focus on power, economic dependency, and ability to achieve dignity; not control
 - “Independence” needs to be an economic reality, not just a descriptive phrase



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