Employment and Labor Law 10th edition Cihon Solutions Manual

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Chapter 1
FIRST THE FOREST, THEN THE TREES: AN OVERVIEW OF EMPLOYMENT AND LABOR LAW

INTRODUCTION

Chapter one introduces the student to foundations of labor and employment laws and how political, social, and economic conditions have contributed to the rise and fall of 1) government intervention in the employer/employee relationship, and 2) the influence of organized labor. Historical examples date back to the New Testament of the Bible and should enlighten the student to the fact that the employer/employee struggle for power speaks directly to the nature of human psychology and the quest for power and resources.

After reading this chapter, students should realize that the balance of power in the employer/employee relationship is decidedly on the employer's side, absent any government invention or organized opposition, as long as there is a ready and willing labor pool. Indeed, up until the Industrial Revolution, even the legal system favored the employer through laws which prohibited employees from leaving their employers in search of higher pay and prohibited them from organizing to demand higher wages, benefits, or better working conditions. However, developing social awareness for individual rights have led lawmakers in the United States to pass a long list of laws designed to balance the power in the employer/employee relationship.

Chapter one not only introduces students to all of the major legal theories and laws that will be covered in succeeding chapters, it portrays these laws within the social and political contexts that contributed to their evolution. It is critical that students understand this very important relationship because it will assist them not only in understanding how we arrived where we are today, but how employment laws may continue to change, as the stressors in our society change.

CHAPTER OUTLINE

I. INTRODUCTION

One may consider the craftsman guilds as the earliest forms of unions. As early as the Middle Ages, employment in many trades was restricted to those in the proper class or family. However, as these guilds grew, so also did corruption within the system. This ultimately led to working class revolts, spawning harsh reprisals from those in authority. The balance of power swung briefly to the worker's side during the mid-14th century when deaths due to the plague significantly reduced the labor pool. However, government response was to mandate lower wages, penalize would be employers who attempted to induce a worker to abandon his current job for promise of higher wages, and punish those who refused to work.

The tide began to turn with the birth of the Industrial Revolution. As challenges within the judicial system progressed, common law* swung to a seemingly more neutral position of employment-at-will*. This doctrine espouses that neither the employee nor the employer are bound by any contract of continued employment and either can terminate the employment relationship, at any time, for any reason, so long as the reason is not otherwise illegal. However, in reality, the employer still holds the power in the relationship, as long as there is a ready and able labor pool.

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Since the balance of power remained with the employer, employees banded together into labor unions. Although early courts viewed them as criminal conspiracies, unions began to win favor with the courts beginning in 1842.

***Common law** is law that is made through court opinions, rather than by a formal lawmaking process.

***Employment-at-will** describes when both the employee and the employer are free to unilaterally terminate the relationship at any time and for any legally permissible reason, or for no reason at all.

1-1 THE NEW DEAL AND THE RISE OF THE MODERN AMERICAN UNION

A. New Deal Legislation passed at the urging of President Franklin D. Roosevelt

   i. The Social Security Act (1935) provides modest pensions to retired workers.

   ii. The National Labor Relations Act (1935) sets the ground rules for the give and take between labor unions and corporate managers.

   iii. The Walsh-Healy Act (1936) the first of several statutes to set the terms and conditions of employment to be provided by government contractors.

   iv. The Merchant Marine (Jones) Act (1936) provides remedies for injured sailors.

   v. The Fair Labor Standards Act (1938) sets minimum wages, mandates overtime pay, and regulates child labor.

B. Despite the impressive list, changes did not come easy. The Supreme Court had repeatedly refused to allow any employee protection laws, declaring them unconstitutional. Then two things happened:

   i. President Roosevelt threatened to increase the number of Justices on the Supreme Court (this was within his power), if the Court did not change it's view of employment protection legislation, and

   ii. The Court voted to validate state legislation that required employers to pay women a minimum wage. (This case is commonly referred to as: "the switch in time that saved the nine.")

      1. Case: *West Coast Hotel Company v. Parrish*

      2. Chambermaid, Elsie Parrish was required to "kick-back" a part of her state mandated wages to the hotel, effectively reducing her minimum earnings.

      3. Washington Supreme Court found in her favor.

      4. U.S. Supreme Court upheld the decision, reasoning:

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a. It is in the public interest to safeguard women's health and protect them from unscrupulous employers,

b. the protection of women is a legitimate end of the exercise of state power, and

c. the requirement of a fair minimum wage designed so the woman can meet the "very necessities of existence" is a means of protection.

From this point forward, New Deal legislations gained a foothold and labor unions began to grow and increase in membership.

1-2 THE POSTWAR DECLINE OF ORGANIZED LABOR

Several significant issues and trends combined to cause the gradual decline of organized labor:

A. Union abuse of power: John L. Lewis, president of the United Mine Worker's Union called for a strike, at the height of WWII, making miners look unpatriotic and selfish, creating a very negative perception of unions; toward the end of the war, may other unions struck, as companies made big prophets while wages remained frozen. Believing that the American Federation of Labor/Congress of Industrial Organizations (AFL-CIO) had become too powerful, congress passed the Taft-Hartley Act (1947) making it illegal to require an employee to join a union in order to obtain or keep a job (and establishing other unfair labor practices on the part of union).

B. Political scrutiny of illegal and unethical activity: Paranoia during the Cold War between the U.S. and the U.S.S.R. led some politicians, notably Sen. Joseph McCarthy, to suspect Communist influence had infiltrated the International Longshoreman's Union. Additionally, Sen. Estes Kefauver and others alleged a connection between organized labor and organized crime.

C. Globalization: The U.S. manufacturing industry has been pressured by Japan's post WWI restructuring, Asian and European competition. The manufacturing sector was the bedrock of unionism.

Globalization is the integration of national economies into a worldwide economy due to trade, investment, migration, and information technology.

D. Statutes protecting individual employee rights: Since the 1960s, there has been an onslaught of legislation providing protections once only available through union negotiation.

Individual employee rights are rights enjoyed by workers as individuals, as against collective rights secured by unionization; sources are statutes and court decisions.

i. Title VII of the Civil Rights Act of 1964 was the most significant legislation protecting employees from discrimination on the basis of sex, religion, national origin, race, color, or religion.

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ii. Age Discrimination in Employment Act (ADEA) prohibits discrimination against workers 40 years of age and older.

iii. Court decision recognizing a legal theory of wrongful discharge.

E. Occasionally, statutory protections and terms of collective bargaining agreements conflict.

F. Case: *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974)

i. The employer wanted to limit the aggrieved employee's remedy to the grievance/arbitration procedures in the collective bargaining agreement that Gardner-Denver had with Alexander's union and cut off Alexander's access to Title VII.

ii. The court found that the collective bargaining agreement governed contractual rights, and statutory rights are distinctly separate. The union cannot contract away the individual employee's statutory rights. Thus, the doctrine of election of remedies did not apply.

Election of remedies is the requirement to choose one out of two or more means afforded under the law for the redress of an injury to the exclusion of the other(s).

1-3 THE RESURRECTION OF THE ARBITRATION REMEDY

Whereas previously, these cases were frequently resolved through CBA arbitration clauses, after the Alexander ruling, cases rooted in individual employment rights swamped the courts. In 1991, the Supreme Court once again ruled on the subject.

Whistleblower is an employee who reports or attempts to report employer wrongdoing or actions threatening public health or safety to government authorities.

Case: *Gilmer v. Interstate/Johnson Lane Corporation,* U.S. 20 (1991)

i. The Supreme Court ruled on whether an agreement to arbitrate employment disputes could ever trump an employee's right to pursue his or her claims under a federal statute that enabled the aggrieved employee to file a complaint with an agency and/or in court. The Court held that an ADEA claim could be subjected to compulsory arbitration.

ii. After *Gilmer*, U.S. trial and appellate courts extended the verdict's reach to virtually all types of employment discrimination cases. Simultaneously, federal agencies also embraced alternative dispute resolution (ADR).

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THE WORKING LAW

In its 2014 press release, *Restaurant Franchiser Unlawfully Barred New Hires from Filing Discrimination Charges, Federal Agency Charges*, the EEOC sent a sharp signal that the outer limits of deferral to arbitration had been reached and that the trend required a strong push in the opposite direction. The EEOC stated that Doherty's mandatory arbitration agreement, which required all employment-related claims be submitted to and determined exclusively by binding arbitration, interfered with employees' rights to file discrimination charges. This pronouncement flew in the face of the Supreme Court's ruling in Alexander five years prior.

In 2012, Obama appointees dominated the NLRB, and the EEOC and NLRB appeared to be of one mind in regard to substitution of private ADR remedies for statutory rights and recourse to federal courts and agencies.

In 2017, President Donald Trump nominated Justice Neil Gorsuch for the Supreme Court. Once Gorsuch was confirmed, the conservative justices were firmly in the saddle and sharply changing what had been considered the expected course for these types of cases.

Epic Systems Corp. v. Lewis is an explicit example of the pro-employer impact Republicans have had on the Supreme Court in more recent years, wherein the majority held that an agreement to waive class-action rights and submit to arbitration in an employee's contract trumps the courts' ability to entertain a class-action suit under the Fair Labor Standards Act.

CASE 1.1 **EPIC SYSTEMS CORP. V. LEWIS**
584 U.S. ___ (2018)

Facts: This case was a consolidation of three separate cases: *Epic Systems Corp. v Lewis* (Docket 16-285), *Ernst & Young LLP v. Morris* (16-300), and *National Labor Relations Board v. Murphy Oil USA, Inc.* (16-307). In each case, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Nonetheless, each employee sought to litigate Fair Labor Standards Act (FLSA) and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act (FAA) generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes the obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements violated the National Labor Relations Act (NLRA). The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion.

Issue: Under the NLRA and the FAA, can employment contracts legally bar employees from collective arbitration?

Decision: The Supreme Court held that arbitration agreements in which an employee agrees to arbitrate all claims against an employer on an individual basis do not violate the NLRA, regardless of the allowances set by the saving clause of the FAA. Penning the majority opinion, the recently appointed Justice Gorsuch wrote that the FAA "has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Gorsuch further noted that the Court has rejected past efforts to manufacture conflicts between the Arbitration Act and other federal statutes, and nothing in the NLRA hints at a manifest wish to displace the FAA. In a dissenting opinion, Justice Ginsburg wrote, "The court today holds enforceable this arm-twisted, take-it-or-leave-it contract—including the provisions requiring employees to litigate wage and hours claims only

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one-by- one.... Federal labor law does not countenance such isolation of employees."

CASE 1.2 **APPLE SoCAL, LLC D/B/A APPLEBEE'S, APPLE AMERICAN GROUP II, LLC D/B/A APPLEBEE'S AND APPLE AMERICAN GROUP, LLC AND SAMUEL Y. RODRIGUEZ**
367 NLRB No. 44 (2018)

Facts: Samuel Y. Rodriguez, an employee at Applebee's restaurant, alleged in a complaint that Applebee's maintained and enforced a mandatory arbitration agreement that unlawfully restricts employees' statutory right to pursue class or collective actions in violation of Section 8(a)(1) of the NLRA. The complaint also alleged that the mandatory arbitration agreement included language that employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board. On May 2, 2018, Applebee's filed a motion for partial summary judgment and a supporting brief. Applebee's contended that the allegation that the arbitration agreement includes language that employees would reasonably conclude prohibits or restricts their right to file charges with the Board should be dismissed as untimely under Section 10(b) of the Act. On July 2, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why Applebee's motion should not be granted in favor of either party with respect to the 10(b) issue.

Issue: Does a mandatory arbitration agreement violate Section 8(a)(1) because it prohibits or restricts employees' access to the NLRB?

Decision: The Board rejected the respondents' argument that the allegation should be dismissed as untimely under Section 10(b). The Board also observed that, at the time the charge and the amended charges were filed, the issue of whether maintenance of a facially neutral work rule or policy violated Section 8(a)(1) would have been resolved based on the "reasonably construe" prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board noted that it subsequently issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), in which it overruled the Lutheran Heritage "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. The Board found that, under the standard announced in Boeing, the General Counsel has not established that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to this complaint allegation.

1-4 EMPLOYEE HEALTH, SAFETY, AND WELFARE

A. Covered thoroughly in their own sections of this text are the major aspects of employee health, safety, and welfare, as they are embodied in our federal and state laws. These include:

i. The federal Occupational Safety and Health Act (OSHA) and its many state-law counterparts.

ii. Workers' compensation and unemployment insurance statutes, which are a part of virtually every state's statutory safety net for injured and out-of-work workers.

iii. The U.S. Social Security system, which includes both pensions and support payments for permanently disabled workers who are still too young to retire.

iv. The Employee Retirement Income Security Act (ERISA), which is intended to protect and preserve employee pensions.

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v. The Family and Medical Leave Act (FMLA) and its numerous state and local counterparts, which increasingly require employers to grant paid leaves of absence for an ever-increasing range of personal issues.

vi. Worker Adjustment and Retraining (WARN) Acts, both federal and state, which are aimed at letting employees know when a plant closing or mass layoff is in the offing.

vii. The Patient Protection and Affordable Care Act, commonly called Obamacare after the president during whose term it was enacted, which dramatically revised the American healthcare system, notably by mandating that all Americans buy health insurance or pay a tax penalty by 2014, but which was challenged before the U.S. Supreme Court in March 2012.

Note: No national statute requires private employers to provide their employees with either health insurance or a pension plan.

THE WORKING LAW

From 2011 to 2018, public-employee labor unions have been targeted by conservative governors, legislators, and the U.S. Supreme Court. After the November 2010 mid-term elections, the switch from liberal Democrats to conservative Republicans in many governors' mansions saw several states move toward ending collective bargaining by public employees. The initiative was most visible and confrontational in Wisconsin and Ohio, prompting the American Federation of State, Local, County, and Municipal Employees (AFSCME) to issue a statement condemning the initiative.

Although teachers and unions have racked up some wins in the years since, the onslaught of anti-union legislation has largely continued unabated. In the 2016 election, the Republican Party won control of both the House and the Senate, and President Trump was able to fill a Supreme Court vacancy with a conservative judge (Justice Gorsuch).

Meanwhile, an important case regarding the power of labor unions to collect fees from nonunion members had been working its way through the courts since 2015: *Janus v. American Federation of State, County and Municipal Employees (AFSCME), Council 31*, No. 16-1466, 585 U.S. __ (2018).

Janus originated as a public employee's challenge to the practice of unions in the public sector charging "agency fees" to employees who do no wish to join a union (but who also typically benefit from union deals). *Janus* argued that agency fees are unconstitutional because they force employees to pay money to political groups (unions) with whom they do not necessarily agree, resulting in a form of compelled speech.

Overruling a previous Supreme Court judgment, the Court held that the state's extraction of agency fees from "nonconsenting" public-sector employees violates the First Amendment. By effectively choosing a winner in the debate over agency fees, the *Janus* ruling shakes up the very foundation of labor law, and its ramifications will likely be far-reaching.

ETHICAL DILEMMA

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Is President Obama's "Go It Alone" Strategy Constitutional?

In 2010 the Republican Party won control of the House of Representatives in the midterm national elections, and took control of the Senate in 2014. This prevented President Obama from being able to win passage of any of his legislative agenda. The president increasingly sought to circumvent the roadblock by using his ability to issue executive orders to outmaneuver his opponents, the most controversial of all being the 2014 executive actions on immigration. Congressional opponents saw this as an attempt to cut them out of immigration-reform initiatives, and/or as a usurpation of congressional power. Most significantly, a 25-state coalition, led by Texas Attorney General (now governor) Greg Abbott, sued the president in an effort to roll back some of President Obama's orders.

With President Trump now in office, Texas Attorney General Ken Paxton has continued the work of the former AG, suing the current administration about five times per year. The current administration, however, is much more eager to listen. President Trump has been steadily rolling back Obama-era legislation since he entered office, often through the use of executive orders. AG Paxton sees Texas' lawsuits against Obama-era rules and regulations as being "in partnership" with the Trump administration's goals.

ANSWERS TO END OF CHAPTER PROBLEMS

QUESTIONS

1. Employment at will was devised by American judges in the 19th century, a time when the young nation was pushing West and expanding its industrial base. The public policy inherent in employment at will is the same policy manifested in the enormous land grants given to railroad companies to facilitate their rights of way. The purpose of both was to make it easier and more economical for free enterprise to expand and prosper. By depriving workers of job security, and therefore bargaining leverage, wages were depressed and employers given the maximum flexibility and power in dealing with their workforces. Declaring unions to be illegal combinations and conspiracies, another feature of the American common law during much of the 19th century reflected the same public-policy considerations.

2. The Industrial Revolution created a demand for labor. Workers banded together into labor unions in order to gain some power. This shifted some power back to the workers. Courts initially resisted these unions, considering them to be similar to criminal conspiracies, based on Old English law that made it a crime for a worker to either leave a job in search of higher pay or to demand higher pay. However, the court's view gradually changed as judges applied enlightened logic to analyze cases under the U.S. Constitution. They came to view that organizing the union, in and of itself, was not a crime, and in fact was protected under the First Amendment of the U.S. Constitution right of assembly provision. If the members of the organization did not engage in illegal activity then they were free to pursue their goals, even if reaching their goals (of higher wages, for example) would have the effect of diminishing the employer's profits.

3. FDR had threatened to seek authorization from the Democratic Congress to appoint additional Justices to the Supreme Court, thereby altering the majority in favor of New Deal legislation. Previously, the Court, usually by narrow margins such as 5-4 had declared a number of key statutes, such as the National Recovery Act, to be unconstitutional. Roosevelt's frustration led to his so-called "Court packing" plan. The plan resulted in an outcry from Republicans and even some Democrats and it's unclear whether, if push came to shove, would have given him the power to pack the Court. But the threat was sufficient to induce at least one Justice to change

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sides... the so-called "switch in time that saved the nine," according to one pundit.

4. The instructor might present the following pros and cons for students' consideration and debate:

   PROS:

   Better wages, benefits, and employment conditions for workers.
   Protection against unjust dismissal (no more employment at will for them).
   Perhaps safer work places

   CONS:

   Employers lose their ability to be agile entrepreneurs due to numerous work rules.
   Unions are often corrupt. Some have been associated with organized crime.

5. In 1974, the *Alexander* Court determined that the right to be protected against illegal discrimination is a protected statutory right, as is the right to have the government agency (the EEOC) investigate the claim. Therefore, the union cannot waive an employee's right to invoke the protection of the law by binding the employee to a grievance or arbitration clause contained in a collective bargaining agreement, in the case of a dispute arising under statutory law. The issue of mandatory grievance and arbitration clauses arose again in 1991. In this case, Gilmer had signed the agreement to arbitrate, himself. The waiver was not part of a collective bargaining agreement outside his control. Additionally, the *Gilmer* Court noted that even though Gilmer was required to arbitrate the dispute, he was still allowed to request that the EEOC investigate his claim. Therefore, his situation was different than Alexander's.

6. The reelection of President Obama for a second term in 2012, and the Democrats' retention of a majority in the Senate mean that major cuts in so-called "entitlement" programs, notably Social Security and Medicare/Medicaid are unlikely. On the other hand, the size of the U.S. deficit and the tenaciously sluggish economy, coming ever so slowly back from the Great Recession, make a significant enhancement of Social Security benefits a virtual impossibility. At the same time, it seems highly unlikely that the GOP-dominated House of Representatives is going to go along with mandatory pensions funded by employers. To the contrary, the fiscal crises in many states, where defined-benefit plans have prevailed for public employees, demonstrate that such plans are relics of a bygone era. The dramatic decline of unions in the private sector means that few American workers have the leverage to force companies to dramatically enhance, or to create where absent now, pension plans. Nor can we assume that workers, given the chance, would necessarily agree to lower wages in return for pension plans.

7. One might argue that eliminating collective bargaining rights is a case of "throwing out the baby with the bath water." By this we mean that the real problem for most states is that unionized public employees have defined-benefit pension plans, as well as guaranteed health care at retirement, following 20 to 30-year careers. These are Cadillac plans, which in many instances have been chronically underfunded by the state legislatures for decades. Since taking these benefits away from employees who already are vested is usually impossible, one idea behind elimination of bargaining rights is to make sure future generations of public workers are not eligible for the same. Collective bargaining and union representation usually also mean that employees are protected from arbitrary discipline. One could argue that public employees are less in need of such protection, since public employers are restrained by the 14th Amendment of the U.S. Constitution, which imposes on "state actors" most of the Bill of Rights, including free speech, due process of law, and search-and-seizure prohibitions. The reasoning goes that for this reason public workers should feel sufficiently secure from employer abuses that unions typically oppose in the private sector.

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8. American courts create common (judge made) law. The doctrine of employment at will was a creation of the common law during the 19th century, when America was expanding west and developing into a major industrial power. Later, American courts began fashioning exceptions to the pure doctrine of at-will employment, most notably the public-policy exception. The courts also developed the related torts of defamation, invasion of privacy, infliction of emotional harm, etc. Additionally, the courts interpret the statutory law, including the anti-discrimination laws and major labor and wage & hour laws. With regard to federal law, the US Supreme Court is the final arbiter of what the law means. But we have seen—as, for example, with the Americans with Disabilities Amendments Act in 2008—that Congress is ready, willing and able to overrule the Supreme Court, when the legislators feel that the high court has misinterpreted the law and/or misapprehended Congressional intent. Private enterprise for its part often complains that the courts accord workers too many rights. One might retort that the rise of individual employee rights, such as the public policy exception to at will employ, has been in inverse proportion to the decline of labor unions over the past 60 years.

9. The instructor will need to lead this debate, should the instructor choose to use this problem.

   The instructor may direct student to conduct research, including these web addresses:

   https://search.whitehouse.gov/search?query=executive+order&op=Search&affiliate=wh
   https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders
   http://www.archives.gov/federal-register/executive-orders/obama-subjects.html
   http://www.presidency.ucsb.edu/data/orders.php

   Some questions the instructor might throw out for consideration and debate include:

   - Republicans have compared President Obama's ample use of executive orders to that of a monarchy. Do you think this comparison holds water? What checks and balances are in place to avoid "executive tyranny"? Do you think some of those checks and balances be eliminated to make the pathway clearer for new laws?
   - How have President Obama's executive orders helped close the wage gap for women and minority workers?

10. The TV pundit Bill Maher occasionally ruminates about why Americans, whose high-paying industrial jobs have migrated overseas, and who are left working low-wage service jobs with few benefits, are not flocking to labor unions. His concern, first of all, is overstated. In fact the Service Employees International Union and some other labor organizations are enjoying increased success in attracting workers on the lower rungs of the American economy. Some experts attribute the fact that more workers don't unionize to flaws in the National Labor Relations Act, which supposedly creates a level playing field but actually favors employers in many ways, such as the slowness of its procedures and its limited remedies. The Obama NLRB has tried to remedy the first of these perceived shortcomings by announcing regulations in 2015 for so "snap elections" with limited opportunity for employers to prevent recognition by committing unfair labor practices. It is difficult for unions to raise wages when jobs can be readily shipped overseas. To counter this problem, some international labor unions have been organizing globally and/or leveraging their strength in heavily unionized nations, such as Germany, to force multi-national firms to recognize them in the U.S. and elsewhere.

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