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PART I

INTRODUCTION

The way work is structured and administered directly affects the economic performance of the firm, the quality of working life of the employees, and the very fortunes of a nation. With the globalization of markets and enterprises, multinational corporations face unique challenges in setting the terms and conditions of employment. No one consistent set of policies can span multiple national jurisdictions, yet employees often have assignments that involve rotation among various locations and working together in teams with people each operating in different countries. The result is a wide array of dilemmas and tensions that are brought into sharp relief by this coursebook.

The assumption of this volume is that a significant cohort of human resource managers are active in companies that function multinationally and that more are likely to be engaged in such enterprises. Consequently, lawyers are and will increasingly be called upon to advise managers about employment policies and practices in that environment. Even as corporations seek, if not complete uniformity, at least to harmonize their human resource (HR) policies, employment law and employment relations remain deeply rooted in the nation state. Thus HR policies within a single enterprise may differ because of the legislation, administrative policies, and court decisions these legal systems produce – especially as limits on what management would like to do: the very structure and assumptions on which these legal systems operate, the role of the rule of law in human resource management, can have centrifugal effects.

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We have chosen five countries for comparative purposes. The United States has been chosen not because we view its law as in any sense a model – though, as will be seen, it does represent something of an economic neo-liberal outlier compared to the others – but because U.S.-based companies represent the most significant group in the multinational corporate universe. We selected four others, that number being manageable without overwhelming the student, for two reasons. First, for their educational value because their labor laws are quite distinct from one another. Indeed, the countries span different legal traditions (common law and civil law; English, French, and German legal roots). Second, the countries represent a range of economic and cultural contexts (liberal versus coordinated markets; developing versus developed economies; and Eastern versus Western cultural traditions). Third, these countries all host large numbers of outside multinationals. Just consider the data on U.S. and U.S.-affiliated

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multinationals hosted by these four countries.[1] The figures for the last year for which data are available are set out in Table I.1.

Table I.1 U.S. multinationals in comparison countries

	Number of U.S. affiliates	Number employed by them
Australia	828	312,200
Brazil	588	452,200
Germany	1,586	649,000
Japan	896	590,000

Source: U.S. Dept. of Commerce, Bureau of Economic Analysis, *International Economic Accounts* (Nov. 17, 2008).

These materials proceed on a problem-focused basis. We believe that in lieu of purely descriptive accounts, discussion of the law is enlivened by confronting it in application. It is often the case that different legal systems yield equivalent results, albeit by very different doctrinal means. The problem method draws out practical equivalence, doctrinal analogies as well as differences in analyses and outcome. For a notable example in employment law *see* WORKPLACE JUSTICE: EMPLOYMENT OBLIGATIONS IN INTERNATIONAL PERSPECTIVE (Hoyt Wheeler & Jacques Rojot eds., 1992).[2] We have accordingly devised a set of problems that we thought would represent the kinds of real world issues HR managers and their lawyers confront. We have vetted them with a sample of mid-career and senior HR managers as well as lawyers in the U.S. and abroad in advance of submitting them to our panel of legal experts.[3] These responses are accompanied by additional references and suggested readings which, in turn, should stimulate further in-depth consideration of how, and why, these systems function as they do. But a caveat is worth mentioning here even if it will emerge

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1 We considered China and India but chose not to include them. They are economically significant globally and will become even more so. Nevertheless, in both countries the content of the law, the ease of access to the law, and the effectiveness of enforcement are works-in-progress. We concluded, that, for the time being, the coverage we chose is adequate for systemic variety, and that Brazil stood in good stead as an important, rapidly developing country: hourly compensation costs in manufacturing increased in 2010 over 2009 in Brazil by about 24 percent in U.S. dollars while in the U.S. they increased by about 2 percent (Daily Labor Report, 245 DLR D-1 Dec. 21, 2011).

2 Other leading works featuring this methodology but only touching on issues in employment are GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds., 2000) and PERSONALITY RIGHTS IN EUROPEAN TORT LAW (Gert Bruggemeier, Aurelia Ciacchi & Patrick O'Callahan eds., 2010).

3 Because German law is so highly textured the assistance of two experts in German labor law was needed. Professor Waas attended to Problems 1, 2, 3, 4, 8, 10, 11, 12, 13, 16, 17, 18, 19, 20, and 21. Dr Fischinger attended to Problems 5, 6, 7, 9, 14, and 15 and also supplied a translation of the German "Social Plan" set out in connection with Problem 10.

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with clarity as the problems are worked through: the bare fact that a practice or policy might be lawful speaks not at all to whether it is desirable – or tell us how employers, unions, and employees actually behave. *Can* does not imply *ought*. Put differently, the question might be posed in each case regarding how the law facilitates or hinders the implementation of best practices.

With the assistance of the consulting HR managers we identified six areas where the kinds of problems they confront are most common and where the differences – and similarities – are most salient:

- *Employee voice*. Does the law allow or require that employees be heard in company decisions? If so, on what subjects, by what means, and with what legal consequences?
- *Discrimination*. Most countries forbid discrimination by employers on some invidious, usually class-based grounds. How do these play out in commonly encountered scenarios? Do these vary from country to country? If so, why?
- *Privacy*. Over the past several decades demands for the protection of personal data have accelerated in tandem with the proliferation of technologies that make more and more data available and render employees more and more transparent. Does the law limit the deployment or utilization of these technologies? Does it protect employees against intrusion in the workplace or in private life?
- *Wrongful dismissal*. Does the law constrain the employer's ability to discharge an employee? On what grounds? Subject to what procedure? With what consequences?
- *Compensation and benefits administration*. Can a corporation have consistent compensation and benefit policies that span nations? How can pay and benefits be fair given different legal constraints across countries?
- *Global supply chain and labor standards*. Does the law – "hard law" – impose any obligations on companies vis-à-vis the labor standards of their foreign affiliates, contractors and suppliers? If not, does "soft law" – international norms or efforts by non-governmental organizations – affect what companies do in that regard? If so, how and with what consequences?

This is a time of fundamental change in the human resource function. Key elements, such as benefits, compensation, training, and HR analytics are increasingly being outsourced to external providers. At the same time, in a global knowledge economy, talent management and change management are more central than ever to the economic fortunes of a multinational corporation. Equally, virtually every nation sees human capital as the foundation for its future success in the global economy. The six problem areas selected for this

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volume are emblematic of a fundamental reality, which is that employers and employees have both common and competing interests. The law is the foundation on which these mixed motive relationships are navigated and mediates the degree to which the potential of human resource management is or is not realized. The primary purpose of this coursebook is to educate future professionals on this emerging and important domain at the intersection of national labor and employment laws, on the one hand, and multinational employment practices, on the other. A secondary, but perhaps further reaching purpose is to motivate broader debate and dialogue on these issues. The full array of cases and examples presented here point to limits in the institutional arrangements and alternative approaches, conceptually and in outcome. Additional notes, comments, and questions are appended to stimulate research, discussion, and thought. In larger perspective, this book as a whole can be understood as a problem statement for which we do not yet have the answers.

> The HR practitioner should help hone the founding concepts of the organization and … ask tough questions … holding companies true to these tenets. They have to make the C-suite aware of the impact of their decisions on consumers and employees in diverse environments. It is an awareness of social and cultural assumptions that could be very supportive or damaging to their ultimate goals … it is HR's job to create insight and appreciation … so that the mission, vision and values of the organization can best be realized.
>
> Vice President, Employee Relations, Health Care

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A. SKETCHES OF THE LABOR AND EMPLOYMENT LAW SYSTEMS

The texture of a nation's labor and employment law is invariably complex and highly nuanced. It is hard enough to master one system let alone five. What follows are brief sketches to outline the structure of these countries' systems to put the reader on a map, so to speak. At the close of these sketches a brief statistical display of the demographics of the jurisdictions is set out. The content-specific aspects of the law will be dealt with in the course of analyzing the problems for discussion.

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EMPLOYMENT LAW IN AUSTRALIA: A GENERAL INTRODUCTION

Political structure, governance and legal system

Australia is a federation, comprising the Commonwealth of Australia, six States (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania) and a number of Territories, of which the two largest are the Northern Territory and the Australian Capital Territory.

Australia has a written Constitution, which establishes a system of federal courts and confers power on a bicameral parliament to legislate on certain specified matters. Each of the States has its own Constitution, parliament and court system. State parliaments have a "plenary" or residual power to legislate on any matter, though if any of their statutes are inconsistent with a valid federal law, the federal law will prevail. The Territories have been afforded a measure of self-government, and also have their own legislatures and court systems. But their laws can be overridden by the Australian Parliament, which can legislate on any matter arising in a Territory. By contrast, the Australian Constitution protects the States in certain ways from the exercise of federal powers.

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Although the Australian Constitution is loosely modelled on the US Constitution, the Commonwealth, States and Territories each operate a "Westminster" system of government, in which the executive government is formed by the party (or coalition) with a majority in the lower house of parliament. Hence there is no clear separation between the legislature and the executive.

Like the US and other former British colonies, Australia's legal system still accords an important role to the "common law" – judge-made law developed by reference to established principles and precedents. The common law can be – and often is – excluded or overridden by legislation. But important aspects of the law of contract and the law of tort (civil wrongs) are still governed by common law principles.

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Responsibility for employment regulation

Australia's employment laws are amongst the most complex in the world. The reasons for this are many and varied. They include the absence of any clear demarcation in the Constitution between federal and State authority over employment matters, as well as a historical attachment to the use of compulsory arbitration by public tribunals to resolve labour disputes and regulate minimum wages, working hours and other employment conditions.

Importantly, however, the picture has begun to simplify in recent years, thanks to a series of major reforms that have culminated in the federal Fair Work Act 2009. With the cooperation of the States, and with effect from 1 January 2010, this statute now operates to regulate employment conditions and labour relations for *all* private sector (i.e. non-governmental) employers. The only exception is Western Australia, although here too all companies are covered by the federal statute.

For the most part, the Fair Work Act operates to the exclusion of any State or Territory labour laws. However, there are important exceptions. The regulation of occupational health and safety (OHS), workers' compensation, training and child labour, for instance, are all matters that are primarily left to the States and Territories. Hence a company that operates throughout Australia has traditionally had to comply with eight different OHS statutes, although a recent attempt has been made to harmonise those laws. Most States and Territories have now enacted a model Work Health and Safety Act to replace their former legislation. Discrimination or equal opportunity is another matter where federal, State and Territory laws may co-exist.

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Minimum employment conditions

Under the Fair Work Act, all employees (including managers) are entitled to the benefit of the National Employment Standards (NES). These create minimum entitlements in relation to various forms of leave, as well as matters such as notice of termination and redundancy (severance) pay. They also cap working hours at 38 per week, plus reasonable additional hours.

In addition, most non-managerial employees are covered by a further and more detailed set of minimum entitlements, enshrined in an instrument known as an award. Traditionally, awards were made by industrial tribunals in settlement of labour disputes, and there were thousands of such instruments. However the award system has just been reviewed and radically simplified. Most employees are now covered (if they are covered at all) by one of the 122 "modern awards"

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enterprise agreements (as they are now known) may be made for all or part of a single enterprise, or for a group of enterprises. They can have a nominal duration of up to four years. After agreements reach their expiry date, they continue in operation, but can be more easily replaced or terminated.

Enterprise agreements can be negotiated with one or more unions, or directly with a group of employees. Either way, the final text must generally be approved by a majority of employees in some sort of vote, before being submitted to Fair Work Australia (see below) for approval. An agreement will only be approved if it leaves each affected employee "better off overall" than they would be under an otherwise applicable award.

An employer cannot be forced to bargain, unless a majority of employees request an agreement. Once bargaining is initiated, however, all concerned must negotiate in good faith, though there is no obligation to bargain to conclusion. Employees may take "protected" (i.e. lawful) industrial action in support of a new single-enterprise agreement, though only after the expiry date of any existing agreement. Employers can only initiate a lockout in response to protected action by employees. Any other form of industrial action is unlawful.

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Unfair employment practices

The Fair Work Act allows a dismissed employee who has served a minimum qualifying period to challenge the fairness of their dismissal. A successful claim may result in reinstatement (plus back pay), or compensation of up to six months' remuneration. Higher-paid non-award employees, including many managers, are excluded from making such a claim.

The Act also contains various "general protections" against discriminatory or otherwise wrongful treatment at work. For example, it prohibits an employer from taking adverse action against an employee or job applicant on the ground that they are a union member or non-member, or that they have or are proposing to exercise some sort of "workplace right." There are also a range of other federal, State or Territory laws that deal with discrimination on the grounds of race, gender, age, disability, and so on.

The employment contract

Each employee is considered to have entered into a contract of employment, whether this is formally documented or not. To the extent that the parties have not expressly reached agreement on matters such as the duration of the hiring, or the employee's obligation to comply with instructions, the common law will

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imply appropriate terms on these matters. In practice, detailed employment contracts tend to be written only for managerial or professional employees.

It should also be emphasised that relatively few employees in Australia are engaged on an "at will" basis. Assuming the hiring is not for a fixed term, an employer must generally give notice before dismissing an employee, other than in the case of serious misconduct. The one major exception may be casual employees. It is often assumed that a casual can simply be refused any further work, without any need for notice, although the issue has not been fully tested. In any event, there have been many examples of long-term casuals successfully bringing claims for unfair dismissal.

An employment contract can lawfully offer wages or benefits that are more favourable to an employee than the minimum entitlements set by the NES, an applicable modern award, or any other labour statute. But a promise to accept less than any of those entitlements is not enforceable.

Regulatory agencies

There are two main regulatory agencies under the Fair Work Act. Fair Work Australia (FWA, renamed the Fair Work Commission on January 1, 2013) operates for certain purposes as a tribunal, but in other ways through administrative decisions. Its responsibilities include:

- adjusting minimum wage rates;
- reviewing and updating awards;
- policing industrial action and other tactics used in negotiating enterprise agreements;
- helping to resolve bargaining disputes, including (though only in limited instances) through compulsory arbitration;
- scrutinising and approving enterprise agreements;
- resolving disputes arising under awards, enterprise agreements or the NES, where the parties have agreed it should have that role; and
- determining unfair dismissal claims.

The Fair Work Ombudsman promotes compliance with awards, enterprise agreements and other statutory obligations. Its inspectors have the power to enter workplaces, investigate breaches and launch prosecutions. It is also responsible for providing education and advice on workplace laws to employers and employees.

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For a general overview of Australian employment law, including the Fair Work Act, see ANDREW STEWART, STEWART'S GUIDE TO EMPLOYMENT LAW (4th ed. 2013). An online supplement was accessed at www.federationpress.com.au/supplements/.

More detailed accounts can be found in BREEN CREIGHTON & ANDREW STEWART, LABOUR LAW (5th ed. 2010) and ROSEMARY OWENS, JOELLEN RILEY & JILL MURRAY, THE LAW OF WORK (2d ed. 2011).

Because of the massive scope of the recent changes to Australia's laws, not all accounts of Australian labour or employment law are up to date. *Care should therefore be taken when reading any material written prior to 2009.*

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EMPLOYMENT LAW IN BRAZIL: A GENERAL INTRODUCTION

Political structure, governance and legal system

Brazil is a federation, comprising 26 States, its Municipalities and the Federal District (Brasília). It is a complex political structure, which concentrates power on the federal level. Its political structure may be attributed to historical reasons as the country was originally organized as a centralized empire after independence in 1822. Federal importance as a trend has thus survived the proclamation of the Republic in 1889 and the seven Constitutions the country has known since independence.

Brazil promulgated in 1988 its seventh written Constitution. This established a system of federal courts, with four different branches: federal (which examines cases that have a State agency as one of the litigants), electoral, labor and military (which examine, respectively, electoral, labor and military matters). The National Congress is a bicameral parliament entitled to a wide array of exclusive legislative competence, which may be delegated to the States through the approval of a specific statute by a higher quorum. The Union, the States and Federal District also have a concurrent legislative competence, though if any of their statutes are inconsistent with a valid federal law, the federal law will prevail. Accordingly, the States and Federal District may legislate on any matter which is not an exclusive prerogative of the Union or the Municipalities as the latter also have exclusive legislative competences. Each State has its own Constitution, parliament and court system.

The Brazilian system of government is presidential and elections are held every four years. The President is directly elected by the people and the electoral body is actually composed of 140,646,446 voters. As for the National Congress, the electoral system is purely proportional for a scenario of 30 political parties, the latest created in June, 2012. No party has been able to obtain a Congressional majority which has to be negotiated at the beginning of every legislature term. Hence there is a clear separation between the legislature and the executive.

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Brazil's legal system is clearly civil based although a complex system of judicial precedents has been developed by the Higher Courts over the years.

Responsibility for employment regulation

The Constitution establishes that Brazil's employment laws can only be issued by federal authority and some labor rights have constitutional status. Although the Labor Code was issued in 1943, it is still valid in every aspect which is not contrary to the constitutional regulation. Discussions over the Labor Code reform have been on the public agenda for many years although no conclusion has been reached so far. Employment regulation is thus homogeneous for the whole country.

Brazil's Labor Ministry also has legal competence to regulate occupational health and safety (OHS) conditions. Over the years, it has produced a series of 35 OHS statutes that regulate most of the working conditions on the matter, the latest issued in March, 2012. Employers are compelled to enforce such administrative statutes which are verified by Labor Inspectors.

Public employees are not regulated by the Labor Code and have a specific regulation which replicates most of the labor standards. Federal public employees are thus regulated by the Federal Statute 8,112 (1990). States and Municipalities have their own Public Service Statutes. Nonetheless, all of them have to comply with constitutional labor rights.

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Minimum employment conditions

Brazilian labor regulation does not have a specific statute that sets a minimum for employment conditions. Actually, all employers are bound by the Constitutional labor rights and the dispositions of the Labor Code. Among other rights, the Constitution entitles every employee to a minimum wage (which was last fixed in January 2012 at the equivalent amount of US$ 306.00 per month), 30 days of vacation with an additional payment of one third of the employee's salary, a 13th salary at the end of a year, a 30 day delay at least for dismissal, payment for overtime hours of at least 50 percent more than for normal working hours. It also caps working hours at 8 per day and 44 per week.

Every employee is entitled to an individual Time Service Guarantee Fund (FGTS) account to which the employer is required to contribute with a monthly deposit equivalent to 8 percent of the employee salary. Once the employee is dismissed the employer is required to make an additional deposit equivalent to 40 percent of all deposits previously made and the employee is

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Labor justice

There are no regulatory agencies in Brazilian employment law. Employment litigation is settled in a federal specialized judicial branch which is structured in three levels: Labor Judges, Labor Courts and the Superior Labor Court. Labor Judges are attached to one of the 24 Labor Courts and have jurisdiction over one or more Municipalities. Labor Courts examine the appeals against Labor Judges' decisions. They also work as a first-level jurisdiction for litigation arising from collective bargaining. Labor Court decisions may be appealed to the Superior Labor Court, which decides every case in last resort. An extraordinary appeal may be made from a Superior Labor Court decision to the Brazilian Supreme Court if the case deals with constitutional matters.

Since 1941, the Labor justice system has examined over 70,000,000 cases. Still, more than half of these were filed over the last 14 years (1998–2011). Between 1994 and 2010, annual cases averaged 2,463,984.5, with no single year having less than 2,000,000 cases. Finally, by 2011, the cap of 3,000,000 cases was overcome as 3,061,172 cases were received. As "only" 3,016,049 cases were decided, by the end of the year the number of unsettled cases still stood at 1,450,197. The numbers are impressive and show not only that litigation is on the rise but also that almost every Brazilian employee has at least once in his lifetime had his day in a Labor Court.

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For a general overview of the Brazilian legal system, see LIBRARY OF CONGRESS, THE LEGAL SYSTEM OF BRAZIL, accessed at http://www.loc.gov/law/help/brazil-legal.php.

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EMPLOYMENT LAW IN GERMANY: A GENERAL INTRODUCTION

Political structure, governance and legal system

Germany is a federal state, comprising 16 partially self-governing States (*Länder*) ranging from so-called "city-states" (Berlin, Hamburg, Bremen) to "territorial states" like North Rhine-Westphalia, Baden-Württemberg and Bavaria.

Germany has a written Constitution, the so-called Basic Law (*Grundgesetz*) which was promulgated on 23 May 1949, as the fundamental law of those states of West Germany that were initially included within the Federal Republic. When the Communist regime in East Germany toppled in 1990 and the German Democratic Republic peacefully joined the Federal Republic of Germany, the Basic Law became the Constitution of the reunited Germany. The main body of the legislative branch is the *Bundestag*, which enacts federal legislation, including the budget. The *Bundesrat* represents the States and participates in federal legislation. The Basic Law fixes a number of matters such as foreign affairs and defense within the exclusive legislative power of the Federation. On matters within the concurrent legislative power, the States have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. The Basic Law enshrines a number of basic (fundamental) rights which may be restricted only if certain requirements are met. In no case may the essence of such a right be affected. Basic rights are of major importance in the area of labor law for they bind the legislature, the executive, and the judiciary as directly applicable law. In particular, in those areas, like strike and lockout, where no statutory law exists, the respective lacunas are filled by judge-made law which is essentially derived from basic rights as well as fundamental constitutional principles such as the so-called "social state" principle.

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Labor courts

There is an extensive system of labor courts with jurisdiction for both individual labor law – mostly concerning contracts but also including wrongful dismissal

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claims – and collective labor law, including the rights of both unions and works councils. These exist at three levels. The courts of first instance and the intermediate courts of appeals are state courts, called respectively labor courts – *Arbeitsgerichte* (cited as ArbG) – and Regional (or State) Labor Courts, *Landesarbeitsgerichte* (cited as LAG). At the apex is the Federal Labor Court (*Bundesarbeitsgericht*, or BAG), which hears appeals only on questions of law. All three courts are tripartite: ArbG and LAG cases are heard by a panel presided over by a professional judge and two lay judges, one selected through nomination by employers and the other by unions. The lay judges have the same authority as the professional judge. Appeals from the ArbG to the LAG essentially involve a *de novo* presentation of the case, but lawyers need not necessarily be involved. The BAG is also tripartite, functioning in panels, known as Senates, geared to particular sets of legal questions and the tripartite membership is enlarged. It is possible for the BAG to sit in a Grand Senate for especially important cases.

Responsibility for employment regulation

Labor law (including the organization of enterprises, occupational health and safety, and employment agencies, as well as social security, including unemployment insurance) is among the matters within the concurrent legislative power of the Federation and the States. Since the Federation has made ample use of its power to legislate, state laws barely play a role in this field, however. As opposed to many other countries, there is no uniform Labor Code in Germany. Statutory labor law is widely spread over various Acts. For instance, there are specific Acts on temporary agency work, fixed-term employment contracts and part time work. Dismissal protection is dealt with in the Dismissal Protection Act (*Kündigungsschutzgesetz*). The Works Councils Act (*Betriebsverfassungsgesetz*) establishes the so-called works constitution. Collective bargaining is the subject of specific legislation, too (*Tarifvertragsgesetz*).

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Though various Acts exist in the field of labor law, some areas have not been addressed by legislation. This is why judge-made law plays an important role in Germany, with the rules primarily derived from basic rights and principles of the Constitution. Constitutional provisions are not directly applicable between employer and employee. They are, however, indirectly applicable because, according to the courts, they form the criteria for interpreting the so-called general norms of civil law like *bonos mores* and good faith.

Over the last few decades there has been an increased Europeanization of German labor law. A case in point is the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) which came into force in 2006. The Act

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explicitly prevents employers from discriminating against job applicants or employees on the basis of gender, race or ethnic origin; religion or belief; age; disability; or sexual orientation. By passing this Act, Germany implemented four EU directives regarding anti-discrimination. Before that time, anti-discrimination rules in Germany were essentially based on human rights and the case law of the courts.

The employment contract

Between the employer and the employee a contract of employment exists. A person is in principle regarded as an "employee" if he or she is in a position of subordination. However, the courts take a "holistic view" which means that even subordination does not represent an indispensable requirement. Instead, various criteria are used as indicative of the existence of an employment relationship. Next to "employees" the law recognizes so-called "quasi employees" (*Arbeitnehmerähnliche*). Persons who belong to this category are economically dependent on another person and enjoy some labor rights. Contracts of employment are not required to be in writing. However, the employer is obliged to provide the employee with a written statement of all terms and conditions of employment.

As far as the employment relationship is concerned, freedom of contract is considered to exist only with some limitations. The Federal Constitutional Court once expressly stated that power was unevenly divided between the employer and the employee. Hence, freedom of contract could not guarantee a proper balance of interests. According to the court, the legislature has to step in to make up for a lack of protection.

The employment contract has many distinctive features. For instance, pay may be due even without work being performed by the employee. Such is true, for instance, in the case of sickness. According to German labor law there is a continuation of full salary payments for a period of six weeks if an employee is sick. Such is also true under the so-called doctrine of "works risks" which was developed by the courts. Under this doctrine an employee retains his/her entitlement to remuneration if, for example, lack of energy or raw materials makes it impossible to work. As regards holidays, a statutory claim exists for 20 working days' vacation per calendar year for employees who work a normal five-day week (i.e. four weeks' vacation). However, it is more typical for an employee to receive between 25 and 30 vacation days per calendar year, on the basis of collective agreements.

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right of profession as guaranteed by the Constitution. Accordingly, even if the Dismissal Protection Act does not apply, a dismissal may be found illegal by the courts for contravening the principle of good faith or being in breach of *bonos mores*.

Co-determination

The essential feature of the German employee representation system is the dualism of the representation of workers' interests by trade unions, on the one hand, and of works councils, on the other hand. Under German law works councils are independent legal bodies with the specific task of representing workers in the respective unit (the establishment in the case of a works council). Trade unions, on the other hand, have a more comprehensive task, namely to represent workers' interests at the bargaining table. Works councils form autonomous legal bodies which represent workers' interests independently. Workers' representatives at plant level are not necessarily members of a trade union, nor are they simply nominated by a trade union. Instead, they are essentially elected by all employees who work in a given establishment, irrespective of whether they are union members or not. The role of works councils will be discussed in several of the problems.

In addition to employee representation at plant level, there is a system of employee representation on corporate boards. While co-determination by works councils takes place at the level of the individual plant or establishment, the level of "entrepreneurial co-determination," as it is known in Germany, is the enterprise level, if not the level of a group of companies. Works councils' entitlements seek to restrict the powers of the employer in relation to (organizing and running) the establishment. In contrast, "entrepreneurial co-determination" aims at allowing employees (or their representatives) to participate in decisions that are taken in corporate boards. The extent of co-determination at board level depends on the size of the company concerned and its legal form. If, for instance, a stock corporation (*Aktiengesellschaft*) or limited liability company (*Gesellschaft mit beschränkter Haftung*) employs more than 2,000 persons on a regular basis, one half of the seats on the supervisory board of such company are reserved for workers' representatives. Since the chairman enjoys a double vote in case of a tie (and shareholders are in a position to ensure that one of their own is elected as chairman of the board), a slight (if determinative) predominance of capital owners is ensured.

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Collective bargaining

Trade unionism and collective bargaining play an important role in Germany. Though union density has fallen to considerably less than 20 percent, around 60 percent of employees in the West and 50 percent of employees in the East of Germany are in one way or another bound to collective agreements. Only in relatively rare cases are collective agreements concluded by a trade union and an individual employer. The predominant level of collective bargaining is the individual branch or sector of industry, with collective agreements being concluded between employers' associations and trade unions. Collective agreements take normative effect. They are directly binding on employers and employees if both are members of the associations that have concluded the collective agreement. The employer must belong to the relevant employers' association and the worker must belong to the relevant trade union. Because only a minority of workers belongs to a union, collective agreements mostly become (indirectly) effective by being referred to in individual contracts of employment. Most employers are prepared to offer such reference in order to limit the willingness of their workforce to join a trade union.

Workers have the right to strike because bargaining without the right to strike would be no more than "collective begging," in the words of the Federal Labor Court. That the right to strike is based on the right to bargain collectively has an important consequence, namely, that the right to strike is guaranteed only insofar as the strike is related to that very purpose. A strike is lawful in Germany if and only if its underlying objective is to reach a collective agreement. As a result, "wild-cat strikes" are prohibited in Germany. When determining the lawfulness of a strike, extensive use is made of the principle of proportionality or *ultima ratio*. According to the courts, a strike is illegal if it is evidently neither necessary nor appropriate when taking the aim of industrial action into account. By assessing the lawfulness of a strike according to these standards, the courts are prepared to grant trade unions wide discretionary power and to exercise a considerable measure of self-restraint.

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EMPLOYMENT LAW IN JAPAN: A GENERAL INTRODUCTION

Overview of the Japanese labor law system

The Japanese labor law is understood to comprise three major branches: individual labor relations law, collective labor relations law, and labor market law.[4] These three branches have their legislative basis in the Constitution promulgated in 1946.

The Constitution

The Japanese Constitution guarantees fundamental social rights in Articles 25 to 28. Article 25, commonly called the "right to live" provision, proclaims the principle of the welfare state.[5] Article 26 establishes people's right to, and obligation regarding, education.[6] Articles 27 and 28 deal directly with labor and employment relations as seen below.

These provisions on the fundamental social rights were influenced significantly by the Weimar Constitution in Germany. These social rights provisions in the Constitution provided an important political and legislative basis for developing social policy in Japan.

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Individual labor relations law

Article 27 paragraph 2 of the Constitution ("Standards for wages, hours, rest and other working conditions shall be fixed by law.") requires the state to enact laws to regulate terms and conditions of employment. This article provides the legislative ground for individual labor relations law.[7]

4 Kazuo Sugeno (Leo Kanowitz trans.), JAPANESE LABOR AND EMPLOYMENT LAW (University of Tokyo Press, 2002); Takashi Araki, LABOR AND EMPLOYMENT LAW IN JAPAN 7 (Japan Institute of Labor, 2002).

5 Article 25: "All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for promotion and extension of social welfare and security, and of public health."

6 Article 26: "All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obliged to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free."

7 Art. 27 para. 3 of the Constitution, concerning prohibition of child labor ("Children shall not be exploited."), is incorporated into the child labor protective provisions of the LSA of 1947.

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After World War II, the government established the Ministry of Labor in 1946 and enacted a series of worker protective laws. In 1947, the Labor Standards Act, the Workers' Accident Compensation Insurance Act, the Employment Security Act and the Unemployment Insurance Act were enacted. Among these, the Labor Standards Act (LSA) is the most important and comprehensive piece of protective labor legislation, establishing minimum standards of working conditions.

Subsequently, two chapters contained in the LSA were separated and became independent statutes: the Minimum Wages Act of 1959 and the Industrial Safety and Health Act of 1972. Other labor protective legislation followed, including the Security of Wage Payment Act of 1976, the Equal Employment Opportunity Act of 1985, the Child Care Leave Act of 1991 and so forth. The LSA underwent large-scale amendments in 1987, 1998, 2003 and 2008 to modernize its regulations.

Apart from labor protective norms sanctioned by the criminal penalties and administrative supervision, important rules governing individual labor relations have been established by the courts through the accumulation of judgments. To borrow a German expression, they are not *Arbeitsschutzrecht* (labor protective law) but *Arbeitsvertragsrecht* (labor contract law). In 2007, the Labor Contract Act (LCA) was enacted and some of the important case law rules were incorporated into the Act.[8]

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Collective labor relations law

Collective labor relations are mainly regulated by Japan's Constitution, the Labor Union Act (LUA) of 1949 and the Labor Relations Adjustment Act of 1946.

The Constitution of Japan guarantees workers' fundamental rights. Article 28 of the Constitution reads, "the right of workers to organize and to bargain and act collectively is guaranteed." Any legislative or administrative act that infringes upon these rights without reasonable justification is therefore unconstitutional and void. Workers are immune from any criminal or civil liability for their engagement in proper union activities. Article 28 is understood to stem from the provision in the Weimar Constitution of 1919, which guaranteed freedom of association and created the "third-party effect" (*Drittwirkung*),

8 For the enactment and contents of the LCA, see Ryuichi Yamakawa, "The Enactment of the Labor Contract Act: Its Significance and Future Issues," 6(2) *Japan Labor Review* 4 (2009); Takashi Araki, "Enactment of the Labor Contract Act and its Significance for Japanese Labor Law," 32(12) *Journal of Labour Law* (Korean Society of Labor Law) 97–123 (2009).

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regulating relations between private citizens. Thus, in the opinion of most, Article 28 is construed as regulating not only relations between the state and private citizens, but also relations between employers and workers. Consequently, workers have a cause of action against an employer who infringes upon their union rights. For instance, a dismissal of a worker by reason of his/her legal union activities is deemed as null and void because it amounts to a violation of the constitutional norm.

Article 28 is further interpreted as entrusting the Diet with the power to enact statutes to effectuate basic union rights. Accordingly, the LUA sets requirements for "qualified" unions, establishes the unfair labor practice system prohibiting employers' anti-union actions, gives collective bargaining agreements normative effect, and establishes the Central and Local Labor Relations Commissions. The Labor Relations Adjustment Act was also enacted in 1946 to facilitate the resolution of collective labor disputes. Under this Act, the Labor Relations Commissions are entrusted with the conciliation, mediation and arbitration of labor disputes.

From a comparative perspective, it is noteworthy that Japanese law not only gives civil and criminal immunity to proper acts of trade unions, but also encourages collective bargaining by imposing a duty to bargain on employers and by sanctioning it through the unfair labor practice system.

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Labor market law

Article 27 paragraph 1 of the Constitution ("All people shall have the right and the obligation to work.") has been interpreted as requiring two political obligations on the part of the state.[9] First, the state shall intervene in the labor market so as to enable workers to obtain suitable job opportunities. Second, the state bears a political obligation to guarantee the livelihood of those workers who cannot obtain such opportunities.[10] This article forms the basis of "labor market law."

Corresponding to the first legislative mandate, various statues were enacted. The Employment Security Act of 1947 regulates employment placement services, recruitment and labor supply businesses. The Employment Measures Act of 1966 proclaims the general principles of labor market policies. Other

9 Sugeno, supra note 4, 15.

10 Art. 27 para. 1 also mentions the obligation to work. The literal meaning of the phrase implies industrial conscription. However, since that interpretation is not appropriate, "obligation to work" is interpreted to mean the state has no obligation towards those who do not have an intention to work. Thus, the availability of unemployment benefits is confined to those who intend to work.

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Labor market laws

Employment Measures Act

Employment Security Act

Worker Dispatching Act

Employment Insurance Act

Older Persons' Employment Stabilization Act

Disabled Persons' Employment Promotion Act

Regional Employment Development Promotion Act

Human Resources Development Promotion Act

Minimum standards of working conditions fixed by mandatory statutes

Worker protective laws

The individual employment relationship between an employer and a worker is regulated by labor protective laws such as the Labor Standards Act, the Minimum Wages Act, the Security of Wage Payment Act, the Industrial Safety and Health Act, the Workers' Accident Compensation Insurance Act, the Equal Employment Opportunity Act, and the Worker Dispatching Act.

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As mentioned already, the most fundamental and important of these is the Labor Standards Act which establishes minimum working standards, such as employers' duty of full payment of wages (Art. 24), maximum working hours (8 hours a day, 40 hours a week, Art. 32), paid leave (10 to 20 days a year, Art. 39), special protection of young workers (Arts. 56–64) and pregnant women (Arts. 64–2 to 68), workers' compensation for work-related accidents (Arts. 75–88), rules of employment (Arts. 89–93) and supervision (Arts. 97–105) and penalties (Arts. 117–21).

LSA applies to all establishments which engage in the employment of workers irrespective of the number of workers. The exceptions are family businesses which employ family members only (Art. 116 para. 2), domestic workers (Art. 116 para. 2) and other employment relations for which special regulations apply, namely seamen (Art. 116 para. 1) and some civil servants. From a comparative perspective, the Labor Standards Act is very broad in its coverage.

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Work rules

Work rules are the most important legal tools regulating terms and conditions of employment in Japan.

Duty to draw up work rules

Work rules are a set of regulations set forth by an employer for the purpose of establishing uniform rules and conditions of employment at the workplace. Article 89 of the LSA prescribes that an employer who continuously employs ten or more workers[12] must draw up work rules on the following matters: (1) the time at which work begins and ends, rest periods, rest days, leave, and matters pertaining to shifts, (2) the method of decision, computation and payment of wages, date of payment of wages and matters pertaining to wage increases, (3) retirement including dismissals, (3–2) retirement allowances, (4) extraordinary wages and minimum wages, (5) cost of food or supplies for work, (6) safety and health, (7) vocational training, (8) accident compensation, (9) commendations and sanctions, and (10) other items applicable to all workers at the workplace. Items 1 to 3 are absolutely mandatory matters which must be included in the work rules. Items 3–2 to 10 are conditionally mandatory matters which must be included in the work rules when the employer wants to introduce regulations concerning these matters.

When the employer institutes the work rules for the first time or when the work rules are altered, the employer must submit those new rules to the competent Labor Standards Inspection Office. The rules must also be made known to the workers by conspicuous posting, distribution of printed documents or setting up accessible computer terminals (LSA Art. 106, OELSA Art. 52–2). The duties for drawing up, submitting and displaying work rules are sanctioned by criminal provisions (LSA Art. 120).

In drawing up or modifying work rules, the employer is required to ask the opinion of a labor union organized by a majority of the workers at the workplace or, where no such union exists, the opinion of a person representing a majority of the workers. However, a *consensus* is not required. Even when the majority representative opposes the content of the work rules, the employer may submit them to the Labor Standards Inspection Office with such an opposing opinion and the submission will be accepted. In this sense, the employer can unilaterally establish and modify work rules.

12 Though it is not clear from the provision, it is generally interpreted that "ten or more workers" should be calculated not in the enterprise but in the establishment, on the rationale that work rules apply in each establishment and procedures for drawing up work rules presuppose each establishment as a unit (LSL Art. 90).

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The legal effect of work rules and their unfavorable modification

The work rules apply to all workers in a workplace or establishment. Work rules cannot violate enacted laws or collective agreements applicable to the establishment (LSA Art. 92 para. 1). The LSA gives work rules an imperative and direct effect on individual labor contracts. Namely, the Act states that employment contracts that stipulate working conditions inferior to those provided in the work rules shall be invalid and that such conditions are to be replaced by the standards in the work rules (LCA Art. 12).

The LCA incorporates the established case law on reasonable modification of work rules. As a principle, the modification of work rules without a worker's consent is not binding but if the modification is reasonable, such modified work rules have a binding effect on all workers, including those who were opposed to the modification itself (LCA Arts. 9, 10). Underlying this ruling is a consideration for employment security and the necessity for adjusting working conditions. Traditional contract theory dictates that a worker who opposes the modifications of working conditions be discharged. However, according to the established Japanese case law, such a dismissal may well be regarded as an abuse of the right to dismiss. On the other hand, because the employment relationship is a continuous contractual relationship, modification and adjustment of working conditions are inevitable. In light of these circumstances, Japanese courts have given unilaterally modified work rules a binding effect on condition that the modification is reasonable. These unique rules can be called the Japanese version of "flexicurity," reconciling flexible regulation of working conditions with employment security.[13]

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Collective agreements

The fourth vehicle for regulating the content of individual labor contracts is a collective bargaining agreement between the employer and the union.

Normative effect

According to Article 16 of the LUA, any portion of an individual labor contract is void if it contravenes the standards concerning conditions of work and other matters relating to the treatment of workers that are provided for in a collective agreement. In such a case, the invalidated parts of the individual contract are governed by the standards set forth in the collective agreement. Similarly, if there are matters that the individual employment contract does not cover, the same rule applies.

13 Araki, *supra* note 8.

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union that organizes the majority of workers in the company (plural representation system).

A second difference is that, unlike the Taft-Hartley Act in the United States, the LUA does not impose a duty to bargain on labor unions.

Enforcement mechanism of labor law

Court system

Japan has no courts specially designated for labor litigation. All labor and employment related lawsuits must be filed in ordinary courts. The judges are professional jurists.

Japan has a three-tiered court system: district courts (including Labor Tribunals), high courts and the Supreme Court. The district court in each prefecture is usually the court of first instance.[15] A party may appeal from a judgment of the district court to the competent high court. It is possible for a party who is not satisfied with the judgment to make a further appeal to the Supreme Court. However, the grounds for appeal to the Supreme Court are limited to errors of interpretation of the Constitution or other violations of the Constitution in the original judgment (Code of Civil Procedure, Art. 312 para. 1). The Supreme Court also has discretion to accept appeals where the original judgment contradicts the precedents of the Supreme Court or involves other significant matters concerning the interpretation of law (Code of Civil Procedure, Art. 318 para. 1).[16]

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Until 2006, Japan did not have a labor court system with lay judges like *Arbeitsgerichte* in Germany, Employment Tribunals in the UK, and *conseil des prud'hommes* in France. Faced with the rapid increase in individual labor litigation, however, Japan introduced a new labor dispute resolution system called the Labor Tribunal System (*Roudou Shinpan*) in 2006.

The Labor Tribunal System established in each district court in Japan is a procedure consisting of one professional judge and two lay judges recommended by labor and the management side respectively. In a sense, therefore, the Labor Tribunal System is a Japanese version of a tripartite labor court, although it is not a separate court but a forum established in an ordinary court.

15 Cases wher the amount at issue does not exceed 900,000 yen must be filed in a summary court. The cases filed in the summary court can be appealed to a district court and to an appellate court, but not to the Supreme Court.

16 Oda, *Japanese Law*, 64ff (2nd. ed. 1999).

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Because the new tribunal is in principle aimed at overcoming delays in labor litigation, the Labor Tribunal must decide the case within three sessions. This means that a filed complaint will be disposed of within three or four months. Its hearings are informal and not open to the public. If either party rejects the Tribunal's decision, it has no effect, but the case is automatically transferred to the regular civil section of the same district court.

Since its coming into operation in 2006, the Labor Tribunal System has enjoyed a strong reputation for its expedited procedures and high performance with a high rate of settlement (80 percent).

Administrative agencies of the national government

The Ministry of Labor was responsible for the administration of labor law and labor policy until the end of 2000. However, as a part of the reform of Japan's central bureaucracy, the Ministry of Labor and the Ministry of Health and Welfare were merged and the Ministry of Health, Welfare and Labor (MHWL) was established in January 2001. Within the MHWL, several bureaus are in charge of the administration and implementation of labor laws. The MHWL maintains Prefectural Labor Bureaus in each of the 47 prefectures to implement the laws at local level.

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The Labor Standards Bureau within the MHWL administers labor standards established by the Labor Standards Act, the Minimum Wages Act, the Industrial Safety and Health Act. The Labor Standards Bureau also administers the Workers' Accident Compensation Act. Actual implementation of this labor protective legislation occurs through the Labor Standards Inspection Offices in each prefecture. Approximately 3,500 Labor Standards Inspectors work at 343 Labor Standards Inspection Offices throughout Japan. The Labor Standards Inspectors are authorized to inspect workplaces, to demand the production of books and records, and to question employers and workers (LSA Art. 101). Furthermore, with respect to a violation of the LSA, Labor Standard Inspectors shall exercise the duties of judicial police officers under the Criminal Procedure Act (LSA Art. 102).

A worker may report violation of labor protective laws to the Labor Standards Inspection Office. Dismissal and other disadvantageous treatment by reason of such a worker having made a report is prohibited by criminal sanctions (LSA Arts. 104, 119 no.1).

The Equal Employment Opportunity Act is administered by the Equal Employment, Children and Family Bureau within the MHWL. Under its Prefectural Labor Bureaus, the Equal Employment Offices (*Koyo Kinto-shitsu*)

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are responsible for the daily enforcement of the laws related to employment equality and harmonization of work and family life.

The Employment Measures Act, the Employment Security Act, the Worker Dispatching Act and other labor market policy and regulations are administered by the Employment Security Bureau within the MHWL. The Public Employment Security Offices are responsible for public placement services, vocational guidance, and the employment insurance system, including distribution of benefits and grants to workers, as well as firms.

Labor Relations Commission (*Rodo Iinkai*)

The Central Labor Relations Commission at the national level and the Local Labor Relations Commissions in each prefecture deal with collective labor disputes. This commission is an independent administrative committee comprised of an equal number of commissioners representing employers, workers and the public interest.

The Labor Relations Commission has two main functions. First, it engages with collective labor disputes through conciliation, mediation and voluntary arbitration. Second, it adjudicates unfair labor practice cases and issues remedial orders when it finds that an unfair labor practice was committed by an employer.

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For a general overview of Japanese labor and employment law, see KAZUO SUGENO (Leo Kanowitz trans.), JAPANESE LABOR AND EMPLOYMENT LAW (University of Tokyo Press, 2002); TAKASHI ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN (Japan Institute of Labor, 2002); TADASHI HANAMI & FUMITO KOMIYA, LABOUR LAW IN JAPAN (Kluwer International, 2011).

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http://www.jil.go.jp/english/laborinfo/library/Laws.htm.

Useful English articles on Japanese labor and employment law and industrial relations are accessed at http://www.jil.go.jp/english/index.html.

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EMPLOYMENT LAW IN THE UNITED STATES: A GENERAL INTRODUCTION

The United States is a federal structure composed of a national government and 50 states in addition to the District of Columbia and other possessions. The federal government is composed of an executive branch – including autonomous administrative agencies – a bicameral legislature and a three-tiered system of federal courts: district courts, circuit courts of appeals, and the Supreme Court. Actions of the federal government within its constitutional sphere are binding upon the states. Thus, federal legislation may preempt state action, that is, reserve a field of regulation to it exclusively, or allow the states to act so long as they do not contravene the federal scheme.

Each of the 50 states has its own three-branched governmental form: its own constitution, which may be more capacious in recognition of individual rights than is the federal constitution; its own executive, legislative, and judicial branches.

Unlike some countries where the constitution sets out labor rights or whose bill of rights is taken to be part of the order of legal values that infuse private employment relations – Germany is an example of this – with one exception, the abolition of slavery, the federal constitution controls public, not private centers of power. For example, an employee cannot invoke a constitutional right of free speech against an action of a private employer. In some states, however, the state constitution may act on the private sphere as, most notably, do some provisions in California.

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Responsibility for employment regulation

Until the constitutional revolution of the New Deal in the 1930s, the power of Congress to legislate regarding the terms and conditions of employment, even of employees who worked for employers engaged in interstate commerce, was extremely limited: only if the employee actually crossed a state line in the performance of his or her work did Congress have any power. Thus, the basic regulation of employment fell to the states either by common law – contract or tort – or by legislation. In a scenario that is echoed in the global economy today, competition between the states could be conducive toward a "race to the

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which, because of the many exceptions that can vary significantly from state to state, makes the U.S. law of employment almost bewilderingly complicated. Unlike Germany, Japan, Australia, Brazil, and a great many other countries, there is no general right not to be dismissed wrongly – aside from statutes in Montana and Puerto Rico.

State protective legislation

Many states do echo or go beyond non-preemptive federal law: they provide a higher minimum wage or add protected categories not included under federal antidiscrimination law, for example, marital status, sexual orientation, gender identification, obesity (Michigan), or "appearance" (District of Columbia). As a result, there may be a multiplicity of fora, administrative and judicial, federal and state, to which an aggrieved employee may have resort.

State laws deal also with such matters as: occupational safety and health, including mandatory rest periods; workers' compensation; unemployment compensation insurance (under a federal system but subject to state participation with considerable areas of state discretion); drug and alcohol testing; whistleblowing and other conscientious objection; plant closing; job references; wage payment; covenants not to compete; trade secrets; employee privacy; and a good deal more.

The common law

There is no federal common law of contract or tort. Federal courts may have jurisdiction to hear cases presenting such issues where the parties are from different states – for example, a Delaware incorporated corporation being sued by an Illinois employee – under so-called "diversity of citizenship" jurisdiction where the dollar amount is above a certain threshold, but the common law to be applied in such cases is that of the relevant state under the forum state's "choice of law" rules. Thus such matters as defamation, deceit, invasion of privacy, infliction of emotional distress, interference in prospective economic advantage, breach of loyalty or fiduciary duty are matters of state law. In some areas, the states generally take a uniform approach – indeed, there may be a "uniform state law" – but in others they differ, sometimes sharply.

Vindicating legal rights: courts, administrative agencies, and arbitrators

In some cases the aggrieved employee has available – or must resort to – an administrative agency. For example, claims that an employer has interfered in or coerced employees in their right to unionize or engage in other acts of statutory mutual aid or protection under the Labor Act must be made to the General Counsel's office of the NLRB which may – or may not – issue a complaint and

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pursue legal process. There is no private right of action under that law. Claims of unlawful employment discrimination under the Civil Rights Act must first be presented to the federal and any cognate state administrative agency; and if they decline to sue, which is most often the case, the individual has to secure counsel and bring a lawsuit on her own. The United States has no labor court, unlike, for example, Germany or Brazil. Consequently, resort must be had to state or federal court which, as a practical matter, means that the aggrieved individual must secure legal counsel.

A number of American companies have adapted policies that require non-unionized employees to forego access to the courts and submit all their legal claims to arbitration systems of the company's devising. The United States Supreme Court has upheld the enforceability of these plans under a 1925 federal law so long as due process is afforded. The states are not free to adopt policies disallowing employers that power.

References

There is no single comprehensive treatise on all of U.S. labor and employment law. Rather, there are comprehensive volumes treating the law of collective bargaining, employment discrimination, occupational health and safety, wrongful dismissal, covenants not to compete, and so on. The relevant references on U.S. law will be adverted to in the discussion of the problems that ensue.

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B. SOME DEMOGRAPHIC CONTEXT

> [F]rom an HR practitioner … perspective [it is important to understand] the demography of the labor markets that you choose to compete in. Whether they be existing markets and mapping trends, or analyzing information and trends as you aspire to new markets. These demographic realities shape the competitive and structural forces [to which] we will need to respond. Having a clear understanding of these trends can help identify … potential shifts in protections or priorities for enforcement. Additionally, for a values-driven organization (as opposed to a purely bottom-line driven organization) understanding and being comfortable with these structural profiles can help drive policies relevant to your market space. Crafting these policies to reflect the demographic realities that you face can provide a significant opportunity to gain an advantage in attracting and retaining talent.
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> Director, HR, Industrial Manufacturing Sector

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More comparative data will be set out in connection with the discussion of specific problems. What follows will give a broad overview of the five countries presented for comparative study.

Table I.2 Workforce size, education expenditure, and UN education index by country (2007, estimated)

	Workforce size (m)	Education expenditure (as a percent of GDP)	UN education index
Australia	10.9	5.4	0.993
Brazil	99.47	5.0	0.891
Germany	43.63	4.5	0.954
Japan	66.07	3.5	0.958
United States	153.1	5.5	0.978

Sources: https://www.cia.gov/library/publications/the-world-factbook/geos/au.html. The UN education index is measured by the adult literacy rate (with two-thirds weighting) and the combined primary, secondary, and tertiary gross enrollment ratio (with one-third weighting). The adult literacy rate gives an indication of the ability to read and write, while the GER gives an indication of the level of education from nursery (UK & others)/kindergarten (USA & others) to postgraduate education.

Table I.3 Labor force participation, 2009

	Australia	Brazil	Germany	Japan	United States
Employment-population ratio – Total (Percent of civilian working-age population)	62.9	64.9	54.0	56.4	59.3
Labor force participation rate – Total (Percent of civilian working-age population)	66.7	70.7	58.5	59.3	65.4
Labor force participation rate – Men (Percent of civilian working-age population)	73.3	81.9	65.3	71.2	72.0
Labor force participation rate – Women (Percent of civilian working-age population)	60.1	60.1	52.1	48.2	59.2
Women's share of the labor force (Percent of civilian labor force)	45.5	43.7	45.9	42.1	46.7

Notes: The first row, employment-population ratio represents the total percentage of working-age civilians who were employed in 2009 (the balance were unemployed or not looking for work). The second row includes all participants in the labor force, employed and unemployed. The next two rows represent the same percentages, broken down for men and women. Finally, the women's share of the labor force represents the percentage of the civilian labor force (the middle three rows) who are female.

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Source: U.S. Department of Labor, U.S. Bureau of Labor Statistics, Division of International Labor Comparisons.

Table I.4 Labor participation rate by gender (% female and % male, population aged 15+)

		2007	2008	2009	2010
Australia	Female	58	59	59	59
	Male	73	73	72	73
Brazil	Female	58	59	59	59
	Male	81	81	81	81
Germany	Female	52	52	53	53
	Male	67	67	67	67
Japan	Female	49	49	49	50
	Male	73	73	72	72
United States	Female	58	58	58	58
	Male	72	72	71	70

Source: The World Bank, World Development Indicators, http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS.

Table I.5 Unemployment rate by gender (% female labor force and % male labor force)

		2007	2008	2009	2010
Australia	Female	4.8	4.6	5.4	5.4
	Male	4.0	4.0	5.7	5.1
Brazil	Female	10.8	9.6	11.0	–
	Male	6.0	5.2	6.1	–
Germany	Female	8.8	7.7	7.3	6.6
	Male	8.5	7.4	8.1	7.5
Japan	Female	3.7	3.8	4.7	4.5
	Male	4.0	4.1	5.3	5.4
United States	Female	4.5	5.4	8.1	8.6
	Male	4.7	6.1	10.3	10.5

Source: The World Bank, World Development Indicators, http://data.worldbank.org/topic/labor-and-social-protection.

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PART II

EMPLOYEE VOICE: COLLECTIVE BARGAINING, CO-DETERMINATION, INFORMATION SHARING AND CONSULTATION

INTRODUCTION

The history of collective workplace protest – the demand to be heard on wages or working conditions – transcends history and culture. There is evidence of strikes in Roman Egypt and even of collective agreements in the ancient world. *See* W.H. Buckler, *Labor Disputes in the Province of Asia*, in ANATOLIAN STUDIES PRESENTED TO SIR WILLIAM MITCHELL RAMSAY Ch. III (W.H. Buckler & W.M. Calder eds. 1923). Labor protests were a feature of textile manufacture in the Middle Ages, but not in textiles alone. *See* Samuel Cohn, Jr., LUST FOR LIBERTY: THE POLITICS OF SOCIAL REVOLT IN MEDIEVAL EUROPE, 1200–1425 (2006). In eighteenth century Japan, peasant social protest, including refusal to work, reflected economic as well as social tensions. *E.g.* Anne Walthall, SOCIAL PROTEST AND POPULAR CULTURE IN EIGHTEENTH-CENTURY JAPAN (1986). One is tempted to consider the desire for voice an aspect of the human condition. In modern times, the International Labor Organization's conventions and numerous international declarations regard "freedom of association" as a human right.

With the rise of wage labor as the predominant form in which work would be done in eighteenth century Europe and North America, the law moved through three phases to deal with workers' demands for collective voice: repression, tolerance, and support. Today, the legal forms in which voice can be exercised vary: from forms of corporate governance, notably, employee representation on corporate boards; to collective bargaining; to co-determination by representative employee bodies "on the shop floor" or higher up in the enterprise's structure; to forms of "information sharing and consultation". These may be supplemented by less formal means little treated by law if at all, such as "affinity groups" and even less structured networks connected by social media. Many of these exist side by side.

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The most common form in which legal support has been expressed has been in the provision for collective bargaining. But, there is enormous variation in how the right to bargain collectively is realized, in the manner and degree to which the representative is required to manifest its representative nature, in the architecture of a bargaining structure, in the extent to which the employee representative is or can be actively involved in the fashioning of employment or other corporate policy, and in the role of the state itself. *See generally*, Folke Schmidt & Alan Neal, *Collective Agreements and Collective Bargaining*, preprint from XV INT'L ENCYCLOPEDIA OF COMPARATIVE LAW (1984) (on the historical variety). In some systems, Germany and Brazil, for example, collective representation may or must transcend the individual firm. In others, Japan, for example, it is predominantly restricted to the individual firm. In the United States, bargaining structure is largely up to the parties to work out.

Tables II.1 and II.2 give a rough indication of union density in each of these countries and over time. We say "rough" because the data conflates public and the private sectors. In the United States, for example, private sector density is below 7 percent. As the note to Table II.1 explains, contract coverage can exceed the union's membership, sometimes rather significantly as in Germany. Nevertheless, despite these reservations the tables are instructive.

Table II.1 *Union membership (combined public and private sector) as a percentage of the labor force*

	1970	1980	1990	2000	2010
Australia	50.2	49.5	40.5	24.7	18.0
Brazil	19.6*	34.8*	38.1*	24.8*	–
Germany	32.0	34.9	31.2	25.0	18.5
Japan	35.1	31.1	25.4	21.5	18.4
United States	23.5	19.5	15.5	12.8	11.4

Note: Union membership (sometimes termed "union density") represents the proportion of union members relative to the labor force. Note that these figures have been adjusted by the source for the proportion of union members who are retired in each country. The proportion of the workforce covered by union-negotiated agreements – union coverage – will be larger in each case.

* Data for Brazil for time periods: 1976–80; 1981–85; 1986–90; 1991–95 from E.A. Lora and C. Pagés-Serra, *Labor Market Regulations and Institutions*, in ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA – 2004 REPORT, October 2003, Inter-American Development Bank.

Sources: David G. Blanchflower, A Cross-Country Study of Union Membership, IZA DP No. 2016, March 2006, adapted from J. Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LABOR REVIEW, January 2006, pp. 38–49; and, for 2010 data, OECD StatExtracts at: http://stats.oecd.org/Index.aspx?DatasetCode=UN_DEN.

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Table II.2 Private sector union membership as a percentage of the labor force

Australia (2009)	13.2
Brazil (2009/10)	18
Germany (2003)	19.7
Japan (2009)	16.9
United States (2012)	6.6

Sources: Australian Bureau of Statistics, EMPLOYEE EARNINGS, BENEFITS, AND TRADE UNION MEMBERSHIP, AUSTRALIA (August 2011, released 27 April 2012); Roberto Fragale, "Employment Law in Brazil: A General Introduction," supra; Wolfgang Streeck, REFORMING CAPITALISM (2009), Figure 3.2, p. 97; Japanese Working Life Profile, 2000/2001 – Labor Statistics. U.S. Bureau of Labor Statistics, www.bls.gov/news.release/union2.ar0.htm

Provision has also been made for a variety of other forms of representation within the firm. These vary from systems of co-determination, as in Germany (and Austria), to systems of information sharing and consultation, as in the *comité d'enterprise* in France. *See generally*, Roger Blanpain, *Representation of Employees at Plant and Enterprise Level*, preprint from XV INT'L ENCYCLOPEDIA OF COMPARATIVE LAW (1994) (on the historical background). The latter has been pressed upon the Member States of the European Union by a Directive requiring them to make provision for such bodies where domestic law does not already so provide. (The Directive is appended at the close of this introduction.) Obviously, German law's more exacting system of co-determination via elected works councils goes well beyond the Directive's minima; but in other countries, where such provision was lacking, the United Kingdom, for example, the Directive has required legal change. *See* Simon Deakin & Gillian Morris, LABOUR LAW 913–69 (6th ed. 2012). Set out below is a snapshot of what corporate CEOs think of the nature of management-employee relations in the sample of countries taken up here.

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Table II.3 Cooperation in labor-employer relations

Australia	4.3
Brazil	4.3
Germany	5.2
Japan	5.6
United States	4.7

Note: CEOs were asked "How would you characterize labor-employer relations in your country?" (1 = generally confrontational; 7 = generally cooperative). A weighted average for 2011–12 is shown (mean for 144 nations is 4.3).

Source: World Economic Forum, Executive Opinion Survey, Global Competitiveness Report 2012–2013.

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The variety of approaches to collective representation is best introduced by a seemingly simple question, put by Problem 1. Some of the follow-on complexities of these approaches will be developed in the ensuing problems. For preparation the European Union's Directive on employee information sharing and consultation is set out below.

DIRECTIVE 2002/14 EC

Whereas:

(9) Timely information and consultation is a prerequisite for the success of the restructuring and adaptation of under-takings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work.

(13) The existing legal frameworks for employee information and consultation at Community and national level tend to adopt an excessively a posteriori approach to the process of change, neglect the economic aspects of decisions taken and do not contribute either to genuine anticipation of employment developments within the undertaking or to risk prevention.

(27) Information and consultation imply both rights and obligations for management and labour at undertaking or establishment level.

Article 1

Object and principles

1. The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community
2. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness
3. When defining or implementing practical arrangements for information and consultation, the employer and the employees representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.

Article 2

Definitions

For the purposes of this Directive:

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