



Labor & Employment Law

[by Erica Winter]

Interested in finding a job that involves thinking about other people's jobs? Well, since the month of September includes Labor Day, we thought we'd take a look at the only legal specialty that directly corresponds to a federal holiday – labor and employment law.

The Rubik's Cube of legal specialties

Labor and employment law encompasses such a wide range of legal work that it's more like having a "general practice all in one area," says John V. Berry, a labor and employment lawyer in Washington, DC.

Berry's uncle, Victor Hanson, was a labor lawyer in his native Detroit, inspired Berry to enter this field. Berry, who received his J.D. from the University of Detroit and his LL.M. from George Washington University in Washington, DC, represents police unions as well as union members involved in individual disputes.

After working for a law firm for two years, Berry accepted an in-house position for both the Park Police and Capitol Police unions in Washington. There, he was, as he puts it, "one attorney handling 3,500 members with issues," and usually dealt with 60 to 65 cases concurrently. This gave him good experience and enabled him to hang out his own shingle.

All the lawyers we spoke with concurred: There is a wide variety of opportunities and settings in this field.

Some examples are in-house at a union; local, state or federal government agency; corporation; solo practice; boutique firm; and large firm. Again, if you are looking for a specialty in which there are several types of work environments, labor and employment law is a good choice.

Before you choose a work environment, however, you should understand the various

classifications of legal work available within this specialty.

"Generally, 'labor law' means that you are working on issues involving collective bargaining agreements and unions," explains Dr. Clyde Summers, who has been teaching labor and employment law at the University of Pennsylvania Law School for 60 years. Summers is one of the nation's experts on labor and employment law. "'Employment law' generally means that the attorney is dealing with individual employee problems which fall outside of the scope of a collective bargaining agreement, where there is no union involved," continues Summers.

[Since we wanted to spend time talking about this legal specialty, Dr. Summers agreed that I could give you information on his professional experience from the University of Pennsylvania Law School web site. I have summarized the information from that site in the following two paragraphs.]

An alumnus of the University of Illinois and Columbia law schools, he has written hundreds of law review articles, co-edited five casebooks on labor law, and his writings have laid the foundations for labor laws such as the Landrum Griffin Act and the Commission of Uniform State Laws' Model Employment Termination Act.

Summers has been awarded fellowships from the Ford, Fulbright, German Marshall, and Guggenheim foundations, as well as from the National Endowment for the Humanities. Summers is currently President of the World Congress of the International

Society for Labor Law and Social Security.

"Some employment lawyers – those who work on issues not pertaining to collective bargaining agreements – prefer to be seen as members of a stand-alone specialty, separate from labor law," says Hannah Schwarzschild, an employment attorney with the firm Willig, Williams & Davidson in Philadelphia.

Schwarzschild, an alumna of Boalt Hall School of Law at the University of California at Berkeley, has been practicing law for 15 years, 10 of which have been focused on employment. She began her employment work with HIV-discrimination cases and now works on civil enforcement of employment laws, particularly discrimination and whistleblower retaliation.

"The differences in your actual job between the legal areas of 'labor' and 'employment' break out even further," says Summers.

"In labor law, dealing with collective bargaining agreements, a lawyer works primarily in arbitration, negotiations, and settlements of grievance disputes," advances Summers. "You would also deal with legal problems of union organizing, and then strikes and boycotts. There is not as much work in these two last arenas as there used to be," says Summers.

The "employment" piece of this specialty involves litigation over discrimination issues and violations of federal and state laws. Most often, you would be either suing or defending an employer in civil court over violation of

Equal Employment Opportunity Commission (EEOC) rules.

"If you are trying employment cases that involve unions, you would be in federal court," says Summers. "If the employment case is an issue of discrimination, it could be tried in either federal or state court," says Summers, "although it is most likely to be in federal court."

Where to go? What to do?

Do you have to be in a big "labor" town (Philadelphia, Cleveland, Detroit) to get a job in this field?

Well, no, but...

It's not like divorce law, where there is a demand for lawyers everywhere. Despite the fact that people do work – and have employment issues – in all areas, if you are looking for a job in this specialty, you should consider the location.

"If you want to do labor and employment law, you do need to look in a fairly large city," says Summers, "in order to get enough work to sustain a practice." "Albany, NY, Columbus, OH, Pittsburgh, PA., or Memphis, TN, would all fit the bill," says Summers. According to Summers, if you have your heart set on living in a town of fewer than 50,000 people and exclusively practicing labor and employment law, you wouldn't make a living.

"The exception to this is going to a town that has a large local industry that is unionized, like the coal industry in Wheeling, WV," says Summers.

But is it fun?

This work, especially on the employment front, can be "challenging, rewarding, frustrating, and sometimes infuriating," says Schwarzschild. It is "enormously satisfying" to get a person their job back or to find

vindication for those who have been wrongly fired or discriminated against. Schwarzschild also likes to work with broad social issues – such as racial discrimination or sexual harassment or issues of retaliation against whistle-blowers. Employment cases can be far more than just a lawsuit.

Still, the process of litigating employment cases can be "nasty, brutish, and long," says Schwarzschild. "Cases are extremely contentious and hard-fought," she says, "and have become less and less civilized over the past 15 years."

Neil Klingshirn got into labor and employment law in law school and stayed with it. He enjoys the contentiousness of litigation. He loves working with people and also recommends this specialty to those who "like to fight and do battle." Klingshirn has been practicing labor and employment law for 17 years.

Currently with the two-lawyer firm Fortney & Klingshirn in Akron, OH, he previously worked five years at a boutique firm before he joined another associate who had struck out on his own.

Changes and hot topics in this field.

Some legal specialties mirror the economy (real estate, for example). Labor and employment law is linked to the legislative and political climate on the state and federal level, as well as the make-up of the U.S. Supreme Court.

Changes in the law and its interpretation have a direct impact on how (and which) employment and labor lawsuits can be brought, how they are defended, and who benefits. Plus, changes in the social climate of the country have a direct impact on labor and employment cases.

Here is a list of what's going on in labor and employment law right now.

#1: Overtime laws

Having just released the federal rules governing changes regarding which employees can be paid overtime, the Department of Labor may have to break out the shredder and start all over again, as the U.S. House of Representatives came in at the eleventh hour and put a hold on the new rules.

"The new rules are pretty controversial," says Neil Klingshirn. "Unions say the rules remove overtime pay for many, while the Department of Labor is saying that it gives more payment rights to workers," says Klingshirn.

In simplest terms, the changes state that workers earning less than \$23,000 per year qualify for overtime pay (time and a half for every hour over 40 hours per week) – no matter how managerial their duties. A manager at a fast-food restaurant, for example, might fall into this category. On the flip side, if a worker earns more than \$100,000 annually, they do not qualify for overtime pay, even if they are not managers – say, a unionized longshoreman.

"Also," says Ronald Schwartz, "there is a new 'long test' and a new 'short test' that employers can use to show that an employee does not qualify for overtime pay. These measures have been changed so that it is easier to show that an employee does not qualify," says Schwartz, who has been practicing labor and employment law for 20 years.

An alumnus of Chicago Kent Law School, Schwartz got his start as a staff attorney at the Chicago Kent Legal Clinic. There, he built up the employment law section and taught law students how to practice in the field. In 1995, he left to join the small Chicago firm of Hedberg, Tobin, Flaherty & Whalen.

"Those currently suing for restoration of overtime pay may see their cases hinge on timing," says Schwartz, "depending on how the law shapes up when their cases are being

decided.”

#2. Interpretation of the Americans with Disabilities Act (ADA)

“In the past ten years, it is striking how unfavorable the [U.S.] Supreme Court has been to the ADA,” says Schwartz. The ADA has been significantly weakened, making it harder for employees to bring lawsuits against employers based on issues of disability.

“Specifically,” says Schwartz, “in the case *Sutton v. United Airlines*, the Supreme Court ruled that, in determining whether a plaintiff is disabled and may sue under the ADA, a court must consider “mitigating measures” of that person’s impairment.”

A mitigating measure is something that, when done by the person, alleviates the effect of the disability and allows the person to function as one who is not impaired. For example, if a diabetic takes her medication, she can live a normal life. Without the medication, she is impaired, but with it, she is not, according to the Supreme Court.

Previously, the EEOC had said that mitigating measure should not be considered in assessing inclusion under the ADA. But that has changed.

Sutton was not the best case to champion the rights of the disabled. Two pilots, sisters, were not hired by United Airlines because they wore glasses. They had been pilots for smaller, regional airlines and sued United under the ADA, saying they were being discriminated against because they were disabled. “It was a bad set of facts for an ADA case,” says Schwartz.

The Court ruled that the two pilots were not covered under the ADA since their glasses allowed normal function in everyday life. It did not rule, however, on the issue of United’s policy of only hiring those who do not need glasses (a policy implying that those who need glasses are too impaired to fly their planes). So ADA cases – for all people who have physical

impairments – are now being judged in a highly restrictive context.

“The ruling had a devastating impact,” says Schwartz, who believes it has eliminated some cases altogether. One of Schwartz’s clients has heart disease and was absent from work for six weeks. She was able to return while on medication but was fired soon thereafter. In the middle of her case, she became ineligible for coverage under the ADA.

“It is awful to turn people away who may have had a case under the ADA before these ruling but now do not,” says Schwarzschild. “You can, however, look at the case in alternate ways,” she says. What might at first appear to be an issue of disability may reveal itself to be an issue of age.

#3. Tax laws

This might not leap to mind when you think about labor and employment law, but it could impact your ability to do this job.

In 1996, in order to pass a law increasing the federal minimum wage, a deal was struck to include a rider on the bill that would impose a tax on damages earned for emotional distress on lawsuits (other than personal injury cases). This includes a tax on attorney fees. What this means is that any settlement an employee might win will be far lower than it was prior to the new tax rule. “In some situations,” says Schwartz, “a client could find that, even if they win their case, they would end up paying more than they won in combined taxes and fees.”

Other changes

- “As union membership has dropped, collective bargaining issues have shrunk; and the employment side of this specialty has gained prominence,” says Summers.
- “As recently as 15 years ago, there were few women to be seen going into this field,” says Summers, “but now there are more women doing labor and employment law than men.”

• “There has been a shift in focus towards age discrimination,” says Schwarzschild, “as Baby Boomers age and remain in the workforce.” Economic pressures are causing some employers to cut staff, and they are doing it illegally – by age. Also, older people now feel they cannot afford to retire and stay in the workforce past age 65. “These issues appeal to juries,” says Schwarzschild, “since everyone can relate to getting older.”

Advice

1. Some lawyers we spoke with see this as a growing field, while others are seeing their business drop and looking to branch out into other areas of law to supplement their practices. Take a look at the climate in your preferred niche (and location) of this specialty before committing yourself.
2. “If you are making a lateral move into labor and employment law, be willing to move down a spot from where you are to break into the specialty,” recommends John Berry. Also, for those just out of law school, he recommends that you be willing to sacrifice high earnings at first in order to get the experience you need.
3. “For better or worse, labor and employment law is not really seen as being ‘big time,’ as corporate law is,” says Summers. Within large law firms, there is not much competition to do labor and employment work; so if you want experience in this arena, just tell your firm’s partners.
4. “It is easier to get in to the field on the management side,” says Summers. If you want to get a gig on the worker side, it’s a bit more challenging. He does not see a lot of hiring by unions for in-house counsel these days, and it is harder to get a job at a worker-side firm than it is to get one on the management side. Boutique firms representing employees or unions are usually smaller than management-side firms and do less hiring, especially if the candidate is right out of law school.



5. "Attorneys representing unions now are a very small group," agrees Klingshirn. Even in Cleveland, an old union town, there are far more jobs now representing individual employees than unions or union members, he estimates.

6. "Try to gain experience by working in government," recommends Summers, "at the EEOC or National Labor Relations Board (NLRB)." One caveat: "Those agencies may be looking for lawyers with a few years of experience, not those just out of school," says Schwarzschild. [An EEOC representative we spoke with said that they hire based on experience, but there is no specific years-of-experience cutoff for hiring.]

7. "Do what I did," recommends Klingshirn. He found strong attorneys to be his mentors at a large management-side firm for seven years before joining another associate (his partner, Michael Fortney) in their small firm. "If you want to be on the management side after gaining experience with a large firm, your options are open from there," he says. "You can stay and go for partner, join a company in-house, or start your own firm."

8. "Especially if you want to go into the employment side of this specialty, litigation experience will stand you in good stead," says Schwarzschild. If you are just starting out, doing DA or public defender work for a few years will give you good litigation chops. Litigation experience makes a huge difference in succeeding in this field."

9. "There are opportunities out there to get into labor and employment law," says Schwartz. "And you won't earn far more money than other legal specialties. Still, if this field interests you, he says, go for it!"