

Introduction

In January 2000, the London Underground trains carried an advertisement that captures the ambiguity in the employment relationship at the turn of the millennium. The ad, for a leading employment placement agency, pictures a rumpled T-shirt on which appears the slogan “I’m only here for the beer money.” Next to the shirt is the following text:

Are you putting in effort or just hours? There’s nothing wrong with being in it for the money so long as there’s something in it for your employer. Commitment has nothing to do with the hours you work and everything to do with your attitude. Want to work 3 days a week? Go ahead. Fancy 6 months off? It’s your life. It ain’t what you do, it’s the way that you do it. Talk to Brook Street. Whatever you want to do, we’ll help you make a career of it.

From the vantage point of the past hundred years, this ad reeks with irony. A “career” involving three days a week? “Commitment” when you are only working for the money? While the ad gives its blessing to this what-me-worry, airhead type of worker, it also speaks of mutual obligations between employer and employee. It says there’s nothing wrong with remaining uninvolved *so long as there’s something in it for your employer*. Therein lies the irony. How can this three-day-a-week, six months off at a time, beer-drinking, day-dreaming employee have something to offer an employer? Clearly the mutual expectations of the employment relationship have undergone a profound transformation.

One does not need to cross the Atlantic to see the changes underway in the nature of work. Recently McDonald’s distributed a brochure along with its burgers, called “Good Jobs for Good People.” It said:

Looking for a good job? Look no further than McDonald’s.

- If you’re still in school, we can offer you the chance to learn valuable skills for your future while you earn extra spending money.

- If you have young children and only want to work part time, we can give you flexible hours while you earn the extra income a growing family needs.
- If you're retired and want a job that lets you meet people and have fun while you earn a little extra cash, McDonald's can give you that too.
- If you think a job at McDonald's sounds like a good idea, don't wait. Fill out the attached application and talk to a member of our management team today. Tomorrow you could have a job.

Aimed primarily at students, young mothers, and retirees, this brochure seeks to recruit applicants by promising flexibility and learning opportunities. McDonald's is not seeking long-term, attached, and loyal employees.

Change is apparent in the terminology of work itself. Employees are no longer "workers" – they are professionals in their particular skill or line of work. Cafeteria workers are now called "Culinary Service Professionals;" salespeople are now "Sales Associates;" clerical workers are now "Administrative Assistants;" bank tellers are now "Customer Service Representatives," bank loan officers are "Personal Bankers" or "Financial Specialists," and supermarket cashiers are "Cash Register Professionals." These new professionals have web pages, magazines, and trade conferences with which to network with other professionals and keep abreast of opportunities and developments.

Job seekers today approach the labor market like generals preparing for a strategic air strike. They stake out their target companies on the internet, gathering intelligence from former and current employees about culture and customs of the local worksite. They study the garb of the local population to determine whether casual attire or professional attire is the appropriate camouflage for their interview. And they calibrate their primary weapon – the résumé – to the terrain they expect to encounter.

Résumés are no longer crisp chronological lists of schools attended and positions held. Today, résumés are narratives about skills mastered and tasks performed. Résumé preparation services advise applicants to organize their résumés on a functional rather than a chronological basis, emphasizing abilities and potentials rather than work history. Such a résumé does not highlight either past employers or the sequence of jobs. Indeed, one has to read a resume carefully to find the names of employers or the sequence of jobs.

Evidence of change is also apparent in employer recruitment tactics. Employers are using new approaches to attract applicants, and are offering incentives tailored to the new sensibilities. McDonald's advertises on the radio, offering training in skills such as management and finance, areas that go far beyond the immediate tasks of operating a register or making a hamburger. Burger King offers to help with college tuition.

At the other end of the spectrum, business consultants talk about the "talent wars" of recruitment. They advise firms to restructure human resource

policies in order to attract the top talent by offering learning opportunities, lifestyle perks, and performance incentive compensation. For example, in his recent book *WINNING THE TALENT WARS*, management consultant Bruce Tulgan advises firms that to retain valued employees they need to permit people to customize their jobs to suit their own ambitions and lifestyles.¹ Firms should let their employees select their work tasks, work locations, schedules, and learning opportunities. In Tulgan's view, employees are free agents operating in a free talent market, so they should be offered whatever it takes to attract and keep them – whatever it takes except promotion opportunities or job security.²

The popular management writer and Harvard Business School professor Rosabeth Moss Kanter advises firms that to attract a committed workforce they need to make employees feel welcome and valued. She suggests giving employees gifts to welcome them into the workplace community, giving them buddies and mentors to cement their bond, staging periodic formal and informal recognition ceremonies to foster positive feelings, providing family-friendly schedules to accommodate private lives, and in other ways creating a culture of respect and trust.³ Conspicuously absent are assurances of job security. Rather, Kanter says, firms need to build commitment, not blind loyalty.⁴

These observable trends reflect what management theorists and industrial relations specialists call the “new psychological contract,” or the “new deal at work.” In the new deal, the long-standing assumption of long-term attachment between an employee and a single firm has broken down. No longer is employment centered on a single, primary employer. Instead, employees now expect to change jobs frequently. No longer does an employee derive identity from a formal employment relationship with a single firm; rather, employment identity comes from attachment to an occupation, a skills cluster, or an industry. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to look upon their jobs differently, to manage their own careers, and not to expect career-long job security.

Although there have been many journalistic accounts and academic studies documenting changes in the nature of the employment relationship in recent years, there has been little systemic consideration of the policy implications. From a policy perspective, it is important to define precisely what the new deal is and how it differs from the old deal. Once we understand the terms of the new employment relationship – the explicit and implicit promises, terms, obligations, and expectations that both parties bring to

¹ Bruce Tulgan, *WINNING THE TALENT WARS* 155–57 (2001).

² *Id.* at 154–55.

³ Rosabeth Moss Kanter, *E-VOLVE* 211–14 (2001).

⁴ *Id.* at 225–26.

the relationship – we can evaluate the new workplace from the perspective of fairness to individuals, equity between individuals, and justice society-wide. Such an understanding will force us to revisit labor and employment regulation and enable us to determine which aspects of the current regulatory framework need to be retained, which ones abandoned, and which ones modified, in order to provide employee protection and social justice in the new workplace.

To consider the implications of the change in the workplace for labor and employment regulation, it is necessary to place the new workplace in historical perspective. There have been three distinct phases in the history of American industry over the past two hundred years, each with its own types of job structures, its own form of labor activism, and its own system of employment regulation. These are the eras of *artisanal* production, *industrial* production, and *digital* production. In each era, the labor relations system has had to address certain core issues that arise under any economic system that relies on labor markets for production – issues of worker motivation, skill development, intergenerational transfer of production knowledge, and workplace fairness. If a system cannot deliver with some minimal level of effectiveness in each of these areas, production cannot be efficient and neither growth nor social peace can be maintained. In each era, prevailing custom, technology, and practices addressed each of these issues, with varying degrees of success. Further, in each era, labor organizations emerged that promoted a vision of social welfare and workplace justice that operated within, yet at the same time in opposition to, existing institutional structures. Out of the interaction between employers and labor organizations there emerged legal regulations that were both compatible with and constitutive of the prevailing job structures of the era.

The three eras can be briefly described as follows:

I. Artisanal Production

Artisanal production relied upon craft workers who possessed, as a group, complete knowledge about the production process in their particular calling. In the nineteenth century, craft workers typically used their own tools and materials to produce shoes, barrels, horseshoes, steel, and other products manufactured for sale in local and regional markets. The craft workers were often both producers and merchants. Occasionally they had employers who coordinated the raw materials and provided marketing for the finished product, but employers did not direct the work or prescribe the manner of performance. Markets were local and/or regional; unions were producers' associations and guildlike craft unions. The individual employment relationship was governed by master-servant law, and collective action was regulated by the common law doctrine of criminal conspiracy.

2. Industrial Production

Industrial production developed in the late nineteenth and early twentieth centuries. It was characterized by mass production for national markets. Employers sought uniformity in products and processes in order to achieve economies of scale. They utilized assembly line production techniques for manufactured items where it was feasible to do so. In continuous production processes such as steel production, employers established scientific management job structures. In both cases, large firms established internal labor markets with narrow job definitions and clearly defined, hierarchical job ladders. Firms fostered long-term relationships with their employees by curtailing lateral hiring and by giving them an implicit promise of job security. Industrial unions formed in order to regularize and enforce the implicit promises employers made. The role of law in this system was to legalize unions and enable them to exercise countervailing power to employers, to engage in labor-management self-regulation of the workplace, and to enforce explicit and implicit deals in the workplace. These goals were effectuated by the New Deal system of labor regulation that provided labor law to facilitate union formation and establish a self-regulatory framework of collective bargaining. Individual employment law provided a safety net for those left outside the internal labor market system.

3. Digital Production

In the era of digital production, markets are global and highly competitive. Production is also global, as firms locate or operate in networks of firms that are located all over the globe. Profits derive primarily from a firm's intangible intellectual property such as knowledge, patents, copyrights, managerial acumen, and informal networks, rather than from ownership of capital or raw materials. Computers are the central nervous system of global production networks, coordinating the diffuse and disparate parts while at the same time providing the interface between the firm and the external environment. Computerization infuses all aspects of production, from product design to task execution and marketing. Computers are also involved in internal organizational processes, mediating production and human resource tasks. Because of the central role of computers, I call this the era of digital production. In the digital era, frequent shifts in market conditions and consumer demand lead firms to seek flexibility in their labor relations.

One defining characteristic of the digital era is the central role of human intellectual capital – skills, knowledge, information, know-how, tacit knowledge, imagination, and capacity for learning and innovation embodied in employees. Firms believe that value and profitability in the digital era depend upon the intellectual capital of their employees, whether it be the top CEO or the lowliest janitor. Therefore, employers compete for talent, and seek to encourage training, skill upgrading, lifetime learning, and other forms of human capital growth. Scientific management has been superseded

by alternate forms of work organization. Rather than reiterating the hierarchies of the past, work is now arranged in fluid workplaces that have permeable borders between firms and within divisions of specific firms.

Presently, the American workplace is poised between the industrial and the digital eras. Some sectors of the American economy, such as the public sector, are still organized into old-fashioned internal labor markets characteristic of the industrial era. However, many private sector firms are moving toward digitalized forms of production and digital-era job structures. Some of these firms are at the vanguard of the technological revolution, such as Microsoft and Hewlett Packard, and some are manufacturers making old-fashioned products, such as the General Electric Company. These firms are characterized as part of the digital era not because of the products they produce but how they produce them. These firms have organized their production, marketing, finance, management, and human resource activities in a new way. They are at the vanguard of a new mode of work organization that has profound implications for the people who work in these firms as well as for the American workplace of the future.

The work arrangements characteristic of the new era place stress on the existing labor laws and employment institutions that were designed for an earlier age. When production arrangements and job structures shift, new types of concerns about workplace fairness and social justice arise. For example, digital production promises high earnings and exciting work for some, but with costs. One cost is job instability. Long-term job security is a feature of an earlier era, yet without it, many face the likelihood of frequent involuntary job loss throughout their working lives. The wave of layoffs of dot.com technology workers in the early 2000s echoed the experience of middle management in the early 1990s and production workers in the 1980s. Job loss invariably imposes high personal costs on the individuals involved. However the dot.com layoffs, unlike the layoffs of the 1980s and 1990s, have not generated intense anger and bitterness, at least amongst younger workers. Rather, journalists report that today's pink slips are accepted as a regrettable but predictable fact of life. Thus the current wave of layoffs reinforces the "no long term" credo that has dominated the workplace in the past decade.⁵

In addition to job instability, the new deal at work involves insecurity about basic social welfare benefits. In the American social welfare system, social safety net programs such as old-age assistance, health insurance, accident and disability insurance, and unemployment insurance are employer based. If employees do not have long-term attachment to an employing unit, they often lose their eligibility for benefits.

⁵ Louis Uchitelle, *Pink Slip? Now It's All in a Days Work*, NEW YORK TIMES, Aug. 5, 2001, Sec. 3, p. 1; Rick Marin, *Is This the Face of a Midlife Crisis?* NEW YORK TIMES, June 24, 2001, Sec. 9, p. 1.

Yet another cost is found in the changing forms of racial and gender discrimination. The flattened hierarchies and diffuse authority structures of the new workplace present elusive problems for women and minorities that are difficult to remedy under current discrimination laws.

The new workplace also imposes a cost in terms of the loss of employee collective representation. The labor and employment laws of the 1930s were a response to both the advent of scientific management job structures and the rise of industrial unions. Now, as new forms of production and a new set of job structures are emerging, the existing labor laws and forms of collective action are out of date. As a result, employees are devising new forms of collective action to provide employee representation and voice. The labor and employment laws will also have to change in order to accommodate the new issues posed and the new forms of labor-management conflict that arise.

An additional aspect of the digital workplace is rising income inequality. There is considerable evidence of growing income disparity both between sectors of the workforce and within firms, particularly within firms that have adopted digital-era work relations practices. Indeed, the disparity in income between executives and average workers has grown exponentially since the 1970s, and today is at epic proportions.

Yet another, sometimes tragic, cost of the digital workplace is visited upon the cohort of employees who have been caught in the transition from the industrial to the digital era. These tend to be older employees who have seen the rules of the game changed mid-course, leaving them disappointed, embittered, and angry. Disputes over pension plan restructuring have arisen as companies have attempted to convert pension plans that were structured to reward long-term employment into fully portable, vest-as-you-go systems. The rising incidence of violent episodes in the workplace is a dramatic manifestation of the costs of abrupt changes in work practices and expectations that accompany the shift. The plight of this transitional cohort further reminds us that while it is important to devise new concepts of labor and employment regulation, it is also important to ensure that proposals for reform do not leave those working under the old industrial job structures more vulnerable than ever.

The task of labor policy today is to reshape labor law and employment institutions to provide fairness, stability, and justice in the digital era. The task is twofold – to devise a labor and employment law for the new workplace while retaining the protections for workers in the old workplace.

The Structure of the Book

This book begins with a history of the earlier artisanal and industrial eras, and then considers the implications of the shift to the digital era for job structures and labor regulation. It proceeds as follows:

Part I sets out the labor relations systems and the regulatory framework that governed them in the past. Chapter 1 describes the artisan production phase, in which craft workers collectively regulated employment and production. Chapter 2 describes the industrial production era, in which skill was separated from the worker and thinking was separated from doing. In this era, the prototypical worker was the semiskilled machine operative and the prevailing form of labor organization was the industrial union. Chapter 3 describes the advent and spread of internal labor markets, with their origins in the scientific management and personnel theories of the early twentieth century. It shows that internal labor market job structures came to dominate major U.S. manufacturing firms by the mid twentieth century.

Part II describes the emerging new workplace of the digital age. Chapter 4 presents empirical data to document the shift from the industrial production to the digital production era. Chapter 4 also presents sociological accounts of the changing workplace that reinforce the findings of the empirical data. Chapter 5 describes the digital employment system. Drawing on contemporary organizational behavior and management theories, it identifies the terms of the new employment relationship. These terms include the promise of employability security rather than job security; the promise of training rather than lifetime tenure; the promise of opportunities to form networks rather than the promise of promotions; peer group decision making rather than hierarchical supervision and evaluation; broadly defined projects rather than narrowly defined jobs; and opportunities to exercise bounded discretion rather than top-down, command-and-control authority relations.

Part III addresses the implications of digital job structures for labor and employment regulation. Chapter 6 introduces the issue of regulation by describing the many ways in which existing labor and employment laws are based upon assumptions of the industrial era. This background puts into the foreground the misfit between current labor and employment regulation and the new workplace practices. The remainder of Part Three is devoted to discussing particular areas in which existing labor regulation must be revised in light of the new employment relationship.

Chapter 7 addresses a legal issue that was invisible in the past but has become prominent today – the issue of who owns an employee’s human capital. Because the new employment relationship relies on employees’ intellectual, imaginative, and cognitive contribution to the firm, employers put a premium on human capital development and knowledge sharing within the firm. Yet the frequent lateral movement between firms that typifies the new relationship means that when an employee leaves one employer and goes to work for a competitor, there is a danger that proprietary knowledge will go too. Increasingly, employees and employers have disputes over who owns the valuable human capital that employees gain in the course of their employment. The chapter proposes a framework for deciding disputes about human capital ownership from the perspective of the mutual

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expectations, understandings, and implicit promises of the new employment relationship.

Chapter 8 addresses the impact of the new employment relationship on employment discrimination. It argues that the nature of employment discrimination has changed in ways that undermine the effectiveness of traditional approaches of discrimination law. Chapter 8 proposes new definitions of employment discrimination and new methods of redress that respond to the challenges of new forms of discrimination in the workplace.

Chapter 9 addresses the consequences of the new employment relationship for employee representation. It argues that many traditional union practices and many aspects of existing labor law are based upon assumptions that were valid under the old employment relationship but no longer pertain.

Chapter 10, entitled Reimagining Employee Representation, presents two new models of labor organization that are better suited than traditional union practices to a boundaryless workplace – new craft unionism and citizenship unionism. It gives examples of both types of organizations in their incipiency, and considers the ways in which each model is able to address current issues of workplace and societal justice.

Part IV addresses the implications of the changing work practices for social justice. Chapter 11 describes the crisis in social insurance that has arisen from the increased job mobility of the digital workplace. The chapter discusses proposals to expand benefit portability that would be necessary to adapt social insurance to the digital-era workplace.

Chapter 12 documents the extent of rising income inequality in the United States in the past two decades. It discusses several theories that have been proposed to explain the widening income distribution, including theories of skill-biased technological change, a shift from manufacturing to service sector production, and increasingly globalized production. The chapter demonstrates that one important cause of growing income inequality lies with the work practices of the digital era. It then considers several approaches for reversing the trend toward greater inequality. It also considers several programs and proposals designed to make it easier for individuals to be flexible and navigate successfully in the face of the new boundaryless workplace.

The Summary and Conclusion addresses the issue of how to bring about change. It suggests that a new legal framework be devised and new organizations formed to ensure that the digital era provides social justice both inside the workplace and throughout society more generally.

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Excerpt

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PART I

LABOR RELATIONS REGIMES OF THE PAST