

Proposal: Programme of activities to be conducted at the University of Modena and Reggio Emilia – mid-March to mid-April 2021

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This proposal outlines four seminars on the law of the workplace in a major national jurisdiction: the United States (US). Long considered an outlier lacking adequate minimum labour standards legislation, protection against unjust dismissal, and social protection more generally, and exhibiting low trade union density, the US was nonetheless a leader in the creation of equal employment opportunity law. The U.S. is also a central site of debate about the rise of the gig and digital economies, including proposed regulation of new forms of work and surveillance.

The seminars, which will combine lecture with classroom discussion, will familiarise students with a body of collective and individual workplace law, which lacks a cohesive set of core principles. This legal regime must be understood in its historical, political, and cultural context, and through a multidisciplinary approach. A regulatory system that in good economic times has helped facilitate low unemployment, responds much less well in periods of economic crisis. Considering how this system is presently functioning will assist students in addressing several fundamental questions applicable in any country. Why do governments regulate the labour market? How is the success of these regulatory efforts to be measured? What are the best ways to obtain humane working conditions for all?

In addition to classroom time, there will be 1 – 2 hours per week devoted to office hours for students. Time will also be spent with colleagues at the Marco Biagi Foundation in meetings and conducting research related to an interdisciplinary team examining the socioeconomic impacts of COVID-19 and strategies for recovery. The seminars will be taught in English.

Seminar 1: An introduction to the US employment and labour law system (4 hours)

This seminar will provide a survey of the legal regulation of employment relationships in the United States. The legal materials are framed within two distinct historical periods. The first period involves the development of laws to protect worker collective action and collective bargaining, and a guarantee of minimum labour standards for workers not represented by unions, which began during the Great Depression of the 1930s. A second period highlights the political revolution that gave rise to the protection of individual employee rights, especially anti-discrimination law, which began in the 1960s. The role of law in allocating power between unions, employees, and employers is one theme of the seminar. Another is how institutions respond to legal regulation or its lack in their everyday actions.

In the mid-twentieth century, America's relatively thin legal protections were bolstered by the social practices of large and medium-size employers, who, without legal mandates, provided internal promotion procedures, an implicit promise of long-term employment, private pensions, paid vacations and holidays, paid sick leave, and, in a country without a national health insurance system, employer-subsidized health insurance plans. Over time, those social practices have waned, replaced by enterprise disaggregation and outsourcing, and rising insecurity for many workers. It is with this backdrop of an altered social contract that the formal legal methods by which American employees obtain job security are evaluated. Beginning with the unique default presumption of at-will employment, the seminar will consider the rare use of individual employment contracts and the diminishing impact of collective bargaining agreements, as well as reason-specific employment protections, such as those related to equal employment opportunity (EEO)

laws, protection of occupational safety and health, thin protections pertaining to redundancy, and laws prescribing minimum labour standards, including wages, hours, and benefits.

Preliminary suggested readings:

COLVIN A. (2016), *Conflict and employment relations in the individual rights era*, in D. Lipsky, A. Avgar, J. Ryan Lamare (eds.), *Advances in industrial and labor relations: Vol. 22: Managing and resolving workplace conflict*, Emerald Group Publishing, Bingley, United Kingdom, 1-30.

CORBETT W. (2012), *Employment Law in North America: The United States*, in R. Blanpain, S. Bisom-Rapp, W. Corbett, H. Josephs, M. Zimmer (eds.), *The Global Workplace – International and Comparative Employment Law: Cases and Materials*, Wolters Kluwer, New York, 123-130, 131-135, 150-152, 156-162, 165-169.

STONE K. V.W. (2001), *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, *UCLA Law Review* vol. 48, 519.

Seminar 2: US EEO law: job security, managerial practice, and the case of age and gender (4 hours)

The second seminar will focus specifically on American equal employment opportunity law, which in the US is viewed as a primary source of job security protection, at least for at-will employees, who otherwise may be terminated without good cause. US EEO law is over half a century old and very well-developed. At the same time, the persistence in the US of employment discrimination based on race, gender, national origin, religion, age, and disability might be seen as a puzzling phenomenon. How and why this aspirational legal regime failed to produce the kind of change many of its proponents envisioned is best explained by legal sociologists, who have studied over time the organisational responses to EEO law.

As an initial matter, the seminar will acquaint students with the national laws prohibiting employment discrimination and the legal theories upon which applicants and employees may challenge employers' adverse employment actions and workplace policies. Discussion in the second part of the seminar will center on the work of legal sociologists who study how organisations reacted to EEO law in ways that symbolically demonstrate legal compliance. These symbolic compliance strategies introduced a managerial logic to a civil rights regime, which affected the law's transformative potential. Finally, the third part of the seminar will apply the insights of social scientists to the intractable problems of age and gender discrimination. How the ban on mandatory retirement and the prohibition of sexual harassment actually work in practice reveals why the law falls short of the mark in its potential to transform a society committed at least in principle to equality.

Preliminary suggested readings:

BERREY E., NELSON R., NIELSON L.B. (2017), *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*, The University of Chicago Press, Chicago.

BISOM-RAPP S., SARGEANT M. (2016), *Lifetime Disadvantage, Discrimination and the Gendered Workforce*, Cambridge University Press, Cambridge.

DOBBIN F., KALEV A. (2019), *The Promise and Peril of Sexual Harassment Programs*, *PNAS* 116 (25): 12255-12260.

EDELMAN L. (2016), *Working Law: Courts, Corporations, and Symbolic Civil Rights*, The University of Chicago Press, Chicago.

Seminar 3: Digital transformation of work and the US debate over regulatory techniques (3 hours)

This seminar will set forth several ways in which technology is destabilizing work and the law of the workplace. Technology has produced massive changes in the economy in terms of where and how work is accomplished, who or what performs the work, how to characterise and safeguard seemingly new relationships between parties, and how to manage the externalities created by new forms of business. Performance-monitoring software risks undermining the privacy and autonomy of workers. Artificial intelligence and robotics raise the prospect of the destruction of jobs and elimination of human decision-making in the workplace. The platform economy offers new ways of earning income by affiliating with companies, which seek to avoid the strictures of labour and employment law, tax law, and competition law.

The first section of the seminar will introduce three technological innovations that potentially disrupt or transform the workplace, and the legal and social practices associated with employment: 1) digital surveillance, including productivity apps, 2) artificial intelligence, including the use of algorithms for employment decision-making, 3) and the creation of digital labour platforms that make up the sharing or platform economy. The second section of this module will assess efforts in the US to use existing law to obtain labour and social protection for workers in the face of technological change. The seminar concludes with proposals for new law and policies that balance the promise of technological change against the need to safeguard decent work and working conditions.

Preliminary suggested readings:

AJUNWA I., CRAWFORD K., SCHULTZ J. (2017), *Limitless Worker Surveillance*, *California Law Review*, vol. 105, 735-776.

DE STEFANO V., ALOSI A. (2019), *Fundamental Labour Rights, Platform Work and Human Rights Protection of Non-Standard Workers*, in J. Bellace, B. ter Haar, (eds.), *Research Handbook on Labour, Business and Human Rights Law*, Edward Elgar, Cheltenham, United Kingdom, 359-379.

ESTLUND C., (2018), *What Should We Do After Work? Automation and Employment Law*, *Yale Law Journal*, vol. 128, 254-326.

KIM P. (2017), *Data-Driven Discrimination at Work*, *William & Mary Law Review*, vol. 48, 857-936.

LOBEL O. (2019), *The Debate Over How to Classify Gig Workers is Missing the Bigger Picture*, *Harvard Business Review*.

ROGERS B. (2016), *Employment Rights in the Platform Economy: Getting Back to Basics*, *Harvard Law & Policy Review*, vol. 10, 479-520.

Seminar 4: The US system confronts the COVID-19 emergency (3 hours)

This seminar will focus on how the US system of workplace and social protection law is functioning during the global COVID-19 pandemic. At the national level, the US was ill-prepared to meet the economic and health crisis represented by the COVID-19 emergency. Indeed, the weaknesses of the American system were thrown into stark relief by the impact of the novel coronavirus on the economy. Systemic vulnerabilities include the country's lack of a universal health care system, lack of universal entitlement by workers to paid sick or paid family leave, and lax enforcement of occupational health and safety law.

The seminar will focus on the ways in which national and state legislative actions attempted to fill gaping holes in legal and social protection, how trade unions and other civil society groups agitated on behalf of the most vulnerable workers, and the socioeconomic dispersion of ill effects that track racial, ethnic, and gender lines. How the pandemic changed political discourse around work and workers' rights, especially in the year of a presidential election, will also be considered.

Preliminary suggested readings:

BALES R. (2020), *COVID-19 and Labour Law: US* in B. ter Haar, E. Menegatti, I. Senatori, E. Sychenko (eds.), *Covid-19 and Labour Law. A Global Review, Italian Labour Law e-Journal*, Vol. 13, No. 1S.

BERKOWITZ D., SONN P. (2020), *Protecting Worker Safety & Health in the COVID Crisis: A State & Local Model Policy Response*, National Employment Law Project Policy Brief.

HAFIZ H., OEI S-Y, RING D., SHNITSER N. (2020), *Regulating in Pandemic, Evaluating Economic and Financial Policy Responses to the Coronavirus Crisis*, Boston College Law School Legal Studies Research Paper No. 527.

LITHWICK D. (2020) *America's Heroism Trap*, *Slate.com.*, available at: <https://slate.com/news-and-politics/2020/04/coronavirus-humans-vs-heroes.html>