INTRODUCTION ON INFORMATIONAL ASYMMETRIES IN THE LABOR MARKET

Matthew W. Finkin†

A previous number of the *Journal* published a collection of national studies on the regulation of information in the authors' respective labor markets. That collection addressed what employers can (and do) learn about prospective employees and new hires.[1] The common thread concerned the restrictions, if any, placed on the information an employer is able to receive or to use. Most of the countries reported on imposed some limits, primarily on the basis of discrimination in employment: Interview questions or job application forms that probe for information related to marital status, disability, union membership, religion, national origin, or, in Japan, domicile (as it might indicate residence in a neighborhood populated largely by workers of a disfavored social class) are commonly prohibited. In addition, some jurisdictions limit access or use out of a general concern for individual privacy or to facilitate some more specific social goal such as the re-entry of rehabilitated criminal offenders into the labor market. In sum, all these laws assume that an applicant can be rendered near "transparent" to a prospective employer;[2] the only question being the limits to be placed on the employers' ability to do just that.

The papers that follow explore the obverse of the first collection: What information about the employer must or is a prospective employee or new hire entitled or enabled to receive. As Catharina Calleman puts it, "Prospective employees may want information concerning an employer before deciding to apply for employment. Persons already employed have an interest in information concerning

† Albert J. Harno Professor of Law, University of Illinois; General Editor, *Comparative Labor Law & Policy Journal*.

1. Symposium, *Regulation of Information in the Labor Market: What Employers May Learn About Prospective Employees*, 21 COMP. LAB. L. & POL'Y J. No. 4 (2000).

2. This largely is the result of sophisticated and increasingly inexpensive information technology and a growing number of databases of employee information.

the employer in order to be able to assess their own future."[3] A prospective employee would like to know the possibility of advancement, the prospect of lay-off, the likelihood of exposure to workplace risk, how stringent supervision is, how agreeable are one's future co-workers, and the like.

In the case of incumbent workers, all the jurisdictions surveyed and the United States as well (though not represented in the collection) entitle collective bargaining representatives to receive information in the employer's possession that bears upon the performance of that representative function. Moreover, in Europe, an E.U. Directive, as well as national laws require information sharing and consultation with incumbent workers outside of the framework of collective bargaining, with works councils or with the employees directly. In Sweden and Japan, certain businesses information and plans may be shared with the collective representative—pursuant to law in the former, by custom and practice in the latter—even if the information does not concern a specific subject of collective bargaining. In neither Canada nor the United States is such non-collective bargaining information-sharing done by law or custom.

Most jurisdictions (including the United States) also require that at least some other information be made directly available to affected workers: the substance of certain terms and conditions of employment; the nature of specific legal protections; the toxic substances to which employees might be exposed; the details of welfare and pension benefits plans; and, notice of plant closing. In the United States, however, notice is often satisfied by the display of a poster; indeed, so extensive are such posting requirements that the resulting collage may have more aesthetic than informational value.[4]

Further, in Canada and Australia (and the United States), a knowing misrepresentation of facts bearing upon a person's willingness to take the job—of the financial soundness of enterprise, for example—might be actionable in tort, though in the latter case the law is rather at 6s and 7s about the degree to which a prospective employer owes a duty of forthcomingness if the question is not asked by the employee.[5] The law might well be similar, or stronger, in some of the other jurisdictions, but that topic is only lightly touched upon.

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3. Catharina Calleman, *Information About Employers—Sweden*, 22 COMP. LAB. L. & POL'Y J. 611 (2001).

4. A chart of state posting requirements consumes 84 typescript pages. Doug Phelan, *Mandatory Disclosure and Posting Requirements by Employers* (seminar paper in Individual Employee Rights, University of Illinois College of Law, Fall 2000) (in possession of the author).

5. *See generally* Sara Mullings, *Truth-in-Hiring Claims and the At-Will Rule: Should an Employer Have a License to Lie?*, 1997 COLUM. BUS. L. REV. 105 (1997); Frank Cavico,

One is struck, however, by an area of collective silence: None of the studies indicate that much if anything in the law treats an applicant's ability to lean about a prospective employer, of whether it is a desirable or undesirable place to work, before he or she actually enters upon employment. How employees find jobs and so what they know about their employers beforehand no doubt differs from country to country and by category of employment—for professional work as compared to manual labor; it is a subject of comparative sociology concerning the geographic mobility of workers and the manner in which they "network" or not. Suffice it to say here, when employees learn about job availability from relatives or friends currently in the company's employ, they have available a wealth of inside information about life on the job, if not about the employer's long-term business plans and prospects: they may know more about the manner and quality of management and supervision than the prospective employer may know about them, about their actual abilities and proclivities notwithstanding the background information the employer might be privileged to assemble. Nevertheless, at least in the United States, such word-of-mouth job information—reliance on a network of relatives and friends—has significantly declined as a source of job referral: In the 30s, at least half of respondents to one survey indicated that they secured their jobs in that fashion,[6] but by 1999, only about 13% reported that as a job search method.[7] Job search via the internet increased from 14% in 1995, to 54% in 1999.[8] That device gives instant access to an enormous number of job listings and, either directly or by link to the employer's website, a snapshot of the company's presentation of itself;[9] but, it gives out no information the prospective employer would not wish to disclose.

The computer has also made readily available to prospective employees the same body of information that prospective investors might wish to learn; and, anonymous chatboards, sometimes geared to specific employers, may be mined for evidence of and reasons for employee disgruntlement. But the former fails to provide information about the employer's treatment of its workforce, and the latter needs to be taken with more than a grain of salt.

Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer, 20 CAMPBELL L. REV. 1 (1997).

6. WALTER LICHT, GETTING WORK: PHILADELPHIA 1840-1950, 172 (1992).

7. Peter Kuhn & Mikal Skuterud, *Job Search Methods: Internet Versus Traditional*, 123 MONTHLY LAB. REV. 3 (Oct. 2000).

8. *Id.*

9. Among the larger and more popular sites are: http://jobsearch.monster.com; http://careers.yahoo.com; http://directory.google.com/Top/Business/Employment/Job_Search.

In sum, an employer in the United States can readily learn of applicants' litigation, marital, driving, and workers' compensation claim histories; but, though access to the final decisions of regulatory agencies in contested cases is available, a prospective employee cannot learn whether or not the employer has a record of health and safety,[10] worker compensation, civil rights, or labor law complaints.[11]

Consequently, if reputational effect in the labor market is more efficient than legal regulation to achieve socially desirable outcomes, and if information asymmetry is a market imperfection,[12] a question worth pursuing is whether or not there are significant informational asymmetries in the labor market and, if there are, what the law might be able to do about it.[13] Such an investigation would profit from a comparative perspective, from the experience in industrialized democracies of how employers find jobs and what information they are enabled to acquire in the job search. From what appears, this is, from the legal perspective, academically untilled territory.

10. Federal Occupational Safety & Health Law requires that employers be required to afford access to employees or their designated representatives of the injury logs the Act requires employers to maintain. 24 U.S.C. § 657(c) (1998). But these are not otherwise available.

11. A commercial publication, the Bureau of National Affairs, has announced web access to all unfair labor practice charges filed against unions in all the regional offices of the National Labor Relations Board, *available at* www.bnalaborplus.com. In this way, employers can track union behavior. No service is offered for applicants to track filings of unfair labor practice charges against employers.

12. *E.g.* Diane Reyniers, *Information and Rational Asymmetries in a Simple High-Low Search Wage Model*, 38 ECON. LETTERS 479 (1992); Von Koplin & Larry Singell, Jr., *Asymmetric Information, Strategic Behavior, and Discrimination in the Labor Market*, 10 ECON. THEORY 175 (1997).

13. A state public employment service in the United States successfully resisted the demand of a company's former employee that it append his and the comments of other former employees' to its computerized job listing for the plaintiff's former employer. Cahill v. Texas Workplace Comm'n, 121 F. Supp. 2d 1022 (E.D. Tex. 2000).