

THE VIRTUAL WORKPLACE

The recent pandemic has clarified the overwhelming connection between the workplace and technology. With thousands of employees suddenly forced to work at home, a large segment of the workforce quickly received crash courses in videoconferencing and other technologies, and society as a whole took a step back to redefine what employment actually means. The virtual workplace is the blending of brick-and-mortar physical places of business with the advanced technologies that now make it possible for workers to perform their duties outside of the office. Trying to regulate in this area requires the application of decades old employment laws to a context never even contemplated by the legislatures that wrote those rules. This book explores the emerging issues of virtual work – defining employment, litigating claims, aggregating cases, unionizing workers, and preventing harassment – and provides clarity to these areas, synthesizing the current case law, statutory rules, and academic literature to provide guidance to workers and companies operating in the technology sector.

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PUBLIC HEALTH, EFFICIENCY, AND OPPORTUNITY

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University of South Carolina School of Law



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This book is dedicated to all of the frontline workers who helped save our country during the time of pandemic crisis. Thank you to all of the doctors, nurses, grocery store workers, delivery drivers, and everyone who put their lives on the line to keep our country safe and to provide a sense of normalcy during times that were anything but normal.

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Preface

The outbreak of COVID-19 caused our society to rethink the fundamental meaning of “work,” and the extent to which employment has any physical boundaries. With literally hundreds of thousands of workers required suddenly to work from home, the perception of virtual employment radically changed overnight. Indeed, many employers that were previously strongly and openly opposed to allowing workers to perform their job duties outside a brick-and-mortar facility quickly required such work-at-home relationships. The law, which often takes decades to refine with respect to employment doctrine, could not keep pace with these changes. Indeed, in my vast experience in this field, I can recall no singular event that has had a quicker, more substantive impact on the workplace.

This text seeks to tackle some of the core issues now evolving in this area, focusing on how the law is struggling with a changing technological landscape. This work provides clarity and simplicity to this area, synthesizing the current case law, statutory rules, and academic literature to provide substantial guidance to workers and companies operating in the realm of the technology sector. While no work can provide an exhaustive review of all emerging issues in the platform-based economy, this text addresses the primary topics with which courts and businesses are currently grappling. In particular, this book examines closely the core definition of what it means to be an employee in this sector. The battle lines were drawn early on over this question, and the line between “employee” and “independent contractor” in the technology sector has created much consternation as the courts attempt to apply decades-old employment laws to workers now using highly advanced modern technologies. In addition, there is also confusion over how workers can attempt to vindicate their claims in the federal courts. Access to justice is a critical factor here, and workers must be able to actually bring viable claims against their places of business if the laws are to have any real meaning. Similarly,

aggregation of claims often comes into question in this area. Many workers in the technology sector have had similar experiences with the same company and bring related employment claims in court. These workers must be able to band their claims together if they are to effectuate any meaningful change with their employers.

In this same vein, collective action is a critical area being discussed in the gig economy. It can be difficult for workers to unionize in the technology sector where there is often no physical place of business and where coworkers may never even meet one another. This book proposes an alternative arrangement – a “union light” – type approach that could be highly beneficial for both companies and workers in this evolving sector.

One other employment-related question that must be addressed in the technology sector is the high prevalence of harassment that occurs. This book looks squarely at that question, examining why this industry sees such a large number of sexual harassment claims. This work takes the next step of identifying possible solutions to this ongoing problem, or offering suggestions that can help alter these existing inappropriate behaviors.

The *virtual workplace* is no longer something from the world of science fiction and it is not limited to a select few employees or companies with tremendous resources. COVID-19 has forced the virtual workplace on almost all employees to a certain extent, as many job responsibilities have been moved online with workers performing their duties either at home or remotely. The employment laws in this area, which are already in need of updating, have struggled to keep up. This book takes this struggle head-on, identifying the areas where technology and traditional workplace laws collide, and explains the best way that the courts and litigants can now address these difficult and evolving questions.

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- “The Discrimination Presumption,” *Notre Dame Law Review* 94 (2019): 1115–60.
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- “Harassment, Technology, and the Modern Worker,” *Employee Rights and Employment Policy Journal* 23 (2019): 85–114.
- “A Modern Union for the Modern Economy,” *Fordham Law Review* 86 (2018): 1727–84 (with J. Hirsch).
- “Tailoring Class Actions to the On-Demand Economy,” *Ohio State Law Journal* 78 (2017): 21–72.
- “Commonality and the Constitution: A Framework for Federal and State Court Class Actions,” *Indiana Law Journal* 91 (2016): 455–92.
- “Navigating the Uber Economy,” *University of California at Davis Law Review* 49 (2016): 1511–46.
- “The Issue Class,” *Boston College Law Review* 56 (2015): 121–58.
- “Weathering Wal-Mart,” *Notre Dame Law Review* 89 (2014): 1343–82.
- “Plausibility and Disparate Impact,” *Hastings Law Journal* 64 (2012): 287–324.

“Plausibility beyond the Complaint,” *William & Mary Law Review* 53 (2012): 987–1038.

“After *Iqbal*,” *Wake Forest Law Review* 45 (2010): 179–230.

“Pleading Disability,” *Boston College Law Review* 51 (2010): 95–150.

“The Trouble with *Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases,” *University of Illinois Law Review* 2009 (2009): 1011–60.

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