

THE LAW AND ECONOMICS OF EMPLOYEE INFORMATION EXCHANGE IN THE KNOWLEDGE ECONOMY

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INTRODUCTION

Bill Fowler knows that knowledge is power. That's why the 56-year-old factory worker seldom tells anyone anything.

"If I gave away my tricks, management could use [them] to speed things up and keep me at a flat-out pace all day long," says Mr. Fowler.

His job here at Blackmer/Dover Resources Inc. is cutting metal shafts for industrial pumps. It's a precision task: A minor error could render a pump useless. Mr. Fowler, a 24-year plant veteran, is known for the accuracy of his cuts. His bosses also say he can be hours faster than anyone else at readying his giant cutting machines to shift from making one type of pump shaft to another. As they seek to incorporate employee know-how into the manufacturing process, they would love to know his secrets. But he refuses to share his best ones even with fellow workers."¹

Mr. Fowler's story illustrates nicely how, in the new economy, knowledge has become both the key production process component and an important object of exchange itself. While knowledge has always been a component of economic activity, it has become "the one factor of production" capable of increasing the productive capacity of both capital and labor.² Mr. Fowler's story also reminds us that, as it was the case in years past, the interests of employers and employees do not necessarily coincide when it comes to allocating rights regarding the ownership and exchange of knowledge.

Interestingly, this transition towards a "knowledge economy," and the implications that it has in resolving the inherent conflict between management and labor, has gone almost totally unnoticed by courts, legislatures, and legal scholars alike. The laws that regulate U.S. labor markets are

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¹ Timothy Aepfel, *Tricks of the Trade: On Factory Floors, Top Workers Hide Secret to Success*, WALL ST. J., July 1, 2002 at A1.

² See Peter F. Drucker, *From Capitalism to Knowledge Society*, in *THE KNOWLEDGE ECONOMY* 15 (Dale Neef ed., 1998).

based on a value system reflective of the industrial economy of the 1900s. In particular, the laws regulating the ability of employees to own and share information about their jobs are based on the premises underlying last century's industrial economy. A disconnect thus has developed between the legal regime and the actual operation of labor markets, making our employment laws ineffective in handling the demands created by the shift towards the knowledge economy.

This article expands current research by identifying the various implications of the transition towards a knowledge economy on the right of employees to exchange information about their jobs. We believe that the dynamics of the knowledge economy demand a better appreciation of the importance of information exchanges in the workplace. This greater appreciation requires that legal rules be made clear and strengthened regarding a possible general workplace right to information.

In Part I we review the work of three leading employment law scholars who have noted recently the shift towards the knowledge economy and questioned the ability of current law to address some of the challenges raised by this shift. Expanding on current scholarship, in Part II, we introduce our argument that employment law doctrines should incorporate some protections regarding the ability of employees to exchange information regarding their terms and conditions of employment, both within and outside their organizations.

In Part III we identify the characteristics of the knowledge economy and argue that the transition into a knowledge economy has had important effects on U.S. labor markets. In Part IV, we develop the theoretical foundations for regulating information flows in the workplace. We identify the various rationales advanced in favor of and against a broad right to information exchange. Parts V and VI present and evaluate various regulatory approaches, and make recommendations for legislative and regulatory reform. We argue in favor of a regulatory framework that allows for some potential flexibility in the regulation of workplace information exchange.

I. THE CHANGING NATURE OF U.S. LABOR MARKETS

Several leading employment law scholars have recently argued that a significant disconnect exists between our employment and labor laws and the labor markets such laws seek to regulate.³ Their argument is twofold.

³ Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) [hereinafter Stone, *New Psychological Contract*]; see also Alan Hyde, *Employee Organization in High-Velocity Labor Markets*, in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO

First, they assert that significant structural changes have occurred in U.S. labor markets.⁴ Second, they aver that these changes have gone unnoticed by legislatures, courts, and indeed even many legal scholars, thus, creating the current disconnect.⁵

In a recent article, Professor Katherine Stone of Cornell Law School, for example, argues that U.S. labor markets now operate under a “new psychological contract.”⁶ As compared to the old psychological contract, which involved expectations of long-term employment, attachment to a firm, and very specialized firm-specific knowledge, the new psychological contract is much more flexible.⁷ The foundation of the new contract is on life-time learning; i.e., employers are expected to provide employees with the opportunity to learn multiple aspects of any job.⁸ Employees, on the other hand, cannot expect lifetime employment, but instead should expect to move among jobs many times during their working lives.⁹ In this new contract, employees are more strongly attached to their “careers” or “professions” than to any one particular firm or employer.¹⁰

Professor Alan Hyde of Rutgers Law School, in a forthcoming book¹¹ and various recent articles,¹² describes the new employment relationship in terms of “high-velocity” labor markets.¹³ These markets, point out Profes-

COLLECTIVE BARGAINING, PROCEEDINGS OF NEW YORK UNIV. 50TH ANNUAL CONFERENCE ON LABOR 467 (Samuel Estreicher ed., 1998) [hereinafter Hyde, *High Velocity Markets*]; Alan Hyde, *What do “Equal Employment” and “Loyalty” Mean if Internal Labor Markets Die? The Emerging Law of Silicon Valley’s High-Velocity Market*, in GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21ST CENTURY, PROCEEDINGS OF NEW YORK UNIV. 52ND ANNUAL CONFERENCE ON LABOR 467 (Samuel Estreicher ed., 2000) [hereinafter Hyde, *Silicon Valley*]; Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 NYU L. REV. 575 (1999); Katherine V.-W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002) [hereinafter Stone, *Knowledge at Work*]; Alan Hyde, *The Wealth of Shared Information: Silicon Valley’s High-Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets*, at <http://andromeda.rutgers.edu/~hyde> (last visited August 16, 2004) [hereinafter Hyde, *Wealth of Shared Information*].

⁴ See Hyde, *Silicon Valley*, *supra* note 3, at 211-12 (describing “high-velocity” labor markets); Gilson, *supra* note 3, at 585 (describing today’s labor markets as fast, flexible, and fluid).

⁵ See Stone, *New Psychological Contract*, *supra* note 3, at 576 (identifying laws regarding post-employment restrictions as an example of the current disconnect).

⁶ *Id.*; see also Stone, *Knowledge at Work*, *supra* note 3.

⁷ See Stone, *New Psychological Contract*, *supra* note 3, at 568-72.

⁸ *Id.* at 569-70.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Hyde, *Wealth of Shared Information*, *supra* note 3.

¹² See Hyde, *Silicon Valley*, *supra* note 3; Hyde, *High Velocity Markets*, *supra* note 3.

¹³ See Hyde, *Silicon Valley*, *supra* note 3, at 211-12.

sor Hyde, are those “in which job tenures are short and internal labor markets weak.”¹⁴ Instead, “high-velocity” labor markets are characterized by collective learning, dense social networks, and open labor markets.¹⁵ Professor Hyde emphasizes the importance of information in “high-velocity” markets. While information is important in all labor markets, the kind of technical/problem-solving information that is valued in high-velocity “markets,”¹⁶ and the fact that employees are allowed “to carry this information among firms through formal and informal contacts,”¹⁷ make “high-velocity” markets substantially different from traditional employment markets.

Finally, Stanford Law School’s Professor Ronald Gilson utilizes the concept of “high technology industrial districts” to anchor his description of the economics of today’s labor markets.¹⁸ A key characteristic of these

¹⁴ *Id.* In recent years there’s been something of an explosion in the application of internal labor market economic theory to legal analysis of employment problems. See, e.g., Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363 (1995); Stewart J. Schwab, *Life Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988). The gist of this theory turns on the differentiation between firm-specific and general investments by employees. See Bierman & Gely, *supra*, at 370-83. For example, let’s say a given university has a special football tradition and a law school Dean wants a certain law faculty member (perhaps a former football player) to serve on a special university committee meeting two hours a week for the academic year studying the merits of retaining this tradition. This can be viewed as a “firm specific” investment by the professor, or, alternatively, as an investment in the “internal labor market” of the given university. The roughly sixty hours the professor spends on this endeavor may win the faculty member some “good citizen” points at the school where he is, but it will likely be of no interest to other universities should the professor apply to them for a job some time in the future. Indeed, from the perspective of other universities, i.e., the “external labor market” (ELM), the professor would be much better off spending the sixty hours working on an article for publication in a prestigious law journal. The dilemma thus becomes clear. The organization wants the employee to make the firm-specific investment, but the employee may likely resist. Thus, the need arises to devise a mechanism that will create the right kind of incentives for the acquisition of firm specific skills. The Internal Labor Markets (“ILMs”) provide such a mechanism and thus constitute an alternative to exclusive reliance on the use of ELMs. ILMs arise because of the ELMs’ inability to deal with employment transactions when there is a need for skills that are specific to a firm. Implementation of an ILM requires the employers and employees to agree to an understanding of a long-term employment relationship. By internalizing parts of the employment relationship, firms potentially can encourage workers to make long-term investments with them, which in turn produce technological and cost efficiencies for the firm. Central to the ILMs functioning is the expectation that employees will be attached to the firm for a long period of time, or that they will be adequately compensated for their investments in the case of a breach.

¹⁵ See Hyde, *High Velocity Markets*, *supra* note 3, at 211-12.

¹⁶ See Hyde, *Wealth of Shared Information*, *supra* note 3.

¹⁷ *Id.*

¹⁸ See Gilson, *supra* note 3.

districts, according to Gilson, is the existence of “knowledge spillovers,”¹⁹ (or inter-firm exchanges of information), which are maintained either through voluntary cooperation or involuntary employee movement. It is through knowledge spillovers that firms operating within a particular district are able to sustain innovation and development.²⁰ Central to the concept of knowledge spillovers is thus a labor market very similar to that described by Professors Hyde and Stone: fast, flexible, and fluid.

Having identified, albeit using different constructs, the changes that have occurred in U.S. labor markets, Professors Gilson, Hyde, and Stone argue that the legal institutions that regulate labor markets need to first realize that labor markets have changed, and then adjust legal rules accordingly. While each of them advances different prescriptions, the underlying premise of their arguments is very similar, i.e., the dynamics of U.S. labor markets have changed, and thus the legal framework regulating the employment relationship needs to follow suit. Their research then evaluates current legal frameworks, particularly in the area of post-employment restrictions.

For example, consider the Professors Hyde and Gilson’s separate analyses comparing the performance of two high technology sectors - California’s Silicon Valley and Boston’s Route 128. Both Gilson and Hyde make it clear that the major factor explaining the difference in performance between Silicon Valley and Route 128 involves the law of post-employment restrictions.²¹

Professor Hyde refers to post-employment laws as “the chief legal impediment to endogenous economic growth in most U.S. jurisdictions.”²² “Outside of California,” continues Professor Hyde, “employers have many ways of preventing information from diffusing to rivals.”²³ He points out that, in these jurisdictions, employers can enter into covenants not to compete, rely on common or statutory trade secrets law, and enforce invention assignment agreement, to limit the ability of employees to carry information from one job to another.²⁴ Professor Hyde ultimately attributes the success of Silicon Valley’s high velocity markets to California’s “de facto” elimination of trade secret protection, not based on black letter law, but on the reluctance of courts, juries, and even California attorneys to enforce trade secret statutory and common law doctrines.²⁵

¹⁹ *Id.* at 585-86.

²⁰ *Id.*

²¹ See Hyde, *Wealth of Shared Information*, *supra* note 3; Gilson, *supra* note 3, at 595.

²² See Hyde, *Wealth of Shared Information*, *supra* note 3.

²³ *Id.*

²⁴ See Hyde, *Silicon Valley*, *supra* note 3, at 487.

²⁵ *Id.* at 489-90.

Professor Gilson similarly believes that the rules involving post-employment restrictions are central to understanding the differences in the performance of the two high-tech sectors. According to Gilson, “the legal rules governing employee mobility are a causal antecedent of . . . a Silicon Valley business culture that supports job hopping and a Route 128 business culture that discourages it.”²⁶ Contrary to Hyde, Professor Gilson singles out the fact that California’s courts have, to a large extent, refused to enforce non-compete covenants as the key factor.²⁷

Thus, while Professors Hyde and Gilson disagree as to which legal doctrine best explains the success of Silicon Valley’s economic performance, the main implication of their analysis is instructive to the argument we make in this article. Underlying the arguments of Professors Hyde and Gilson is the suggestion that with regard to post-employment restrictions, society will be better served by following California’s approach—an approach that encourages free flows of information in the workplace.

Professor Stone also identifies post-employment restrictions law as an example of the disconnect in existing legal rules caused by the transition into the new economy (what she refers to as the “new psychological contract”).²⁸ While she does not discuss the California experience, her explicit criticism is consistent with Professors Hyde and Gilson’s underlying argument. Professor Stone criticizes the judicial expansion of the enforceability of covenants not to compete and trade secret doctrines.²⁹ For example, Professor Stone points out that courts across the country have shown an increasing willingness to enforce covenants not to compete on the basis of a former employee’s ability to possibly “steal” customer contacts, and in situations in which the employer has provided training that arguably will be lost if the employee, was allowed to violate the terms of the non-compete agreement.³⁰ She argues convincingly that such a trend is completely contrary to the terms of the new psychological contract. According to Professor Stone, one of the elements of the new psychological contract is the understanding that employees are expected to network both inside and outside the firm to increase the chances of their employability once they leave their current employment.³¹ Networking, even with clients, is a critical part of that process.³² Enforcing covenants not to compete, on the argument that

²⁶ Gilson, *supra* note 3, at 578.

²⁷ *Id.* at 607-09.

²⁸ See Stone, *New Psychological Contract*, *supra* note 3, at 576-77. Professor Stone also argues that employment discrimination law and union organizing rules need to be reassessed in light of the development of the new psychological contract. *Id.* at 597-654.

²⁹ *Id.* at 577-85.

³⁰ *Id.* at 587-97.

³¹ *Id.* at 594.

³² *Id.*

the employee might be taking clients with him or her after leaving the firm, clearly contradicts that expectation.³³ She argues that “[b]y treating customer lists and knowledge of customer needs as a basis for enforcing restrictive covenants, or as a trade secret, courts are unwittingly permitting employers to renege on one of the fundamental terms of today’s employment contract.”³⁴ Legal rules recognizing the need for a broad right to information among employees is necessary, according to Professor Stone’s analysis, to fully enforce the terms of the new psychological contract.

II. BEYOND GILSON, HYDE, AND STONE: THE CONCEPT OF INFORMATION RIGHTS

We believe that Professors Gilson, Hyde, and Stone have identified correctly the transition that has occurred in U.S. labor markets, and have argued correctly that this transition justifies changes in laws regulating post-employment restrictions, in particular trade secret protection and covenants not to compete. These changes, in their view, justify legal rules that employees can use as a *shield* against attempts by employers to limit the employees’ ability to carry with them information and knowledge once they leave employment.

However, we also believe that the changes Professors Gilson, Hyde, and Stone identify have implications that go far beyond the area of post-employment restrictions. The transition into what has been referred to as a knowledge economy³⁵ has created a premium on the value of information and a corresponding emphasis on the ability of employers and employees to communicate at work. This effect is as likely, if not more likely, to affect the rights of employees and employers *during* the employment relationship as their rights after the employment relationship ends. Accordingly, it appears to be appropriate to extend the analysis of the impact of the knowledge economy to other aspects of the employment relationship.

Consider Professors Hyde and Gilson’s explanation of the experience with Silicon Valley and Route 128. By focusing on post-employment law, we believe that they missed an equally important factor that might have also been important in the success of Silicon Valley as compared to Route 128. In several areas, other than post-employment restrictions, California law supports the rights of employees to communicate and obtain information regarding work issues. For example, since 1984, California law has explicitly allowed employees to discuss openly their pay during the course

³³ *Id.* at 588.

³⁴ Stone, *supra* note 3, at 588.

³⁵ *See infra* notes 38-64 and accompanying text.

of their employment.³⁶ Arguably, the freedom to discuss openly their pay, allows employees, their peers, and even potential future employers, to gain knowledge about market factors that could facilitate movement, or in Gilson's terms, "hopping" from job to job.³⁷ This access to information might have been an important piece in the legal structure that facilitated the success of California's Silicon Valley vis-à-vis Boston's Route 128.

Similarly, information exchange and sharing on-the-job is a very important part of the "new psychological contract" referred to by Professor Stone. Open employee discussion and information exchange about pay and working conditions obviously enhances employee career-building and job mobility. Accordingly, any attempts by employers to limit the ability of employees to exchange information during the term of employment will arguably frustrate the expectations employees have under the new psychological contract. Thus, employment law doctrines should reflect this understanding by prohibiting restrictions on the ability of employees to exchange information both inside and outside the organization regarding their terms and conditions of employment. This point, which Professor Stone does not address, is obviously as important a piece of any theory of a right to information as the various arguments made regarding post-employment restrictions.

We argue that issues regarding the ability of employers to restrict their employees from communicating with each other while at work by, for example, engaging in discussions about pay issues and working conditions, provide a particularly useful area for expanding the work of Professors Gilson, Hyde, and Stone. Surprisingly, employees across the country are subject to a myriad of restrictions regarding their ability to communicate, sometimes at all, while at work, and more commonly, to restrictions regarding the type of information they can exchange with each other. It is our contention that a better understanding of these restrictions requires that they be viewed in light of the changes that have occurred as we have moved into the knowledge economy. In a sense, we argue that the changes that Professors Gilson, Hyde, and Stone have identified can also be used to justify legal rules that employees can use, in today's knowledge economy, as a *sword* against employers' attempts to limit their ability to use and communicate ideas and information while at work.

³⁶ CAL. LAB. CODE §§ 232, 232.5 (West 2002).

³⁷ See Gilson, *supra* note 3, at 594-95.

III. THE KNOWLEDGE ECONOMY AND POWER PARADIGMS

A. Overview

A significant development in the U.S. economy, and for that matter the world economy, occurred during the 1990s and into the 21st century: a change in the role and importance of knowledge, and the processing of knowledge.³⁸ Knowledge has always been an important ingredient of economic activity. From the knowledge farmers had about seasons and weather,³⁹ to the knowledge skilled masters passed along to their apprentices,⁴⁰ up to the knowledge of the factory worker, or the “scientific” manager in designing a better assembly line,⁴¹ these were all important determinants of economic activity. Commentators point out, however, that the importance of knowledge in today’s economy has risen to a completely different level.⁴² This new era has been coined the “knowledge economy” (“KE”), and it is distinguished from its predecessor, the industrial economy. To identify better the rise of what we refer to as information rights, we start by describing the key aspects of the KE.

³⁸ See JOHN HOUGHTON & PETER SHEEHAN, CENTER FOR STRATEGIC ECON. STUDIES, A PRIMER ON THE KNOWLEDGE ECONOMY 1 (2000), available at <http://www.cfses.com/documents/knowledgeeconprimer.pdf> (last visited Aug. 14, 2004); see also Yuko Aoyama & Manuel Castells, *An Empirical Assessment of the Informational Society: Employment and Occupational Structures of G-7 Countries, 1920-2000*, 141 INT’L LAB. REV. 123, 125 (describing the knowledge or information economy as one involving “a production system organized around the principles of maximizing knowledge-based productivity through the development and diffusion of information technologies.”); ORG. FOR ECON. CO-OPERATION AND DEV., THE KNOWLEDGE-BASED ECONOMY 9 (1996), available at <http://www.oecd.org/dataoecd/51/8/1913021.pdf> (last visited Aug. 16, 2004) (“The term ‘Knowledge-based economy’ results from a fuller recognition of the role of knowledge and technology in economic growth.”); LEIF EDVINSSON & MICHAEL S. MALONE, INTELLECTUAL CAPITAL 12 (1997) (“The core of the so-called *knowledge economy* is huge investment flows into human capital as well as information technology.”).

³⁹ See HOUGHTON & SHEEHAN, *supra* note 38, at 1.

⁴⁰ *Id.*

⁴¹ *Id.* See ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 38, at 11 (noting that Adam Smith referred to new layers of specialists who as “men of speculation” made important contributions to the production of economically useful knowledge).

⁴² HOUGHTON & SHEEHAN, *supra* note 38, at 1 (“[T]he degree of incorporation of knowledge and information into economic activity is now so great that it is inducing quite profound structural and qualitative changes in the operation of the economy and transforming the basis of competitive advantage.”).

B. *The Knowledge Economy*

In the knowledge economy, “knowledge” or “knowledges”⁴³ become *the* key ingredient of economic activity.⁴⁴ The increased importance of knowledge is twofold—knowledge becomes more important as a component of the production process, and also as a product itself.

Knowledge has become an ever more important component in the production process. Commentators argue that knowledge has become “the one factor of production, sidelining both capital and labor.”⁴⁵ Traditionally, “production functions” included factors like labor, capital, materials, and energy.⁴⁶ Knowledge and technology were considered to be external influences on the production process, and thus, not directly included in accounting processes. Knowledge is now seen as an important component in the production process.⁴⁷ Accounting practices have been developed to allow for the inclusion of knowledge more directly into the production process.⁴⁸ The attempts to measure knowledge more properly as a factor of production are based on the realization that more than ever, knowledge has the capability of increasing the productive capacity of the other production factors. Indeed, knowledge not only is capable of raising the return on investments of other factors, but it does so without decreasing the stock of knowledge possessed by a firm. Unlike capital and labor, knowledge can “grow rather than diminish with use.”⁴⁹ This allows for the possibility of sustained competitive advantages to an extent never before seen.⁵⁰

Not only has knowledge become a key factor of production, it has also become more important as a product.⁵¹ Transactions in knowledge, both

⁴³ See Peter F. Drucker, *The Age of Social Transformation*, THE ATL. MONTHLY, NOV. 1994, at 68 (distinguishing between knowledge and “knowledges” to emphasize the idea that in the knowledge society, knowledge exists only in application).

⁴⁴ See HOUGHTON & SHEEHAN, *supra* note 38, at 1.

⁴⁵ See Drucker, *supra* note 2, at 15.

⁴⁶ See ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 38, at 11.

⁴⁷ “The core assets of the modern business enterprise lie not in buildings, machinery, and real estate, but in the intelligence, understanding, skills, and experience of employees.” Brook Manville & Josiah Ober, *Beyond Empowerment: Building a Company of Citizens*, 81 HARV. BUS. REV. 48 (2003).

⁴⁸ See EDVINSSON & MALONE, *supra* note 38, at 10-15. (developing an accounting system for measuring and reporting intellectual capital); JAC FITZ-ENZ, *THE ROI OF HUMAN CAPITAL: MEASURING THE ECONOMIC VALUE OF EMPLOYEE PERFORMANCE*, (2000) (identifying methods for the measurement of human capital investments).

⁴⁹ See Paul S. Adler, *Market, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism*, 12 ORG. SCIENCE 215, 216 (2001) (describing the implications of the transition into a knowledge economy).

⁵⁰ *Id.* (“Knowledge tends, therefore, to play an increasingly central role in economic development over time.”); see also, ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 38, at 11.

⁵¹ See KEITH SMITH, *WHAT IS THE ‘KNOWLEDGE ECONOMY’? KNOWLEDGE-INTENSIVE*

within a firm and among firms, comprise a much larger portion of economic activity today that it did even a decade ago.⁵² The stock of “codified knowledge,” which refers to “know-what” (knowledge of facts) and “know-why” (scientific and technical knowledge),⁵³ has increased, in part, due to technological advances that have augmented the ability of firms and individuals to transfer information.⁵⁴ Given that robust markets have developed in the trading of information, proprietary rights questions become much more significant.⁵⁵ Acquiring and developing relevant knowledge is not costless.⁵⁶ Firms, therefore, are very protective of their ability to create and transmit knowledge and to be able to benefit from this activity.⁵⁷

The KE is also characterized by a relative shortage in the stock of tacit knowledge.⁵⁸ “Tacit knowledge” refers to “know-how” (skills or capability to do something) and “know-who” (referring to the formation of social relationships that facilitate access to those with information and to the use of information efficiently).⁵⁹ The ability of organizations to access and transfer information has made it significantly more important for those same organizations to possess the human capabilities necessary to sort through the information and use it efficiently.⁶⁰

INDUSTRIES AND DISTRIBUTED KNOWLEDGE BASES (2000), available at <http://www.business.auc.dk/druid/summer2000/Gallery/smith.pdf> (last visited Aug. 17, 2004).

⁵² *Id.* at 7-8.

⁵³ See ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 38, at 12.

⁵⁴ See HOUGHTON & SHEEHAN, *supra* note 38, at 2 (“Because the marginal cost of manipulating, storing and transmitting information is virtually zero, the application of knowledge to all aspects of the economy is being greatly facilitated, and the knowledge intensity of economic activities greatly increased.”).

⁵⁵ JOSEPH E. STIGLITZ, PUBLIC POLICY FOR A KNOWLEDGE ECONOMY (1999), available at <http://www.worldbank.org/html/extdr/extme/knowledge-economy.pdf> (last visited Aug. 17, 2004).

⁵⁶ *Id.*

⁵⁷ *Id.* The ability of firms to do this, however, is complicated by the very feature of knowledge that makes it so relevant to today’s economy: its non-rivalrousness. Unlike physical goods, knowledge is not destroyed by consumption. See Hyde, *Wealth of Shared Information*, *supra* note 3 (discussing the economics of “non-rivalrous” goods). Further, because of technological advances and the economy’s ability to store and transmit knowledge at very low costs, once knowledge is publicly available it becomes almost impossible to restrict its use across a large cross-section of the economy. In the knowledge economy, we thus observe increased concern by economic actors with the creation and transmission of information, and with their ability to safeguard their investments in all kind of “knowledges.” *Id.*

⁵⁸ See HOUGHTON & SHEEHAN, *supra* note 38, at 11.

⁵⁹ See ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 38, at 13.

⁶⁰ See FITZ-ENZ, *supra* note 48, at 6 (“In actuality, it is the information that the person possesses and his or her ability and willingness to share it that establish value potential.”); W. Chan Kim & Renee Mauborgne, *Fair Process: Managing in the Knowledge Economy*, HARV. BUS. REV., Jan. 2003, at 127, 128 (noting that in a knowledge-based economy “value creation depends increasingly on ideas and innovation.”).

In the KE the skills that firms value the most are different from the skills that were valued in the industrial economy. Conceptual, interpersonal-management, and communications skills are particularly in high demand since those skills enhance the ability of a firm to handle codified knowledge.⁶¹ Because of the shift in the kind of skills that are valued in the KE, firms have redesigned their compensation systems.⁶² Rewarding employees for their ability to acquire and use tacit knowledge requires a reassessment of the rationales for compensating employees. In the KE, employees are more likely to be evaluated, not on the basis of specific job duties, but instead, on the basis of skills such as innovation, creativity, problem solving, and openness to change.⁶³ Unlike the industrial economy, where performance evaluations were based on job descriptions, in the KE, performance evaluations are based on the competencies the individual brings to the work place and how those competencies are used in pursuing the employer's objectives.⁶⁴

In the KE, there is no knowledge hierarchy.⁶⁵ As Professor Peter Drucker, a leading management scholar, has pointed out, "[t]he knowledge of the knowledge society, precisely because it is knowledge only when applied in action, derives its rank and standing from the situation."⁶⁶

The high demand generated in the KE for tacit knowledge has elevated the role of "knowledge workers"⁶⁷ vis-à-vis the employer. In a sense, knowledge workers (such as computer software programmers) "own the tools of production."⁶⁸ Unlike the industrial worker, who needed the capitalist "infinitely more" than the capitalist needed the worker, the roles are reversed in the KE.⁶⁹ As the owners of a factor of production, employees are expected to also bear the risks and responsibilities normally associated with any kind of investment. To play this role effectively, employees must have access to information, not only about their own jobs, but arguably

⁶¹ See ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 38, at 12. "The skills required of humans will increasingly be those that are complementary with information and communication technology; not those that are substitutes. Whereas machines replaced labor in the industrial era, information technology will be the locus of codified knowledge in the knowledge economy, and work in the knowledge economy will increasingly demand uniquely human (tacit) skills—such as conceptual and interpersonal management and communication skills." See HOUGHTON & SHEEHAN, *supra* note 38, at 11.

⁶² See Jeffrey Pfeffer, *Seven Practices of Successful Organizations*, CAL. MGMT. REV., Winter 1998, at 108-12 (describing various compensation practices used by information intensive organizations).

⁶³ See HOUGHTON & SHEEHAN, *supra* note 38, at 11.

⁶⁴ See Stone, *New Psychological Contract*, *supra* note 3, at 571.

⁶⁵ See Drucker, *supra* note 2, at 71.

⁶⁶ *Id.*

⁶⁷ *Id.* at 71.

⁶⁸ *Id.*

⁶⁹ *Id.*

about the jobs of others both within and outside his or her own organization.

The coming of age of the KE has significantly altered the dynamics of labor markets. Moreover, the changes that have occurred in the production process and in product markets as part of the transition towards a KE have significantly altered numerous aspects of the employment relationship. We argue these changes require us to evaluate the legal rules concerning the ability of employees to exchange information and to adopt new rules and policies that are responsive to the operations of today's labor markets. In Part V we evaluate existing laws and make specific recommendations in this regard.

C. *Shifting Power Paradigms in the Knowledge Economy*

There is a long tradition in legal scholarship of analyzing legal rules as mechanisms that institutionalize power structures, either between social classes, contracting parties, in social relationships, or in the employment context. For example, the legal rules governing employment contracts in the 1800s have been described as ones in which courts "effectively granted to the modern class of employers a property right (the right to control how one's employee performs his contract) founded upon the preindustrial master's claim to property in his servant's personal services."⁷⁰ Cases involving the application of criminal conspiracy doctrines to attempts by workers to collectively deal with the employer,⁷¹ and cases involving denials to employees departing their jobs before the end of their commitments the right to recover wages due at the time of departure,⁷² illustrate an understanding of the employment relationship as one involving "necessarily unequal" parties.⁷³

Labor law doctrines, as well as more recent employment law doctrines, have also been described in terms of the power structures they perpetuate. For example, the judicial interpretations of the NLRA have been described as squarely based on a set of values and assumptions that preceded the statute, and which perpetuate the power relationships that the statute was purportedly designed to alter.⁷⁴ A central point of this literature

⁷⁰ Christopher L. Tomlins, *Law and Power in the Employment Relationship*, in *LABOR LAW IN AMERICA* 71, 74 (Christopher L. Tomlins & Andrew J. King eds. 1992).

⁷¹ *Id.* at 84 (discussing the famous Supreme Judicial Court of Massachusetts' 1842 decision in *Commonwealth v. Hunt* from this perspective).

⁷² *Id.* at 85.

⁷³ *Id.* at 88.

⁷⁴ JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 2 (1983). In particular, Atleson argues, "The belief in the inherent rights of property and the need for capital mobility . . .

is that at the workplace employers have been, and continue to be, in a position of power, and that employee rights must exist within that power structure.⁷⁵

Most significant to our discussion is the argument raised in this literature regarding the notion of the preeminence of employer property rights. Professor James Atleson, for example, argues “[t]he right of employees to communicate with each other and other statutory interests must compete with shadowy notions about employer ownership . . . [s]imilarly, the employer’s presumed property rights seem to support decisions that reject the legitimacy of employee efforts to regulate their work effort.”⁷⁶ Professor Atleson analyzes a number of labor⁷⁷ and employment law⁷⁸ doctrines from this perspective, concluding that under American labor and employment law, power structures that define certain duties and obligations which employees owe to their employers result in a “process that recognizes the lower status of employees in the employment context.”⁷⁹

If, as this literature suggests, legal rules regulating the workplace can be understood as institutionalizing certain power structures, then the disconnect that resulted from the transition into a KE must have repercussions

. underlie certain rules, and some decisions turn on the perceived superior need for continued production or the fear of employee irresponsibility.” *Id.* Specifically, Professor Atleson identifies five core values: the need to maintain the continuity of production; the belief that employees will act irresponsibly if not controlled; the understanding that employees have a limited role to play in the management of the enterprise; the preeminence of the property rights of the employer; and, the belief that “employees cannot be full partners in the enterprise because such an arrangement would interfere with inherent and exclusive managerial rights of employers.” *Id.* at 7-9.

⁷⁵ *Id.* at 7. For example, the right to strike is explicitly recognized under the National Labor Relations Act, 29 U.S.C. § 163 (2000), but only, argues Atleson, “because the threat to withdraw labor power, or its actual withdrawal, is the only employee action that will make collective bargaining effective, and collective bargaining, in turn, will encourage ‘industrial peace.’” ATLESON, *supra* note 74, at 7. Strikes are protected only to the extent that they help validate the system of collective bargaining, which in turn is likely to reduce the need for strikes, thus, ensuring the continuity of production. *Id.* Accordingly, argues Atleson, courts have accepted the right to strike, but limited it in several significant ways. *Id.* For example, Atleson points out the 1938 Supreme Court decision in *NLRB v. Mackay Radio*, 304 US 333 (1938), in which the Court noted that the NLRA did not impair the right of employers to replace strikers, which in turn “drastically undercut the new act’s protection of the critical right to strike.” *Id.* at 19.

⁷⁶ *Id.* at 8.

⁷⁷ For example, Professor Atleson argues that the rules developed by the Supreme Court regarding union access to company property for purpose of organizing clearly illustrate the preeminence of property rights over the rights of employees to receive information about unionization. *Id.* at 93.

⁷⁸ Professor Atleson discusses the Supreme Court decision in *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (1978), in which the Court prohibited the use of warrantless inspections by federal safety and health officials under the Occupational Safety and Health Act. ATLESON, *supra* note 74, at 92-93.

⁷⁹ *Id.* at 84.

in the allocation of power in the workplace. Clearly, the KE resulted in a shift in the power dynamics at the workplace. In the industrial economy, employers owned the most important factor of production—capital. In the KE, knowledge, particularly tacit knowledge (know how and know who), is owned, or at least, is within reach of, most employees. With employees as owners of a critical factor of production, a new power dynamic develops at work. From this perspective, the disconnect that we argue exists in today's labor markets, can be understood as a struggle between employers and employees trying to define new rules to deal with this shift in power. Employers are, in a sense, trying to hold on to the old rules, which tended to favor the owner of the most important factor of production—capital, while employees are at the same time trying to carve rules that protect their new roles as owners of the current critical factor of production—knowledge.

IV. THE ECONOMICS OF THE REGULATION OF INFORMATION RIGHTS AT WORK

A. *Overview*

In the KE, knowledge itself, as well as the ability of individuals to exchange information, have become key ingredients for successful participation in economic activity. The change in the role that knowledge plays as an engine in economic activity is likely to affect the power structures that developed in the period preceding the rise of the KE. In particular, we expect that the central role played by knowledge and information in the KE, shifts the balance of power in favor of those individuals (i.e., employees), in control of those key factors of production. We also expect that employees who find themselves in this newly advantageous position, will prefer employment rules which facilitate the ability to gather and collect information. Existing labor and employment law doctrines regulating information flows, however, are based on the “old” industrial model that gives employers quite a lot of control over information flows, both during the course of employment and even after the employment relationship has ended.

We argue that these shifts resulted in a disconnect between the underlying dynamics of today's labor markets and employment and labor law, particularly with regard to rules concerning the ability of employees to communicate in the workplace. Not surprisingly, employers and employees appear to have different preferences with regard to the question of how to regulate the flow of this type of information. Employees appear to prefer to have an open exchange of this type of information, while employers appear to prefer to have the ability to limit exchanges on this information. In this

section, we describe the various reasons that might explain the preferences of employers and employees regarding rules regulating information exchanges.

B. *Rationales for a Broad Right to Information*

1. Access to Information

Employees need access to information to evaluate their employment conditions, and to assess whether better opportunities lie elsewhere outside their current organizations. Obviously, employees need information to allow them to evaluate how their current terms and conditions of their current employments compare to alternative market opportunities. Arguably, by knowing their own terms of employment (and by definition their own preferences), employees will have all the information they need to make this assessment.

Recent research in the field of behavioral economics, however, indicates that employees care, not only about their absolute level of income, but also about their relative income levels. That is, employees care a lot about their status in local hierarchies.⁸⁰ Because employees care about their relative position in the status hierarchy, a market is likely to develop for local status. Those that have strong preferences for status will “pay” for the privilege to be the highest paid employee by accepting a wage less than their marginal productivity. Those that do not care about status as much (although still having some concern about it) will require a wage premium for being at the bottom of the status hierarchy.⁸¹

To make these tradeoffs, employees need information, not only about their own terms and conditions of employment, but also about those of their co-workers. The existence of markets for local status creates a rationale for

⁸⁰ See ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 3-34 (1986) (developing the theory of relative preferences); Robert H. Frank, *Are Workers Paid Their Marginal Products?* 74 AM. ECON. REV. 549, 570 (1984) (arguing that in a model that assumes that individual preferences are relative, the wage structure within a firm must be one in which individuals are not paid their marginal products) [hereinafter Frank, *Marginal Products*].

⁸¹ See Frank, *Marginal Products*, *supra* note 80, at 551. The basic premise here is that because individuals care about how they compare to others with whom they are in close contact, they are willing to “pay” for the benefits of being at the top of their relevant comparison group. They pay by either accepting a wage lower than their marginal productivity (for those at the top of the hierarchy) or by demanding a wage premium in the form of a wage rate above that employee’s marginal productivity (for those at the bottom of the hierarchy). Evidence of this is found in the wage dispersion among automobile and real estate salespeople where the difference in salaries between the top and bottom performers is much narrower than what conventional economic theory will dictate. *Id.* at 555-558.

the need of employees to have open discussions about wages and other terms and conditions of employment.⁸² To properly evaluate the tradeoffs that they have made between status and income, employees need to know their position in the local hierarchy.

2. The Increasing Importance of Networks

In the KE, employees are attached to their professions more than to any one particular employer.⁸³ As the owners of the key factor of production in the KE, workers are in need of more and better information. To the extent that workers need to better manage their careers and their human capital investment, there is a more pressing need for information, not only about their substantive areas of expertise, but also about their careers. Just as owners of capital need to know about investment opportunities, capital flows, and other information that better allows them to put their resources to the best possible use, workers, as the owners of knowledge (at least tacit knowledge), need better information regarding how their human capital is valued in the market and under what conditions it is being traded in the labor market.

The ability to obtain this kind of information will be greatly reduced if limits are imposed on the right of employees to exchange information. If employees are prevented from discussing their pay and working conditions, for example, there will be a reduction in the stock of available information about any particular employer, and/or industry. This reduction in information will make it more difficult for employees to move, thus reducing a potential source of efficiency in the labor market.

⁸² The market for local status explains why, unlike as predicted by neoclassical economists, workers often do not appear to get paid their marginal productivities. *See id.* at 553-55. Traditional neoclassical economists have long advanced the argument that workers will be paid their marginal products, that is workers are paid an amount equal to their contributions to the total revenue of the firm. Otherwise, it has been argued, employees paid less than their marginal product will leave to firms that will agree to pay the higher wage. *See id.* at 550-51. This standard account has been criticized as inconsistent with the compensation practices observed in many organizations. *See id.* at 549. Considerable evidence has been advanced that shows that wage differentials within firms tend to be considerably smaller than what the neoclassical marginal productivity model would predict, suggesting that the most productive workers are being paid less than their marginal productivities, while the least productive workers are being paid more than what they contribute to the revenues of the firm. *See id.* 554-58.

⁸³ *See Stone, New Psychological Contract, supra* note 3, at 553-56.

3. A Safeguard Against Discriminatory Practices

Any restrictions on the ability of workers to communicate with other similarly situated employees raise the possibility of facilitating or enabling illegal activity by employers. Restrictions on communications among employees might facilitate discriminatory behavior by employers in the form of differentials in terms and conditions of employment on the basis of a statutorily protected characteristic. Without the ability of comparing wages and other information about their employment, employees become particularly vulnerable to illegal employer discriminatory behavior.

Minority workers in the KE appear to face a new kind of dilemma. On the one hand, as described earlier, the shift in the importance of capital vis-à-vis knowledge has given workers stronger leverage in their relationships with employers.⁸⁴ On the other hand, the employment relationship in which this newly acquired power can be exercised tends to be much more flexible, individualized, and isolated than ever before.⁸⁵ In such a context, individuals, particularly women and minorities, who have been traditionally marginalized in the mainstream labor markets, might find themselves isolated from other similarly situated workers. This isolation might make it easier for employers to engage in discriminatory behavior, especially if employees are prohibited from discussing information regarding terms and conditions of employments.

Professor Stone identifies several other potential problems faced by women and minority workers within the KE. For example, because of the flexible and fluid organization of work in the KE, the traditional lines of hierarchical authority, that were a common feature of the industrial workplace, have disappeared.⁸⁶ With traditional lines of authority gone, it has become increasingly more difficult to identify the source of discriminatory practices, which is an essential component of bringing actions under existing anti-discrimination laws.⁸⁷ Again, without the ability to discuss employment information with co-workers, employees affected by discriminatory practices will find it increasingly difficult to obtain the necessary information to evaluate their particular situations.

Concerns about discriminatory practices at work provide a justification for a broad right to information, and a corresponding argument for prohibiting employment rules that tend to limit the ability of employees to discuss terms and conditions of employment. In this sense, a broad right to

⁸⁴ See *supra* notes 62-64 and accompanying text.

⁸⁵ See Stone, *New Psychological Contract*, *supra* note 3, at 553-65.

⁸⁶ *Id.* at 606-07.

⁸⁷ See *id.* at 606, 611.

information serves as a check to potential illegal employer discriminatory behavior.

4. Bounded Self-Interest and Trust Relationships

Harvard Law Professor Christine Jolls recently advanced the concept of bounded self-interest/fairness dynamics in analyzing employer-employee compensation structures.⁸⁸ This concept states that some employers pay some employees *more* than the minimum the employees would generally accept for performing the job in question.⁸⁹ According to Professor Jolls, the reason for such “fair” treatment by employers is the expectation that it will encourage better job performance by employees.⁹⁰

Professor Jolls notes that, at the heart of fairness, dynamic pay is the notion of trust relationships.⁹¹ In the KE, employers pay a fair wage and then trust that employees (especially those not easily monitored) will perform well.⁹² Reciprocally, it seems employees are called on to trust that their employer is indeed paying and otherwise treating them well. Rules adopted by the employer limiting the ability of employees to communicate certain kind of information seem a quite logical part of such a trust situation, particularly given the fact that some employees may be receiving above-market wages.⁹³ If Professor Jolls is correct in her assertion that workplace trust relationships promote economic efficiency, such rules can be seen as part of an overall workplace trust dynamic that is quite positive and business justified.

A closer look at the concept of trust, however, indicates that a relationship of trust is built upon the foundation of open information. More specifically, modern reflective trust (as opposed to blind trust)⁹⁴ has been

⁸⁸ See Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47 (2002).

⁸⁹ In economic terms, employers pay employees above their so-called “reservation wage”. Nobel Laureate George Akerlof has done pioneering work in this area. See George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. ECON. 543 (1982).

⁹⁰ See Jolls, *supra* note 88, at 51-57.

⁹¹ *Id.* at 57.

⁹² *Id.* See generally Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1753-58 (2001) (discussing the positive relationship between trust relationships and corporate efficiency).

⁹³ For a nice example of this concept in operation, see Lawrence F. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 593-95 (2001). See generally Rafael LaPorta, et al., *Trust in Large Organizations*, 87 AM. ECON. REV. 333 (1997) (discussing employees being called on to trust the actions of their employing organizations).

⁹⁴ Traditional concepts of trust have emphasized the “soft” aspects of trust, such as confidence, familiarity, and shared values. From this perspective, trust has been defined as “the subjective probab-

described as being grounded in principles of “open dialogue among peers.”⁹⁵ Reflective trust is thus based on the ability to develop trust by means of a reasoned exchange of information. Accordingly, the establishment of such trust is heavily dependent on the existence of “transparent operating procedures and upward avenues for redress of grievances.”⁹⁶ Under this view of trust, open flows of information thus appear to be critical.

Reflective trust arguably offers an alternative, or at least a complement, to market (price mechanisms)⁹⁷ and hierarchy (authority mechanisms)⁹⁸ in organizing economic relationships, such as the employment relationship, particularly with respect to the management of employees within the KE.⁹⁹ The increased importance of knowledge in production processes presents employers with difficult challenges. Hierarchical or autocratic organization structures might be well suited for managing routine, discrete tasks, but it is believed to be inefficient “in the performance of innovation tasks requiring the generation of new knowledge.”¹⁰⁰ Similarly, market mechanisms “[fail] to optimize the production and allocation of knowledge.”¹⁰¹ The problem here is derived from the non-rivalrous nature of knowledge.¹⁰² Strong intellectual property rights appear to be necessary to provide the incentives to generate knowledge, but such rules can, at the

ity with which an actor assesses that another actor or group of actors will perform a particular action, both before she or he can monitor such a particular action (or independently of his or her capacity ever to be able to monitor it) and in a context in which it affects his or her actions.” Adler, *supra* note 49, at 217. Arguably, within this conception of trust there is no need for information openness. Since decisions as to whether to trust someone are made before and even in the absence of an ability to monitor that person’s behavior, the need for information is reduced and maybe even eliminated. *See id.* at 227.

⁹⁵ Trust relationships can be based on a more “studied, rational, and tentative” or “reflective” form of trust. *Id.*

⁹⁶ *See* Carroll Underwood Stephens, *The Ontology of Trust and the Transformation of Capitalism in a Knowledge Economy—A Commentary on Paul Adler’s “Market, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism”* 12 *ORG. SCI.* 238 (2001).

⁹⁷ Market control systems rely on the price mechanism to coordinate the activities of sellers and buyers, both within a firm and across organizations. William Ouchi, *Markets, Bureaucracies and Clans*, 25 *ADMIN. SCI. QUART.* 129, 130 (1980).

⁹⁸ *See* OLIVER WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS*, 20-41 (1975).

⁹⁹ *See* Adler, *supra* note 49, at 216-18.

¹⁰⁰ *Id.* at 216. For example, Adler describes the inadequacy of hierarchical forms of management to promote cooperation among independent, specialized departments. “When specialized units are told to cooperate in tasks that typically encounter unanticipated problems requiring novel solutions, tasks such as the development of a new product, the hierarchical form gives higher-level managers few levers with which to ensure that the participating units will collaborate.” *Id.*

¹⁰¹ *Id.*

¹⁰² *See* Hyde, *Wealth of Shared Information*, *supra* note 3.

same time, prevent “socially optimal allocations”¹⁰³ and even get in the way of the production process itself.¹⁰⁴

By comparison, organizational structures based on principles of reflective trust might improve on hierarchy and market mechanisms in managing knowledge based organizations. For example, trust could help to reduce coordination problems where hierarchy or authority is inadequate, as in the case of two individuals or organization units with similar organizational authority but different functions.¹⁰⁵ Reflective trust can help reduce “transaction costs—replacing contracts with handshakes—and agency risks—replacing the fear of shirking and misrepresentation with mutual confidence.”¹⁰⁶

Reflective trust, however, requires open flow of information and transparent processes. If reflective trust is associated with increased economic efficiency, rules limiting the ability of employees to obtain information probably result in diminution of social welfare, and thus legally banning such rules might be beneficial.

C. *Rationales for Limiting a Right to Information*

1. General Managerial Efficiency

Clearly, wage and related discussions among employees are going to have an impact on the employment setting. For one, there may be inter-employee conflict and jealousy. Moreover, employees concerned or upset about their relative pay are going to ask their employer questions about this, and indeed perhaps challenge the employer’s decision-making in this regard.¹⁰⁷ Finally, pay openness may foster greater employee efforts to engage in so-called “influence” behavior,¹⁰⁸ whereby they try through various

¹⁰³ See Adler, *supra* note 49, at 217.

¹⁰⁴ Compare the experiences of Silicon Valley and Route 128, as described in Gilson, *supra* note 13 at 586-92.

¹⁰⁵ See Adler, *supra* note 49, at 219.

¹⁰⁶ *Id.*

¹⁰⁷ See John Case, *When Salaries Aren't Secret*, HARV. BUS. REV., May 2001, at 37, 48 (analyzing a fictional case of a company that faces the decision of whether to make salaries public information); Gerald S. Leventhal, et al., *Inequity and Interpersonal Conflict: Reward Allocation and Secrecy about Reward as Methods of Preventing Conflict*, 23 J. PERSONALITY & SOC. PSYCHOL. 88, 101-02 (1972) (“An individual who controls the allocation of pay in an organization may maintain secrecy about his distribution or reward because he hopes to minimize dissatisfaction and interpersonal conflict.”).

¹⁰⁸ See Kathryn M. Bartol & David C. Martin, *Effects of Dependence, Dependency Threats, and Pay Secrecy on Managerial Pay Allocations*, 74 J. APPLIED PSYCHOL. 105, 106 (1989) (discussing the relationship between pay secrecy policies and influence behavior within organizations); see also Gerald R. Ferris & Timothy A. Judge, *Personnel/Human Resources Management: A Political Influence Per-*

methods to persuade their employer to give them a raise. Such activities require managerial time to be spent in a relatively unproductive manner, and from this perspective, rules which directly limit such activities can be seen as promoting managerial efficiency.

2. Facilitating the Design of Compensation Systems

Restrictions on the ability of employees to share information, and on the type of information they might share, might be an important component of an employer's compensation system. Legal rules that prohibit employers from imposing restrictions in the sharing of information could result in workplace inefficiencies.

Employer wage-setting and compensation policies are designed to increase productivity via the allocation of rewards.¹⁰⁹ Merit-based compensation systems are generally viewed as achieving this goal. Designing the right compensation system, however, is difficult given the wide variety of jobs that need to be evaluated. Some jobs involve fairly easy tasks, which lend themselves to easy evaluations of performance. In these jobs, objective factors (e.g., number of widgets produced in a given amount of time) are used in evaluating performance and thus, the corresponding level of compensation. Other jobs, however, involve much more complex tasks, making it harder to evaluate job performance.¹¹⁰ For these more complex jobs, performance evaluations are likely to depend on subjective factors (e.g., quality of customer satisfaction).

The type of criteria (objective or subjective) used in evaluating job performance, and in designing compensation systems, creates a potential complication for employers. The criteria used in evaluating simple jobs lend themselves to easy comparisons because they are objective in nature. Performance evaluations for the more complex jobs, however, tend to be more context-specific, and thus, less suited for broad comparisons.

Whether employees are allowed to share information about their jobs in the case of the simple task type of job should not affect the ability of management to implement a merit-based compensation system. Since the factors used in the evaluation are objective and easy to verify, the employer should not be as concerned about having employees share information

spective, 17 J. MGMT. 447 (1991).

¹⁰⁹ See Case, *supra* note 107, at 49.

¹¹⁰ See Sheldon E. Haber & Robert S. Goldfarb, *Does Salaried Status Affect Human Capital Accumulation?*, 48 INDUS. & LAB. REL. REV. 322, 326 (1995) (discussing how job characteristics affect the selection of a compensation system).

about their terms and conditions of employment. The objectivity of the information used in making reward decisions should reduce the possible discontent and resentment associated with management decisions regarding the allocation of benefits and rewards.

In the case of more complex KE types of jobs, however, the unfettered sharing of information by employees might affect the ability of employers to institute merit-based compensation systems.¹¹¹ Research indicates that where performance cannot be evaluated objectively, restrictions regarding the sharing of information are necessary for the compensation system to work properly.¹¹² Forcing the use of more objective measures of performance in situations where such performance appraisal techniques are not appropriate will likely reduce the set of incentives necessary for innovation, and have a corresponding downward effect on long-term productivity.¹¹³

Restrictions on the ability of employees to share information might also be explained by reference to the risk-sharing functions of employment contracts. In general, employment contracts can be understood as instruments attempting to allocate the various contributions and rewards of the parties to the contract.¹¹⁴ Allocating these elements requires that the risk associated with the contract be in turn distributed between the parties.¹¹⁵ In particular, the risks associated with stochastic factors that could affect income have to be allocated between employers and employees.¹¹⁶ As part of the various complex arrangements that are made when entering employ-

¹¹¹ See Leventhal et al., *supra* note 107 at 100 (finding, in an experimental setting, that under conditions of secrecy individuals in charge of allocating pay were more likely to increase the difference between the rewards of superior and inferior performers).

¹¹² See Case, *supra* note 107, at 48.

¹¹³ See *id.* at 44 (“One frequently cited problem of such a formal pay structure is that it doesn’t allow for flexibility in a tight job market, where you typically need to pay a recruitment premium above a job’s market value to attract people.”). Compensation systems involving subjective measures are not always more efficient than their alternatives, particularly because of the possibility of employer’s abuse. Arguably, managers could use the veil of secrecy to either incorporate irrelevant factors into the job evaluation process, or even worse, discriminate against employees on the basis of illegal criteria. As we discussed above, this possibility is one of the reasons justifying a broad right to information flows at the workplace.

¹¹⁴ See Joseph E. Stiglitz, *The Design Of Labor Contracts: The Economics of Incentives and Risk Sharing*, in INCENTIVES, COOPERATION, AND RISK SHARING 47, 50 (Haig R. Nalbantian ed., 1987) [hereinafter, Stiglitz, *Design of Labor Contracts*].

¹¹⁵ *Id.* at 47 (“Economists believe that, in general, the employment relationship is *not* a zero sum game, that by structuring the employment relationship appropriately, both workers and the firm can benefit.”).

¹¹⁶ See Haig R. Nalbantian, *Incentive Compensation in Perspective*, in INCENTIVES, COOPERATION, AND RISK SHARING 3, 14-15 (Haig R. Nalbantian ed., 1987); Eugene F. Fama, *Time, Salary, and Incentive Payoffs in Labor Contracts*, 9 J. LABOR ECON. 25, 42 (1991) (modeling the choice between various forms of compensation).

ment contracts, the parties also “negotiate” over the allocation of these risks.¹¹⁷

Risk management theory suggests that it is efficient to allocate risk to the party better able to bear the cost associated with any specific risk.¹¹⁸ In the employment context, since employers are generally believed to be risk-neutral while employees are believed to be risk-averse, employers are in a better position to bear the risk associated with stochastic fluctuations in income.¹¹⁹ Unlike most employers, employees have a fairly limited ability to diversify their human capital portfolio.¹²⁰ That is, it is much more difficult to spread one’s human capital among different projects or functions than it is for the owners of capital to diversify their wealth among a wide variety of investments.¹²¹ Accordingly, we should expect to see employers assuming the role of insurers of “employment-related risks”¹²² by insuring employees against the risks associated with income uncertainty. This is accomplished by properly structuring the compensation arrangements in a way that reflects the desired share of burden of risks.¹²³ Income fluctuation contracts, for example, often provide for some form of guaranteed income, as opposed to a pay-by-result agreement.¹²⁴ By guaranteeing employees, for example, a monthly income, the parties are shifting to the employer the risk associated with month-to-month variations in productivity.¹²⁵

Risk-shifting contracts of this kind are not feasible however, in situations in which labor can move very freely from one firm to another.¹²⁶ Workers will only stay with their firms during the bad times, and then move to “greener pastures” during good times. Arguably then, without some restrictions on labor mobility, risk-shifting contracts will probably not be offered.

¹¹⁷ See Stiglitz, *Design of Labor Contracts*, *supra* note 114, at 54-61.

¹¹⁸ See *id.* at 50.

¹¹⁹ See *id.* If employees were not risk averse but were instead risk neutral, designing an efficient contract becomes a trivial issue. See Nalbantian, *supra* note 116, at 12.

¹²⁰ Human capital refers to the investments individuals made in education. See Gary S. Becker, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION, 3rd ed., 15-17 (3d ed. 1993).

¹²¹ See Nalbantian, *supra* note 116, at 10.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ See *id.* Notice that under such an agreement, although the risk is shifted to the employer, employees, at least in part, are paying for the shift in the burden of risk by likely accepting a wage rate lower than what otherwise would be the case.

¹²⁶ See Leif Danziger & Eliakim Katz, *Wage Secrecy as a Social Convention*, 35 ECON. INQUIRY 59, 60 (1997) (arguing that the role of wage secrecy is to reduce effective labor mobility, and thus enhance the feasibility of risk-shifting contracts).

Labor mobility can be limited by utilizing so-called “social conventions” that make it more difficult or costly for employees to move. Rules limiting the ability of employees to obtain information represents one such type of social convention, since these rules can limit the employees’ ability to talk with fellow employees about pay, including other wage offers they have received. Consequently, some economists have argued strongly that companies adopt pay secrecy policies in order to avoid employee opportunism in risk-shifting compensation policy situations.¹²⁷

3. Proprietary Employer Interests

Many U.S. corporations today put considerable effort into designing employee compensation plans.¹²⁸ Indeed, many companies pay considerable sums to outside compensation consultants to assist them in this endeavor.¹²⁹ Human resource professionals believe that properly designed employee compensation programs can represent a source of competitive advantage.¹³⁰ Put in this context, employer compensation plans can be seen as a sort of proprietary information in which the firm has strong privacy rights.¹³¹

¹²⁷ *Id.*

¹²⁸ See Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002).

¹²⁹ *Id.* at 789-91.

¹³⁰ See Barry Gerhart, *Compensation Strategy and Organizational Performance*, in COMPENSATION IN ORGANIZATIONS: CURRENT RESEARCH AND PRACTICE 151 (Sara L. Rynes & Barry Gerhart eds., 2001).

¹³¹ In law firms, for example, assigning firm partners fair and proper “credit” for business generation is frequently a major problem facing law firm managing partners and management committees. It is not uncommon for clients and billable work to come to firms as a result of the efforts of a number of different firm partners and in various different ways. The big question then becomes how to allocate proper business generation credit when it comes to deciding partnership compensation. Which partner, for example, becomes the “billing partner” on the work and thus gets primary credit for the client? Let’s assume a law firm has hired an expensive compensation consultant to help it work out this problem and as a result has developed a highly successful and unique partner pay credit allocation system. This system can give the firm a real competitive advantage over other firms in which partners are constantly at war with each other over business-generation issues. Consequently the partner pay allocation system represents real proprietary information to the firm. Rules limiting employee access and use of certain kinds of information can help keep this information properly proprietary. See Jonathan Lindsey et al., *Lateral Partners; Compensation Is Key to Attracting and Retaining Rainmakers*, 6 LAW FIRM PARTNERSHIP & BENEFITS, 1 (2002).

V. CURRENT REGULATION OF EMPLOYEE INFORMATION EXCHANGE RIGHTS

A. *The National Labor Relations Act (“NLRA”)*

While it probably comes as a surprise to some, the NLRA provides what is probably the broadest set of protections regarding what we refer to as employees’ information rights. In addition to protecting employees who seek union representation, Section 7 of the NLRA protects employees who “engage in other *concerted activity* for the purpose of . . . *other mutual aid or protection.*”¹³²

Employers’ actions that interfere with concerted employee activity, or with activities for other mutual aid or protection, run contrary to the requirements of the NLRA. The NLRA protects employee “concerted activity,” such as employee information exchanges and discussions regarding wages and other working conditions. This statutory protection is independent of whether employees are represented by a union and applies to nearly all private sector employees in the United States. The NLRB, and various Courts of Appeal, have consistently found conversations by employees about wages and terms and conditions of employment to be protected concerted activity, and consequently have found employers’ attempts to interfere with such conversations to amount to an NLRA Section 8(a)(1) violation.¹³³

B. *State Approaches: California and Connecticut*

Two states, California and Connecticut, have enacted legislation that directly addresses the issue of workplace rights to information.

¹³² 29 U.S.C. § 157 (2000) (emphasis added).

¹³³ Section 8(a)(1) of the NLRA makes it an unlawful or unfair labor practice for an employer to “interfere with, restrain, or coerce employees” with respect to their NLRA Section 7 organizational rights. 29 U.S.C. § 158(a)(1) (2000). *See, e.g.*, *Fredericksburg Glass & Mirror, Inc.*, 323 N.L.R.B. 165 (1997); *NLRB v. Main Street Terrace Center*, 218 F.3d 531 (6th Cir. 2000). A two-prong test is applied in section 8(a)(1) unfair labor practice cases. *See Medeco Security Locks v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998) (finding that employer violated NLRA by prohibiting employee from discussing circumstances surrounding his transfer). First it must be determined whether the employer’s action adversely affected employees’ Section 7 rights. If it does, the employer can advance a “substantial and legitimate business justification” for her conduct. *Id.* The Board will then apply a *balancing test* to determine whether the employees’ Section 7 rights outweigh the employer’s business justification. *Id.* Such a finding will require the Board to hold that the employer’s action have violated Section 8(a)(1). *Id.*

1. California Law

In 1984 the California legislature made it illegal for employers to “require as a condition of employment, that any employee refrain from disclosing the amount of his or her wages.”¹³⁴ This right was non-waivable by the employee, and the employers could not take any adverse employment action related to job advancement against an employee who had chosen to disclose his or her wages.

In September 2002, the California Legislature significantly expanded the existing law by including employers’ attempts to prohibit employees from discussing all “working conditions.” Section 232 of the amended statute prohibits employers from requiring, as a condition of employment, that “an employee refrain from disclosing the amount of his or her wages,” and forbids employers to “discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.”¹³⁵ The statute adds a new section which prohibits the same kind of employer behavior with respect to disclosure of “the employer’s working conditions.”¹³⁶

The passage of the recent amendments was prompted primarily by the efforts of organized labor. Various major labor organizations, such as the American Federation of State, County, and Municipal Employees (“AFSCME”), the Communications Workers of America, the United Steelworkers of America, and the California Labor Federation (“AFL-CIO”) were among the key supporters of the legislation. The California Federation of Labor saw the bill primarily as an organizing tool, and indeed explicitly refers to the new legislation as a victory that will help unions organize.¹³⁷ Proponents argued that the legislation was necessary since the existing law only protected conversations regarding wages. They argued that without the amendments many workers feared speaking up about unsafe working conditions at their places of work, stating that “[e]mployer power, intimidation, and potential retaliation” keeps workers in silence as they continue to labor in hazardous situations.¹³⁸

The main opponent of the bill was the Motion Picture Association of America. The Motion Picture Association’s expressed concern was two-fold. First, it raised the issue that the bill could lead to the “disclosure of various forms of confidential material not related to the traditional ‘working

¹³⁴ 2002 Cal. Legis. Serv. 934, § 232 (West).

¹³⁵ *Id.*

¹³⁶ *Id.* at § 232.5.

¹³⁷ See *California Unions Win Key Legislative Victories*, www.calaborfed.org/legislation/leg_index.htm. (last visited 12/21/2002) (on file with authors).

¹³⁸ *Id.*

conditions.”¹³⁹ Second, the Association argued that the bill could have several unintended consequences, such as having an employee “disclose another worker’s adverse personnel action.”¹⁴⁰ In an apparent concession to some of the concerns expressed by the Motion Picture Association, the California Legislature included a provision in the final enacted bill providing that the right to discuss working conditions “is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.”¹⁴¹

The California statute has generated little litigation. In fact, there appears to be only one case involving Labor Code Section 232. *Grant-Burton v. Covenant Care Inc.*,¹⁴² involved a wrongful termination against public policy claim by a marketing director who had been fired because of comments she made regarding the compensation practices of the employer at a corporate meeting in which other marketing directors of the same employer were in attendance. The plaintiff challenged her discharge arguing that it was in violation of public policy. As the source of this public policy, the plaintiff pointed to Section 232 of the California’s Labor Code.

Under California law, to prevail in a wrongful discharge against public policy claim, the plaintiff must establish that the policy is public “in the sense that it inures to the benefit of the public rather than serving merely the interests of the individual.”¹⁴³ The court, citing several federal labor cases, explained the connection between the ability of employees to discuss wages and the benefits that inure to the public.¹⁴⁴ For example, the California court relied heavily on the U.S. Supreme Court’s decision in the case of *Thornhill v. Alabama*,¹⁴⁵ and its language to the effect that

“[It] is recognized now that satisfactory hours and wages and working conditions in industry . . . have an importance which is not less than the interests of those in the business or industry directly concerned Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”¹⁴⁶

¹³⁹ STAFF OF THE OFFICE OF SENATE FLOOR ANALYSES, SENATE RULES COMM., 2001-02 SESSION, ANALYSIS OF ASSEMBLY BILL 2895 (2002), available at ftp://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_2851-2900/ab_2895_cfa_20020813_143726_sen_floor.html (last visited Aug. 14, 2004).

¹⁴⁰ *Id.*

¹⁴¹ CAL. LAB. CODE § 232.5(d) (West 2002).

¹⁴² 122 Cal. Rptr. 2d.204 (2002).

¹⁴³ *Id.* at 213.

¹⁴⁴ *Id.* at 213-16.

¹⁴⁵ 310 U.S. 88 (1940).

¹⁴⁶ *Id.* at 103.

The court in *Grant-Burton* thus concluded that the plaintiff's wrongful termination claim was based "on a policy—codified under federal and state law—that inures to the benefit of the public," and thus, found her discharge to be unlawful.¹⁴⁷

2. Connecticut Law

Like California, Connecticut has legislation that appears to address workplace informational rights. Section 31-51q of the General Statutes of Connecticut prohibits employers from subjecting any employee to "discipline or discharge on the account of exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4, or 14 of article first of the Constitution of the state."¹⁴⁸ This protection does not extend to situations where the employees' activities "substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer."¹⁴⁹

This statutory section has been applied in a number of cases in which employees have been discharged or disciplined based on comments they have made at work regarding employment conditions. In general, the provision has been narrowly interpreted, resulting in little protection being afforded to private sector employees.¹⁵⁰ For example, in a case involving an employee who was discharged for expressing concerns over safety, employee attitudes, customer service, and other issues, a court found against the employee plaintiff noting that the concerns were raised "by the plaintiff in his role as an employee, not as a concerned citizen."¹⁵¹ Accordingly, the complaints were deemed matters of private concern not protected under the statute.¹⁵² Similarly, the statute was found not to protect a former hospital employee who had voiced concerns regarding mismanagement by the hospital's administration, and how she had been overworked and subject to inordinate amounts of stress.¹⁵³ The court found that the plaintiff's speech

¹⁴⁷ *Grant-Burton*, 122 Cal. Rptr. 2d at 216.

¹⁴⁸ CONN. GEN. STAT. § 31-51q (2003)

¹⁴⁹ *Id.*

¹⁵⁰ See David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 41-42 (1998).

¹⁵¹ *Lowe v. AmeriGas, Inc.*, 52 F. Supp. 2d 349, 359 (D. Conn. 1999).

¹⁵² *Id.* The court found, however, that the "plaintiff's complaints about safety concerns regarding the improper storage of a hazardous substance such as propane . . . implicate[d] matters of public concern." *Id.*

¹⁵³ *Urashka v. Griffin Hosp.*, 841 F. Supp. 468, 474 n.7 (D. Conn. 1994).

involved “the private matter of the terms and conditions of her employment,” and thus, was not protected under the Connecticut statutes.¹⁵⁴

C. *Recent Congressional Proposals*

In recent years, legislation has been introduced in Congress addressing the right of employees to discuss certain types of information at work.¹⁵⁵ All the bills propose amending various sub-sections of the FLSA,¹⁵⁶ known as the Equal Pay Act of 1963 (“EPA”).¹⁵⁷ All proposals would make it “per se” illegal under Section 215 of the FLSA to discharge or discriminate against any employee because such employee “has inquired about, discussed, or otherwise disclosed the wages of the employee or another employee.”¹⁵⁸ The congressional proposals provide virtually no flexibility in terms of potential employer restrictions on employee information exchange rights.

VI. EVALUATING EXISTING REGULATORY MODELS

A. *Overview*

In this section we evaluate the various possible regulatory approaches in this area in the context of the KE. In evaluating possible frameworks and proposals, we keep in mind the arguments we developed above¹⁵⁹ supporting either openness or the imposition of limitations regarding workplace information exchanges. Our earlier discussion suggests that valid argu-

¹⁵⁴ *Id.* at 475.

¹⁵⁵ See Paycheck Fairness Act, S. 76, 108th Cong. (2003); Paycheck Fairness Act, H.R. 781, 107th Cong. (2001); Paycheck Fairness Act, S. 77, 107th Cong. (2001); Fair Pay Act of 2001, H.R. 1362, 107th Cong. (2001); Fair Pay Act of 2001, S. 684, 107th Cong. (2001); Wage Awareness Protection Act, S. 2966, 106th Cong. (2000); Paycheck Fairness Act, H.R. 541, 106th Cong. (1999); Paycheck Fairness Act, S. 74, 106th Cong. (1999).

¹⁵⁶ 29 U.S.C. § 201-19 (2000).

¹⁵⁷ 29 U.S.C. § 206(d) (2000).

¹⁵⁸ Paycheck Fairness Act, H.R. 781, 107th Cong. § 3(d)(4) (2001); Paycheck Fairness Act, S. 77, 107th Cong. § 3(d)(2) (2001); Paycheck Fairness Act, H.R. 541, 106th Cong. § 3(a)(2) (1999); Paycheck Fairness Act, S. 74, 106th Cong. § 3(a)(2) (1999). Two other bills have slightly different language, making it illegal “to discharge or in any other manner discriminate against, coerce, intimidate, threaten, or interfere with any employee or any other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee’s wages or the wages of any other employee” Fair Pay Act of 2001, H.R. 1362, 107th Cong. § (4)(2)(7) (2001); Fair Pay Act of 2001, S. 684, 107th Cong. § (4)(2)(7) (2001).

¹⁵⁹ See *supra* notes 80 -131 and accompanying text.

ments support either position.¹⁶⁰ We argue that a regulatory framework that allows for some potential flexibility in the regulation of workplace information exchange represents the best approach.

B. *The NLRA*

In many respects, the NLRA appears to present the right approach to the regulation of workplace information exchange rules. First, the NLRA allows for a case-by-case decision making process. Within the doctrinal parameters the NLRB has developed regarding the “concerted action” question under Section 7 of the NLRA, the Board is able to assess the reasons why, in any given case, an employer is seeking to impose restrictions on employee discussion of wages and terms and conditions of employment. The case law allows for a balancing approach, protecting the interests of both employers and employees.

The need for a flexible regulatory approach is particularly pressing because of the heterogeneity of firms, even within the KE. Organizations make different choices regarding what role knowledge should play.¹⁶¹ Some firms decide to be “frontier firms” and thus, decide to make significant investments in research and development.¹⁶² Other firms will choose to be “followers,” waiting for knowledge spillovers as a source of information.¹⁶³ The decisions firms make regarding knowledge acquisition are likely to be reflected in their employment practices. For example, some firms will entirely adopt the concept of life-time employability (and relatively short-term employment), while others might prefer to adhere, more or less, to the ideal of long-term employment. Similarly, for some types of jobs, networks will become very important, while in other professions less reliance on networks is likely to be the norm. Even if every firm in the marketplace operates within the KE, there will be differences among those firms. To the extent that firms differ with regard to elements of this new paradigm, they are also likely to differ in terms of their policies regarding information exchanges. A balancing model, like that provided by the NLRA, will be best able to identify these differences and to adopt policies that are responsive to the dynamics of the particular firm and employees involved.

¹⁶⁰ *Id.*

¹⁶¹ See Jan Eeckhout & Boyan Jovanovic, *Knowledge Spillovers and Inequality*, 92 AM. ECON. REV. 1290 (2002) (describing choices firms make regarding how much to rely on transfers of knowledge).

¹⁶² *Id.* at 1290.

¹⁶³ *Id.*

Moreover, having determinations regarding KE workplace information exchange rights made by an administrative agency like the NLRB, which arguably possesses considerable “expertise” with respect to workplace regulation matters,¹⁶⁴ also seems to make a lot of sense. The NLRB can, as it does in a myriad of workplace regulation areas,¹⁶⁵ weigh properly specific facts and balance employee versus employer interests.

C. Congressional Proposals

Unfortunately, however, recent congressional proposals in this area have not involved NLRA reform. Instead, recent bills in Congress have addressed this issue via amendments to the FLSA, refocusing the regulatory approach away from flexibility and towards rigid regulation.

The proposed bills have been framed as amendments to the *anti-retaliatory provisions* of the FLSA.¹⁶⁶ Such provisions are very broad and strict since they seek to protect employees in the exercise of their rights under the statute to some very basic and important protections, such as the right to a congressionally established minimum wage.¹⁶⁷ The anti-retaliatory provisions are *absolute* in the sense that they are *not* subject to any defenses. By equating the protections regarding wage discussions to the anti-retaliatory provisions of the FLSA, the recent regulatory proposals make it “per se” illegal for an employer to take any action against an employee (i.e., discharge or in any other manner discriminate against, coerce, intimidate, threaten, or interfere)¹⁶⁸ “because the employee inquired about, disclosed, compared, or otherwise discussed the employee’s wages or the wages of any other employee.”¹⁶⁹

We believe that the recent congressional proposals represent regulatory overkill. While open workplace wage and other information exchange is an important general part of the KE, there are clearly certain situations where strong arguments exist in favor of limiting the flow of such informa-

¹⁶⁴ See Lee Modjeska, *In Defense of the NLRB*, 33 MERCER L. REV. 851, 855 (1982); Michael J. Hayes, *After ‘Hiding the Ball’ is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 561-64 (2002).

¹⁶⁵ See, for example, the cases involving the distinction between permissible predictions and threats in the context of organizing campaigns. *Compare* Crown Cork & Seal Co., 255 N.L.R.B. 14, 14 (1981) (finding a threat where the employer fails to establish an objective factual basis for the prediction that unionization at the plant involved will result in a shutdown), *with* Bo-Ed Inc., 281 N.L.R.B. 226, 227 (1986) (finding no threat where the employer commented that other unionized restaurants in the area had either closed or were not doing well financially).

¹⁶⁶ 29 U.S.C. §215 (2000).

¹⁶⁷ 29 U.S.C. §206(a) (2000).

¹⁶⁸ See, e.g., Fair Pay Act of 2001, S. 684, 107th Cong. § 4(7) (2001).

¹⁶⁹ *Id.*

tion. Amending the FLSA to make such limitations “per se” unlawful thus appears to make little sense.

D. *The State Approaches*

Of the two different state approaches identified above,¹⁷⁰ the California approach represents the better model. The Connecticut approach appears ineffective, or at least too limited, since it has been construed to apply to issues only of public concern as opposed to issues regarding the concerns of individuals as employees.¹⁷¹ It appears that in the context of workplace information rights, the “public concern” element will rarely be present.

The California approach presents a mixed bag. On one hand, the California statute is an improvement over the various congressional proposals in one very important respect. As discussed earlier,¹⁷² the various proposals introduced in Congress over the last couple of years have amended the anti-retaliatory provisions of the FLSA. Accordingly, the protections in the federal bill are not subject to any kind of defense. The protections regarding wage and working conditions discussions, under the California statute, are not linked to anti-retaliatory provisions, and more importantly, *do* provide for some exceptions. The California Legislature included a provision in its 2002 amendments to this legislation providing that the right to discuss working conditions “is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.”¹⁷³

By recognizing that there might be situations in which limits on the right to workplace information exchange might be necessary, the revised California statute provides a significantly better approach to regulating this area than the proposed congressional legislation. The exceptions provided under the amended California law, however, are rather narrow, addressing only issues of trade secrets and other proprietary information. As we argued above,¹⁷⁴ we think that questions regarding workplace information rights are far broader than trade secrets issues. Moreover, this California statutory limitation appears to apply only to employee discussions of “working conditions,” and not to their discussion of “wages.”¹⁷⁵

¹⁷⁰ See *supra* notes 134-54 and accompanying text.

¹⁷¹ See *supra* notes 148-54 and accompanying text.

¹⁷² See *supra* notes 132-3 and accompanying text.

¹⁷³ CAL. LAB. CODE § 232.5(d) (West 2002).

¹⁷⁴ See *supra* notes 35 -37 and accompanying text.

¹⁷⁵ § 232.5(a)-(c).

In short, the approach taken in the revised California statute is clearly a step in the right direction, but does not go far enough. The California law explicitly recognizes the importance of workplace information exchange, which is preferable, given the continued development of the KE. Moreover, the revised statute recognizes some possible limitations on the right to workplace information exchanges. The scope of these limitations, however, does not appear to be broad enough.

E. *A Simple Proposal for Reform: Making the NLRA More Effective*

Clearly, given the advent of the KE, the issue of employee/workplace information exchange rights is a highly important one, and one that has recently commanded considerable legislative and scholarly attention. In addition, building on the analyses of Professors Gilson, Hyde, and Stone, it also seems clear that some reform is needed to get legal regulation in sync with the KE. The issue then becomes, what type of legal reform?

Our discussion above suggests that a flexible approach to reform in this area is needed, and that congressional enactment of recently proposed legislation making all employer restrictions on workplace wage and related information exchange “per se” unlawful would be a big mistake. Moreover, any new legislation needs to go beyond just the trade secrets-type area. A uniform federal approach to regulating this important area of economic activity makes more sense than leaving the matter to state and local jurisdiction.

In developing a specific model of proposed reform, recent scholarship by University of Chicago Law Professor Cass R. Sunstein dealing with the topic of human behavior and employment law, and appearing in the *Virginia Law Review*,¹⁷⁶ is particularly helpful and instructive. First, Professor Sunstein points out that, contrary to the “conventional wisdom,” workers often do not know about “legal rules” governing the employment relationship.¹⁷⁷ As developed extensively above, this is true with respect to employee rights to exchange information in the workplace. Employees are generally unaware of their right to exchange information regarding wages, hours, and working conditions (information rights) despite explicit protection in Section 7 of the National Labor Relations Act.

Thus, it is clear that step one of any proposed model of reform involves making employees more aware of their rights in this regard. This, however, may be easier said than done.

¹⁷⁶ Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001).

¹⁷⁷ *Id.* at 206; see also, Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997).

For example, in 1993 a prominent labor and employment law professor submitted a rulemaking petition to the NLRB asking the Labor Board to mandate that all employers covered by the NLRA (which includes most private sector employers) place a poster in their workplaces informing employees of their specific Section 7 rights to engage in “concerted activity” even absent the existence of a union.¹⁷⁸ The NLRB has not yet acted on this rulemaking petition.¹⁷⁹

Consequently, it seems time for Congress to directly address this issue by amending the NLRA to require all covered employers to give clear “notice” to their employees regarding their Section 7 rights. Such notice should involve both posting of workplace notices and periodic distribution to employees of information in this regard.¹⁸⁰

Somewhat ironically, an old federal statute, the NLRA, seems uniquely able to address the issue of employee information exchange rights in the new millennium. The NLRA’s potential effectiveness, in this regard, will continue to lie dormant, however, unless employees are informed regarding their comprehensive rights under this statute. The matter calls for immediate congressional action. Sometimes simple changes to the law can be highly instrumental in allowing the law to achieve its full promise.

CONCLUSION

As a variety of leading legal scholars have made clear, today’s new “knowledge economy” has potentially created a need for new doctrines of employment law. This dynamic arguably exists, perhaps as much as anywhere else, with respect to the issue of employee rights to exchange information in today’s workplace. This article analyzes this matter from a law and economics perspective. It argues that, somewhat ironically, the National Labor Relations Act, as it exists currently, already provides an excellent general framework for regulation of this area, but that the NLRA needs to be amended clearly to provide employees with greater notice of their broad Section 7 statutory rights.

¹⁷⁸ See Charles J. Morris, Rulemaking Petition to the National Labor Relations Board, (Feb. 9, 1993) (on file with authors).

¹⁷⁹ Telephone interview with Jeffrey D. Wedekind, Solicitor, National Labor Relations Board (July 3, 2003).

¹⁸⁰ See Morris, *supra* note 178.