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Legalese is not spoken here.

Queen for a day: If I ran the world, would I scrap our employment laws?

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Walter Olson of the great Overlawyered.com sent a challenge over Twitter earlier this week:

For those of you who don't know Mr. Olson, he's a libertarian. :-)

I have to admit, I needed time to process this! I complain about these laws all the time, but would I really want to get rid of *all* protections for employees who want to organize, be paid a fair wage, avoid being thrown out on the street without a nickel when they are 59 years old, or need some unpaid time off so they can get their chemotherapy? No, I would not. So I would not scrap the National Labor Relations Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Family and Medical Leave Act, even if I were queen – or dictator – for a day. (I don't deal with Davis-Bacon enough to want to express an opinion on that one.)

But that's not to say I'd be averse to changing some of these laws. If I were queen for a day and could do whatever I wanted, here's what I might do:

I'd get rid of the wrongful discharge "lottery." I do think workers deserve legal protections, and I believe that the employment laws create a useful economic "cost" for exploitation.

On the other hand . . . if an employer does wrong, that should not create a multi-million-dollar windfall for the wronged employee. Windfalls are often a function of (1) how much of a "squeaky wheel" the employee was, (2) how good a lawyer the employee was able to retain, (3) how successful the forum-shopping was, (4) how anti-employer the jury was, and (5) a lot of other things that have little or no relationship to the degree of actual employer wrongdoing.

So I would scrap this whole wrongful discharge "lottery" that we have in the United States and go to something more analogous to the workers' compensation system or the Montana Wrongful Discharge from Employment Act. I'm thinking out loud, but I'd probably favor a law requiring that if employees are not discharged for good cause (as defined in my new law) the employer has to pay severance for some specified period. If the discharge is not only "without cause" but is actually for an illegal reason, then the employee would get a few years' salary, with interest. But no more zillion-dollar boondoggles. Any disputes about "cause" would be settled by arbitration. "Illegality" could continue to be resolved in court or with the relevant government agency.

I'd continue allowing employees to organize (or not) and to engage in protected concerted activity, but I would amend the NLRA so that the interpretations don't shift with every presidential administration, creating more stability and predictability for both employers and employees. (And since I'm queen for a day, my opinions about those positions would prevail!) Calling your boss an "SOB" on social media would again be a legitimate ground for termination of employment. I would allow employers to place reasonable restrictions on employees' use of social media, and return to the days when it was perfectly fine to tell employees to keep confidential information "confidential" and require them to treat each other with "respect" and "courtesy."

"Mandatory curtseys would be good."

I believe there should be a minimum wage (the level is subject to debate), and I favor paying time and a half when employees work more than 40 hours in a workweek. I'm fine with the exemptions as they currently exist. But I agree with my colleague Jon Hyman of the *Ohio Employer's Law Blog* that the Fair Labor Standards Act could use some modernization to take into account the use of mobile devices, flexible work hours, and telecommuting. The FLSA needs to become more flexible but not so "flexible" that employees lose their family and private time, which might ultimately result in the French solution of legislating that workers don't have to check their emails outside normal business hours. I'm not sure how to go about striking that balance, but I'd direct Congress to start looking at it.

I favor protections against age discrimination in employment. I don't have any major issues with the ADEA, with the possible exception of the "40 and older" age range. I have never heard of anyone being discriminated against for being age 41 — apart from models, athletes, actresses, and TV anchorwomen. Come to think of it, they deserve protection, too, so maybe I would leave the floor at 40. It also seems to me that an *upper* cap might be in order. I'd rather be told I was being let go at age 89 because I'd reached "mandatory retirement age" than because I was getting senile and incompetent. (Is that just me?) That said, any "protected age group" is necessarily going to be arbitrary, and "40 and older" doesn't strike me as outrageous. And if we had an upper cap, we might have to be amending the ADEA every few years as people live, stay healthy, and work longer, which would be a pain.

(Yes, young people – believe it or not, this was actually a TV show.)

I favor letting employees have job-protected time off for childbirth (or adoption or foster placement of a child), and for their own or their close family members' serious health conditions. (I'm going to put the FMLA military protections aside, only because getting into that will make this post way too complicated, but I'm not opposed to those, either, and in my experience companies have not had difficulty complying with them.) But I would amend the FMLA to give employers a few rights they don't have now. First, employers must be given some options when an employee is on intermittent leave that is not based on "planned medical treatment." Among other things, an employer should have the right to temporarily transfer an employee whose intermittent FMLA-covered absences are unpredictable and causing disruption and hardship to co-workers and to the company. Second, I'd tighten the definition of "serious health condition," at least for everyone between the ages of roughly 14 and 70. I would abolish (or make available only for small children and the elderly) the "one visit to a health care provider and a continuing course of treatment" and probably the "two visits to a health care provider" categories. I'd keep the other categories. From the employee side, I would consider adding grandparents to the list of covered family members. I'd also consider allowing employees to take time off to be with their adult daughters for childbirth/postpartum and add bereavement as a new FMLA event (assuming the deceased was one of the covered family members of the employee).

So, Mr. Olson, thank you for your very thought-provoking tweet! Readers, please let us know in the comments whether and how you would change any of our existing employment laws.