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Employees' IP and the Employment Relationship – Incentives to Innovate

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Relations
Law



Contexts

- The importance of innovation:
 - “Hard” IP
 - “Know-how”
- Labour market changes
- Shifts in regulation theory and policy
- Labour law as a part of the regulatory architecture to promote innovation

Labour law basics

- Contractual duties
 - Implied terms: fidelity, good faith, confidentiality
 - Express terms
- Equitable duty of confidence
- Confidential information (intellectual capital)

IP law basics

- Statutory provisions for copyright & designs
- Common law presumption for patents
- “Know-how” and restraint clauses

- Fundamental nature of “course of employment” test

The upshot

- Contract (of employment) is trumps
- Areas of uncertainty:
 - Employee/independent contractor
 - ‘the course of employment’
 - ‘confidential information’ and ‘trade secrets’
- What incentives are set?

Frameworks for allocating benefits of innovation

Two frameworks in current literature:

- Economic
- “Fairness”

Too academic?

- Practice-based alternative

Economic framework

Employers should get benefits as:

- Incentive to invest in R & D
- Greater capacity to exploit innovation
- Employers take the “risk”

Free markets encourage innovation *and* good employers

Fairness and cooperation

It may be “fair” to allocate benefits to workers

- Law should enable credible employer commitments to fair treatment
- Cooperation fosters innovation
- “Psychological” contract
- Restricted use of post-employment restraints

Limitations of approaches

- Broad
- Focused on one side
- Limited conception of parties
- Limited conception of benefits

Practice-based approach

- Focused on employment relationship
- Acknowledges multiple motivations
- Nuanced understanding of “control”
- Acknowledges industry/firm differences
- Requires empirical investigation and practical insight