


**INTRODUCTION TO  
AMERICAN EMPLOYMENT LAW  
PALACKÝ UNIVERSITY 2008**



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Deakins

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**I.**

**OVERVIEW OF  
U.S. JUDICIAL SYSTEM  
FEDERAL AND  
STATE LAWS**

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**U.S. Civil Judicial System**

- Federal Judiciary
- State Judiciary
- State Subdivisions with courts

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**Federal**

- U.S. District Courts
  - Located within States and Federal Capital
  - Trial Courts
  - General Subject Matter Jurisdiction
- U.S. Courts of Appeals
  - Eleven Circuits with Jurisdiction over appeals from defined States
- U.S. Supreme Court

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**State**

- Trial Courts
- Intermediate Appellate Courts
- State Supreme Courts
- Exclusive versus Co-Extensive Jurisdiction
- Personal jurisdiction requires "contacts with State"

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**U.S. Constitution**

- "Full Faith and Credit" Given by Federal Courts to State Court Decisions

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**ROLE OF JUDICIAL BRANCH**

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**Stare Decisis**

- Precedent Decisions are to be followed by Judges and Courts

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**Common Law**

- Developed over time
- Decision of highest court
- May be influenced by political or social views of judges

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**II.**

**THE EMPLOYMENT  
RELATIONSHIP**

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**The Employment Relationship**

- That of Master and Servant
- Complex due to pervasive government regulation

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**Common Law Applies to Employment**

- "Intentional" and "Negligent" Wrongdoing
- "Tort Law" – a civil wrong
  - Unjustified or Inexcusable intrusion in another's interests
  - Damages

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**“Intentional” =**

- Intended actions carrying risk of damage caused
- E.g. Battery

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**Negligence =**

- Duty of care owed
- Breach of duty
- Injury proximately caused by breach of duty
- E.g. Working conditions resulting in job injury

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**SOME POLICIES UNDERLYING U.S. EMPLOYMENT LAW ISSUES**

- At-Will Employment. An employee is at-will if he does not have a written contract specifying a duration of his employment or the circumstances under which he can be fired. Neither employer nor employee has any expectations to continued employment or employment for any length of time. An employer cannot, however, fire an employee or change the conditions of his employment for discriminatory reasons (prohibited by a statute).
- There should be no discrimination against an applicant or employee due to race, ethnicity, national origin, religion, sex, age, disability or certain other legally protected characteristics or status.

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**SOME POLICIES UNDERLYING U.S. EMPLOYMENT LAW ISSUES**

- The employer has the right to protect the business interests which it has invested time and money to develop. These interests include confidential and proprietary information, and trade secrets.
- The employee owes a duty of loyalty to his employer during his employment.
- The employee has the right to protect his own interests. These interests include the right to work and to move from job to job. The law encourages the mobility of workers. An employee has the right to use his skills, experience and general knowledge from one job to another.

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**Law Balances Interests of Employer and Employee**

- E.g. Privacy
- E.g. Defamation

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**Management's Interest**

- Make desired personnel movements without getting knocked down or set back (Litigation Avoidance)
  - Hiring of best people
  - Promotion and transfer of best people
  - Proper compensation
  - Removing those who don't succeed

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**Some Major Truths in U.S.**

- A rights-conscious workforce in U.S.
- Congress and State Legislatures are constantly inventing new employer regulations – “Code”
- Courts take up where Congress and State Legislature left off – Common Law
- Federal and State agencies “pro-employee”
- Everyone can get a lawyer

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**Balance Shifting in Favor of The Employee**

- Jury trials on most claims
- Majority of jurors don't trust management
- Harder to get rid of cases early
- Contingency Fees/Too many lawyers
- Strict liability
- Fee shifting statutes
- Growing list of statutory regulations
- Expanding list of theories of recovery under common law
- Unwary and untrained managers

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**“Employee At Will”**

- The traditional U.S. Rule. See *Adair v. U.S.*, 208 U.S. 161 (1908)
- Employment presumed to be voluntary and indefinite for both employer and employee
- Employee can quit whenever, without notice, and for whatever reason desired
- Employer can terminate whenever, without notice, for good cause, bad cause or no cause at all
- Neither party may breach a contract
- Employer may not violate statutes or breach common law precedent

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**Contracts of Hire**

- "Offer" = Express or Implied promise to pay for services
- "Acceptance" = Begin working or promise to work
- "Consideration" = Wages and benefits flowing from employee services

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**Mutual Assent**

- What are the Contract's essential terms and conditions?

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**Employment Handbooks, Manuals and Policies may Create Binding Employer Commitments**

- As supporting evidence to clarify other documents or statements. E.g., statement of continued duration of employment along with handbook saying employer's policy to terminate only for "just cause" can overcome at-will employment
- As proof of longer-term work where employee relied on clear promissory handbook language when work was commenced
- As "unilateral" contract creating employer duties which may not be unilaterally changed, augmented, or even withdrawn with notice
  - Employer Disclaimers

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**Employee Duty of Loyalty**

- Not to take or disclose trade secrets
- Not to take for employee's self the business opportunities that under ordinary business practice, would be thought to belong to the employer
- Not to compete with the employer while an employee

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**Individual Written Employment Contracts**

- Establish rights and obligations before and after employment
- Trade Secrets and other Confidential Information

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**Written Contracts Common Restrictive Covenants**

- Non-competition
- Non-solicitation
- Legitimate employer interest reasonably protected
- Consideration

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**Written Contracts**

- Choice of Law
- Arbitration of Disputes

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**Who are “Employers” and “Employees”?**

- Statutory definition
- Common Law
- Determine duties and protections owed the worker and by whom

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**Important Concepts**

- Independent Contractor
- Joint Employment
- Successorship

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**Employer's Liability for Acts of Supervisors**

- Law of agency
- Respondeat Superior

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**Legal Regimes Governing the Employment Relationship**

- Statutory
  - Federal
  - State
  - City or County
- Administrative Agencies
- Common Law
- The Constitution (Governmental or Public Sector Employees)

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**Employment Discrimination – Federal and State**

PRINCIPLE:

- No person or group of persons should be treated differently from another person or group under the same or similar circumstances because of a protected personal characteristic.

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**Disparate Treatment – (“Intentional”)**

- Employer may not refuse to hire, discharge, or otherwise discriminate against a person with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, national origin, age or other protected characteristic.
- Bans decisions motivated by bias or stereotyping.
- “It” happened “because of.”

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**Disparate Impact – (“Unintentional”)**

- Employer may not limit, segregate or classify his employees or applicants in any way which would deprive or tend to deprive employment opportunities because of race, color, religion, sex, national origin, age, or other protected characteristics.
- Bans policies or practices adversely impacting one group with protected characteristics where the practice is not “job related” and “consistent with business necessity.”
- EMPLOYER INTENTION TO DISCRIMINATE OR MOTIVE IMMATERIAL

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**Defenses Which Excuse Discrimination**

- Bona Fide Occupational Qualification
- Other

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**Proving Intentional Discrimination**

- Motivation proved by direct evidence
- Circumstantial Evidence: unexplained disparate treatment as proof of motive
- Systematic discrimination and statistical proof of motive

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**Circumstantial Evidence Case**

- Plaintiff must first establish *prima facie* case
- Employer must then articulate a legitimate, nondiscriminatory reason for treatment
- Plaintiff must persuade court a discriminating reason more likely explains treatment or the Employer's explanation is unworthy of belief

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**The *Prima Facie* Case**

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| <ul style="list-style-type: none"><li>■ Hiring and Promotion<ul style="list-style-type: none"><li>• Plaintiff in protected class</li><li>• Plaintiff applied</li><li>• Employer sought applicants for a vacancy</li><li>• Plaintiff was qualified for the vacancy</li><li>• Plaintiff not hired</li><li>• Employer continued to seek applicants or hired someone from another class</li></ul></li></ul> | <ul style="list-style-type: none"><li>■ Discharge or Layoff<ul style="list-style-type: none"><li>• Plaintiff in protected class</li><li>• Had been satisfactory until discharge</li><li>• Discharged</li><li>• Employer sought a replacement</li></ul></li></ul> |
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**Plaintiff's Burden to Persuade Court that Legitimate Nondiscriminatory Reason Expressed by Employer is a Pretext to Mask Discriminatory Motive**

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**The Proof Game**

- Employee
  - I'm one of "them"
  - You did "it" to me because I'm one of "them"
- Company
  - No I didn't... We had a good reason
  - Being one of them didn't enter into it
- Employee
  - You're lying (pretext)
  - Real reason: I am one of "them"

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**Proving Unintentional Discrimination – Disparate Impact**

- Plaintiff must identify a specific practice and prove the challenged practice impacted on class
- Employer must demonstrate practice is job related and justified by business necessity

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**The Proof Game**

- Class of Individuals
  - We're among "them"
  - Your practice of ... limited us in comparison to others
  - Here is our proof
- Company
  - You may have been disadvantaged but here is our job related reason for practice
  - We can show its justified by our business

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**Most U.S. Employment Discrimination Claims**

- Vast majority settled or dismissed
- 60% disposed of by pre-trial motions
- Only 4% go to trial

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**Summary Judgment**

- No genuine issue of material fact
- On the undisputed facts one side wins on law
- No trial
- Important role in discrimination cases

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**Common Discrimination Claims on the Basis of Characteristic**

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**Age Discrimination**

- Federal = Age 40+
- No preferences because of age
- No requirements for over 40 not required for under 40
- Equal standards of performance
- Allows different treatment due to "Reasonable factors other than age"

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**Sex Discrimination**

- Gender applies to men and women
- Pregnancy and childbearing
- Harassment

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**Disability Discrimination Plus Accommodation**

- Who is a “qualified individual with a disability”?
- Reasonable accommodation and undue hardship
- Medical examination and employment tests
- Psychiatric disabilities

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**Americans With Disabilities Act: The Five Main Questions**

- What is a disability?
- What are essential job functions?
- Who is a qualified disabled individual?
- What is a reasonable accommodation?
- What is an undue hardship?

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**Americans With Disabilities Act**

- What is a disability?
  - Physical or mental impairment which substantially limits one or more of the person’s major life activities or
  - A record of such an impairment
  - Being regarded as having such an impairment
- Occupational injury or FMLA serious medical condition doesn’t = disability

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**What Are Essential Job Functions?**

- Fundamental Duties of the Employment Position
- Ask:
  - Does incumbent actually perform task?
  - Will removing task fundamentally alter job?

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**Americans With Disabilities Act**

- Who is a qualified individual with a disability?
  - An individual who can perform the essential functions of the job in question with or without reasonable accommodation.

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**Americans With Disabilities Act**

- What is reasonable accommodation?
  - Any change in the work environment or in the way things are usually done that results in performance of essential job functions
  - E.g., transfer or reassignment, modification of equipment, or job restructuring

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**Americans With Disabilities Act**

- What is undue hardship?
  - an action that is excessively costly, extensive, substantial, or significantly disruptive

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**Race and National Origin**

- "Speak English Only" Rules

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**Religion Plus Accommodation**

- Duty arises when conflict between religious beliefs or practices and job requirements
- Employer must eliminate or modify job requirement unless it would be undue hardship
- Where more than one accommodation possible – employer chooses

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**Discrimination Complaints**

- No Retaliation – discrimination on the basis of conduct

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**Lifestyle Issues**

- Sexual Orientation/Preference
- Dress, Grooming, Physical Appearance
- Religious Practices
- Romantic Relationships
- Eating and Drinking
- Smoking
- Contraception
- Pornography
- Body Piercings and Tattoos

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**Sexual Orientation**

- Existing laws prohibiting discrimination against gays and lesbians
- Benefits for domestic partners?
- Transsexuals?

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**Dress, Grooming, Physical Appearance**

- Dress codes
- Religion
- "Abercrombie and Fitch" looks – race and national origin
- Disfigurement – Disability
- Appearance Standards Different for Men and Women

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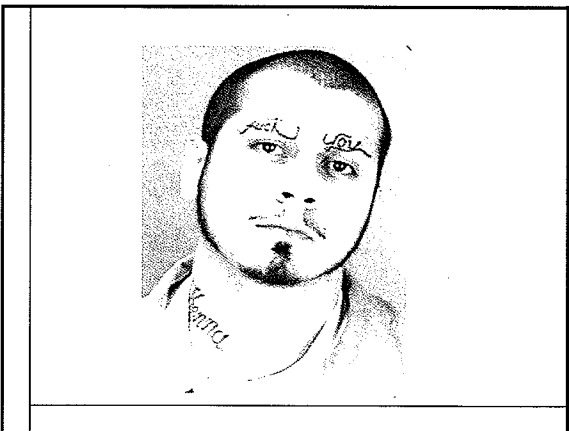
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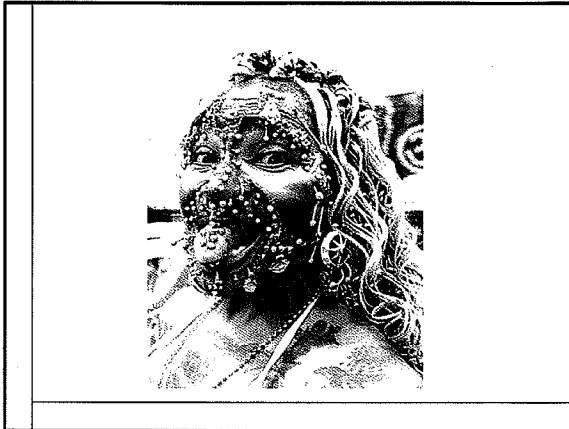
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**Religious Practices**

- Schedules
- Uniforms, Dress and Symbols

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**Eating and Drinking**

- Alcoholism
- Obesity

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**“Romance” Lawsuits**

- Sexual harassment claims based on continued attempts to date following end of relationship or use of power or coercion by person in authority
- “Paramour favoritism” claims by coworkers

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**“Romance” Lawsuits (Cont’d)**

Participant Claims:

*Huebschen v. Department of Health & Social Svcs.*

- Court rejected male employee’s retaliation claim after supervisor/former lover recommended employee’s demotion.
- Court determined supervisor made recommendation out of spite, not because of employee’s gender

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**“Romance” Lawsuits (Cont’d)**

Participant Claims:

*Reed v. Folla 31 Pub. Sch. Dist.*

- Court rejected female principal’s discrimination claim after school board did not renew principal’s contract due to her harassing conduct directed at her former lover, another district employee.

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**“Romance” Lawsuits (Cont’d)**

**Participant Claims:**

*Stephens v. Brooklyn Hebrew Sch. For Special Children*

- Trio of coworkers engaged in fight in employer’s parking lot over adulterous relationship.
- Court rejected discrimination claim, finding trio was fired because of the fight, not the relationship.

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**“Romance” Lawsuits (Cont’d)**

**Participant Claims:**

*Kepler v. Hinsdale Township High Sch.*

- Court found for defendant on discharged plaintiff’s *quid pro quo* harassment claim, but acknowledged claim could exist if a plaintiff could show former lover “threatened punishment if copulation or some form of erotic engagement was refused.”

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**“Romance” Lawsuits (Cont’d)**

**“Paramour Favoritism” Claims:**

*McDowell v. Cornell Univ.*

- Employee’s discharge following complaint about supervisor’s affair with university administrator did not constitute actionable retaliation.
- Employer’s favoritism toward paramour is not based on sex because it disadvantages men and women alike for reasons other than gender.

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**“Romance” Lawsuits (Cont’d)**

“Paramour Favoritism” Claims:  
*Wilson v. Delta State Univ.*

- Court rejected male employee’s claim that relationship between coworker and supervisor discriminatorily affected his employment
- Court determined paramour favoritism prejudiced both male and female employees

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**“Romance” Lawsuits (Cont’d)**

California’s Approach:  
*Miller v. Department of Corrections*

- Court reinstated plaintiff’s claims, finding that if sexual favoritism in workplace is sufficiently widespread it may create an actionable hostile environment.

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**The Extraterritorial Reach of U.S. Employment Laws to Foreign Jurisdictions**

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**Discrimination Coverage to U.S. Employer's Actions Overseas**

- The extraterritorial reach – U.S. laws follow expatriates
- Foreign laws defense – Must comply with conflicting local laws

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**Application of U.S. Workplace Laws to Employees Abroad**

- U.S. employment discrimination laws:
  - Prohibit discrimination by U.S. companies against U.S. citizens
  - Prohibit discrimination by a foreign subsidiary against U.S. citizens
  - Do not apply to non-U.S. citizens outside the United States

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**Application of U.S. Workplace Laws to Employees Abroad**

- The "Foreign Laws Defense" applies if:
  - Decision concerns an employee in a foreign workplace
  - Compliance with U.S. law would violate foreign law
  - Foreign law is that of the country where work is located

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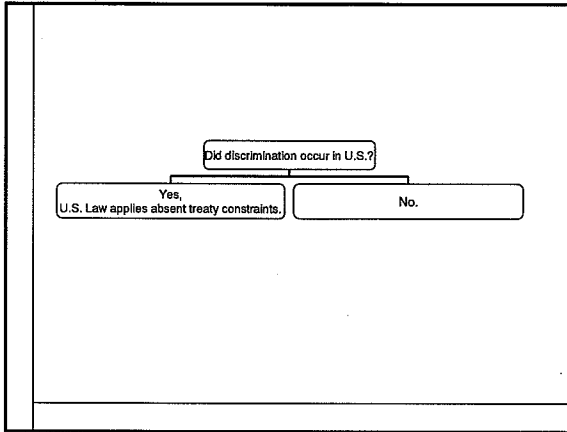
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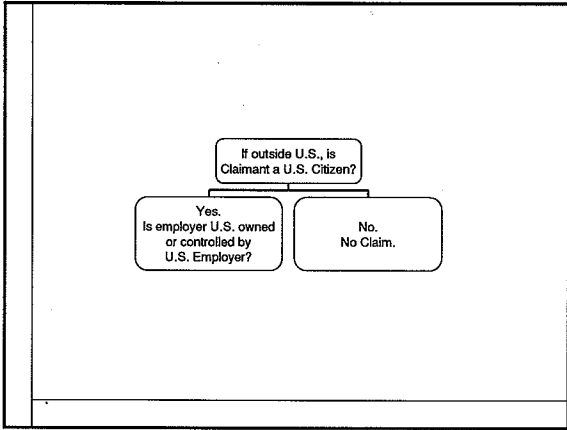
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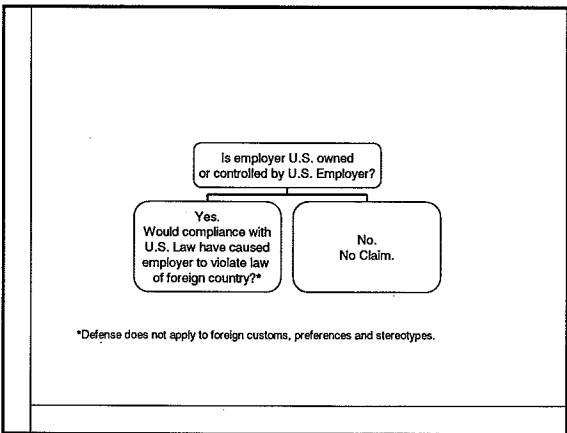
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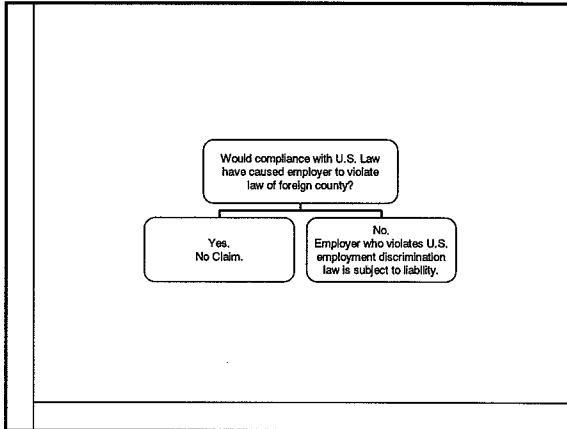
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**Affirmative Action To Advance Women and Minorities**

- U.S. Government Contractor
- Obligations
- Written Plans
- Defense to Discrimination

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**Hiring – Legal Framework**

- Discrimination Laws
- Background Checks
- Authorization to Work/Immigration Laws
- Other
  - State Law privacy: off duty use of alcohol/tobacco; AIDS; sex preference

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**Characteristics of Legal Selection Systems**

- The law generally expects employers to establish the job relatedness and business needs of any selection process, and to judge all applicants by the same criteria.
  - Objective and specific job-related selection criteria
  - Standardized and objective hiring system practices

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**Hiring**

- May an employer ask whether an applicant can perform the job?
  - YES.
- May an employer ask applicants to describe of demonstrate how they would perform the job (including any needed reasonable accommodation)?
  - YES.
- May an employer ask whether an applicant can meet the employer's attendance requirements?
  - YES.

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**Hiring**

- May an employer ask applicants about their certifications and licenses?
  - YES.
- May an employer ask applicants about their conviction records?
  - YES. *Not arrest.*
- May an employer ask applicants about their workers' compensation history?
  - NO. *Not pre-offer.*

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**Hiring**

- May an employer ask applicants about their current illegal use of drugs?
  - YES.
- May an employer ask applicants about their lawful drug use?
  - NO.
- May an employer ask applicants about their lawful drug use if the employer is administering a test for illegal use of drugs?
  - YES.

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**Hiring**

- May an employer ask applicants about their prior illegal drug use?
  - YES.
- May an employer ask applicants about their drinking habits?
  - YES. *Unless the particular question is likely to elicit information about alcoholism, which is a disability.*
- May an employer ask third parties questions it could not ask the applicant directly?
  - NO.

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**Hiring**

- May an employer require applicants to take physical agility tests?
  - YES.
- May an employer require applicants to take physical fitness tests?
  - YES.
- May an employer ask an applicant to provide medical certification that s/he can safely perform a physical agility or physical fitness test?
  - YES.

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**Hiring**

- May an employer ask an applicant to assume liability for injuries incurred in performing a physical agility or physical fitness test
  - YES.
- May an employer give psychological examinations to applicants?
  - YES, *unless the particular examination is medical.*
- May an employer give applicants tests to determine illegal use of controlled substances?
  - YES.

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**Hiring**

- May an employer give alcohol tests to applicants?
  - NO.

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**Don't**

- Don't ask questions about religion. If you need to know if religious observances might prevent the applicant from working on certain days or at certain times, ask the applicant if he or she could work at those times, or explain the job's normal shifts and overtime requirements and ask if there would be problems working those shifts.
- Don't ask dates of attendance at education institution unless necessary to verify educational history.
- Don't ask about political affiliations or about memberships in voluntary organizations or social clubs.

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**Don't**

- Don't ask questions referring directly to an applicant's race, religion, age, sex, national origin, marital status, or sexual preference.
- Don't ask applicants to submit photographs or disclose physical characteristics that may indicate race or national origin.
- Don't ask questions of women not asked of men.
- Don't ask women their maiden names or questions which may convey national origin, or for information on marriage or children.

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**Don't**

- Don't ask a woman applicant if she is pregnant or plans to become so.
- Don't ask questions about previous residences because they may convey concern about racial, economic, or ethnic status.
- Don't ask an applicant about personal finances, such as credit card rating, charge accounts, bank accounts, assets, or even home or car ownership. If the job requires a car, just ask if applicant has use of a reliable vehicle.
- Don't ask an applicant about arrests. Consider convictions only in relation to specific job requirements.

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**Don't**

- Don't ask about physical or mental disabilities at pre-offer stage.
- Don't ask about previous claims for workers' compensation.
- Don't make unrealistic or overly optimistic statements regarding career opportunities, job duties or salary.
- Don't describe employment as "lifetime, continued, or permanent."

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**Negligent Hiring, Retention and Supervision**  
**Common Law**

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**WORKPLACE HARASSMENT**

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**What is Harassment?**

- What Kind of Conduct Might Constitute Harassment?
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  - ?
  - ?

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**Harassing Conduct is Unlawful When...**

- "Sufficiently severe or pervasive" to alter terms and conditions of employment
- Objectively and subjectively objectionable
- "Because of" the victim's protected status

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**What is Sexual Harassment?**

- How Does the Law Define Sexual Harassment?
  - Unwelcome Conduct
  - Of a sexual nature
  - When such conduct:
    - Is made either explicitly or implicitly, a term of condition of employment; or
    - Is used as the basis of an employment decision; or
    - Has the purpose or effect of creating an intimidating, hostile or offensive work environment.

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- **QUID PRO QUO HARASSMENT:** *Submission to or rejection of sexual conduct is used as the basis for making employment decisions, such as promotions, pay increases, hiring and firing.*
  - Employee subject to unwelcome sexual advance.
  - Based on sex – "But for sex, not object of advance."
  - Employee reaction affected tangible aspect of the employee's compensation, terms and conditions or privileges of employment.

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■ **OFFENSIVE ENVIRONMENT HARASSMENT:**  
*Sexual conduct which unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive working environment. A violation of the law can occur even if the employee suffers no tangible or economic detriment.*

- Employee subject to unwelcome verbal or physical conduct of a sexual nature.
- Based on sex – "But for sex, not subject to conduct."
- Affected terms and conditions of employment.

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**WHAT IS "UNWELCOME" CONDUCT?**  
  
(Subjectively Objectionable)

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**Determining whether conduct is unwelcome**

- Objective evidence
- Did the employee by his/her conduct indicate that the sexual advances or conduct were unwelcome?

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**Determining whether conduct is unwelcome**

- The “totality of the circumstances” will be taken into consideration, including factors such as:
  - Whether the employee contemporaneously complained about the conduct;
  - If no complaint was made, the reason the employee did not come forward, i.e., fear of retaliation;
  - Whether the employee’s conduct was consistent or inconsistent with the claim that sexual conduct was unwelcome;
  - Whether the conduct was welcomed by the employee’s actions, i.e.: commonly using sexually explicit language, suggestive dress, or a sexually aggressive manner.

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**WHAT IS OFFENSIVE?**  
(Objectively Objectionable)

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**Does Offensive Environment Exist?**

Objective standard used:  
*Would a reasonable person facing the same conditions find the conduct offensive?*

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**Does Offensive Environment Exist?**

- What is the frequency of the conduct?
- Is it physically threatening or humiliating?
- Does it unreasonably interfere with an employee's work performance?
- Was the alleged harasser a co-worker or supervisor?
- Did others join in carrying out the conduct?

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**Does Offensive Environment Exist?**

- Was the conduct directed at more than one individual or was the complaining party singled out by the alleged harasser?
- What was the complaining party's participation?
- What was the relationship between the complaining party and the alleged harasser?  
And,
- Were the remarks hostile and derogatory?

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**What Is An Offensive Environment In The Age Of Advanced Technology?**

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**Offensive Environment Through Technology**

- E-mail
- Internet
- Computer games

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**Examining Various Kinds of Sexual Harassment That Can Occur In The Workplace**

- Employee → Employee
- Customer/Vendor → Employee
- Manager or Supervisor → Employee

WHO CAN BE LIABLE?

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**Employee → Employee**

- An employer becomes liable for sexual harassment between employees when it knew or should have known of the conduct and failed to take immediate corrective action.
- A supervisor or manager may be held personally liable for harassment which occurs between employees when the supervisor, manager, or lead knew or should have known of the harassment and failed to take immediate corrective action.

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**Employee → Employee**

- The harassing employee may be held personally liable through common-law causes of action, such as invasion of privacy, intentional infliction of emotional distress, assault, battery and defamation.

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**Manager or Supervisor → Employee**

- Quid Pro Quo Harassment: the employer will always be liable where a supervisor or manager has made or threatened to make an employment decision based on submission to sexual conduct. The use of authority and position to obtain sexual favors will result in liability even when the sexual advance or conduct occurs during non-working hours or off-company premises. The supervisor or manager may also be held personally liable for such conduct.

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**Manager or Supervisor → Employee**

- Hostile Environment: Employers are directly liable for work environment harassment. The manager or supervisor may also be held personally liable for work conduct.

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**Customer or Vendor → Employee**

- The same standard will be used as with harassment which occurs between two employees.

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**HOW DO EMPLOYERS AVOID CLAIMS OF SEXUAL HARASSMENT?**

**THE AFFIRMATIVE DEFENSE**

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**Employer Prevention Program**

- **EMPLOYEE AWARENESS**
  - Written policy prohibiting sexual harassment communicated to employees
    - Handbook
    - Employee Bulletin
    - At Hire
  - Top management has expressed strong disapproval of sexual harassment
  - Employees informed of right to raise complaints and how to raise

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**Did Employee Unreasonably Fail to Utilize Program?**

- PROCEDURES FOR REDRESS
  - Procedure for reporting
  - Prompt investigation
  - Prompt, effective remedial action\*
  - Follow-up to make sure harassment ended
  - Offenders appropriately punished

\*Reasonably calculated to halt harassment

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**True, False, or Maybe?**

- A man as well as a woman may be the victim of sexual harassment, and a woman as well as a man may be the harasser.
- The victim does not have to be the opposite sex of the harasser.
- The victim does not have to be the person at whom unwelcome sexual conduct is directed. He or she may be someone who is affected by such conduct when it is directed towards another person.

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**True, False, or Maybe?**

- The victim does not have to complain to the harasser or report the harassment to his/her supervisor or employer in order for the employer to be held responsible for the unlawful conduct when committed by a supervisory employee.

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**True, False, or Maybe?**

- If the harasser is a non-supervisory employee, the employer is not responsible for the act committed by the harasser unless he/she knew or should have known and failed to take immediate and appropriate corrective action.
- Submission to the requests for sexual favors does not negate the victim's rights to file a sexual harassment complaint.

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**True, False, or Maybe?**

- If an employee is receiving benefits (promotions, increases, etc.) as a result of a voluntary sexual relationship with a supervisor/manager, employees being denied these same benefits are eligible to file a complaint of sexual harassment.

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**True, False, or Maybe?**

- Explicit sexual language and provocative dress by an employee may be taken into account when that employee files a complaint of sexual harassment.
- Annoying obscene language and sexually oriented poster displays create a hostile work environment.

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**True, False, or Maybe?**

- A supervisor's constant touching, attempting to kiss and other sexual advances towards an employee constitute sexual harassment.

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**Sexual Harassment or Not?**

- A supervisor invites a subordinate of the opposite sex to lunch.
- A supervisor asks a subordinate of the opposite sex out on a date.
- A supervisor and a subordinate of the opposite sex take a business trip together, staying in separate rooms and discussing only business.
- During dinner, the supervisor and subordinate consume alcoholic beverages.

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**Sexual Harassment or Not?**

- The supervisor and a subordinate have a consenting physical encounter after a few cocktails. After the business trip ends, the supervisor stops giving the subordinate meaningful work projects and responsibilities and then gives the subordinate a poor performance evaluation based upon a lack of initiative in work.

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**Sexual Harassment or Not?**

- During a business trip, an employee makes remarks and sexual physical contact with a female employee. She complains to a supervisor, and 12 hours later, the company president tells her she needs to stay on the business trip but would not have to work with the co-worker after the conclusion of the trip, 1- 1/2 days later.

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**Sexual Harassment or Not?**

- During a business trip, a female employee makes sexual innuendoes & lewd jokes to a male employee. He complains, and the company transfers the male employee and reprimands the female worker.

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**Sexual Harassment or Not?**

- An office manager touches his female employees affectionately and calls them his "little ladies." They do not mind.
- A new employee is hired into the situation above. She complains but nothing is done.

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**Sexual Harassment or Not?**

- Two employees at the same level in the company become involved in a romantic relationship.
- A supervisor and a subordinate of the opposite sex become involved in a romantic relationship.
- An employee rejects a homosexual advance and is fired.

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**Sexual Harassment or Not?**

- A customer makes suggestive remarks to an employee. The employee complains. A supervisor says it's unfortunate, but there is nothing they can do.
- A supervisor avoids communication with an employee who rejected his sexual advances.
- A supervisor unjustly criticizes the work of an employee who refused his advances.

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**Termination of Employment –  
Statutory and Common Law**

- Four reasons for discipline/discharge
  - Attendance
  - Behavior/Conduct
  - Job Performance
  - Redundancy
- Importance of employer policies and procedures

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**The "At Will" Rule**

- All employment for indefinite period is presumed to be "at will"
- Unless a contract says otherwise
  - Breach of contract
- Unless a law says otherwise
  - Fire someone for illegal reason
- Unless employer fails to enforce and thereby waives policies (*Goodyear* case, TX Sup. Ct.)

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**Erosion of The "At Will" Rule**

- No performance of illegal acts
- Protective legislation – no discrimination
- Reporting unlawful or improper employer activity – "Whistleblower"
- Public Policy Limits
- Express Contracts
- Employee performing statutory duty or exercised right conferred by law
- Employer waiver of right to terminate for assigned reason

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**THE NEW GAME: TURN EVERY EMPLOYMENT CLAIM INTO A "PERSONAL INJURY" CASE**

**THE COMMON LAW CLAIM**

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**Why?**

- Can Win More (\$\$\$)
- Jury Trial
- Possible Insurance
- Attorneys Fee-Shifting Statutes (Company pays twice!)

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**How?**

- EEO Claim
- Public Policy
- Find a new "tort"
  - Defamation
  - Privacy
  - Fraud
  - Assault/Battery
  - Intentional Infliction of Emotional Distress for outrageous conduct
  - Negligent Hiring/Retention

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**The Proof Game**

- Employee
  - I'm one of "them"
  - You discharged me because I'm one of "them"
- Company
  - No I didn't... We had a good reason
  - Being one of them didn't enter into it
- Employee
  - You're lying (pretext)
  - Real reason: I am one of "them"

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**How to Prove Pretext?**

- Find the weakness or inconsistency in management's story

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**Constructive Discharge**

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**References for a New Job after Termination**

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**Redundancy**

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**Hours of Work, Absence from Work, and Payment of Wages**

- Statutory
- Basic Concepts
  - Hours of Work
  - Minimum Wage
  - Overtime Pay
  - U.S. Federal Minimum Wage \$6.55 per hour (106 CZK)

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**Overtime Pay**

- Regular rate
- Time worked
- Tip credit
- Exemptions

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**Attendance Legal Issues**

- Discrimination
- Pregnancy
- Disability
- Family and Medical Leave
- Drug/Alcohol Abuse or Treatment
- Religious Accommodation
- Civil (jury, voting)
- On-the-job injury
- Uniformed Military Service

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**Benefits**

- Time off for holidays and vacations determined by Employer
- Healthcare
  - Employer decides or provides
  - Non-discrimination and minimum standards
  - Privacy protection
  - Continuation of coverage after employee terminates
- Retirement Plans
- Social Security

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**Health and Safety**

- Federal Occupational Safety and Health Administration
- State Adoption
- On-the-job injury protection for health benefit and wage continuation
  - "Worker's Compensation"

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**Employment Law Remedies**

- Common Law Tort Remedies
- Common Law Contract Remedies
- Statutory Remedies

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**Statutory Remedies**

- "Intentional" Violations = not an accident
- "Make whole"/"Rightful Place"
- Equitable Process

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**Remedies for Employees**

- Front Pay
- Back Pay
- Employment Benefits
- Reinstatement/Hiring
- Compensatory Damages

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**Remedies for Employees and Employers**

- Injunctions
- Punitive Damages
- Attorneys' Fees
- Liquidated Damages

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**Limitations on Remedies**

- Duty to Mitigate
- Damages
- CAPS

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**How Employment Claims Are Customarily Resolved in U.S. Today**

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**Courts**

- Decided by Judge or Jury
- Cannot always choose
- Decider/Fact Finder
- Full Evidentiary and Discovery Rules
- Formal Trial
- Held at Time and Place Convenient to Court
- Public Proceedings

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**Courts**

- Can Appeal Adverse Decision
  - Question of fact, law, discretion
- Takes Time
- Expensive
- Parties Pay Their Own Attorney (unless contract or statute apportions costs/fees)

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**Arbitration**

- Usually Need Contract Provision
- Decided by One or More Arbitrators Chosen by the Parties
  - Arbitrators independent
  - Arbitrators frequently experts in disputed field
- Evidentiary Rules Loosened; Discovery Restricted
- More Informal Hearing
  - Evidence still Presented
  - Cross Examination still occurs
- Held at Time and Place Convenient to Parties and Arbitrator

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**Arbitration**

- Proceedings Private (until challenge to decision)
- Cannot Appeal Arbitrator's Decision Except for Limited Circumstances:
  - Failure to follow procedures
  - Decision arbitrary and capricious
    - But no second guessing decision
  - Bias
- Decision Can Be Enforced by Filing In Court
- Takes Less Time than Court
- Less Expensive
- Parties Split Cost of Arbitrator and Pay Their Own Attorneys Fees (unless contract or statute apportion costs/fees)

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**Mediation**

- Attempt to Settle Case with Use of a Neutral Facilitator – Negotiation
- Court May Require Mediation
- Mediator Does not Decide Case
- If the Parties do not Reach a Settlement, Matter Proceeds to Court/Arbitration
- Parties Split Costs of Mediator and Pay Their own Attorneys Fees

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**Current Issues**

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**“Caregiver Discrimination”**

- Sex-based disparate treatment and stereotyping of female caregivers
- Pregnancy discrimination
- Discrimination against male caregivers
- Stereotyping or harassment of workers who are caregivers for disabled family members
- Retaliation against workers who assert their rights or complain about discrimination
- Disability Law “association” discrimination

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**Retaliation Claims**

- Many possible sources

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**Why Are Retaliation Claims Increasingly Common?**

- Otherwise complaint employers face real risks
  - Whiner employee who makes unwarranted complaints may provoke negative reaction from supervisor or co-workers
- Broad scope – not just adverse *employment* actions
  - Can be based on actions that “would have been materially adverse to a reasonable employee” and could “dissuade a reasonable worker from making or supporting” a complaint
- Serves as a “back up” claim
  - If the main claims fails, plaintiff can pursue retaliation

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**Elements of Retaliation Claim**

- Employee must prove:
  - (1) engaged in protected activity;
  - (2) employer was aware employee engaged in protected activity;
  - (3) employer took adverse employment action; and
  - (4) circumstances sufficient to raise inference that protected activity likely contributed to decision

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**Reasonably Perceived Violation**

- Generally, employee need only demonstrate complaint arose from a reasonably perceived violation.

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**Class or Collective Actions**

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**“Whistleblowing”**

- Sarbanes-Oxley Act
- Fraud by U.S. Government Contractors

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**Trade Secrets/Non-Compete Litigation**

- More frequent in poor economy
- Significant movement of key employees

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