

# INTRODUCTION TO AMERICAN EMPLOYMENT LAW

## PALACKY UNIVERSITY 2008

### I. INTRODUCTION TO U.S. JUDICIAL SYSTEM

- A. US has Federal and State Laws
- B. Federal – Matters of importance to the country as a whole
- C. State – Matters Which Each State Should Control as Sovereign
  - 1. General employment matters
  - 2. Each state has its own legislative and court-made laws
  - 3. A state only has jurisdiction over a person who has sufficient contacts with that state
    - a) Through residence or principal place of business
    - b) Through general contacts with the state – “doing business”
    - c) Through other contacts specific to the matter at issue
- D. Sometimes a State Can Regulate a Matter Already Regulated by the Federal Government
  - 1. Many employment matters are regulated by state and federal laws
- E. The Rule of Law Comes from the Constitution (Federal or State), the Legislative Branch (Congress or Legislature) and the Courts
- F. The Legislative Branch Enacts Statutes – formal laws
- G. The Courts
  - 1. The Courts review the statutes enacted by the Congress or Legislature
    - a) Decide whether a statute is valid and constitutional; and
    - b) Interpret the statute’s wording, meaning, and application to particular facts
  - 2. The Courts also create and develop legal doctrines known as the Common Law

3. The Common Law is:
  - a) Developed over time
  - b) Based on Precedent – past court decisions
  - c) Based on decisions of the highest court
    - (1) The state trial court and court of appeals must follow the decisions of the state supreme court
    - (2) For matters covered by federal law, a state court, federal district court and federal court of appeal must follow the decisions of the U.S. Supreme Court
  - d) May be influenced by political or social views of judges.
4. Here we deal with both Statutory and Common Law

## II. THE EMPLOYMENT RELATIONSHIP

### A. Introduction

1. Why study common law?
2. The traditional “Employment At Will” Rule

### B. Verbal Work Agreements and Implied Contracts

### C. Employee Handbooks and Manuals

### D. Express Written Employment Contracts

1. Introduction
2. Noncompetition and other restrictive covenants
3. Choice of Law Provisions
4. Arbitration Provisions – Limited Judicial Review
5. Letter to an Employee as a Contract

### E. Identifying Responsible Parties: Who are “Employers” and “Employees”?

1. Independent Contractors
2. Joint Employment

3. Successorship
  4. Penalties for misclassification
- F. Employer's Liability for Acts of Supervisors
- G. Legal Regimes Governing the Employment Relationship
1. Statutory Regulation
    - a) Federal
    - b) State
    - c) City or County
  2. Administrative Agencies
  3. Common Law
    - a) Tort "Intentional" and "Negligent" Wrongdoing
    - b) Contracts
  4. The Constitution (Governmental or Public Sector Employees)

### III. FEDERAL STATUTES

- A. The Core Statutes Generally
- B. Title VII of the Civil Rights Act (Title VII)
- C. The Age Discrimination in Employment Act (ADEA)
- D. The Americans with Disabilities Act (ADA)
- E. Collateral Overlapping Statutes and Programs
  1. The Equal Pay Act (EPA)
  2. Immigration Reform and Control Act (IRCA)
  3. The Civil Rights Act of 1866
  4. Executive Order 11246 for U.S. Government Contractors
- F. Social Legislation That Goes beyond "Invidious" Discrimination: Employee Rights Statutes
  1. Generally

2. The Employee Retirement Income Security Act (ERISA)
3. The Family and Medical Leave Act (FMLA) and Pregnancy Discrimination Act (PDA)
4. The Veterans Reemployment Rights Act (USERRA)
5. The Occupational Safety and Health Act (OSHA)
6. The Worker Adjustment and Retraining Notification Act (WARN)
7. Employee Polygraph Protection Act
8. Fair Credit Reporting Act (FCRA)

#### G. Labor Unions and Collective Agreements

1. National Labor Relations Act (NLRA)
2. Rights of Employees
3. Employer Rights and Obligations
4. The Role of Unions and Collective Bargaining Agreements
5. The Federal Preemption Doctrine

#### IV. STATE STATUTES

- A. Overlapping with Federal
- B. Additional Employee Rights and Remedies

#### V. EMPLOYMENT DISCRIMINATION

- A. Discrimination – What an Employer Can and Cannot Do
  1. Disparate Treatment/”Because of”
  2. Disparate Impact/Adverse Effect – Statistics show apparent nondiscriminatory practice has discriminatory effect
- B. Sources of Bans on Discrimination
- C. Proving Discrimination
  1. The *prima facie* case
    - a) Member of protected class

- b) Qualified for job, duties
- c) Employer adverse action
- d) Adverse action because of protected class (does not have to be only reason)

2. Proving Employer Pretext

3. The Summary Judgment Procedure

D. Age Discrimination – An Overview

E. Sex Discrimination – An Overview

- 1. Prohibited Sex Discrimination
- 2. Pregnancy and Childbearing
- 3. Sexual Harassment

F. Disability Discrimination – An Overview

- 1. Who is a “Qualified Individual With a Disability”?
- 2. Reasonable Accommodation – Employer’s Affirmative Duty – But Essential Job Functions Must Be Performed By Employee
  - a) Employee must prove that employer failed to reasonably accommodate employee. Reasonable accommodations include:
    - (1) Job restructuring
    - (2) Change or limiting of work schedules
    - (3) Using equipment or devices
    - (4) Assignment to vacant position
  - b) Employer defenses:
    - (1) There is no reasonable accommodation
    - (2) Even with reasonable accommodation, employee would not be able to perform essential functions of job
    - (3) Reasonable accommodation would be a hardship to employer

(4) The employee's performance of duties as disabled would be a hazard to the employee, his co-workers or the public

3. Medical Examinations and Employment Tests

4. Psychiatric Disabilities

G. Discrimination Based on Race, National Origin, or Religion – An Overview

1. "Speak English Only" Rules

2. Religious Accommodations

H. Affirmative Action – An Overview

1. Employers Covered by Affirmative Action Regulations

2. Employer Affirmative Action Obligations

3. Written Affirmative Action Plans

4. A Defense to Discrimination

I. Lifestyle Issues

1. Sexual Orientation/Preference

2. Dress, Grooming, Physical Appearance

3. Religious Practices

4. Romantic Relationships

5. Eating and Drinking

6. Smoking

J. Extraterritorial Reach of U.S. Discrimination Laws

K. Discrimination Complaints

1. Discrimination Complaint Procedures

2. No Retaliation – Discrimination on the Basis of Conduct

## VI. HIRING

A. Introduction

1. Recruiting and Advertising

2. Job Requirements
- B. Initial Steps in the Hiring Process
    1. Employment Applications
    2. Interviews
    3. Job Offers
  - C. Avoiding Discrimination
    1. Employer's Duty Not to Discriminate
    2. Preemployment Inquiries
    3. Inquiries After Offer of Employment
  - D. Immigration and Employment – An Overview
    1. Verifying Employment Eligibility
    2. Sanctions for Hiring an Unauthorized Alien
    3. Immigration-Related Discrimination
  - E. Hiring Tests
  - F. Negligent Hiring, Training, Retention and Supervision
- VII. HOURS OF WORK, ABSENCE MANAGEMENT AND PAYMENT OF WAGES
- A. Hours of Work
    1. In General
  - B. Fair Labor Standards Act (FLSA)
    1. Federal Minimum Wage Rate
    2. Overtime Pay for Work Week
  - C. Operating under the FLSA
    1. Minimum Wage/Overtime Records
    2. Calculating Regular Pay Rate
    3. Calculating Time Worked

4. Calculating Overtime Pay
5. Tipped Employees
6. Exemptions
  - a) Executive
  - b) Administrative
  - c) Professionals
  - d) Commissioned Employees

#### D. Attendance Legal Issues

1. Discrimination
2. Pregnancy
3. Family and Medical Leave
4. Disability
5. Drug/Alcohol Abuse or Treatment
6. Religious Accommodation
7. Civic (jury, voting)
8. On-the-job Injury
9. Uniformed Military Service

#### E. Family and Medical Leave

1. Family and Medical Leave – An Overview
2. Employees Eligible for Leave

### VIII. BENEFITS

#### A. Overview

#### B. Health Care Benefits

1. Employer Determines or Provides
2. Non-Discrimination Protection and Minimum Standards

3. Privacy Protection
  4. Continuation of Health Insurance When Employment Terminates
- C. Retirement Plans – An Overview
- D. Social Security

## IX. HEALTH AND SAFETY

- A. Occupational Safety and Health Administration
1. Standards
  2. Right-to-Know Laws
  3. Enforcement
- B. State Workers' Compensation Laws

## X. HARASSMENT

- A. Harassment Concepts Generally – A Form of Discrimination
- B. Tangible Employment Action (“Quid Pro Quo”)
- C. Hostile Environment
1. Generally
  2. “Unwelcome”: The Objective Element
    - a) Nature of words or acts
    - b) Frequency and length of time
    - c) Context
  3. “Offensive”: The Subjective Element
  4. “Because of”
  5. Employer’s Affirmative Defense
- D. “Employer” Liability for Harassment
1. Effective Remedy Past and Prospective
  2. Senior Officers

3. Mid-Level Supervisors
4. Co-Worker Harassment

E. Overreaction Danger – Claims From the Accused

## XI. TERMINATION OF EMPLOYMENT

A. Introduction

1. Three Reasons for Disciplinary Discharge
2. Policies and Practices

B. Erosion of the Common Law “Employment At-Will” Rule: Wrongful Discharge

1. No Performance of Illegal Acts
2. Protective Legislation
3. Reporting Unlawful or Improper Employer Activity – “Whistleblowers”
4. The Limits of Public Policy
5. Express Contracts
6. Employee Performing Statutory Duty or Exercised Right Conferred By Law
7. Employer Waiver of Right To Terminate for Assigned Reason

C. Implied Covenants: Good Faith and Fair Dealing

D. Use of General Tort Theory

1. Defamation
2. Invasion of Privacy
3. Fraud
4. Assault/Battery
5. Infliction of Emotional Distress for Abusive Dismissal
6. False Imprisonment

E. Statutory Limits on Termination

F. Constructive Discharge

## G. Termination and References

1. References after Termination
2. Blacklisting

## H. Redundancy

1. Closure of a Business or Facility
2. Relocation
3. Diminishing Need for Employees
4. Unemployment Compensation

## XII. EMPLOYMENT LAW REMEDIES

### A. Introduction

### B. Remedy and Damage Theories: The Purposes of Remedies

1. Common Law Tort Remedies
2. Common Law Contract Remedies
3. Statutory Remedies

### C. Remedies Available Only to Employees or Prospective Employees

1. Back Pay
2. Front Pay
3. Fringe Benefits
4. Reinstatement

### D. Remedies Available to Both Employees and Employers

1. Injunctions
2. Punitive Damages
3. Attorneys' Fees
4. Liquidated Damages

### E. Remedy Award Limitations

1. The Duty to Mitigate Damages
2. Limits on Availability of Equitable Remedies
3. Deductions, Caps & Offsets
4. Tax Considerations

### XIII. COURTS, ARBITRATION, AND MEDIATION

#### A. Courts

1. Decided by Judge or Jury
2. Cannot Always Choose Decider
3. Full Evidentiary and Discovery Rules
4. Formal Trial
5. Held at Time and Place Convenient to Court
6. Proceedings Public
7. Can Appeal Adverse Decision
  - a) Questions of fact, law, discretion
8. Takes Time
9. Expensive
10. Parties Pay Their Own Attorneys Fees (unless contract or statute apportions costs, fees)
11. Ninety-Five Percent of Cases Do Not Go to Trial. Resolution is usually by Settlement, Mediation or Arbitration

#### B. Arbitration

1. Usually Need Contract Provision
2. Decided by One or More Arbitrators Chosen by the Parties
  - a) Arbitrators independent
  - b) Arbitrators frequently experts in the disputed field
3. Evidentiary Rules Loosened; Discovery Restricted

4. More Informal Hearing
  - a) Evidence still presented
  - b) Cross examination still occurs
5. Held at Time and Place Convenient to Parties and Arbitrators
6. Proceedings Private (until challenge to decision)
7. Cannot Appeal Arbitrator's Decision Except for Limited Circumstances:
  - a) Failure to follow procedures
  - b) Decision arbitrary and capricious
    - (1) But no second guessing decision
  - c) Bias
8. Decision Can Be Enforced by Filing in Court
9. Takes Less Time than Court
10. Less Expensive
11. Parties Split Cost of Arbitrator and Pay Their Own Attorneys Fees (unless contract or statute apportions costs, fees)

#### C. Mediation

1. Attempt to Settle Case with Use of a Neutral Facilitator – Negotiation
2. Court May Require Mediation
3. Mediator Does not Decide Case
4. If the Parties Do Not Reach a Settlement, Matter Proceeds to Court/Arbitration
5. Parties Split Costs of Mediator and Pay Their Own Attorneys Fees

#### XIV. CURRENT ISSUES

- A. Introduction
- B. Negligent Hiring or Retention
- C. Alternative Dispute Resolution

- D. Class or Collective Actions
- E. “Whistleblowing” (Sarbanes-Oxley Act)
- F. Electronic Media and Communications
- G. “Caregiver” Discrimination
- H. Trade Secrets/Non-Compete Litigation

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