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EMPLOYMENT AND LABOR LAW

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Patrick J. Cihon James Ottavio Castagnera

Employment and Labor law

Tenth Edition

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PREFACE

More than three decades ago, when we first undertook the writing of an employment and labor law textbook, we had no notion that our creative effort would carve itself such a long-lasting niche in higher education. Clearly, however, the release of this tenth edition, as well as accolades like those below, confirm that *Employment and Labor Law* is now firmly established. Lest this sound as if we were resting on our laurels, allow us to hastily add that this new edition has been significantly revised and updated. A source of particular pride is Part 1, expressly intended to bring our "old standard" firmly into the employment and labor as we stand on the cusp of the third decade of the 21st century. Three decades gone by, the third decade of the millennium just ahead, and three issues of critical importance—privacy, globalization, and immigration—treated in-depth. Additionally, numerous new cases and "The Working Law" features ensure that every chapter of this new volume is on the cutting edge of the topic it covers. Here are some of our adopters' kind words, presented with our sincere appreciation:

> I have practiced labor and employment law for over twenty years and I think this is the best text for a basic labor and employment law class…. It's simple to read and straightforward. I tell my students to keep the book and not sell it because it is quite helpful for the basic questions they will be asked in the work world.
>
> Maris Stella (Star) Swift
> *Grand Valley State University*

> The text is well laid-out, and is written in language that is appropriate for the students; there is no reason for the students to not read the text. The questions that follow the edited cases help to focus the student's analysis of the case in question, its relevance to the topic, and introduce the student to legal concepts and outcomes they tend to neglect or may not fully understand….
>
> Curt M. Weber
> *University of Wisconsin–Whitewater*

> [*Employment and Labor Law* has an] excellent balance of in-depth case-law readings, related ethical considerations, Internet resources, and foundational materials for the non-lawyer audience.
>
> Susan F. Alevas
> *New York University*

Hallmark Features

In the constantly changing, often controversial areas of employment and labor law, the tenth edition of *Employment and Labor Law* provides current information in a way that highlights critical thinking, ethical decision making, and relevance to the business world.

Current and Balanced Coverage

This text offers a comprehensive balance of both employment law and labor law topics and includes up-to-date information. This edition includes the changes already wrought by the Trump Administration, most especially the Republican-dominated National Labor Relations Board and Department of Labor's Wage and Hour Division, as well as the conservative majority now dominant on the U.S. Supreme Court.

Readability

In no other area of the law are nonlawyer professionals exposed to such legal regulation, and in no other area do they experience the need for "lawyer-like" skills to the extent that human resources directors and industrial relations specialists do. This book is therefore written to help business and management students, not necessarily lawyers. The straightforward writing style clarifies complex concepts, while pedagogical features help readers develop the legal reasoning and analysis skills that are vital for success in the business world.

The Working Law

Connecting legal concepts and cases to our everyday environment, The Working Law features highlight the relevancy of the law while sparking student interest and bringing concepts to life. Cutting-edge topics like emotional distress via social networking websites and increasing age discrimination claims in today's tough economy, as well as controversial discussions about sweatshops and the landmark Affordable Care Act, are just a few of those considered in this tenth edition.

Ethical Dilemma

What is the extent of global corporate social responsibility? Can employers use genetic information in hiring decisions? What are the boundaries regarding religion and harassment in the workplace? Questions like these, presented in the Ethical Dilemma features in each chapter, address the increasing need for ethical behavior in decision making. These features can be used to encourage debates in class or as assignments that consider the differences between what is legal and what is ethical.

Guide to Briefing Cases

Students will find the Guide to Briefing Cases to be a valuable reference. It gives a quick overview of how to read a case citation and outlines what information to provide in a brief. While offering an excellent refresher for students who have already taken legal environment or business law courses, it also gives students with no previous legal background an introduction to the basics of case analysis.

Case Treatment

Many new summarized cases, in which the authors outline the facts, issue, and decision of a real case in their own words, have been added to provide more case illustrations that are concise and student-friendly. However, as learning to interpret cases in the language of the court is crucial in developing analytical and critical thinking skills, half of the cases in the text remain excerpted in the words of the courts. These case extracts have been crisply edited to focus attention on the relevant concept, while including occasional dissents and/or concurring opinions, which allow the reader to experience the fact that law develops from the resolution—or at least the accommodation—of differing views. These two different types of case treatment allow for flexibility in approach and depth of coverage.

Concept Summaries

Concept Summaries throughout each chapter reinforce the legal concepts illustrated in applicable sections and provide students with a quick outline to ensure that they understand what they have read.

Key Terms

To help students master the specialized legal terminology and easily identify integral ideas, a Key Terms section is included at the end of each chapter. Page references direct students back to the relevant chapter content and marginal definitions.

End-of-Chapter Problem Types

Each chapter contains five short-answer questions regarding basic chapter comprehension, ten case problems based on real cases, and five hypothetical scenarios to provide students an opportunity to critically analyze real-life situations without a case citation reference. This versatility in the end-of-chapter assignments offers instructors a variety of ways in which to engage students and measure comprehension.

Recent Coverage

The tenth edition of *Employment and Labor Law* includes recent and up-to-date coverage on many topics. Some of the highlights of this edition include the following:

- **Chapter 1:** This cutting-edge chapter provides a broad overview of the employment and labor law landscape covered in the subsequent chapters. Worthy of special note in this tenth edition is the inclusion of *Epic Systems v. Lewis*, the long-awaited Supreme Court decision that settles the question of whether the waiver of class-action rights in favor of individual arbitration in an employment contract is enforceable in a federal court. (The answer, by the way, is yes.) Also included is an updated "The Working Law" on public-employee unions in the wake of the Supreme Court's 2018 *Janus v. AFSCME* decision. Last, but not least, a revised "Ethical Dilemma" explores the efforts by Presidents Obama and Trump to legislate via Executive Orders when the Congress refuses to act.

- **Chapter 2:** While most courts across the country hold that the public-policy exception to at-will employment is unavailable to plaintiffs alleging employment discrimination (since a statutory remedy already exists), the California courts have diverged from this pattern, as illustrated in a 2018 opinion by the federal court for central California.
- **Chapter 3:** In mid-2019, as President Trump beefed up tariffs against Chinese goods and forbade U.S. companies from using Chinese telecommunications equipment, allegations of theft of trade secrets by Chinese nationals working in the United States was much in the media. This issue is highlighted in a 2018 opinion issued by the federal court in Philadelphia, *U.S. v. Xi*, which explains why such employee behavior can be a crime.
- **Chapter 4:** Perhaps no issue is of greater concern to employees—after compensation and benefits—than personal privacy in this so-called Information Age. From the possibility of genetic testing for latent medical defects to the ability to monitor our email, our Internet usage, indeed our every move, privacy rights are in jeopardy, while litigation nonetheless increases. Sure to encourage lively debates, this chapter brings privacy issues to the forefront. For example, *Ringelberg v. Vanguard Integrity Professionals–Nevada* (2018) involves an investigator, working for the former employer, who planted a GPS on the former employee's automobile.
- **Chapter 5:** "The world is flat," to quote *New York Times* columnist Thomas Friedman. Employers and employees alike compete against their counterparts in other regions of the globe. No longer is it enough for students of employment and labor law to grasp the major tenets of American statutory and common law. Furthermore, in a 21st-century society that has moved way beyond America's traditional melting pot, knowledge of the rules and regulations applying to immigrants, international students, and foreign workers is critical. As this tenth edition went to press, President Trump had only just proposed a new set of immigration policies, making this a red-hot issue. This chapter explores these issues. But perhaps most fascinating is one of several decisions in the long and poignant saga of a group Nepalese workers lured to the Middle East with promises of gainful employment and then trafficked by their ostensible employers.
- **Chapter 7:** This chapter includes the red-hot question of whether transgender-based discrimination is covered by Title VII's ban on employment discrimination based on sex. Presented here is one of the several consolidated cases, this one a 2019 opinion from the U.S. Court of Appeals, accepted in spring 2019 by the U.S. Supreme Court in order to resolve the dispute on this issue festering among the federal circuits.
- **Chapter 8:** The case of *Masterpiece Cakeshop v. Colorado* (Supreme Court, 2018) is added to our cutting-edge "The Working Law" on the impact of state religious freedom restoration acts. A 2019 federal case out of Texas explores an employee's right to critique his employer on social media for the latter's alleged failure to accommodate the former's religious beliefs.
- **Chapter 9:** The Supreme Court's decision in *Mount Lemmon Fire District v. Guido* (2018), a rare instance in which the employer was too small to be covered by the ADEA.
- **Chapter 10:** Two more brand-new cases explore the impact of the opioid epidemic and the proliferation of medical-marijuana laws on the ADA and vice versa.
- **Chapter 11:** The revised chapter documents the battle of Executive Orders between the outgoing Obama administration and the incoming Trump presidency in the context of

sexual-orientation and equal-pay rights for employees of government contractors and efforts by the Trump administration to curtail LGBTQ rights.

- **Chapter 14:** An expanded discussion of the recent NLRB decisions regarding employer restrictions on employees' use of social media and the employee status of NCAA Division I football players is included, and the Working Law feature covers the NLRB unfair practice complaint against Boeing for moving production lines to South Carolina. The board's 2015 "quickie election" rules are also discussed.
- **Chapter 16:** A case addressing the legality of the NFL lockout of its players in 2011 is included in this chapter.
- **Chapter 17:** This chapter discusses the recent changes in the NLRB policy of whether to defer to arbitration on unfair labor practice complaints.
- **Chapter 18:** This chapter includes a discussion of employers' obligations to post information regarding employee rights under Executive Order 13496, as well as President Obama's controversial executive orders regarding fair pay for female workers and nondiscrimination protection for LGBT employees.
- **Chapter 19:** View significant labor law issues in an everyday, easy-to-relate-to setting with this chapter's updated material on national security and collective bargaining rights for federal employees and TSA airport screens. This chapter has expanded information on the National Security Personnel System, political action committees, the TSA, and current related cases.
- **Chapter 21:** Following market preferences, this chapter combines content on ERISA with that of employee welfare programs like Social Security, workers' compensation, and unemployment compensation.

Instructor Resources

Instructor's Manual

The Instructor's Manual provides an overview of the chapter, a lecture outline with page references, case synopses for each excerpted case, answers to the case questions, and answers to the end-of-chapter questions, case problems, and hypothetical scenarios.

Test Bank

The Test Bank includes true/false, multiple-choice, short-answer, and essay questions ready to use for creating tests. The Test Bank is available through Cognero.

Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to:

- Author, edit, and manage test bank content from multiple Cengage Learning solutions
- Create multiple test versions in an instant
- Deliver tests from your LMS, your classroom, or wherever you want

PowerPoint® Slides

PowerPoint slides offer a basic chapter outline to accompany class lecture. They also highlight the key learning objectives in each chapter—including slides summarizing each legal case and each The Working Law and Ethical Dilemma feature.

Textbook Companion Website

The companion website for this edition of *Employment and Labor Law* provides access to the Instructor's Manual, Test Bank, and PowerPoint slides. The website also offers links to the following: a number of important employment and labor law statutes, important labor and employment law sites, labor and employment law blogs, legal forms and documents, free legal research sites (comprehensive and circuit-specific), help in the classroom, labor and employment law directories, departments, agencies, associations, and organizations.

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University of South Alabama

Lastly, the authors wish to rededicate the book to the memory of their parents, John E. and Marian M. Cihon and James Ottavio and Catherine L. Castagnera.

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Adjunct Professor of Law, Drexel University

GUIDE TO BRIEFING CASES

Reading and understanding cases is required in order to understand and analyze the legal decisions forming the basis of the law. A case is a bit like a parable or a fable. It presents a set of facts and events that led two opposing parties into a conflict requiring resolution by a court or an agency. The judge or adjudicator is guided by legal principles developed from statutes or prior cases in the resolution of the dispute. There may be competing legal principles that must be reconciled or accommodated. The case is a self-contained record of the resolution of the dispute between the parties, but it is also an incremental step in the process of developing legal principles for resolution of future disputes.

It is the legal principles—their reconciliation and development—and the reasoning process involved that justify the inclusion of the cases we have selected. The critical task of the reader, therefore, is to sift through the facts of a case and to identify the legal principles underlying that case. In analyzing a case you may find it helpful to ask, after reading the case, "Why was this particular case included at this point in the chapter? What does this case add to the textual material immediately preceding it?"

In analyzing the cases, especially the longer ones, you may find it helpful to "brief" them. Case briefing is a highly useful corollary to efficient legal research. A case brief is nothing more than a specialized outline. As such, a brief summarizes the main feature of a court opinion. A group of briefs, accurately and lucidly constructed, often forms the bridge between the relevant decisions identified by a lawyer's research, on one hand, and the memorandum of law, which is his or her final work product, on the other. The following template should prove useful in outlining the case excerpts published in this textbook.

How to Brief a Case

1. **Case Name:** The case name need not include a complete list of all the plaintiffs and defendants, where multiple parties were involved. Typically, a decision is identified by the last name of the first-named plaintiff and the last name of the first-named defendant. Organizations that are parties should be identified by their full names, except that terms such as "Corporation" may be abbreviated, for instance as "Corp."

   For the *Alexander* case presented here, the case name would be *Alexander v. Gardner-Denver Company*.

2. **Case Citation:** Published decisions are identified by the reporters in which they are published. Typical citations begin with the volume number, followed by the name of the reporter, and then the page number where the case begins. Following this information will be the date of the decision in parentheses.

   For example, in the *Alexander v. Gardner-Denver Company* case, the citation is 415 U.S. 36 (1974). This tells the reader that the case appears in volume 415 of the official Supreme Court reporter, starting on page 36, and that the Court announced this decision in 1974.

   Citations come in a dizzying variety of forms. They all have one thing in common: A proper citation provides sufficient information for the reader to know the precise place where the full text can be located, the court that issued the decision, and the date it was announced. The "Bible" of case citations is *The Bluebook: A Uniform System of Citation*, published by the editors of the *Harvard Law Review*. It is now available online at https://www.legalbluebook.com.

3. **Facts:** Here a concise summary of the main facts of the case are presented in no more than a couple of paragraphs. Only facts relevant and material to the court's decision should be included.

   In the *Alexander* case, the full legal case has been summarized into relevant facts for you already.

4. **Procedural History:** In a sentence or two the briefer presents an explanation of how the case made its way to the appeals court in which it is now under consideration.

   In the *Alexander* case, the history has been summarized for you already.

5. **Issue:** A critical portion of the brief, this section identifies the precise question that *this* court is being asked to answer. The issue is usually expressed in the form of a question. That question seldom is the ultimate question in the underlying case, such as whether the defendant in a criminal case is guilty or whether the plaintiff in a civil suit is entitled to damages. Rather, the issue before the appellate court is usually a more narrow legal point that is an essential step toward enabling the trial judge or jury to reach a correct decision on the ultimate issues of the lawsuit. The issue on appeal is almost always a question of law, not fact.

   For example, in *Alexander v. Gardner-Denver Company*, the U.S. Supreme Court was required to tell the lower federal courts whether a union member (Alexander) was required to submit his discrimination case to a labor arbitrator exclusively or whether he could also pursue his rights under the federal antidiscrimination statutes. The Court was not asked to decide the ultimate issue of whether or not the plaintiff had meritorious discrimination claim.

6. **Decision (or Answer):** Here, in a very few words, the briefer records how the court answered the question that was posed to it.
7. **Reasoning:** The analysis underlying the court's decision should be summarized here. As with the "Facts," this analysis should be no more than a couple of paragraphs in length.
8. **Observations:** This optional section is where the briefer may choose to add his or her own reaction to the court's opinion, some notes on decisions that closely agree or sharply disagree with the outcome of the case, or any other observations that he or she thinks may be useful when it comes time to write the research paper, memorandum of law, or other work product at the end of this research product.

PART 1

COMMON-LAW EMPLOYMENT ISSUES

CHAPTER 1

First the Forest, Then the Trees: An Overview of Employment and Labor Law

Employment and labor are, arguably, as old as recorded history. In the New Testament's parable of the laborers in the vineyard, we find those workers who began picking grapes at dawn complaining to the owner because those he hired at noon received the exact same wage as they got. "What business is it of yours, if I choose to be generous?" he inquires rhetorically.

The parable is a rare recorded case of employer largesse. More often workers' complaints have involved too little pay, lack of benefits, unreasonably long hours, or unsafe workplace conditions. When such complaints have typically been addressed, it was by the workers themselves or the government.

For example, in the Middle Ages—when many Europeans believed the earth was flat—craftsmen formed guilds according to their respective trades. But by the 14th century, as one famous historian has explained, "Once united by a common craft, the guild masters, journeymen, and apprentices had spread apart into entrepreneurs and hired hands divided by class hatred. The guild was now a corporation in which the workers had no voice."[1] Dissatisfaction led to working-class revolts, which in turn resulted in brutal reprisals by the upper classes.[2]

The Black Death, a plague that first decimated Europe's population in the mid-14th century, actually benefited those workers who survived. The labor shortage encouraged demands for higher wages and better conditions. Rulers' responses were swift and severe. In 1339, Britain's king issued a proclamation that required everyone to accept the same wages that they had received two years earlier. The new labor law also established stiff penalties for refusing to work, for leaving a job in search of higher pay, and for an offer of higher wages by an employer. Parliament reissued the proclamation as the Statute of Laborers in 1351, not only denouncing workers who had the temerity to demand higher wages, but especially decrying those who chose "rather to beg in idleness than to earn their bread in labor."[3]

employment-at-will both the employee and the employer are free to unilaterally terminate the relationship at any time and for any legally permissible reason, or for no reason at all

common law judge-made law, as opposed to statutes and ordinances enacted by legislative bodies

The Industrial Revolution in 19th-century England and America witnessed the rise of the **employment-at-will** doctrine in the **common law**. At-will employment—covered in depth in Chapter 2—meant, in theory, that either the employer or the worker could terminate their relationship at any time for any reason. In reality, the employers had all the bargaining power; real negotiation of terms and conditions of employment was, for the most part, a myth.

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[1] Barbara W. Tuchman, *A Distant Mirror: The Calamitous 14th Century* (New York: Alfred A. Knopf, 1978), p. 39.

[2] *Ibid.*, pp. 383–91.

[3] *Ibid.*, pp. 125–26.

To put the relationship more nearly into balance, workers banded together into labor unions. The reaction of the American judiciary, drawn almost exclusively from the upper, propertied class, was negative. Early court cases concluded that labor organizations were criminal conspiracies.[4]

Labor, however, persisted. The unions' first breakthrough came in 1842, when the Supreme Judicial Court of Massachusetts held that unionized workers could be indicted only if either their means or their ends were illegal, and that the "tendency" of organized labor to diminish the employer's gains and profits was not in itself a crime.[5] Progress was slow but more or less steady thereafter, highlighted by such federal legislation as the Federal Employers Liability Act (1908) and the Railway Labor Act (1926), which allowed for alternative methods of dispute resolution, first in the railroad and later in the airline industry.

1-1 The New Deal and the Rise of the Modern American Union

Still, nearly a century would elapse before the Great Depression and the subsequent New Deal of President Franklin D. Roosevelt resulted in the enactment of the major federal employment and labor laws, which govern the fundamental features of the employment relationship and unionization to this very day. These statutes include:

- The Social Security Act (1935), which provides modest pensions to retired workers
- The National Labor Relations Act (NLRA; 1935), which sets the ground rules for the give and take between labor unions and corporate managers
- The Walsh-Healy Act (1936), the first of several statutes to set the terms and conditions of employment to be provided by government contractors
- The Merchant Marine (Jones) Act (1936), which provides remedies for injured sailors
- The Fair Labor Standards Act (1938), which sets minimum wages, mandates overtime pay, and regulates child labor

Before these statutes could revolutionize the American workplace, FDR's New Deal had to survive constitutional challenge in the Supreme Court. In the early years of Roosevelt's presidency (1933–1936), the justices repeatedly refused to enforce New Deal legislation, consistently declaring the new laws unconstitutional. Only after FDR threatened to "pack" the court with new appointments from the ranks of his New Deal Democrats did the high court reverse course and declare a piece of labor legislation to be constitutionally legitimate.

In *West Coast Hotel Company v. Parrish*,[6] the challenged law was actually a state statute. Elsie Parrish, a chambermaid working at the Cascadian Hotel in Wenatchee, Washington (owned by the West Coast Hotel Company), sued her employer for the difference between what she was being paid and the $14.50 per 48-hour workweek mandated by the state's Industrial Welfare Committee and the Supervisor of Women in Industry, pursuant to a state law. The trial court held for the defendant. The Washington Supreme Court, taking the case

[4] See, e.g., *Commonwealth v. Pullis*, 3 Commons & Gilmore (Philadelphia Mayor's Court 1806).

[5] *Commonwealth v. Hunt*, 44 Mass. (4 Met.) 111 (1842).

[6] 300 U.S. 379 (1937).

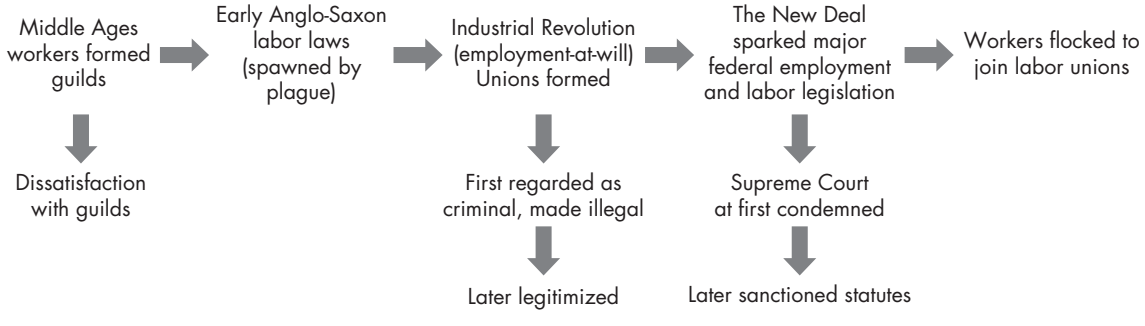
on a direct appeal, reversed the trial court and found in favor of Mrs. Parrish. The hotel appealed to the U.S. Supreme Court. In a decision that clever pundits labeled "the switch in time that saved the nine" (because it forestalled the president's court-packing plan), the justices asked, "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"

The Court majority answered those questions by stating that the legislature of the state was clearly entitled to consider the situation of women in employment, that they were in the class receiving the least pay, that their bargaining power was relatively weak, and that they were the ready victims of those who would take advantage of their necessitous circumstances. Furthermore, continued the Court, the legislature was entitled to adopt measures to reduce the evils of what was known as "the sweating system," which referred to the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living. Deferring to the judgment of the state lawmakers, the Court majority conceded that the legislature had the right to consider that its minimum wage requirements would be an important component of its policy of protecting these highly vulnerable workers. The opinion pointed to the prevalence of similar laws in a growing number of states as evidence of a broadening national consensus that (1) sweatshops were evil and (2) these kinds of laws significantly contributed to their eradication.

While this ruling was directly applicable only to state minimum wage laws—and arguably, only to such statutes as they applied to women—the broader impact was essentially to sweep away judicial opposition to the flood of legislation at both federal and state levels, which was overwhelmingly favorable to workers and their labor organizations. One result was a rush by workers to join labor unions, which organized with legal impunity. Corporations that resisted were charged with unfair labor practices under the NLRA—covered in depth in Part 3—and compelled by the National Labor Relations Board (NLRB) to recognize and bargain with organized labor.

Concept *Summary* 1.1

Labor Disputes Are as Old as Recorded History



1-2 The Postwar Decline of Organized Labor

Several significant issues and trends combined to cause the gradual decline of organized labor in America from its peak in the 1950s, when one in three private-sector employees belonged to a union, to only about seven out of every 100 eligible private-sector workers being unionized in 2010.[7]

Several factors contributed to this precipitous decline. First, many policymakers, especially in the conservative camp, became concerned about labor leaders' abuse of power. One of the worst examples occurred when John L. Lewis, president of the United Mine Workers, violated a "gentlemen's agreement" with the Roosevelt administration during World War II. Sullivan called a strike at the height of the war, making his miners look unpatriotic and selfish in the public eye. Critics, especially politicians aligned with "Big Business," believed the combined American Federation of Labor/Congress of Industrial Organizations (AFL-CIO) had grown to be far too potent. The upshot in 1947 was the Taft-Hartley Act, a federal statute that enacted unfair labor practices for which unions might be punished, such as coercing workers to join against their will.

As the Cold War developed between the U.S. and the U.S.S.R., perceived communist influences in some large and powerful unions, notably the International Longshoremen's Association, placed organized labor in the gun sights of such so-called Red Hunters as the infamous Senator Joseph McCarthy. Similarly, alleged organized-crime ties of other huge unions, especially Jimmy Hoffa's Teamsters, attracted the attention of politicians, ranging from Senator Estes Kefauver in the 1950s to Attorney General Robert F. Kennedy in the early 1960s.

globalization
the integration of national economies into a worldwide economy, due to trade, investment, migration, and information technology

Most destructive of all to organized labor, however, has been **globalization**. American industry's stranglehold on major manufacturing sectors, such as autos and steel, was successfully challenged immediately after World War II—first by a reconstructed Japan, then subsequently by many other Asian and European competitors. The manufacturing sector was the bedrock of unionism. When it declined, organized labor inevitably followed. As in the Middle Ages, the earth is once again flat.[8]

individual employee rights
rights enjoyed by workers as individuals, as against collective rights secured by unionization; sources are statutes and court decisions

Meanwhile, among the many political and social trends of the 1960s was the rise of **individual employee rights**. Leading the way was the Civil Rights Act of 1964. Title VII[9]—covered in detail in Part 2—declared employment discrimination illegal if based on race, sex, religion, or any of several other "protected categories." Other laws and court decisions followed in relatively quick succession, seemingly in inverse proportion to the steady decline of collective bargaining under the auspices of organized labor. Other major examples of individual employee rights laws and legal concepts include the Age Discrimination in Employment Act (ADEA; 1967) and the generalized recognition of theories of wrongful discharge (see Chapter 2) and related employment-related torts (see Chapter 3) in American common law.

These new laws and common-law legal theories have often supplanted labor unions as the main source of legal protection for American workers. In fact, sometimes they actually

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[7] Jerry White, "US trade union membership at lowest level in more than a century," *World Socialist Web Site*, February 3, 2010, available at http://www.wsws.org/en/articles/2010/02/unio-f03.html.

[8] See Thomas L. Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Strauss and Giroux, 2005).

[9] 42 U.S.C. Sec. 2000e *et seq.*

have conflicted with the legal remedies available to workers under collective bargaining agreements. For example, under Title VII, an employee alleging illegal discrimination has the right to file a complaint with the Equal Employment Opportunity Commission (EEOC). If he or she is a union member, that same employee has not only a right but an obligation to pursue any such wrong as a grievance under the collective agreement with his or her employer, apparently as the exclusive remedy.

In *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), the Supreme Court was called upon to reconcile this clash between individual and collective worker rights within a decade of Title VII's enactment. The employer wanted to limit the aggrieved employee's remedy to the grievance/arbitration procedures in the collective bargaining agreement that Gardner-Denver had with Alexander's union. More to the point, the company wanted to cut off Alexander's access to Title VII. The Court refused to allow this to happen, holding that the doctrine of **election of remedies** was inapplicable in the present context, which involved statutory rights distinctly separate from the employees' collective contractual rights, regardless of the fact that violation of both rights may have resulted from the same fact pattern. By merely resorting to the arbitration procedure, Alexander did not automatically waive his cause of action under Title VII; the rights conferred in fact could not be prospectively waived. Such an implied waiver formed no part of the collective bargaining process. The arbitrator's authority was confined to resolution of questions of contractual rights, regardless of whether they resembled or even duplicated Title VII rights. It would take 35 years for the high court to reverse this rule in two stages.

election of remedies
the requirement to choose one out of two or more means afforded under the law for the redress of an injury to the exclusion of the other(s)

In *Alexander*, the Supreme Court established a critical distinction between individual and collective employee rights. Perhaps it was not the Court's intention, but the decision had the effect of further undermining the rapidly eroding influence of labor unions in the American workplace. If union members are able to effectively pursue their rights outside of the labor–management relationship, then why should they bother to pay dues to a labor organization?

1-3 The Resurrection of the Arbitration Remedy

The proliferation of individual employee rights soon swamped the state and federal courts. By the 1980s, for example, employment law cases dominated the federal District Court dockets across the country. In their heyday, labor unions diverted much of this court business into their grievance/arbitration processes. The decline of organized labor combined with the Supreme Court's ruling that individual rights—at least those derived from antidiscrimination, **whistleblower**, and other such statutes—could not be automatically ceded to the labor–management dispute-resolution process contributed significantly to the litigation tsunami.

whistleblower
an employee who reports or attempts to report employer wrongdoing or actions threatening public health or safety to government authorities

In 1991, in *Gilmer v. Interstate/Johnson Lane Corporation*, the Supreme Court revisited the issue of whether an agreement to arbitrate employment disputes could ever trump an employee's right to pursue his or her claims under a federal statute that enabled the aggrieved employee to file a complaint with an agency and/or in court. The Court held that an ADEA claim could be subjected to compulsory arbitration. The case involved a standard employment contract that almost all employees in the financial-services industry are required to sign.

Gilmer's impact on the federal common law was profound. The U.S. trial and appellate courts extended its reach to virtually all types of employment discrimination cases. Simultaneously, federal agencies also embraced alternative dispute resolution (ADR).

THE **WORKING** LAW

At the close of 2014, the EEOC sent a sharp signal that the outer limits of deferral to arbitration had been reached so far as that agency was concerned, and that, indeed, the trend required a strong push in the opposite direction. On September 22, 2014, the discrimination watchdog issued the following press release:

> Restaurant Franchiser Unlawfully Barred New Hires from Filing Discrimination Charges, Federal Agency Charges
>
> MIAMI Doherty Enterprises, Inc., a regional company that owns and operates over 140 franchise restaurants, including Applebee's and Panera Bread locations scattered throughout Florida, Georgia, New Jersey and New York, unlawfully violated its employees' right to file charges of discrimination with the Equal Employment Opportunity Commission (EEOC), the federal agency charged in a lawsuit filed yesterday.
>
> According to the EEOC, Doherty required each prospective employee to sign a mandatory arbitration agreement as a condition of employment. The agreement mandates that all employment-related claims—which would otherwise allow resort to the EEOC—shall be submitted to and determined exclusively by binding arbitration. The agreement interferes with employees' rights to file discrimination charges, the agency says.
>
> Interfering with these employee rights violated Section 707 of Title VII of the Civil Rights Act of 1964, which prohibits employer conduct that constitutes a pattern or practice of resistance to the rights protected by Title VII. Section 707 permits the EEOC to seek immediate relief without the same presuit administrative process that is required under Section 706 of Title VII, and it does not require that the agency's suit arise from a discrimination charge.
>
> The EEOC filed suit in the U.S. District Court for the Southern District of Florida (*EEOC v. Doherty Enterprises, Inc.*, Civil Action No. 9:14-cv-81184-KAM). The suit has been assigned to U.S. District Judge Kenneth A. Marra.
>
> "Employee communication with the EEOC is integral to the agency's mission of eradicating employment discrimination," explained EEOC Regional Attorney Robert E. Weisberg. "When an employer forces all complaints about employment discrimination into confidential arbitration, it shields itself from federal oversight of its employment practices. This practice violates the law, and the EEOC will take action to deter further use of these types of overly broad arbitration agreements."
>
> EEOC District Director Malcolm Medley added, "Preserving access to the legal system is one of the EEOC's six strategic enforcement priorities adopted in its Strategic Enforcement Plan. When an employer seeks to deter people from exercising their federally protected Title VII rights, the EEOC is uniquely situated to seek an end to such unlawful practices, and to ensure the necessary safeguards are in place to allow employees to participate in the EEOC's charge filing process."[10]

Supreme Court Allows Arbitration Clause in Labor Contract to Abrogate Employee's Right to Pursue An Individual Action in Court

The EEOC's 2014 policy pronouncement in *Doherty Enterprises* appears to pose a challenge to the Supreme Court's reconsideration of *Alexander* five years earlier. On April 1, 2009, by a vote of 5–4, the Court held that where a provision of a collective bargaining agreement clearly and unmistakably requires union members to arbitrate ADEA claims, the federal courts will enforce this provision. Writing in dissent, Justice Stevens complained, "Notwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated from, and in some cases reversed, prior

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[10] "EEOC Sues Doherty Enterprises over Mandatory Arbitration Agreement," *JDSUPRA Business Advisor*, September 22, 2014, available at http://www.jdsupra.com/legalnews/eeoc-sues-doherty-enterprisesover-manda-72282.

decisions based on its changed view of the merits of arbitration.... [T]he Court in *Gardner-Denver* held that a clause of a collective bargaining agreement (CBA) requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims.... Today the majority's preference for arbitration again leads it to disregard our precedent."[11]

However, in 2012, the NLRB, dominated by Obama appointees, signaled that they intended to interpret the *14 Penn Plaza* holding very narrowly. Thus, while a Democrat was occupying the White House, the EEOC and NLRB appeared to be of one mind where substitution of private ADR remedies for statutory rights and recourse to federal courts and agencies are concerned. But in 2017, President Donald Trump's pick for the Supreme Court, Justice Neil Gorsuch, was confirmed, putting the conservative Justices firmly in the saddle and sharply changing what had been considered the expected course for these types of cases.

Epic Systems Corp. v. Lewis is an explicit example of the pro-employer impact Republicans have had on the Supreme Court in more recent years, first by blocking the nomination of President Obama's pick for the Court, Merrick Garland, in 2016, and then by cementing another conservative on the Court with Justice Gorsuch. In one of the first decisions authored by the new Justice, the majority held that an agreement to waive class-action rights and submit to arbitration in an employee's contract trumps the courts' ability to entertain a class-action suit under the Fair Labor Standards Act.

The frustrated Justice Stevens's complaints in *Alexander* are somewhat echoed in Justice Ginsburg's more recent dissenting opinion in *Epic Systems Corp. v. Lewis*, which shows how little things have actually changed since *EEOC v. Doherty Enterprises, Inc.* was filed. In her dissenting opinion, Ginsburg laments, "The court today holds enforceable this arm-twisted, take-it-or-leave-it contract—including the provisions requiring employees to litigate wage and hours claims only one-by-one.... Federal labor law does not countenance such isolation of employees."

CASE 1.1

EPIC SYSTEMS CORP. V. LEWIS

584 U.S. ___ (2018)

Facts: This case was a consolidation of three separate cases: *Epic Systems Corp. v Lewis* (Docket 16-285), *Ernst & Young LLP v. Morris* (16-300), and *National Labor Relations Board v. Murphy Oil USA, Inc.* (16-307). In each case, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Nonetheless, each employee sought to litigate Fair Labor Standards Act (FLSA) and related state law claims through class or collective actions in federal court. Although the Federal Arbitration

[11] *14 Penn Plaza LL.C. v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009) is excerpted and discussed in greater depth in Chapter 9.

Act (FAA) generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes the obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements violated the National Labor Relations Act (NLRA). The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable, but in 2012 the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these. Following that ruling, other courts have either agreed with or deferred to the Board's position.

Issue: Under the NLRA and the FAA, can employment contracts legally bar employees from collective arbitration?

Decision: The Supreme Court held that arbitration agreements in which an employee agrees to arbitrate all claims against an employer on an individual basis do not violate the NLRA, regardless of the allowances set by the saving clause of the FAA. Penning the majority opinion, the recently appointed Justice Gorsuch wrote that the FAA "has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Gorsuch further noted that the Court has rejected past efforts to manufacture conflicts between the Arbitration Act and other federal statutes, and nothing in the NLRA hints at a manifest wish to displace the FAA. In a dissenting opinion, Justice Ginsburg wrote, "The court today holds enforceable this arm-twisted, take-it-or-leave-it contract—including the provisions requiring employees to litigate wage and hours claims only one-by-one…. Federal labor law does not countenance such isolation of employees."

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However, in another recent case, the NLRB ruled against an employer's arbitration agreement precluding workers from joining a class action. Whether that decision will survive appeal remains to be seen.

CASE 1.2

Apple SoCal, LLC D/B/A Applebee's, Apple American Group II, LLC D/B/A Applebee's and Apple American Group, LLC and Samuel Y. Rodriguez

367 NLRB No. 44 (2018)

Facts: Samuel Y. Rodriguez, an employee at Applebee's restaurant, alleged in a complaint that Applebee's maintained and enforced a mandatory arbitration agreement that unlawfully restricts employees' statutory right to pursue class or collective actions in violation of Section 8(a)(1) of the NLRA. The complaint also alleged that the mandatory arbitration agreement included language that employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board. On May 2, 2018, Applebee's filed a motion for partial summary judgment and a supporting brief. Applebee's contended that the allegation that the arbitration agreement includes language that employees would reasonably conclude prohibits or restricts their right to file charges with the Board should be dismissed as untimely under Section 10(b) of the Act. On July 2, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why Applebee's motion should not be granted in favor of either party with respect to the 10(b) issue.

Issue: Does a mandatory arbitration agreement violate Section 8(a)(1) because it prohibits or restricts employees' access to the NLRB?

Decision: The Board rejected the respondents' argument that the allegation should be dismissed as untimely under Section 10(b). The Board also observed that, at the time the charge and the amended charges were filed, the issue

of whether maintenance of a facially neutral work rule or policy violated Section 8(a)(1) would have been resolved based on the "reasonably construe" prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board noted that it subsequently issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), in which it overruled the Lutheran Heritage "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. The Board found that, under the standard announced in Boeing, the General Counsel has not established that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to this complaint allegation.

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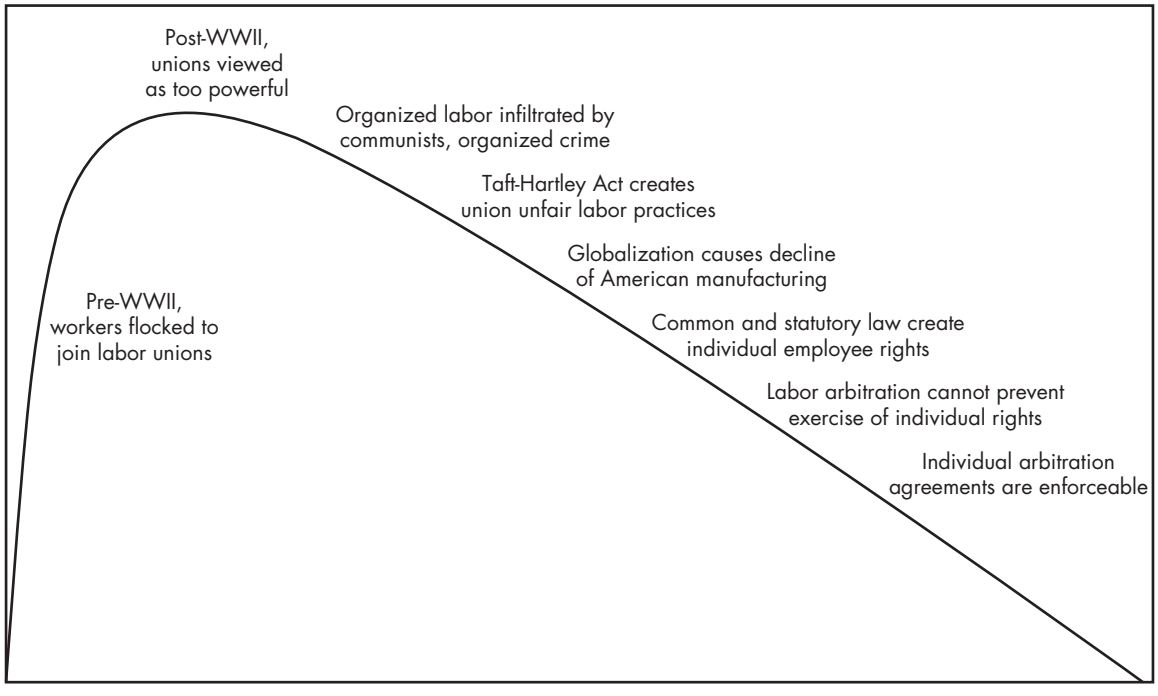
Concept *Summary* 1.2

Decline of Labor Unions and Rise of Individual Rights



1-4 Employee Health, Safety, and Welfare

In the preceding section, we charted a sort of "bell curve" in the rise and fall of labor unions. American workers first banded together to increase their bargaining power and improve their working and living conditions. They then turned (or were driven) increasingly away from unions and toward a panoply of individual rights, ranging from statutory prohibitions of employment discrimination to common-law wrongful discharge decisions, all of which is discussed in detail in the chapters that follow.

Also covered thoroughly in their own sections of this text are the major aspects of employee health, safety, and welfare, as they are embodied in our federal and state laws. These include:

- The federal Occupational Safety and Health Act (OSHA) and its many state-law counterparts
- Workers' compensation and unemployment insurance statutes, which are a part of virtually every state's statutory safety net for injured and out-of-work workers
- The U.S. Social Security system, which includes both pensions and support payments for permanently disabled workers who are still too young to retire
- The Employee Retirement Income Security Act (ERISA), which is intended to protect and preserve employee pensions
- The Family and Medical Leave Act (FMLA) and its numerous state and local counterparts, which increasingly require employers to grant leaves of absence (in some states, even paid leaves) for an ever-increasing range of personal issues
- Worker Adjustment and Retraining Notification (WARN) acts, both federal and state, which are aimed at letting employees know when a plant closing or mass layoff is in the offing
- The Patient Protection and Affordable Care Act (PPACA), commonly called Obamacare after the president during whose first term it was enacted. This act dramatically revised the American health-care system, notably by mandating that all Americans buy health insurance or pay a tax penalty.

As extensive as this web of federal, state, and local laws may seem to be, some notable gaps, which are very troubling to many people, remain in the American labor and employment law system. No national statute requires private employers to provide their employees with either health insurance or a pension plan, for example (although Obamacare ensures that all Americans now have access to some form of health insurance).

THE **WORKING** LAW

From 2011 to 2018 Public-Employee Labor Unions, the Remaining Strongholds of Labor's Power in the United States, Have Been Targeted by Conservative Governors, Legislators, and the U.S. Supreme Court

After the November 2010 mid-term elections, the switch from liberal Democrats to conservative Republicans in many governors' mansions saw several states move toward ending collective bargaining by public employees. This initiative, most visible and confrontational in Wisconsin and Ohio, led the American Federation of State, County and Municipal Employees (AFSCME) to issue the following comment: "The radical proposals by the governors in Wisconsin and Ohio would not just gut public services and jobs, they would take away the rights of workers to collectively bargain and the basic freedom to join a union—effectively eliminating public employee unions. The goals of these efforts are simple: reduce the tax bills of the ultra-rich, privatize public services and deflect blame away from corporations for the reckless behavior that caused the economy to tank."[12]

[12] AFSCME, http://www.afscme.org.

Although teachers and unions have racked up some wins in the years since, the onslaught of anti-union legislation has largely continued unabated. In the 2016 election, the Republican party won control of both the House and the Senate, and recently elected President Trump nominated conservative Justice Gorsuch for the very Supreme Court vacancy the Republicans had blocked President Obama from filling in 2016. Meanwhile, an important case regarding the power of labor unions to collect fees from nonunion members had been working its way through the courts since 2015: *Janus v. American Federation of State, County and Municipal Employees (AFSCME), Council 31*, No. 16-1466, 585 U.S. __ (2018).

Janus originated as a public employee's challenge to the practice of unions in the public sector charging "agency fees" to employees who do no wish to join a union (but who also typically benefit from union deals). There are already 28 states with "right to work" laws that ban unions from charging nonmembers fees, but the 22 states without such laws account for almost half of the United States' union members, and in those states, agency fees are considered vital in order to keep unions funded and operational. *Janus* argued that agency fees are unconstitutional because they force employees to pay money to political groups (unions) with whom they do not necessarily agree, resulting in a form of compelled speech.

The argument in *Janus* is undermined by the Supreme Court's ruling in a landmark 1977 decision, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Supreme Court held in a unanimous ruling that unions could force nonmembers to pay agency fees, but that the money provided by nonmembers simply could not be used for political activity or lobbying. Before the appointment of Justice Gorsuch to the Supreme Court, it appeared there might be a slim chance of a pro-union ruling in *Janus* as well. With Justice Gorsuch on the bench in 2017, however, the ruling in *Janus* was decidedly unfavorable for unions.

Overruling a previous Supreme Court judgment, the Court held that the state's extraction of agency fees from "nonconsenting" public-sector employees violates the First Amendment. The Court stated, "*Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled." In the majority opinion, Justice Alito wrote, "Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns."

The Court added that agency fees cannot be upheld simply based on the idea that they promote an interest in "labor peace" (the belief that there will be conflict and disruption if employees within a unit are represented by more than one union). And although the ruling in *Abood* aimed to uphold unions' rights and workers' rights by narrowing the acceptable uses of nonmember fees, the Court found in *Janus* that this is not enough to ensure workers' rights to free speech. The Court instead wrote that unions engage in political activity even at the bargaining table, and therefore it is impossible to completely uphold an employee's right not to contribute to political speech with which they disagree.

Finally, the Court wrote that avoiding the risk of "free riders" (workers who do not pay union fees but nonetheless benefit from union activity) is not a compelling state interest. Furthermore, the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. Alito wrote,

> As is evident in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees.

In her dissent, Justice Kagan fervently argued in favor of the Court's previous ruling in *Abood*, responding to Justice Alito's opinion point by point. Her greatest concern, however, appeared to be that the Court is effectively dispensing with stare decisis, electing to throw out its own precedents whenever they represent an inconvenience:

> *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited Abood favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle.

However, Justice Kagan also lamented the end of what she considered "an energetic policy debate" over the last many years, slamming the majority opinion for effectively choosing its own winner:

> Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States."
>
> And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.... Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

While Justice Alito's opinion underplayed the effect the ruling will have on unions, it is true that labor unions have been bracing for an unfavorable decision such as *Janus* for years. "The reports of our death are greatly exaggerated," said Randi Weingarten, president of the 1.7 million-member American Federation of Teachers, in 2018 (*https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/*). According to some union leaders, it is still possible for unions to attract new members and convince workers to pay dues. Still, the *Janus* ruling shakes up the very foundation of labor law, and its ramifications will likely be far-reaching. As one union leader wrote, "Alito's decision makes little effort to hide the court majority's hostility to the idea that workers should have the freedom to bargain with their employers. The challenge now is to construct policies consistent with the Court's decision while still fostering state policies promoting collective bargaining and labor organization" (*https://prospect.org/article/union-response-supreme-courts-janus-decision*).

Ethical DILEMMA

Executive Orders and "Going it Alone"

In 2010, the Republican Party won control of the House of Representatives in the mid-term national elections. In 2014, the GOP also (more narrowly) wrested control of the Senate from Democrats. These reversals of fortune presented President Obama

with the prospect of being unable to win passage of any of his legislative agenda. Even achieving Senate consent for his presidential appointments became problematic. The president increasingly sought to circumvent this congressional roadblock by "going it alone," that is, using his ability to issue executive orders to outmaneuver his opponents. President Obama signed a bevy of executive orders, particularly during his last year in office, in order to move his agenda along (though it's worth noting that President Obama actually issued fewer executive orders than any other president, on average, since Grover Cleveland).

Feeling cut out of immigration and health-care reform initiatives, some Republicans—such as former Texas Attorney General Greg Abbott (now mayor) and Oklahoma Attorney General Scott Pruitt (who briefly held a position as the head of the Environmental Protection Agency in President Trump's administration, but resigned under a cloud of ethics scandals in July 2018)—sued the Obama administration multiple times (Abbott, for example, has sued the Obama administration approximately 30 times, as well as the EPA and other agencies) in an effort to roll back some of President Obama's orders.

With President Trump in office, Texas Attorney General Ken Paxton has continued the work of the former AG, suing the current administration about five times per year. The difference now, however, is that the current administration is much more eager to listen. President Trump has been steadily rolling back Obama-era legislation since he entered office, often through the use of executive orders. AG Paxton sees Texas' lawsuits against Obama-era rules and regulations as being "in partnership" with the Trump administration's goals:

> It is useful to think of the legal action conducted by Texas and other states as a kind of rearguard action in the fight against the administrative state. Now that Trump is in office, his aggressive rule-cutting represents an offensive maneuver that is steadily regaining much of the territory lost under the Obama administration…. Taken together, these two components are an excellent start. (https://www.dallasnews.com/news/texas-politics/2018/02/08/trump-charge-texas-still-suing-federal-government-now-can-win)

Concept *Summary* 1.3

Employee Health, Safety, and Welfare

- The web of federal and state laws includes:
  - OSHA
  - ERISA
  - FMLA
  - WARN
  - PPACA
- Gaps:
  - Pensions (protected but not mandated by ERISA)
  - Health care (if the Supreme Court invalidates the PPACA)

CHAPTER REVIEW

» Key Terms

» Summary

- Anglo-American labor and employment law can be traced back at least to 14th-century England. Laws tended to be heavily pro-employer well into the 19th century, when courts decriminalized labor unions and workers were able to combine and thus counterbalance corporate power.
- While some federal and state labor and employment reforms occurred prior to 1930, the first era of significant pro-employee legislation was the New Deal of the Great Depression. The National Labor Relations Act and the Fair Labor Standards Act were among the many statutes enacted by Congress during the 1930s. As a result, labor unions proliferated and prospered.
- After World War II, unions went into a slow but inexorable decline due to unfavorable legislation, the decline of American manufacturing, and the rise of individual employee rights. The Supreme Court decided in the 1970s that union grievance and arbitration procedures could not strip union members of their individual rights, especially where federal antidiscrimination laws were concerned.
- In the 1980s, as the federal courts were deluged with employment cases, the Supreme Court reversed course somewhat, endorsing the use of arbitration clauses in individual employment contracts. The Court in 2009 extended this endorsement to cover arbitration provisions in collective bargaining agreements, provided the parties expressly state their intent to preclude court and agency remedies.
- Employee health, safety, and welfare laws have proliferated at the federal and state levels, notably OSHA, ERISA, FMLA, and WARN. The PPACA (Obamacare) mandates the purchase of health insurance by all Americans by 2014 but may be invalidated by the Supreme Court. A gap remains in the area of mandatory pensions, which are not required under U.S. law.

» Problems

» Questions

1. Can you think of any public policy reasons why the courts developed the concept of employment-at-will in 19th-century America? In thinking about this question, consider that the U.S. Congress made huge land grants to companies willing to undertake the building of the nation's railroads. Can you see how both employment-at-will and public financial support of private enterprise might rise from the same underlying policy considerations?
2. How did new technologies combine with the arrival of millions of unskilled immigrants from Ireland, and later southern and eastern Europe, to impact the

relative bargaining power of capitalists and workers in 19th-century America? What do you think were some reasons why the courts at first tended to support capital against labor? Why do you think that view gradually changed?

3. Imagine that the Supreme Court during the 1930s had staunchly refused to change its view and continued to declare almost all New Deal labor and employment laws to be unconstitutional, as the Court did at first. What do you think might have been some of the results of such intransigence on the Court's part?
4. Granting that organized labor has been guilty of abusing its power, and that when it was on top, some unions were aligned at times with the Mafia or with the American Communist Party, on balance do you think that labor unions are a blessing or a curse to American society?
5. Explain the Supreme Court's attempts in the *Alexander* and *Epic Systems* cases to balance private arbitration with public legal remedies, such as government agency and court cases. Do you think the Court has struck the right balance? If not, do you favor the EEOC/NLRB approach? Why? Or do you believe that the policy considerations at stake here are trumped by political interests, that is, conservatives (represented by the five right-leaning Supreme Court justices) versus liberals (as embodied in the Obama administration's bureaucracy)?
6. One reason that U.S. workers, especially in the manufacturing sector, have a hard time competing with competitors in China, Southeast Asia, and India is wage differentials. And one reason (though not the only one) that labor costs are so much lower in some of America's major competitors, such as Japan and Korea, is that the governments of these countries provide substantial pensions for workers, so that the employers do not need to bear this expense. While providing such a pension (which would have to be significantly larger than current Social Security retirement benefits) would not address wage differentials between the U.S. and its many competitors in Asia and Latin America, this would help level the playing field with others, such as Japan, Korea, and perhaps some of the European Union nations. Should the U.S. Congress consider enacting such an expanded federal pension benefit? What are the pros and cons? Alternatively, should Uncle Sam *require* U.S. employers to establish employee pension plans? What are the pros and cons of doing this?
7. Putting aside partisan politics, what are the pros and cons of attempts by assorted state legislatures and the Supreme Court to eliminate public employees' collective bargaining rights and decertify their labor unions? In answering this question, consider the current fiscal pressures under which many, if not most, states are suffering. Consider, too, that public employees enjoy protections under the 14th Amendment to the U.S. Constitution, which do not apply to private-sector employees.
8. Explain the roles that the courts play in creating and/or implementing labor and employment law. Do any of the roles you can identify amount to unreasonable intrusions into the roles of Congress and the state legislatures? Private enterprise?
9. Having considered and, hopefully, discussed the ethical dilemma posed by both President Obama's and President Trump's use of executive orders to achieve policy goals in the face of congressional roadblocks, do you feel that the separation of powers, so carefully crafted by the nation's founders in the U.S. Constitution, has become too much an impediment to progress in the "Flat Earth" environment in which America (and American workers) must compete? If so, how would you amend the Constitution to deal with this governmental gridlock?
10. Along these same lines, do you believe, as do many conservatives, that labor unions have outlived their usefulness in our "Flat Earth" economic environment? Or, alternatively, do you believe they still play an important role in the American democracy? If so, what would you do to encourage more American workers to rally to organized labor?

CHAPTER 2

Employment Contracts and Wrongful Discharge

This chapter and the one that follows are a survey of several major areas of the law where the federal and state legislatures have not fully populated the field with statutes and, therefore, the courts are still, by and large, sovereign. This type of law is referred to as common law. These include employment-at-will and wrongful discharge, as well as express and implied employment contracts.

2-1 Employment-at-Will and Its Exceptions

employment-at-will both the employee and the employer are free to unilaterally terminate the relationship at any time and for any legally permissible reason, or for no reason at all

To appreciate how far the courts have come, it is necessary to look back to where they were just decades ago. In the 19th century, virtually every state court subscribed to the doctrine of **employment-at-will**. In its raw form, employment-at-will holds that an employee who has not been hired for an express period of time (say a year) can be fired at any time for any reason—or for no reason at all.

State and federal laws have narrowed this sweeping doctrine in many ways. The National Labor Relations Act (NLRA) forbids firing employees for engaging in protected concerted activities. Title VII forbids discharge on the basis of race, color, gender, creed, or national origin. The Age Discrimination in Employment Act (ADEA) protects older workers from discriminatory discharge. The Occupational Safety and Health Act (OSHA) makes it illegal to fire an employee in retaliation for filing a safety complaint.

Although employers may complain that employment regulation is pervasive, these laws leave broad areas of discretion for private-sector employers to discharge at-will employees. Although federal government workers are protected from such discrimination, there is no federal law that specifically outlaws workplace discrimination on the basis of sexual orientation in the private sector (i.e., the law allows an employer to discharge an employee if the company does not approve of an employee being homosexual or transgender). However, a growing number of states have enacted laws that prohibit sexual-orientation discrimination in both public- and private-sector jobs. Furthermore, some cities and counties prohibit discrimination on the basis of sexual orientation on a local level. And in 2014, President Barack Obama issued an executive order forbidding lesbian, gay, bisexual, and transgender (LGBT) discrimination by federal government contractors and subcontractors.

whistleblower employee who reports or attempts to report employer wrongdoing or actions threatening public health or safety to government authorities

Whistleblowers—employees who bring intraorganizational wrongdoing to the attention of the authorities—have often been fired. This has frequently occurred in spite of ostensible legal protection for whistleblowers. However, as we shall see later in this chapter, much tougher protections were put into place by the U.S. Congress in the wake of one of the biggest financial-industry debacles of the 21st century. Sometimes an employee gets fired simply because the boss does not like him or her. In such situations, the employee is not covered by any of the federal and state labor laws previously discussed. Should the employee be protected? If so, how?

Advocates of the employment-at-will doctrine defend it by pointing out that (1) the employee is likewise free to sever the working relationship at any time and (2) in a free market, the worker with sufficient bargaining power can demand an employment contract for a set period of time if so desired.

The trouble with the second point, in the view of most workers, is that as individuals they lack the bargaining power to command such a deal. This is one reason that in this age of globalization, labor unions continue to claim a role in securing workers' rights and job security, despite a plethora of federal and state statutes. Unless and until a federal statute creates a "just cause" requirement (discussed later in the chapter) for all employment terminations—something that is not even on the national agenda—many workers' best bet for job security is unionization. Indeed, making unionization easier was a priority item on the Obama administration's legislative agenda.

The first of these arguments is not so easily dismissed. If the employee is free to quit at any time with or without notice, why should the employer be denied the same discretion in discharging employees? One answer to this troublesome question—an answer given by a majority of the state courts at this time—is, "The firing of an at-will employee is permitted, except if the discharge undermines an important public policy."

2-2 Wrongful Discharge Based on Public Policy

public policy exception although the employee is employed at-will, termination is illegal if a clear and significant mandate of law (statutory or common) is damaged if the firing is permitted to stand unchallenged

The most commonly adopted exception to the pure employment-at-will rule (the employee can be fired at any time for any reason) is the **public policy exception**. If a statute creates a right or a duty for the employee, he or she may not be fired for exercising that legal right or fulfilling that legal duty. A widely adopted example is jury duty. The courts of most states agree that an employer cannot fire an employee who misses work to serve on a jury (provided, of course, that the employee gives the employer proper notice).

Many courts, accepting this exception, however, have kept it narrow by holding that the right or duty must be clearly spelled out by statute. For instance, in the seminal case of *Geary v. United States Steel Corporation*,[1] the Pennsylvania Supreme Court upheld the dismissal of a lawsuit brought by a salesman who was fired for refusing to sell what he insisted to management was an unsafe product. The court noted, "There is no suggestion that he possessed any expert qualifications or that his duties extended to making judgments in matters of product safety." Most courts applying *Geary* have required the plaintiff-employee to point to some precise statutory right or duty before ruling the discharge wrongful.

[1] 456 Pa. 171, 319 A.2d 174, 115 L.R.R.M. (BNA) 4665, Pa., March 25, 1974.

Additionally, if the statute itself provides the employee with a cause of action, the courts are reluctant to recognize an alternative remedy in the form of a lawsuit for wrongful discharge. Thus, several Pennsylvania courts agree that an employee fired on the basis of gender or race discrimination in Pennsylvania has, as his or her exclusive state law remedy, the Pennsylvania Human Relations Act (PHRA), which requires that the employee initially seek redress with the commission created by that act. If the employee fails to file with the commission, thus losing the right of action under the PHRA, that person cannot come into court with the same grievance claiming wrongful discharge. Many other states' courts have reached similar conclusions regarding their states' antidiscrimination, workers' compensation, and work safety laws.

tort
a private or civil wrong or injury, caused by one party to another, either intentionally or negligently

By contrast, California courts are willing to entertain a wrongful-discharge **tort** claim that is grounded in a plaintiff's allegation of sexual harassment. Consider the following case tackled in a 2018 District Court decision.

CASE 2.1

Steines v. Crown Media United States, LLC

2018 WL 6330600, 2018 Fair Empl.Prac.Cas. (BNA) 447, 129, 2018 IER Cases 447, 129 (U.S.D.Ct., C.D. Cal.2018)

Plaintiffs Mark Steines and Steines Entertainment, Inc. brought action against the defendants, Crown Media United States, LLC and others. Steines asserted claims for retaliation, wrongful discharge in violation of public policy, failure to prevent retaliation, and breach of the implied covenant of good faith and fair dealing as a result of Steines' termination from his role as cohost of the Hallmark Channel's daytime lifestyle show *Home & Family*. Steines was fired after he allegedly reported the sexual harassment of female staff by an executive producer on the television show. The U.S. District Court for the Central District of California ultimately denied the defendants' motion to dismiss.

The allegations arose out of Crown Media's response to Steines's complaints about Woody Fraser, the creator and longtime executive producer of *Home & Family*. Fraser allegedly bullied, verbally abused, and harassed cast and crew members, particularly female producers. While on set, Fraser allegedly made sexually inappropriate comments about female guests to Steines in his earpiece. In addition, Steines allegedly witnessed Fraser forcibly hug and massage a number of female employees.

Cast and crew members of *Home & Family* regularly approached Steines with complaints about Fraser's behavior. Through his manager and talent agent, Steines made repeated complaints to Crown Media's executives, but they did not take action. In December 2016, Steines allegedly received an email sent by Fraser to a portion of the television crew. In the email, Fraser admitted anger management problems. Through his manager, Steines forwarded the email to Crown Media's executives. Steines's talent agent also relayed Steines's complaint that Fraser had sexually harassed a female producer. In April 2017, a photo circulated around the *Home & Family* set that purportedly showed Fraser grabbing the face of a young female producer and forcing a kiss on her lips. Steines texted this photo to his manager and his talent agent for them to forward to Crown Media's executives. Steines believed that Crown Media would take action if they saw photographic evidence of Fraser's sexual harassment.

In the spring of 2017, two female employees at *Home & Family* formally reported their claims of sexual harassment. Steines was contacted as a potential witness and he provided information to the female employees' attorney. In June 2017, Steines and his entertainment law attorneys participated in a conference call with Crown Media, which apparently wanted to know what Steines had said to the employees' attorney.

Shortly after the conference call, Steines learned that he was not invited to introduce the network's president and

vice president at the Hallmark Channel's presentation for the Television Critics Association (an introduction he had made at the previous five events). In July 2017, Crown Media terminated Steines's regular voice-over work for the Hallmark Channel, without any explanation or notice. Around the same time, Crown Media's representatives told Steines that they "needed" him to take a substantial pay cut, something the network had never previously requested in Steines's six previous years as cohost. Steines's salary was reduced to an amount even lower than what he was paid two years prior, while his cohost's salary remained unchanged. Crown Media then let Steines's contract expire for the first time since 2012 and subsequently signed Steines to a single-season contract. On May 30, 2018, defendants terminated Steines after a live show taping, despite three months remaining on his contract.

On September 20, 2018, Steines filed action against his employers in Los Angeles County Superior Court.

Analysis and Holding

Retaliation

The District Court found that Steines adequately alleged that he engaged in protected activity to support a claim of retaliation, citing the numerous factual allegations regarding the supposed sexual harassment and gender discrimination on *Home & Family*'s set. Crown Media argued that Steines failed to allege retaliation because he made most of his complaints to Crown Media through his representatives, such as his manager or talent agent. But Crown Media cited no law for their assertion that anti-retaliation laws require that "one must personally engage in the protected activity," rather than make a complaint through a chain of communication. The Court found that even if communicated through a talent agent or manager, Steines initiated the process of making the complaint and Crown Media could attribute the complaints to him.

Crown Media also argued that Steines failed to allege that the defendants subjected Steines to adverse employment action. An adverse employment action requires a "substantial adverse change in the terms and conditions of the plaintiff's employment." A "mere offensive utterance" or "pattern of social slights" is not enough, but "a series of alleged discriminatory acts must be considered collectively rather than individually in determining whether the overall employment action is adverse." Steines adequately alleged adverse employment action, based on the several instances cited in his complaint: being terminated from work assignments he had held for years, being forced to take a pay cut, and eventually, being terminated.

Lastly, Crown Media asserted that Steines's complaint failed to allege a causal link between the alleged protected activity and the alleged adverse action. Causation is ordinarily a question of fact. "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected." However, "if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." The Court found that Steines adequately alleged a causal connection. Steines alleged a pattern of retaliatory conduct between the time Steines assisted with the other employees' FEHA action and the time he was terminated.

Wrongful Termination and Failure to Prevent Retaliation

Crown Media sought to dismiss Steines's claims for wrongful termination and failure to prevent retaliation on the same grounds that they moved to dismiss his claims for retaliation. A discharged employee may bring a tort action for wrongful termination where the discharge violated fundamental principles of public policy. Violations of provisions of FEHA give rise to a tort action for wrongful termination. Similarly, a claim for failure to prevent retaliation depends on an underlying claim for retaliation. As discussed in the previous section, Steines alleged a valid claim for retaliation, so his claims for wrongful termination and failure to prevent retaliation still stand.

For these reasons, the defendants' motion to dismiss was denied,

Case Questions

1. Explain the California court's ruling. Did it find in the employee's favor? If yes, how so?
2. Why did the Court find that Steines's claims for wrongful termination and failure to prevent retaliation could stand?
3. Under what circumstances may a discharged employee bring a tort action for wrongful termination?

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Concept *Summary* 2.1

Employment-at-Will and Wrongful Discharge

- Justifications for at-will employment:
  - Freedom of contract
  - Free enterprise in a competitive marketplace
- Problems with at-will employment:
  - Disparities of bargaining power between employer and employee
  - Potential for unfair treatment falling outside statutory protections
- Exceptions to at-will employment:
  - Statutory exceptions, such as antidiscrimination laws
  - Employment contracts containing set lengths of employment
  - Public policy exception

2-3 Express and Implied Contracts of Employment

express contract a contract in which the terms are explicitly stated, usually in writing but perhaps only verbally, and often in great detail; in interpreting such a contract, the judge and/or the jury is asked only to determine what the explicit terms are and to interpret them according to their plain meaning

implied contract a contractual relationship, the terms and conditions of which must be inferred from the contracting parties' behavior toward one another

Some employees have express contracts of employment, usually for a definite duration. Others fall within the coverage of a collective bargaining agreement negotiated for them by their union. Most workers, however, have no express agreement as to the term of their employment, and some were given an oral promise of a fixed term in a state in which the statute of frauds requires that contracts for performance extending for a year or more be written. Such employees have sometimes tried to convince the courts that they have been given implied promises that take them outside the ranks of their at-will coworkers. An **express contract** has terms spelled out by the parties, usually in writing. **Implied contracts** are contracts that the courts infer from company policies (such as those published in employee handbooks) and the behavior of the parties, or that are implied from the law.

If a company provides its employees with a personnel handbook, and that handbook says that employees will be fired only for certain enumerated infractions of work rules, or that the firm will follow certain procedures in disciplining them, a worker may later argue that the manual formed part of his or her employment contract with the firm. An increasing number of state and federal courts agree.

Many employers in turn have responded by adding clauses to their employee handbooks that reserve the firm's right to make unilateral changes or to vary the application of particular policies to fit the unique circumstances of each new situation. The following cases involve determinations of if and when an employer can withdraw a unilaterally promulgated policy or employment agreement and replace it with another, thus unilaterally altering the employment relationship or deviating from a policy's particular terms in a specific instance.

CASE 2.2

MARK v. CITY OF HATTIESBURG

– So.3d –, 2019 WL 125656 (Mo. Ct. App. 2019)

Facts: A city's former municipal clerk, Sharon Mark, sued the City, the Mayor, and the City Council (collectively, the Appellees) for breach of her employment contract, among other claims, after being suspended without pay for alleged misconduct, and later being reassigned to a different department. In June 2013, Mark sued the City, the Mayor, and the City Council (collectively, the Appellees) and asserted various claims of action, alleging that, during the summer and fall of 2012, while she was ill and recovering from breast cancer, the Appellees slandered her and violated her right to privacy. According to Mark, the Appellees (1) publicly characterized her, via numerous media outlets, as a criminal, a corrupt individual, and incompetent; (2) wrongly released her personal medical information to the public; and (3) ignored the grievance she filed following her suspension. In response to Mark's allegations, the Appellees filed a summary-judgment motion.

Issue: Mark asserted that the City deprived her of a grievance hearing in accordance with the employee handbook and that her reassignment to the housing department "conveyed the impression to the public that she was being punished" for conduct she denied performing. The City's employee handbook directed the Mayor to meet with an aggrieved employee "within three (3) working days of receiving the grievance" and to provide a written response to the grievance "within five (5) working days after that meeting." The handbook further explained that the time limit for the appeal process could be extended with the parties' written consent.

Decision: On cross-examination, Mark acknowledged that the Mayor had contacted her by letter, twice, about setting a time to meet up. She also admitted that she never contacted the Mayor's administrative assistant to schedule an appointment. Instead, Mark testified that she chose to hire an attorney and pursue litigation. Mark also acknowledged during cross-examination that the employee handbook provided for disciplinary action, up to and including termination, for an employee who engaged in conduct unbecoming of a City employee. Though Mark denied any wrongdoing, the findings of the police department's internal investigation led Mark's supervisors to suspend her and two other employees and to fire a fourth employee. Because Mark was an at-will employee, the Mayor could have terminated her employment. Instead, the Mayor chose to reassign her. The Court found no support for Mark's assertions that the City improperly denied her a grievance hearing and wrongfully transferred her.

CASE 2.3

KNEPPER v. OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

WL 144585 (U.S.D.Ct., N.D. Cal. 2019)

Facts: The plaintiff, Dawn Knepper, was a nonequity shareholder of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Ogletree), specializing in employment law. Knepper sought to represent a class of current and former nonequity shareholders of Ogletree, claiming Ogletree engaged in systematic gender discrimination and asserting claims for violation of Title VII, violation of the Equal Pay Act, and violation of related California statutes. However, in January 2016, Knepper received three notices that she would be bound by the firm's arbitration agreement if she did not opt out of it by March 1, 2016. She did not opt out (and Ogletree's records show that Knepper received, opened, and in one case even responded to the email notices). For that reason, Ogletree motioned to transfer the cases to the Central District of California, where arbitration can be compelled pursuant to the arbitration agreement.

Issue: Is Knepper covered by Ogletree's arbitration agreement, and should the cases be transferred to the Central District of California for arbitration?

Decision: The Court held that Knepper was bound by the arbitration agreement, and that the cases should be transferred. Knepper argued that because she did not sign the agreement, or otherwise manifest express consent to it, she could not be bound by it. However, numerous courts have concluded that employees can be bound by agreements to arbitrate where, as in this case, the relevant employer documents and communications disclose that an employee's failure to opt out manifests assent to an "implied-in-fact" arbitration agreement. Although Knepper did not sign the agreement to acknowledge her understanding of her right to opt out and did not submit the opt-out form, she did—at least once—affirmatively acknowledge receipt of notice about both the arbitration program and the right to opt out. The Court further held that Knepper did not actually need to sign the agreement in order to opt-in, only to opt-out: "The 'signature' language [in the agreement] applies to acknowledgment only of the right to opt out, not an acknowledgment of an agreement to be bound."

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CASE 2.4

SEIU, LOCAL 32B v. DAYTON BEACH PARK NO. 1 CORP.

WL 120998 (U.S.D.Ct., N.D. N.Y. 2019)

Facts: Dayton Beach Park No. 1 Corp. (Dayton Beach) brought a motion for summary judgment, seeking to vacate an arbitration award reinstating a discharged employee, William Cabarcas, who had been terminated for violating the organization's side-job rule in the Employee Handbook. Dayton Beach is the owner of a multi building residential facility and employs building maintenance employees to whom the Union is a collective bargaining representative. Dayton Beach and the Union are parties to a Collective Bargaining Agreement, which covers building service employees. According to the Employee Handbook, performing these jobs without approval is "grounds for termination." However, the Arbitrator on Cabarcas's case concluded that Dayton Beach's decision to discharge Cabarcas was "excessive" and without "just cause" because "it previously did not show a strong interest in monitoring and/or enforcing general adherence to the side job rule." The Arbitrator reinstated Cabarcas to his former position but did not award back pay, deeming his time off the payroll to be a disciplinary suspension.

Issue: Did the Arbitrator violate an express term of the Employee Handbook by reinstating the employee in spite of his violation of the side-job provision?

Decision: No. First, the Employee Handbook does not state that a violation of the side-job provision necessarily will result in termination. Second, the Arbitrator found that because the company had previously expressed little interest in enforcing the side-job rule, there was no just cause for the employee's discharge. This reasoning invokes the "justifiable cause" provision in the CBA; the Arbitrator considered whether the employee violated the side-job rule and whether the employer applied the rule fairly to determine whether just cause existed for discharge. Because the Arbitrator's reinstatement of the employee "draws its essence from the collective bargaining agreement," the District Court confirmed the award.

These three case decisions indicate that the employer retains considerable control over the terms of the employment relationship, but this control is not unlimited. While an employer, for example, may exercise discretion in its disciplinary procedures, this discretion is not unlimited. Furthermore, changes in such fundamental terms of employment as compensation, when contractually set, cannot be arbitrarily modified.

THE **WORKING** LAW

Model Employment Termination Act

The National Conference of Commissioners on Uniform State Laws was organized in the 1890s as part of a movement in the American Bar Association for the reform and unification of American law. Currently, the conference's list comprises 99 uniform acts and 24 model acts, which the states are encouraged to adopt. In 1987, the conference established a drafting committee to create a Uniform Employment Termination Act to provide employees with statutory protection against wrongful discharge. By 1991, the conference had approved a "model" act. However, division among the commissioners has prevented the act from achieving the status of "uniform." Consequently, states are encouraged to modify the model to suit each jurisdiction's particular social, economic, and legal needs. So far, only a handful of states have done so.

The heart and soul of the Model Employment Termination Act (META) in its present form is Section 3(a), which states "an employer may not terminate the employment of an employee without good cause." "Good cause" is defined in one of two ways. The employee's own inadequate or improper conduct in the performance of the job is the first. The second involves the economic or institutional goals of the employer. If the employer's goals require reorganization, discontinuing functions, and/or changing the size and character of its workforce, employees discharged as a result are discharged with "good cause."

Section 3(b) limits application of the good-cause limitation on employment-at-will to workers who have been with the particular employer for at least one year. Section 4(c) adds another possible exception, stating that employer and employee may substitute a severance pay agreement for the good cause standard, and the good cause standard is inapplicable to situations where termination comes at the expiration of an express oral or written contract containing a fixed duration for the employment relationship.

If a qualified employee is terminated without good cause, META provides remedies. Remedies that may be sought under META include reinstatement, back pay, lost benefits, or, alternatively, a lump-sum severance payment. META excludes recovery for pain and suffering, emotional distress, defamation, fraud, punitive damages, compensatory damages, or any other monetary award. Attorney's fees are recoverable, so that employees with modest incomes have an opportunity to obtain legal assistance in bringing legitimate claims.

Enforcement in META is conducted solely by arbitration. Judicial review of arbitration awards is permitted only for abuses of the discretion or office of the arbitrators.

Finally, META also provides protections to employees who participate in termination proceedings. Employers are barred from retaliating against an employee who files a complaint, provides testimony, or otherwise lawfully participates in proceedings under META.

The META suggests that claims under it be subject to binding arbitration with arbitral awards being issued within 30 days of hearings. Section 10 forbids retaliation against employees who make claims or who testify under the procedural provisions of the META.[2]

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[2] See, e.g., Montana Wrongful Discharge from Employment Act, Mont. Code Ann. Sections 39-2-901 through 39-2-915. A summary of the META's status across the United States is provided by the Uniform Law Commission, available at http://www.uniformlaws.org/Act.aspx?title=Employment%20Termination%20Act,%20Model.

Concept *Summary* 2.2

Employment Contracts and Employee Handbooks

- Common-law presumption of at-will employment can be overcome by an express contract or by implication, for instance, based on a policy in an employee handbook
- American courts remain reluctant to infer terms and conditions of employment when the employer has not expressly awarded the right to its employees or where the relevant employment documents, or even the reasonable passage of time, indicate the employer set limits on its obligations to the employee(s)

2-4 Protection for Corporate Whistleblowers

In 2002, Congress passed and the president signed the Sarbanes-Oxley Act (SOX). SOX amended the creaky Securities and Exchange Acts of 1933 and 1934, as well as the more recent-vintage Employee Retirement Income Security Act (ERISA), plus the Investment Advisers Act of 1940 and the U.S. Criminal Code. SOX includes two provisions, one criminal and the other civil, for the protection of employees who report improper conduct by corporate officials concerning securities fraud and corruption.

Dozens of federal laws, such as the OSHA and Title VII, protect employees who blow the whistle on illegal practices or who cooperate in investigations and testify at hearings from employer retaliation, such as employment termination. Dozens of states have jumped on the whistleblower bandwagon, adding a dizzying variety of whistleblower laws to the panoply of rules and regulations that human resource managers and employment lawyers must consider before initiating "industrial capital punishment" (i.e., firing a miscreant worker). In those increasingly rare jurisdictions or circumstances in which no federal or state antiretaliation rule is implicated, the courts often have shown themselves willing to carve out a public policy exception to employment-at-will, where the plaintiff provides proof that he or she was fired for reporting or restricting illegal supervisory activity. But the proliferation of such laws and court rulings has often fallen short of protecting whistleblowers, because of either poor enforcement procedures or ineffectual remedies. SOX is unique in making whistleblower retaliation a federal crime that can result in officer/director defendants actually going to prison.

Perhaps the scariest aspect of SOX's criminal provision is that it can be used to punish retaliation against persons who provide information to law enforcement officials relating to the possible commission of any federal offense, not just securities fraud, albeit securities fraud was the catalyst for the legislation. The provision makes it a crime to "knowingly, with the intent to retaliate, take . . . any action harmful to any person, including interference with lawful employment or livelihood of any person, for providing a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense." Individuals found guilty under this proviso may be fined up to a quarter-million dollars and imprisoned up to 10 years. Corporate defendants can face up to a half-million dollar fine if convicted.

2-4a Civil Liability under SOX

A child of corporate greed and accounting scandals, SOX's legislative history indicates that its whistleblower provisions are intended primarily to protect employees of publicly traded companies acting in the public interest to try to prevent officer/director wrongdoing and "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." The following case exemplifies the limits of this new federal whistleblower cause of action.

CASE 2.5

ANDERSON V. SALESFORCE.COM

WL 6728015 (U.S.D.Ct., N.D. Cal. 2019)

Facts: The plaintiff's eleventh cause of action in this case arises under the Sarbanes-Oxley Act ("SOX"). The plaintiff, Stephen Anderson, alleged that sometime after the company hired him as a full-time employee, he became concerned about several of the company's accounting practices. After being rebuffed by his immediate supervisors, Anderson reported his concerns to the company's Associate General Counsel and other senior company employees, who acknowledged his concerns and began an investigation. Anderson alleged that beyond just ignoring his concerns, his immediate supervisors responded by yelling at him and criticizing his conduct. According to the complaint, Anderson's supervisors' retaliatory conduct left Anderson "emotionally shaken" and eventually led him to take a medical leave of absence. The complaint alleges that rather than eventually returning Anderson from his medical leave of absence or accommodating his mental health disability, the company suspended him on an administrative leave. Several months later, the company informed Anderson that it had eliminated his position and, after he was unable to find another position within Salesforce, terminated his employment. In general, Anderson alleged that he was terminated and retaliated against because of his whistleblower activities and/or because of his race. Salesforce sought to compel Anderson to arbitrate his second through eleventh causes of action. Additionally, In addition, Salesforce argued that the plaintiff's first cause of action, the SOX claim, should be stayed pending the completion of arbitration.

Issue: Should the plaintiff be compelled to arbitrate his second through eleventh causes of action? In addition, should the plaintiff's SOX claim (the first claim, which all parties agreed is not arbitrable) be stayed pending the completion of arbitration?

Decision: Because the plaintiff signed an arbitration agreement with Salesforce, in which he agreed to "resolve by arbitration all claims or controversies, past, present or future" that he may have against the company, and because the plaintiff had the option to opt out of the arbitration agreement but chose not to, the Court held that a valid and enforceable agreement to arbitrate exists and that agreement encompasses the dispute at issue. There was no evidence that the plaintiff did not freely enter into the arbitration agreement with Salesforce, and the plaintiff failed to point to any state contract defense that might invalidate the contract. Furthermore, the Court found that the plaintiff's claims and the conduct he alleged falls squarely within the arbitration agreement's scope.

Next, although the plaintiff's SOX claim is not subject to arbitration, the Supreme Court has held, "when a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Accordingly, the Court granted Salesforce's motion to compel arbitration of the plaintiff's second through eleventh causes of action.

Finally, Salesforce asked the court to stay the plaintiff's entire action, including the disposition of his SOX claim, until arbitration is complete. The Court held that it is appropriate to stay the plaintiff's SOX claim and the entire action because the plaintiff's claims all arose from the same conduct

and because allowing the arbitration to resolve will simplify issues of law or questions of fact in future proceedings.

Case Questions

1. Why did the District Court grant the defendants' motion to stay the plaintiff's SOX claim until after arbitration?
2. Do you agree with the District Court opinion? Why or why not?
3. Do you think the District Court was correct from a public-policy perspective in compelling the plaintiff to arbitrate? Are there public-policy arguments as to why a SOX claim should be aired in open court?

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Ethical DILEMMA

The First Amendment and Unprotected Employee Speech

A director of a community youth program conducted an audit of the program's expenses, and in doing so, discovered that a state legislator on the program's payroll has not been reporting for work. Consequently, the director terminated the state lawmaker's employment. Shortly after that, federal authorities indicted the state representative on charges of mail fraud and theft concerning a program receiving federal funds. The director testified, under subpoena, regarding the events that led to his terminating the state legislator. She in fact was convicted and sentenced to 30 months in prison.

Meanwhile, the youth program had experienced significant budget shortfalls. The president of the program's sponsoring university terminated the director along with 28 other employees in a claimed effort to address the financial difficulties. A few days later, however, the president rescinded all but two of the 29 terminations—those of the director and one other employee. The director sued the president in his individual and official capacities, alleging that the president violated the First Amendment by firing him in retaliation for testifying in court. The president made a motion for summary judgment, claiming that the director's testimony was not entitled to First Amendment protection. He claimed the director spoke as an employee and not as a citizen because he acted pursuant to his official duties when he investigated and terminated the state representative's employment.

Consider: Should the First Amendment protect a public employee who provides truthful sworn testimony, compelled by subpoena, of an organization's corruption? Or was the director's testimony unprotected employee speech? What are some policy considerations pushing in each direction?

Concept *Summary* 2.3

Whistleblowers

- A whistleblower is an employee who calls attention to the employer's illegal or unethical activities
- Many federal and state statutes seek to protect whistleblowers by making retaliation an illegal act
- The most significant whistleblower-protection law of the 21st century is the federal Sarbanes-Oxley Act, which protects employees who blow the whistle on illegal financial transactions
- Whistleblowers' rights may conflict with the privacy rights of others

CHAPTER REVIEW

» Key Terms

» Summary

- The employment-at-will doctrine became the norm in 19th-century American common law. The at-will doctrine holds that, unless the parties expressly agree on a specific duration, the employment relationship may be severed by either the employee or the employer at any time and for any reason.
- During the second half of the 20th century, American courts narrowed the at-will doctrine by carving out several common-law exceptions. The most common of these is the public policy exception, which holds that an employer cannot fire an employee if that termination would undermine a clear mandate of public policy. For example, many states have punished employers for firing workers who were absent from work because they had been called to jury duty.
- Another exception to the at-will rule is the legal doctrine of an implied contract. While the parties may not have agreed expressly to a duration of the employment relationship, an employee handbook or other employer policy may state that employees will not be fired except for good cause. Or such a company document may accord employees certain procedural rights, such as arbitration, before a job termination becomes final.
- Under the doctrine of good faith and fair dealing, which only a minority of American courts have adopted as a limitation on at-will employment, a terminated worker may bring a wrongful discharge action whenever the employer has failed to deal in good faith. For instance, an employer who fires a salesperson simply to escape paying commissions might run afoul of this common-law rule.
- The Model Employment Termination Act seeks to make "good cause" the basis for all employment