# Employment Law for Business

*Tenth Edition*

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# Dedication

Brian A. Thompson

One word: *Masterpiece.*

On second thought, three: *Thank you.*

D D B-A

For those whose voices continue to be silenced by others, ours is now and always a responsibility to speak. *Kenbe la:* stand firm, stay true.

L P H

# About the Authors


Mike Horn

## Dawn D. Bennett-Alexander *University of Georgia*

With over fifty awards to her credit, Dawn D. Bennett-Alexander, Esq., is a tenured associate professor of Employment Law and Legal Studies at the University of Georgia's Terry College of Business. An attorney admitted to practice in the District of Columbia and six federal jurisdictions, she is a *cum laude* graduate of the Howard University School of Law and a *magna cum laude* graduate of the Federal City College, now the University of the District of Columbia. With her coauthor, she was cofounder and cochair of the Employment and Labor Law Section of the Academy of Legal Studies in Business and coeditor of the section's *Employment and Labor Law Quarterly,* past coeditor of the section's newsletter, and past president of the Southeastern Academy of Legal Studies in Business. Among other texts, she coauthored, with Linda F. Harrison, McGraw Hill's groundbreaking *The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society* in 2011. Bennett-Alexander taught Employment Law in the University of North Florida's MBA program from 1982 to 1987 and has been conducting Employment Law seminars for managers and supervisors since 1983. Prior to teaching, Bennett-Alexander worked in Washington, DC, at the Federal Labor Relations Authority, the White House Domestic Council, the Federal Trade Commission, the Department of Justice Appellate Division, and the Antioch School of Law and as law clerk to the Honorable Julia Cooper Mack as Judge Mack became the first Black female in the country to be appointed a judge in a court of last resort, the D.C. Court of Appeals. Bennett-Alexander publishes widely in the Employment Law area; is a noted expert on Employment Law and Diversity, Equity and Inclusion issues; was asked to write the first-ever sexual harassment entry for *Grolier Encyclopedia;* edited the National Employee Rights Institute's definitive book on federal employment rights; has chapters in several other books including five Employment Law entries in Sage Publications' first and second editions of the *Encyclopedia of Business Ethics and Society;* has been widely quoted on TV and radio and in the print press, including *USA Today, The Wall Street Journal,* and *Fortune* magazine; and is founder of Practical Diversity, consultants on Diversity, Equity, and Inclusion as well as Employment Law issues. Among other accomplishments, Bennett-Alexander was one of only ten winners of the prestigious national Elizabeth Hurlock Beckman award for teaching excellence in 2015; presented an invited diversity paper for the Oxford Roundtable at Oxford University, Oxford, England in 2014 and the Huber Hurst Research Roundtable in 2019; was a 2000–2001 recipient of the Fulbright Senior Scholar Fellowship under which she taught at the Ghana School of Law in Ghana, West Africa; and conducted research on race and gender in employment. She has also taught in Budapest, Krakow, Austria, Prague, Australia, New Zealand, Italy, and Costa Rica. She is the recipient of the 2019 Honored Trailblazer recognition from UGA's Minority Services and Programs, 2011 University of Georgia President's Martin Luther King, Jr., Fulfilling the Dream Award, her university's highest diversity award, for her outstanding work in building bridges to understanding and unity;

the 2010 recipient of the University of Georgia's Terry College of Business inaugural Diversity Award; and the 2009 recipient of the Ernst & Young Inclusive Excellence Award for Accounting and Business School faculty. She dedicates all her research and writing to her cherished Ancestors, three daughters, and two grandchildren.

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## Laura P. Hartman *DePaul University (Chicago) & The School of Choice/ l'Ecole de Choix (Haiti)*

Laura Pincus Hartman is a professor *emerita* at DePaul University and executive director of the School of Choice Education Organization, a U.S.-based nonprofit that she co-founded, which oversees the School of Choice / l'Ecole de Choix, a unique trilingual elementary school in Haiti that provides high-quality leadership development education to children living in extreme conditions of poverty.

From 2015–2017, Professor Hartman also served as the inaugural director of the Susilo Institute for Ethics in the Global Economy and clinical professor of Business Ethics in the Department of Organizational Behavior. She also was an associated professor at the Kedge Business School (Marseille, France).

Professor Hartman held a number of roles at DePaul University over her almost three-decade career there, including associate vice president for Academic Affairs, Vincent de Paul Professor of Business Ethics at DePaul University's Driehaus College of Business, and director of its Institute for Business and Professional Ethics. Hartman also has taught at INSEAD (France), HEC (France), the Université Paul Cezanne Aix Marseille III, the University of Toulouse, and the Grenoble Graduate School of Business. Hartman is past president of the Society for Business Ethics, was co-chair of its Committee on International Collaborations, and established and directed its professional mentorship program.

In the private sector, concurrent to her academic work, Hartman was director of External Partnerships for Zynga.Org (2009–2012), through which Zynga players of *FarmVille, Words with Friends,* and other online games have contributed over $20 million toward both domestic and international social causes. From 2009–2011, she represented DePaul University on the Worldwide Vincentian Family's Vincentian Board for Haiti and was instrumental in the hands-on design and implementation of a micro-development, finance, and education system for people living in poverty in Haiti. Hartman is a thought leader in leadership and ethical decision making, and her work has resulted in the publication of more than 80 articles, cases, and books and demonstrates the potential for innovative and profitable partnerships to alleviate poverty while providing measurable value to all stakeholders involved.

A winner of the Microsoft CreateGOOD award at Cannes Lions (2015), named one of *Ethisphere's* 100 Most Influential People in Business Ethics, and one of *Fast Company's* Most Creative People in Business (2014), Hartman serves as an advisor to a number of start-ups and has consulted with multinational for-profits, nonprofits, and educational institutions. She was invited to BAInnovate's inaugural UnGrounded lab and has been named to *Fast Company*'s "League of Extraordinary Woman."

Hartman graduated *magna cum laude* from Tufts University and received her law degree from the University of Chicago Law School. She divides her time between Haiti and Sint Maarten and has been a mother to two daughters.

# Prelude to the 10th Edition

Well before our tenth edition, when we knew we would make it to that momentous and quite admirable milestone, our preliminary thoughts for the preface were all about what a milestone it was, especially in light of the fact that it had trod such new territory as a first-of-its-kind textbook that ended up creating the discipline. That is quite an accomplishment. However, as the actual time approached, those thoughts took a far back seat to the situation the country found itself in as relates to the subject matter of this text.

This has been a hard edition to write. Not because writing the book is difficult in and of itself. After all, we have been at this for nearly thirty years now and we love writing it. The difficulty came in day after day seeing all sorts of changes being made to issues addressed in the text that would have been unthinkable before. In February 2020, the FBI for the fist time deemed white supremacist groups on par with Middle Eastern terrorist groups in terms of the threat they pose to the United States.[1] Hundreds of judges have been appointed by the Trump administration, many of whose backgrounds seem to reflect a point of view akin to Trump's rather than qualifications and experience that reflect an ability to be able to listen and judge fairly and objectively based on legal principles. Trump continues to sow racial and ethnic discord. In the midst of a tremendously upsetting global pandemic in March 2020, he insisted on calling it the "China" virus rather than its scientific name, COVID-19. One of the fallouts of this characterization was people who appeared to be of Chinese ethnicity were harassed and subject to violence on our streets, including in one instance a Chinese doctor on his way to help COVID-19 patients. Trump finally announced he would no longer use the term.

In May 2020, protests as well as rioting (what MLK, Jr. called "the language of the unheard") swept across the country after yet another killing of an unarmed African American male at the hands of the police. Officer Derek Chauvin kept his knee on Floyd's neck for 8 minutes and 46 seconds while Floyd lay on his stomach on the ground, handcuffed with his hands behind his back, saying he could not breathe, in front of a crowd shouting for Chauvin to take his knee away. Trump's response was to call the protesters "THUGS" and tweet "When the looting starts, the shooting starts." Quite different than his response to heavily armed white shelter-at-home protesters on the steps of the Michigan capitol, who were, "Good people," "just angry." This attitude Trump projects inevitably finds its way into his policies and into the workplace. Legal principles such as mandatory arbitration agreements long denounced by the EEOC are now endorsed by the agency despite the principle being directly at odds with the agency's mission and declared so 22 years ago by the agency. The Department of Justice argued before the U.S. Supreme Court that Title VII should not include protection for the LGBTQ community, totally at odds with the argument of the EEOC arguing as a party in the case. We are pleased that the Court did not agree with him in its June 15 ruling in *Bostock v. Clayton County, Georgia* decision. And there have been rollbacks in other policies that were intended to give full effect to the laws the agency enforces. While employers came up with breathtaking new and creative and vigorous approaches to workplace race issues in light of the racial reckoning in the wake of the George Floyd killing, Trump ordered that the federal government cease diversity and inclusion training for federal employees and government contractors. When Wells Fargo and Microsoft announced new goals for hiring Black leaders, the Office of Federal Contract Compliance responsible for monitoring federal contracts required them to show cause why this was not illegal. The US Chamber of Commerce, joined by over 150 other profit and non-profit organizations, pushed back and in October 2020 wrote to Trump asking him to withdraw his order.

[1]Allam, Hannah, "FBI Announces That Racist Violence Is Now Equal Priority to Foreign Terrorism," National Public Radio (February 10, 2020).

It is rather unprecedented for us to make such pronouncements, but under the circumstances, we would be remiss if we did not do so. It is not *our* truth. It is *the* truth. It is not said for purposes of politics, persuasion, or denigration but rather to simply state the status of the law and present environment regarding issues this textbook addresses. Despite it all, the law exists, and we persevere and will continue to do our best to teach future employers, managers, and supervisors how to abide by the law and avoid workplace liability for unnecessary and avoidable discrimination claims.

Acting like a cloud over all of this is, at this point, the COVID-19 pandemic. As we write this prelude on October 18, 2020, our classes have been moved online since spring break in March, and they will continue online at least through the spring of 2021. Commencement and virtually every other university program has been canceled or moved to Zoom. All over the country restaurants are closed, as are movie theaters, bowling alleys, churches, and even Broadway. Anyone who can work from home is doing so. Zoom's stock spiked more than 100 percent after the COVID-19 pandemic hit, and it became the primary way meetings were held by every entity from international corporations to families, from churches to civic groups, and from entertainment to classrooms. Although there has been no national declaration of sheltering in place in the United States, scientists urged it, and more than 90 percent of the American population is under some kind of shutdown. All but nonessential venues were closed at some point. Toilet paper is difficult to find. Hospitals are running out of beds, ventilators, and personal protection equipment. Our stock markets have all but crashed. The $2 trillion virus rescue package passed by Congress was deemed insufficient as soon as it was signed. Life as we know it was at a virtual standstill. Even the EEOC paused its issuance of right to sue notices and courts are holding trials and hearings virtually. And we have no idea when things will get back to normal.

But they will. And when they do, we have no doubt that we will continue to persevere as a country, right ourselves, and bring ourselves back to our basic American values such as human dignity, equality, and appreciation of the value of a person's worth measured in what they do rather than their gender, race, ethnicity, religion, disability status, or sexual orientation or other characteristics having little or nothing to do with their qualifications for the job. That is what this law is all about. So, despite the fact that it was difficult to do, we have brought you the latest regarding the law.

We should note for you that, although COVID-19 is a huge part of our lives at the moment, it does not change the fundamental laws we discuss. There have been some impacts, and we have mentioned them where we think appropriate. But because these changes have said they were only due to and during the pandemic, we view them as temporary. So, while we note them in passing for you, we have not dwelled on them because things are moving so quickly and could change and we do not want to have them take you away from the main aspects of the law that will remain long after the pandemic is over. If there are changes in your workplace related to the virus, your employer will notify you of them.

Finally, as we write this, millions of citizens have taken to the streets across the country and even across the globe to express their concern and frustration about the country's ongoing racial inequalities further demonstrated by the killing of yet another unarmed Black man, George Floyd in Minneapolis, MN on May 25, 2020 at the hands of police officer Derek Chauvin. Deep concern for these issues by millions of people across the country was aptly represented by a note posted to his colleagues by Mark Mason, Chief Financial Officer of global Citibank. It was the first corporate response I saw. It was tremendous. The first ten lines of the post simply said, "I can't breathe." These are the words uttered by Mr. Floyd as he lay dying in the streets of Minneapolis. He went on to speak of the personal decision to speak out and why it was necessary for him to do so. He ended with a request for others to join him in contributing to organizations doing the important work of trying to make society better.

I applaud Mr. Mason for being courageous enough to take such a stand and live out the diversity, equity and inclusion values his company espouses. Nike's later "For Once, Don't Do It" anti-racism ad was

awesome as well. In the days that followed, thousands of other companies followed suit and issued statements, and went beyond and sought ways to make have their organizations truly reflect the values they said they believed in. We believe that corporations play an absolutely necessary and invaluable role in helping to reflect in the workplace values that will help us all live in a more just and equitable world and I appreciate these companies taking these inclusive, cutting-edge steps to make that a reality.

In closing, while the step Mr. Mason took, as the chief financial officer for a global financial institution was one that had the potential to impact many around the globe, do not for one second think that you, too, cannot also make an impact wherever you are. Do not underestimate the seeming casual, random conversations you have with your fellow students, friends, colleagues and family members. Use them as a basis to educate, raise awareness and even advocate. People hear you. We are in this together. A win for one of us is a win for all of us. Each of us has a part to play. Play yours for all its worth. Do your part to make the world a better place.

As we have said from our very first edition, ***please*** do not hesitate to contact us about the book. We *love* hearing from you. And we love it that you really do email us.

*Dawn D. Bennett-Alexander*
*Athens, GA*
*October 18, 2020*
*dawndba@gmail.com*

Like Dawn, I reviewed my comments from past editions and realized that perhaps I held a bit more optimism in our social fabric than was warranted during those earlier times. But hope propels me. My hope is not necessarily grounded in abounding evidence of human goodness. Instead, I am inspired and find confidence in the resilience of those around me—how people respond when the world is not so good, to them or to others.

I see people who survive each day with intense political instability, others who manage to persevere in the face of deep conflict or baseless hatred, some who consistently speak up on behalf of those who cannot, people who fight for what is right, no matter the cost. I am in awe of their strength and the way that they wake up each morning and do it again.

What wakes you up in the morning? What keeps you awake at night? No matter what issues are important to you, we encourage you to use your voice, mobilized by education, to impact your life and the lives of others in a way that raises the quality of life for all.

Our responsibility as educators is to galvanize and motivate your response to this world and to develop (or enhance) your empathy in the face of injustice, that lingering sense of indignity even when the affront is not against ourselves. Through this text, we seek to equip you with powerful tools so that both you and those without a voice can be heard more clearly.

Many years may have passed since our first edition was published, and that first edition came out a quarter of a century after Title VII had been passed. It may seem like a great deal of time, and perhaps much has changed, but ***not enough.*** Whether one agrees with his politics or not, it seems fitting to begin each edition with past President Obama's words, "Change will not come if we wait for some other person, or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek."*

Be that change.

*Laura Pincus Hartman*
*Sint Maarten, April 2020*

*Barack Obama's Feb. 5 Speech. *The New York Times*, February 5, 2008.

# Preface

- Can an employer terminate a female employee because male employees find her pleasing shape too distracting?
- Can an employer institute a policy prohibiting Muslim women from wearing their hijabs (head scarves)?
- Can an employer be successfully sued for "reverse discrimination" by an employee who feels harmed by the employer's affirmative action plan?
- If a disabled employee could perform the job requirements when hired, but the job has progressed and the employee is no longer able to perform, must the employer keep her on?
- Is an ex-employer liable for defamation if he gives a negative recommendation about an ex-employee to a potential employer who inquires?

These types of questions, which are routinely decided in workplaces every day, can have devastating financial and productivity consequences if mishandled by the employer. Yet few employers or their managers and supervisors are equipped to handle them well. That is why this textbook was created.

Between fiscal years 1970, when newly enacted job discrimination legislation cases started to rise, and 2019, the number of federal discrimination suits grew from fewer than 350 per year to over 70,000, reaching an all-time high in 2016 of just shy of 100,000. A major factor in this statistic is that the groups protected by Title VII of the Civil Rights Act of 1964 and similar legislation, including minorities, women, and employees over 40, now constitute over 70 percent of the total workforce. Add to that number those protected by laws addressing disability, genetic and family medical history, wages and hours, and unions; workplace environmental right-to-know laws; tort laws; and occupational safety and health laws, and the percentage increases even more. The U.S. Department of Labor alone administers more than 180 federal laws covering about 10 million employers and 125 million workers.[1]

It is good that employers and employees alike are now getting the benefits derived from having a safer, fairer workplace and one more reflective of the population. However, this is not without its attendant challenges. One of those challenges is reflected in the statistics given above. With the advent of workplace regulation by the government, particularly the Civil Rights Act of 1964, there is more of an expectation by employees of certain basic rights in the workplace. When these expectations are not met and the affected population constitutes more than 70 percent of the workforce, problems and their attendant litigation not only will arise but are likely to be numerous.

Plaintiffs generally win nearly 50 percent of lawsuits brought for workplace discrimination. The median monetary damage award is $155,000.[2] As you will soon

[1]https://www.dol.gov/general/aboutdol/majorlaws.

[2]"Valuing Your Case," Workplace Fairness (2017), https://www.workplacefairness.org/valuing_your_case (accessed June 5, 2017).

see, the good news is that the vast majority of the litigation and liability arising in the area covered by these statistics is completely avoidable. Many times the only difference between an employer being sued or not is a manager or supervisor who recognizes that the decision being made may lead to unnecessary litigation and thus avoids it.

When we first began this venture almost 30 years ago, we did not know if we would be able to sell enough copies of the textbook to justify even having a second edition. Luckily, we had a publisher who understood the situation and made a commitment to hang in there with us. The problem was that there was no established market for the text. There were so few classes in this area that they did not even show up as a blip on the radar screen. Actually, we only knew of two. But having worked in this area for years, we knew the need was there, even if the students, faculty, and even employers were not yet aware of it.

We convinced the publishers that "if you publish it, they will come."

And come they did. From the minute the book was first released, it was embraced. And just as we thought, classes were developed, students flooded in, and by the time the smoke cleared, the first edition had exceeded all the publisher's forecasts and expectations. The need that we knew was there really was there, and an entire discipline was created. The textbook spawned other such texts but remains the leading textbook of its kind in the country.

We cannot thank the publishers enough for being so committed to this textbook. Without their commitment, none of this would have happened. And we cannot thank professors and students enough for being there for us, supporting us, believing in the textbook and our voices, and trusting that we will honor the law and our commitment to bring the best to faculty and students.

We have seen what types of employment law problems are most prevalent in the workplace from our extensive experience in the classroom and in our research and writing as well as in conducting over the years many employment seminars for managers, supervisors, business owners, equal employment opportunity officers, human resources personnel, general counsels, and others. We have seen how management most often strays from appropriate considerations and gets into avoidable legal trouble, exposing it to potential increased liability. We came to realize that many of the mistakes were based on ignorance rather than malice. Often employers simply did not know that a situation was being handled incorrectly.

Becoming more aware of potential liability does not mean the employer is not free to make legitimate workplace decisions it deems best. It simply means that those decisions are handled appropriately in ways that lessen or avoid liability. The problem does not lie in not being able to terminate the female who is chronically late for work because the employer thinks she will sue for gender discrimination. Rather, the challenge lies in doing it in a way that precludes her from being able to file a successful gender discrimination claim. It does not mean the employer must retain her despite her failure to adequately meet workplace requirements. Rather, it means that the employer must make certain the termination is beyond reproach. If the employee has performed in a way that results in termination, this should be documentable and, therefore, defensible. Termination of the employee under such

circumstances should present no problem, assuming similarly situated employees consistently have been treated the same way. The employer is free to make the management decisions necessary to run the business, but it simply does so correctly.

Knowing how to do so correctly does not just happen. It must be learned. We set out to create a textbook aimed at anyone who would or presently does manage people. Knowing what is in this book is a necessity. For those already in the workplace, your day is filled with one awkward situation after another—for which you wish you had the answers. For those in school, you will soon be in the workplace, and in the not-too-distant future you will likely be in a position managing others. We cannot promise answers to every one of your questions, but we can promise that we will provide the information and basic considerations in most areas that will help you arrive at an informed, reasonable, and defensible decision about which you can feel more comfortable. You will not walk away feeling as if you rolled the dice when you made a workplace decision and then wait with anxiety to see if the decision will backfire in some way.

In an effort to best inform employers of the reasoning behind legal requirements and to provide a basis for making decisions in "gray areas," we often provide background in relevant social or political movements, or both, as well as in legislative history and other relevant considerations. Law is not created in a vacuum, and this information gives the law context so the purpose is more easily understood. Often understanding why a law exists can help a manager make the correct choices in interpreting the law when making workplace decisions with no clear-cut answers. We have found over the years that so few people really understand what any of this is really about. They know they are not supposed to discriminate on the basis of, say, gender, but they don't always realize (1) when they are doing it and (2) why the law prohibits it. Understanding the background behind the law can give extremely important insight into areas that help with both of these issues and allow the manager to make better decisions, particularly where no clear-cut answer may be apparent.

Legal cases are used to illustrate important concepts; however, we realize that it is the managerial aspects of the concepts with which you must deal. Therefore, we took great pains to try to rid the cases of unnecessary "legalese" and procedural matters that would be more relevant to a lawyer or law student. We also follow each case with questions designed to aid in thinking critically about the issues involved from an employer's standpoint rather than from a purely legal standpoint. We understand that *how* employers make their decisions has a great impact on the decisions made. Therefore, our case-end questions are designed as critical-thinking questions to get the student to go beyond the legal concepts and think critically about management issues. This process of learning to analyze and think critically about issues from different points of view will greatly enhance students' decision-making abilities as future managers or business owners. Addressing the issues in the way they are likely to arise in life greatly enhances that ability. You may wonder why we ask questions such as whether you agree with the court's decision or what you would do in the situation. This is important in getting you to think about facts from your perspective as a potential manager or supervisor. Your thoughts matter just as much as anyone else's, and you should begin to think like a manager if you

are going to be one. Nothing magical happens once you step into the workplace. You bring an awful lot of your own thoughts, preconceived notions, and prejudgments with you. Sometimes these are at odds with the law, which can lead to liability for the employer. The questions are a way to ferret out your own thoughts, to explore what is in your own head that can serve as the basis of decisions you make in the workplace. You can then make any needed adjustments to avoid liability.

It is one thing to know that the law prohibits gender discrimination in employment. It is quite another to recognize such discrimination when it occurs and govern oneself accordingly. For instance, a female employee says she cannot use a "filthy" toilet, which is the only one at the work site. The employer can dismiss the complaint, tell the employee she must use the toilet, and perhaps later be held liable for gender discrimination. Or the employer can think of what implications this may have, given that this is a female employee essentially being denied a right that male employees have in access to a usable toilet. The employer then realizes there may be a problem and is more likely to make the better decision.

This seemingly unlikely scenario is based on an actual case, which you will later read. It is a great example of how simple but unexpected decisions can create liability in surprising ways. Knowing the background and intent of a law often can help in situations where the answer to the problem may not be readily apparent. Including the law in your thinking can help the thought process for making well-founded decisions.

You may notice that, while many of our cases are extremely timely and have a "ripped from the headlines" feel to them, others are somewhat older. There are two reasons why we include those older cases. First, some of them are called "seminal" cases that created the foundation for all of the legal decisions that came afterward, so you need to be aware of them. The other reason is much more practical. Because our goal is to teach you to avoid liability in the workplace, part of our means of reaching the goal is to use fact patterns that we think do the best job of illustrating certain points. Most legal texts try to bring you *only* the latest cases. Of course, we also do that, but our primary goal is to use those cases that we think best illustrate our point. The clearest, most illustrative fact pattern might be an older case rather than a newer one. We will not include newer cases just because they are new. We provide cases that best illustrate our points for you and, if they happen to be older cases that are still good law, we will use them. We are interested in facts that will help you learn what you need to know rather than case dates. We look at the cases that have come out between editions and, if none do the job of illustrating our point better, we go with what is best geared to show you how to think through an issue.

We have made the decision to limit the number of cases in each chapter, and most chapters have three or four. Even though the subject matter from chapter to chapter may lend itself to different numbers of cases, we decided to try for consistency. Hopefully, the carefully chosen cases will still accomplish our purpose.

We also have included endnotes and boxed items from easily accessible media sources that you come across every day, such as *The New York Times, The Wall Street Journal,* and *USA Today.* The intent is to demonstrate how the matters discussed are interesting and integrated into everyday life yet can have serious repercussions for employers. In earlier editions, we opted for reading continuity and thus did not

include a lot of our research material as endnotes. We have made the conscious decision to include more sources as endnotes. Hopefully, what is lost in seeing the endnote callout as you read will be balanced with the fact that you now have the resources to do further investigation on your own since you now have the resources to do so.

Much of today's litigation results from workplace decisions arising from unfortunate ideas about various groups and from lack of awareness about what may result in litigation. We do not want to take away anyone's right to think whatever he or she wants about whomever he or she wants, but we do want to teach that those thoughts may result in legal trouble when they are acted on.

Something new and innovative must be done if we are to break the cycle of insensitivity and myopia that results in spiraling numbers of unnecessary workplace lawsuits. Part of breaking this cycle is using language and terminology that more accurately reflect those considerations. We therefore, in writing the text, made a rather unorthodox move and took the offensive, creating a path rather than following one.

For instance, the term *sex* is generally used in this text to mean sex only in a purely sexual sense—which means we do not use it very much. The term *gender* is used to distinguish males from females (although we understand that gender is not necessarily binary). With the increasing use of sexual harassment as a cause of action, it became confusing to continue to speak of sex as meaning gender, particularly when it adds to the confusion to understand that sex need *not* be present in a sexual harassment claim but gender differences *are* required. For instance, to say that a claim must be based on "a difference in treatment based on sex" leaves it unclear as to whether it means gender or sexual activity. Since it actually means gender, we have made such clarifications. Also, use of the term *sex* in connection with gender discrimination cases, the majority of which are brought by women, continues to inject sexuality into the equation of women and work. This, in turn, contributes to keeping women and sexuality connected in an inappropriate setting (employment). Further, it does so at a time when there is an attempt to decrease such connections and, instead, concentrate on the applicant's qualifications for the job. The term is also confusing when a growing number of workplace discrimination claims have been brought by transgender individuals, for whom gender, sex, and sexuality intersect and can cause confusion if language is not intentional, accurate, conscious, and thoughtful.

We were utterly delighted that for the first time in the 20-year history of the text, we were comfortably using the terms *homosexual* and *sexual orientation.* We are ecstatic that society has come to a place where the negative connotations these terms once had are not as prevalent as they once were. In our previous edition, we wrote the following:

> *So, too, with the term homosexuality. In this text, the term affinity orientation is used instead. The traditional term emphasizes, for one group and not others, the highly personal yet generally irrelevant issue of the employee's sexuality. The use of the term sets up those within that group for consideration as different (usually interpreted to be "less than"), when they may well be qualified for the job and otherwise acceptable. With sexuality being highlighted in referring to them, it becomes difficult to think of them in any other light. The term also*

*continues to pander to the historically more sensational or titillating aspects of the applicant's personal life and uses it to color her or his entire life when all that should be of interest is ability to do the job. Using more appropriate terminology will hopefully keep the focus on that ability.*

Being able to see society move so far in 26 years and pass laws of protection in this area that make it easier to deal with the LGBTQ community as full human beings is heartening.

The term *disabled* or *differently abled* is used rather than *handicapped* to conform to the more enlightened view taken by the Americans with Disabilities Act of 1990. It gets away from the old notion noted by some that those who were differently abled went "cap in hand" looking for handouts. Rather, it recognizes the importance of including in employment these 40 million Americans who can contribute to the workplace despite their physical or mental condition.

There is also a diligent effort to use gender-inclusive or neutral terminology—for example, police officers rather than policemen, firefighters rather than firemen, servers rather than waiters or waitresses, and flight attendants rather than stewards or stewardesses. We urge you to add to the list and use such language in your conversations. To use different terminology for males and females performing the same job reflects a gender difference when there is no need to do so. If, as the law requires, it is irrelevant because it is the job itself on which we wish to focus, then our language should reflect this.

It is not simply a matter of terminology. Words are powerful. They convey ideas to us about the matter spoken of. To the extent we change our language to be more neutral when referring to employees, it will be easier to change our ingrained notions of the "appropriateness" of traditional employment roles based on gender, sexuality, or other largely irrelevant criteria and make employment discrimination laws more effective. Imagine a young girl who is inspired to serve and protect her community. She considers professions and yet is discouraged because she reads and hears about firemen, policemen, and other male-sounding jobs. These positions do not sound like they are oriented toward women, so instead she focuses on the roles that sound like they welcome women. That is a shame.

This conscious choice of language also is not a reflection of temporal "political correctness" considerations. It goes far beyond what terming something *politically correct* tends to do. These changes in terminology are substantive and nontrivial ones that attempt to have language reflect reality rather than have our reality shaped and limited by the language we use. Being sensitive to the matter of language can help make us more sensitive to what stands behind the words. That is an important aid in avoiding liability and obeying the law.

The best way to determine what an employer must do to avoid liability for employment decisions is to look at cases to see what courts have used to determine previous liability. This is why we have provided many and varied cases for you to consider. Much care has been taken to make the cases not only relevant, informative, and illustrative but also interesting and easy to read. There is a good mix of new cases along with the old standards that still define an area. We have assiduously

tried to avoid legalese and intricate legal consideration. Instead, we emphasize the legal managerial aspects of cases—that is, what does the case mean that management should or should not do to be best protected from violating the law?

We wanted the textbook to be informative and readable—a resource to encourage critical and creative thinking about workplace issues and to sensitize you to the need for effective workplace management of these issues. We think we have accomplished our goal. We hope the text is as interesting and informative for you to read and use as it was exciting and challenging for us to write.

# Modifications to the 10th Edition

Throughout the text, we have, as necessary, updated statistics and replaced in-text examples, end-of-chapter questions, and cases with the most current ones available. However, where a case represents the seminal case on a matter, we have chosen to leave that case since it is vital for students to be well versed in the legal precedent. The same is true of chapter-end questions. If they were the best to illustrate a point, we left them in. In addition to the updated statistics and figures throughout, the major changes include the following:

Chapter 1: Discusses

- New information on the costs of misclassifying a worker.
- An overview of the ABC test to determine if someone is an employee (as introduced in *Dynamex Operations v. Lee*).
- The update to section on non-competes relevant to our age of the gig economy.
- A new section on interns, trainees, and volunteers.

Chapter 2: Includes new and updated information on retaliation.

Chapter 3: Contains updated information throughout, including

- Impact of the 2016 election on the work of the EEOC.
- The EEOC's new Strategic Enforcement Plan for 2017–2022.
- The EEOC extension of the Title VII gender category to include discrimination on the basis of sexual orientation, an update on its inclusion of gender as a basis for gender identity claims, and the EEOC's new emphasis on maintaining employee access to Title VII claims.

Chapter 4: Contains

- An analysis of the use artificial intelligence (AI) tools in the recruitment and selection process to reduce even the appearance of discriminatory practices.
- Introduction of the concept of homophily in recruitment (the practice of preferring people like ourselves).
- Implications of health concerns arising from a global pandemic on recruitment and selection processes.
- Discussion of the rise of workplace violence and implications for hiring (both permanent and gig workers).
- Updates to section on drug testing to include discussion of legal marijuana use.
- Updates to section on personality testing.
- The role of social media during selection.

Chapter 5: Modifications include

- Clarification of and more background on the connection between affirmative action background and present-day vestiges.

- Update of the Dodd–Frank Wall Street Reform and Consumer Protection Act of requirement of Offices of Minority and Women's inclusion in the agencies it covers and the businesses they regulate.
- The NFL's informal extension of the Rooney Rule to cover some vacancies for offensive and defensive coordinator positions.

Chapter 6: Includes discussion of the

- Impact of the 2016 presidential election and other recent events on workplace issues.
- Increase in Asian American discrimination.
- Increase in workplace harassment claims.

Chapter 7: Updated data includes

- Brand-new section: "Latinx Discrimination: Impact of Socio-Political Environmental Factors."
- Updated statistics about immigrants in the U.S. workforce.
- Updated EEOC guidance on national origin discrimination.
- The evolving law relating to English-only rules, presented in a comprehensive manner, including expanded discussion on the costs of those policies.
- Additional discussion and clarification on discrimination based on alienage or citizenship status.
- Increasing national origin discrimination claims since September 11, 2001, and updated statistics and discussion on Middle Eastern discrimination.

Chapter 8: Contains new information on

- Increasing gender discrimination claims interpretation.
- U.S. women's soccer team pay discrimination issue and lawsuit.
- Discussion of demonstrations regarding gender issues and concerns in the country.
- Updated gender statistics.
- Claims by women terminated because they were "too hot" and updated concerted individual regional Walmart gender discrimination cases.
- Increasing technology industry gender issues and lawsuits.
- Impact of #MeToo and #TimesUp on women in the workplace.

Chapter 9: Contains

- Impact of #MeToo on sexual harassment claims being filed.
- Claims involving famous harassers such as Harvey Weinstein.
- A discussion of the new Hollywood Commission chaired by Anita Hill.
- Discussion of increased EEOC budgeting and emphasis on sexual harassment claims.

Chapter 10: Contains updated discussions on sexual orientation and gender identity, including

- President Trump's revocation of 2017 executive order calling for federal protection for LGBT employees of federal contractors.

- Discussion of the three LGBTQ cases decided by the U.S. Supreme Court in *Bostock v. Clayton County, Georgia* on June 15, 2020.
- Recent polls on LGBTQ issues and updates.
- The latest HRC Corporate Equality Index figures for corporate adoption of workplace protections and benefits for LGBTQ employees.
- Updated discussion of the Equality Act bill before Congress.

Chapter 11: Contains

- New information on increasingly different manifestations of religious discrimination in the workplace.
- The increasing ways in which religious discrimination claims are being aggressively pursued by employees.

Chapter 12: Examines

- The impact of economic downturn on older workers and the ongoing, difficult question of economics as an RFOA.
- Changes in the application of the ADEA based on size of employer.
- In greater detail the EEOC's "Final Rule on Disparate Impact and Reasonable Factors Other than Age (RFOA)."
- Analysis of the newly enacted Protecting Older Workers Against Discrimination Act (POWADA).
- Added discussion clarifying distinctions between the ADEA and Title VII.
- New section on microtargeting.
- Analysis of disparate impact changes under the ADEA.
- Updates to the "same actor" defense.

Chapter 13: Examines/Updates

- New examples of innovation in the workplace, including the hiring initiatives targeting neurodiverse candidates.
- Refreshed discussion on federal tax incentives for hiring people with disabilities.
- Updated discussion on mental impairments that qualify for protection under the ADA, including updated statistics, updated information on intellectual disabilities, and additional and refreshed information on mental illness.
- New discussion on substance abuse and alcohol, including new section on medical marijuana.
- New section on pregnancy and postpartum, including discussion of the Pregnancy Discrimination Act, which amends the ADA and discussion of postpartum depression.
- New section on service animals in the workplace.
- New section on gender dysphoria and the current legal landscape under the ADA.

Chapter 14: Contains

- Extensive updates based on significant advances in technology, information gathering, social media, monitoring, privacy, and the law that have impacted our world in general and the workplace specifically.
- New case law, examples, and end-of-chapter questions that allow the reader to have a current understanding of the environment and implications for the employment context.

Chapter 15: Discusses various labor issues such as

- Aggressive moves to weaken labor unions.
- Updated statistical information on union participation and impact.
- Student movement to unionize college athletics, graduate students.
- State passage of right-to-work laws.
- Increasing number of labor unrest and strikes.

Chapter 16: Discusses wage and benefit issues such as

- The ongoing issue of employee misclassification violations to avoid paying minimum wages and overtime pay.
- The growing concern over unpaid internships.
- New state laws restricting employer use of applicant's prior pay to determine salary.
- Increased enforcement and clarification of lactation time for nursing mothers.
- Increasing FMLA leave challenges.
- Increasing state laws regarding minimum wages even though the federal law has not changed.

As we have done with other editions, in this tenth edition we have continued to make updates and improvements that we think will help students understand the material better. We have added learning objectives for each chapter, new cases where appropriate, updated background and context information, new boxed information, up-to-the-minute legal issues, more insights, and a modified structure. We have kept the things you tell us you love and added to them.

For instance, several editions ago, a reader suggested that we address the issue of the redundancy of examining certain issues in each chapter where they are raised. Based on this excellent suggestion, which we had considered ourselves over the years, we added a "Toolkit" chapter to our eighth edition and have kept it ever since. The Toolkit chapter (Chapter 2, "The Employment Law Toolkit: Resources for Understanding the Law and Recurring Legal Concepts") introduces you to concepts that you will see throughout the text but, rather than repeat them in each chapter, we have added Toolkit icons instead. These icons will be an indication to you that the issue discussed at that point is included in the Toolkit chapter, and you can go back to that chapter and review the issue again if you would like a refresher.

As always, we *truly* welcome your feedback. We are the only textbook we know of that actually gets fan letters. Keep them coming! ☺ We urge you to email us about any thoughts you have about the text, good or bad, as well as suggestions, unclear items you don't understand, errata, or anything else you think would be helpful. Our contact information is:

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And again as always, we hope you have as much fun reading the book as we did writing it. It really is a pleasure. Enjoy!

# Acknowledgments

The authors would like to honor and thank the following individuals, without whose assistance and support this text would never have been written: McGraw Hill Higher Education editorial support for having the insight and courage to sign the first employment law text of its kind before many others were able to see the vast but undeniable merit of doing so; McGraw Hill Product Developer Allie Kukla; Content Project Manager Amy Gehl; Managing Director Tim Vertovec; Marketing Manager Claire McLemore; and Executive Portfolio Manager Kathleen Klehr. Finally, for their contributions to our tenth edition revisions, we would like to thank the scholars who have class tested and reviewed this manuscript, including the following:

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**Bennett-Alexander:** I would like to thank (1) my co-author, Laura Pincus Hartman, for her intellect, energy, support, and hard work. We don't know exactly how it's been working for nearly 30 years, but it absolutely does, and we love, love, love it. Laura, you are such a wonderful soul in the world, and it is an absolute privilege to share this gift and journey with you; (2) our publishers, editors, and other support staff who love this project as much as we do; (3) my daughters Jenniffer Dawn Bennett-Alexander Jones, Anne Alexis Bennett-Alexander, and Tess Alexandra Bennett Harrison for being my special gifts from above and for knowing that my very favorite thing in the whole world is being their Mama—even though they drive me crazy ☺; (4) my grandchildren, Makayla Anne Jones and Edward Christian Alexander Jones, who are such an absolute delight. Thank you for loving Nana so; (5) my siblings, Brenda Bennett Watkins, Dr. Gale C. Bennett Pinson, Rev. Dr. William H. Bennett II, and Barbara Jean Bennett Bethea (1939–2007), for their unwavering confidence, love, support, and laughs; (6) my BFF, linda f. harrison, who can always be counted on for whatever, including smoothing ruffled feathers and a great belly laugh. I don't know how it works, but it's been doing it for 41 (!!) years; (7) my incomparable university president, Jere W. Morehead. Where do I even start? I appreciate you more than you know in ways of which you are well aware. You make me laugh so, even as your quiet, steady, unrelenting, and total dedication to making UGA all it can be spurs me to do even more than I thought possible, and for that I thank you; (8) the thousands of managers, supervisors, employers, and employees who have shared their experiences and insights over the years; (9) my colleagues from across the country who have been so incredibly supportive of this text over the years; and, last but *certainly* not least, (10) my

very favorites, my students, who are a never-ending source of utter wonder, insight, information, and fun for me. Do we have a good time *or what?*

This text is *immeasurably* richer for having the contributions of *each* of you.

*DDB-A*

**Hartman:** I have gone through a few more challenges posed by Mother Nature in the past several years than I would have anticipated, which have impacted my connectivity and working environment. However, Dawn has been patient and supportive throughout the entire time. It is her patience, along with the massive support of others, that has allowed me to continue to work at the pace I do. Dawn is a rock, and I am grateful to her.

Our lives are enriched because of the community of people who contribute to our lives and our work each day. This text is far enhanced because of the expertise of Summer Brown and Katrina Myers, who have worked on prior editions and I desperately hope continue to be by my side forever. All errors—and, *yes, we know* they are there, dear readers, so send them in—are completely our own.

*LPH*

# Text Organization

*Employment Law for Business, Tenth Edition,* has been revised and updated to maintain its currency amid a rapidly changing landscape in the area of employment law. Some of its content has also been streamlined to provide a more realistic opportunity for instructors to cover key concepts in one semester. Learning objectives at the start of each chapter alert instructor and students to key concepts within. Cases are found at the end of the chapter to facilitate a smoother read, with case icons inserted into the text where references are appropriate.



**Part 1** gives the foundations for employment law, covering introductory topics and cases to set the stage for later coverage. This initial section now includes more material to give students a more thorough grounding.

**Chapter 1** provides an introduction to the employment environment and explains the freedom to contract and the current regulatory environment for employment. It also includes an expansive discussion of employment-at-will.

**Chapter 2** is the Toolkit chapter that provides information on several topics that run throughout the text. Chapters thereafter that mention these issues will use a toolkit icon to notify the reader to go back to the Toolkit chapter if a refresher is needed.

**Chapter 3** covers Title VII of the Civil Rights Act in order to illustrate the foundational nature this groundbreaking legislation has for employment law.

**Chapter 4** introduces the reader to the regulation of the employment process, such as recruitment, selection, and hiring. In examining the variety of methods of information gathering through testing and other media, it also explores the issue of employers' access to extraordinary amounts of information via evolving technology. The chapter has been extensively updated with illustrative and supporting empirical data integrated throughout the chapter, including information relating to corporate use of employee referral programs, workplace violence, employer use of online sources for background investigation, corporate use of personality and integrity tests in the hiring process, and legislation regulating genetic testing in employment.

**Part 2** covers various types of discrimination in employment, with each chapter revised to reflect recent changes.

**Chapter 5** includes a discussion on recent revisions to affirmative action regulations and misuse of affirmative action, including the famous U.S. Supreme Court decision on the firefighters in New Haven, Connecticut.

**Chapter 6** presents a historical overview of racism in the United States, giving students a deeper understanding of how prevalent racial discrimination still is so managers can better recognize potential liability as it arises. In addition, contemporary race issues and racial harassment are addressed.

**Chapter 7** directly follows Chapter 6 in order to link and distinguish the concepts of race and national origin in U.S. laws and culture.

**Chapter 8** features coverage of how gender impacts the workplace, including gender discrimination, pregnancy discrimination, gender stereotyping, workplace grooming codes, fetal protection policies, lactation break requirements, and comparable worth.

**Chapter 9** explores the law relating to sexual harassment, clearly explaining the difference between quid pro quo and hostile environment sexual harassment as well as how to avoid employer liability in this important area.

**Chapter 10** discusses developments in sexual orientation discrimination and gender identity issues and offers management tips on how to handle this quickly evolving topic.

**Chapter 11** gives students up-to-date considerations on the many aspects of religious discrimination, including explanations of the legal definition of religion, points on the employer's duty to reasonably accommodate employees, and information on the correct usage of religion as a BFOQ. Issues of increasing frequency such as Muslim employee workplace conflicts are discussed and methods provided for how to handle these matters.

**Chapter 12** provides a comprehensive review of age discrimination laws in the workplace and has been updated with current statistical information with regard to age discrimination and also includes comparisons of perceptions of age in the United States and other countries. Additional updates include state age discrimination laws and the legal standard prohibiting an employer from engaging in retaliatory behavior in response to an age discrimination filing.

**Chapter 13** offers a complete analysis of the legal environment with regard to workers with disabilities with an expanded discussion of the legal history of protection against discrimination on the basis of disability. The chapter is comprehensive in its coverage of both the Genetic Information Non-Discrimination Act and the Americans with Disabilities Act Amendments Act (ADAAA) and offers examples to managers of ways to create more inclusive working environments.

**Part 3** lays out additional regulatory processes and dilemmas in employment. Several chapters on various regulatory issues have been merged to form the final chapter.

**Chapter 14** examines the roles of both the employer and the employee in connection with privacy in the workplace and has been thoroughly updated to keep step with the practically daily changes in technology and how they affect employee privacy. These developments include reference to blogging, social media, RFIDs, GPS, and expanded legal frameworks, both domestic and global.

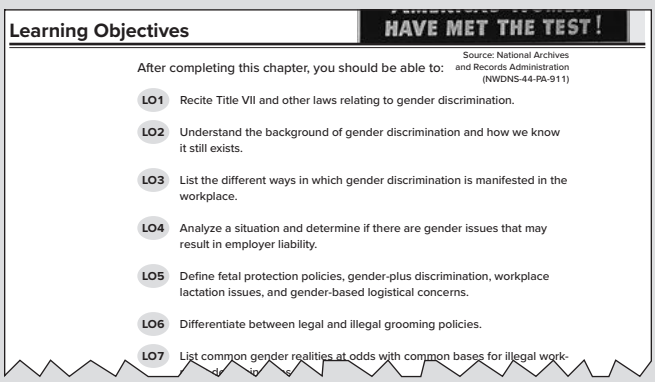
**Chapter 15** addresses collective bargaining and unions in a chapter on labor law.

**Chapter 16** offers helpful information on the Fair Labor Standards Act (FLSA); the Family Medical Leave Act (FMLA), including the amendments for military families preparing for active duty or injured in active duty; the Occupational Safety and Health Act (OSHA); and the Employee Retirement Income Security Act (ERISA).

# Key Features for the 10th Edition

## Learning Objectives

Each chapter has active learning objectives, posted before addressing the subject matter, that give a clear picture of specifically what readers should know when they finish studying the chapter. In addition, the learning objectives are noted at the place in the chapter in which the information appears.



**Learning Objectives**

HAVE MET THE TEST!

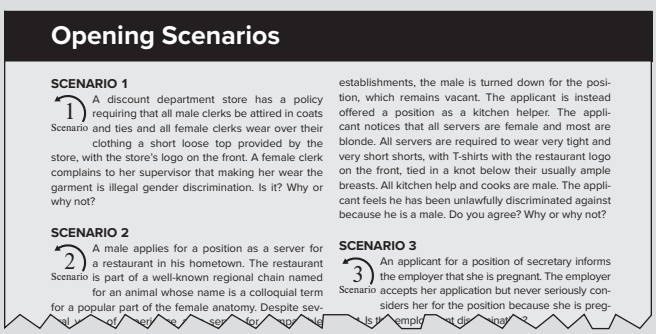
Source: National Archives and Records Administration (NWDNS-44-PA-911)

After completing this chapter, you should be able to:

- **LO1** Recite Title VII and other laws relating to gender discrimination.
- **LO2** Understand the background of gender discrimination and how we know it still exists.
- **LO3** List the different ways in which gender discrimination is manifested in the workplace.
- **LO4** Analyze a situation and determine if there are gender issues that may result in employer liability.
- **LO5** Define fetal protection policies, gender-plus discrimination, workplace lactation issues, and gender-based logistical concerns.
- **LO6** Differentiate between legal and illegal grooming policies.
- **LO7** List common gender realities at odds with common bases for illegal work-

## Opening Scenarios

Based on real cases and situations, chapter-opening scenarios introduce topics and material that illustrate the need for chapter concepts. Scenarios are then revisited throughout the chapter text as material pertinent to the opening scenario is discussed. When you encounter the scenario icon in the chapter body, return to the corresponding opening scenario to see if you can now articulate the correct way to solve the problem.



**Opening Scenarios**

**SCENARIO 1**

Scenario 1 A discount department store has a policy requiring that all male clerks be attired in coats and ties and all female clerks wear over their clothing a short loose top provided by the store, with the store's logo on the front. A female clerk complains to her supervisor that making her wear the garment is illegal gender discrimination. Is it? Why or why not?

**SCENARIO 2**

Scenario 2 A male applies for a position as a server for a restaurant in his hometown. The restaurant is part of a well-known regional chain named for an animal whose name is a colloquial term for a popular part of the female anatomy. Despite sev-

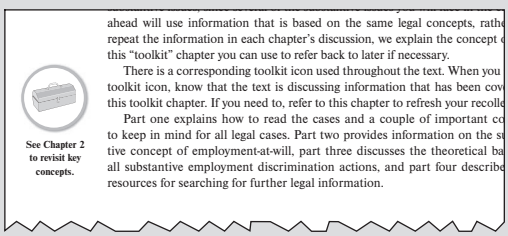
establishments, the male is turned down for the position, which remains vacant. The applicant is instead offered a position as a kitchen helper. The applicant notices that all servers are female and most are blonde. All servers are required to wear very tight and very short shorts, with T-shirts with the restaurant logo on the front, tied in a knot below their usually ample breasts. All kitchen help and cooks are male. The applicant feels he has been unlawfully discriminated against because he is a male. Do you agree? Why or why not?

**SCENARIO 3**

Scenario 3 An applicant for a position of secretary informs the employer that she is pregnant. The employer accepts her application but never seriously considers her for the position because she is preg-

## Toolkit Icons

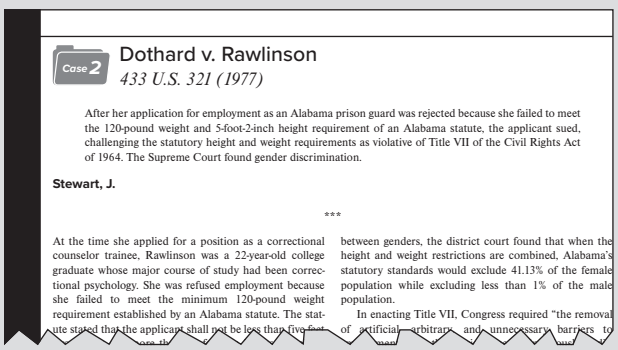
Key concepts used in several different chapters have been combined into one chapter to prevent redundancy. That chapter is Chapter 2, "The Employment Law Toolkit: Resources for Understanding the Law and Recurring Legal Concepts." Where a Toolkit chapter concept arises in a subsequent chapter a notation is made that it can be found in the Toolkit chapter, with an icon placed in the margin.


ahead will use information that is based on the same legal concepts, rathe
repeat the information in each chapter's discussion, we explain the concept
this "toolkit" chapter you can use to refer back to later if necessary.

There is a corresponding toolkit icon used throughout the text. When you
toolkit icon, know that the text is discussing information that has been cov
this toolkit chapter. If you need to, refer to this chapter to refresh your recolle

See Chapter 2 to revisit key concepts.

Part one explains how to read the cases and a couple of important co
to keep in mind for all legal cases. Part two provides information on the s
tive concept of employment-at-will, part three discusses the theoretical ba
all substantive employment discrimination actions, and part four describe
resources for searching for further legal information.


Case 2

Dothard v. Rawlinson

*433 U.S. 321 (1977)*

After her application for employment as an Alabama prison guard was rejected because she failed to meet the 120-pound weight and 5-foot-2-inch height requirement of an Alabama statute, the applicant sued, challenging the statutory height and weight requirements as violative of Title VII of the Civil Rights Act of 1964. The Supreme Court found gender discrimination.

**Stewart, J.**

***

At the time she applied for a position as a correctional counselor trainee, Rawlinson was a 22-year-old college graduate whose major course of study had been correctional psychology. She was refused employment because she failed to meet the minimum 120-pound weight requirement established by an Alabama statute. The statute stated that the applicant shall not be less than five feet

between genders, the district court found that when the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 1% of the male population.

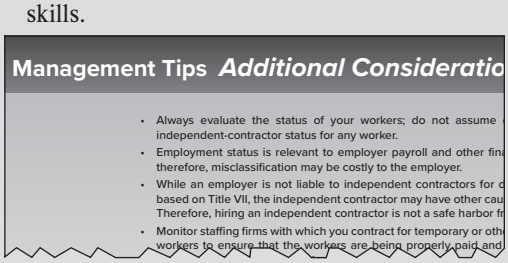
In enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to

## Cases

Excerpted cases are placed at the end of the chapter rather than throughout so that reading can be accomplished without interruption. There are reference icons in the chapter when a case is discussed. There is a minimum of legalese and only facts relevant to the employment law issues are included. Each digested case has a short introductory paragraph to explain the facts and issues in the case and is followed by three critical thinking questions created to build and strengthen managerial liability-avoidance skills.

## Management Tips

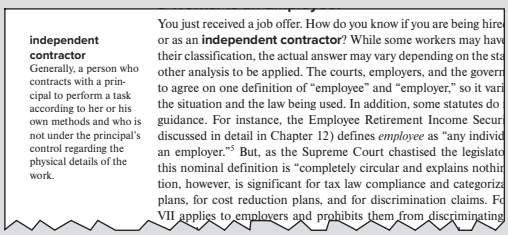
These boxes, included near the conclusion of each chapter, encapsulate how key concepts relate to managerial concerns. The authors offer concise tips on how to put chapter material into practice in the real world.


**Management Tips** ***Additional Considerati***

- Always evaluate the status of your workers; do not assume independent-contractor status for any worker.
- Employment status is relevant to employer payroll and other fin therefore, misclassification may be costly to the employer.
- While an employer is not liable to independent contractors for based on Title VII, the independent contractor may have other cau Therefore, hiring an independent contractor is not a safe harbor f
- Monitor staffing firms with which you contract for temporary or oth workers to ensure that the workers are being properly paid and

## Key Terms

Key terms are displayed in larger boldface. The terms are also listed in the Glossary for quick reference.



**independent contractor**
Generally, a person who contracts with a principal to perform a task according to her or his own methods and who is not under the principal's control regarding the physical details of the work.

You just received a job offer. How do you know if you are being hire
or as an **independent contractor**? While some workers may hav
their classification, the actual answer may vary depending on the st
other analysis to be applied. The courts, employers, and the goverr
to agree on one definition of "employee" and "employer," so it vari
the situation and the law being used. In addition, some statutes do
guidance. For instance, the Employee Retirement Income Secur
discussed in detail in Chapter 12) defines *employee* as "any individ
an employer."[5] But, as the Supreme Court chastised the legislato
this nominal definition is "completely circular and explains nothi
tion, however, is significant for tax law compliance and categoriz
plans, for cost reduction plans, and for discrimination claims. Fo
VII applies to employers and prohibits them from discriminating

## Exhibits

Numerous exhibits are included throughout the text to reinforce concepts visually and to provide students with essential background information.

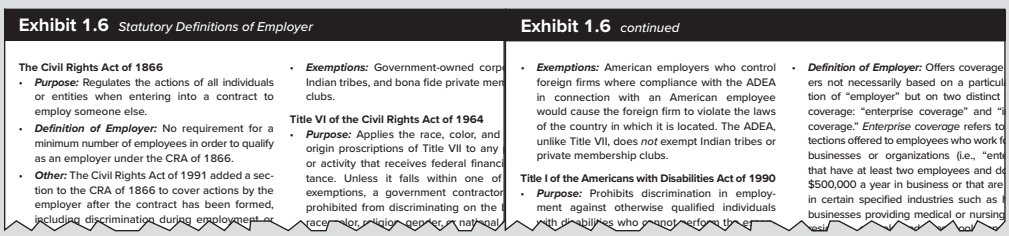


**Exhibit 1.6** *Statutory Definitions of Employer*

**The Civil Rights Act of 1866**

- ***Purpose:*** Regulates the actions of all individuals or entities when entering into a contract to employ someone else.
- ***Definition of Employer:*** No requirement for a minimum number of employees in order to qualify as an employer under the CRA of 1866.
- ***Other:*** The Civil Rights Act of 1991 added a section to the CRA of 1866 to cover actions by the employer after the contract has been formed, including discrimination during employment or
- ***Exemptions:*** Government-owned corp
Indian tribes, and bona fide private mem
clubs.

**Title VI of the Civil Rights Act of 1964**

- ***Purpose:*** Applies the race, color, and origin proscriptions of Title VII to any or activity that receives federal financ tance. Unless it falls within one of exemptions, a government contractor prohibited from discriminating on the race, color, religion, gender, or national

**Exhibit 1.6** *continued*

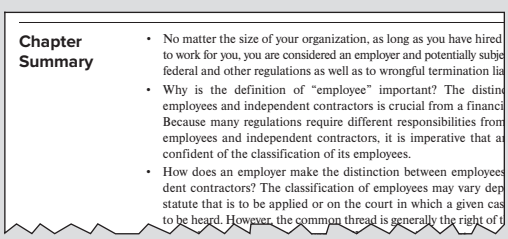
- ***Exemptions:*** American employers who control foreign firms where compliance with the ADEA in connection with an American employee would cause the foreign firm to violate the laws of the country in which it is located. The ADEA, unlike Title VII, does *not* exempt Indian tribes or private membership clubs.

**Title I of the Americans with Disabilities Act of 1990**

- ***Purpose:*** Prohibits discrimination in employment against otherwise qualified individuals with disabilities who cannot perform the e
- ***Definition of Employer:*** Offers coverage ers not necessarily based on a particul tion of "employer" but on two distinct coverage: "enterprise coverage" and " coverage." *Enterprise coverage* refers to tections offered to employees who work f businesses or organizations (i.e., "ente that have at least two employees and d $500,000 a year in business or that are in certain specified industries such as businesses providing medical or nursing

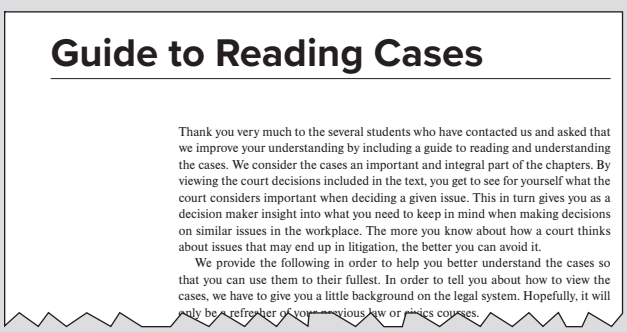
## Chapter Summaries

Each chapter closes with a summary section, giving students and instructors a tool for checking comprehension. Use this bulleted list as an aide in retaining key chapter points.



**Chapter Summary**

- No matter the size of your organization, as long as you have hired to work for you, you are considered an employer and potentially subje federal and other regulations as well as to wrongful termination lia
- Why is the definition of "employee" important? The distinc employees and independent contractors is crucial from a financi Because many regulations require different responsibilities from employees and independent contractors, it is imperative that a confident of the classification of its employees.
- How does an employer make the distinction between employees dent contractors? The classification of employees may vary dep statute that is to be applied or on the court in which a given cas to be heard. However, the common thread is generally the right of t



## Guide to Reading Cases

Thank you very much to the several students who have contacted us and asked that we improve your understanding by including a guide to reading and understanding the cases. We consider the cases an important and integral part of the chapters. By viewing the court decisions included in the text, you get to see for yourself what the court considers important when deciding a given issue. This in turn gives you as a decision maker insight into what you need to keep in mind when making decisions on similar issues in the workplace. The more you know about how a court thinks about issues that may end up in litigation, the better you can avoid it.

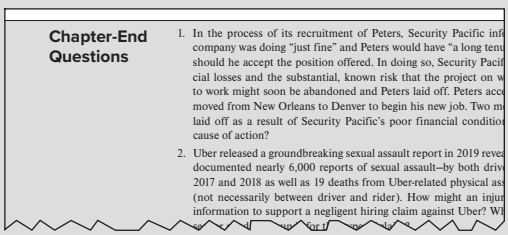
We provide the following in order to help you better understand the cases so that you can use them to their fullest. In order to tell you about how to view the cases, we have to give you a little background on the legal system. Hopefully, it will only be a refresher of your previous law or civics courses.

## Guide to Reading Cases

This guide gives succinct direction on how to get the most out of text cases. Terminology definitions, case citation explanations, and a walkthrough of the trial process are all included to help facilitate student comprehension.

## End-of-Chapter Material

Included at the end of each chapter is a complete set of footnotes for further exploring the issues cited, as well as questions incorporating chapter concepts. Use these as tools to assess your understanding of chapter material.


**Chapter-End Questions**

1. In the process of its recruitment of Peters, Security Pacific inf company was doing "just fine" and Peters would have "a long tenu should he accept the position offered. In doing so, Security Pacif cial losses and the substantial, known risk that the project on w to work might soon be abandoned and Peters laid off. Peters acc moved from New Orleans to Denver to begin his new job. Two m laid off as a result of Security Pacific's poor financial conditio cause of action?
2. Uber released a groundbreaking sexual assault report in 2019 reve documented nearly 6,000 reports of sexual assault–by both driv 2017 and 2018 as well as 19 deaths from Uber-related physical as (not necessarily between driver and rider). How might an injur information to support a negligent hiring claim against Uber? Wh

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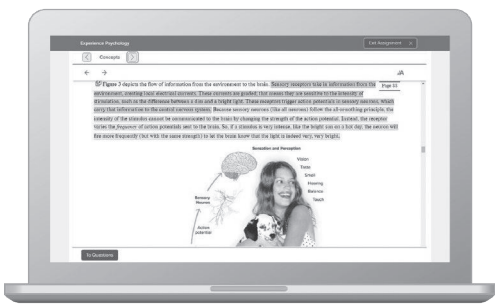

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# Brief Contents

# Contents

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### Gender Discrimination 399



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### Sexual Harassment 462

## Chapter 13



## PART THREE



## Chapter 14

# Guide to Reading Cases

Thank you very much to the several students who have contacted us and asked that we improve your understanding by including a guide to reading and understanding the cases. We consider the cases an important and integral part of the chapters. By viewing the court decisions included in the text, you get to see for yourself what the court considers important when deciding a given issue. This in turn gives you as a decision maker insight into what you need to keep in mind when making decisions on similar issues in the workplace. The more you know about how a court thinks about issues that may end up in litigation, the better you can avoid it.

We provide the following in order to help you better understand the cases so that you can use them to their fullest. In order to tell you about how to view the cases, we have to give you a little background on the legal system. Hopefully, it will only be a refresher of your previous law or civics courses.

## *Stare Decisis* and Precedent

The American legal system is based on *stare decisis,* a system of using legal precedent. Once a judge renders a decision in a case, the decision is generally written and placed in a book called a *law reporter* and must be followed in that jurisdiction when other similar cases arise. The case thus becomes precedent for future cases.

Most of the decisions in the chapters are from federal courts since most of the topics we discuss are based on federal law. Federal courts consist of trial courts (called the "U.S. District Court" for a particular district), courts of appeal (called the "U.S. Circuit Court" for a particular circuit), and the U.S. Supreme Court. U.S. Supreme Court decisions apply to all jurisdictions, and once there is a U.S. Supreme Court decision, all courts must follow the precedent. Circuit court decisions are mandatory precedent only for the circuit in which the decision is issued. All courts in that circuit must follow the U.S. Circuit Court precedents. District court decisions (precedent) are applicable only to the district in which they were made. When courts that are not in the jurisdiction are faced with a novel issue they have not decided before, they can look to other jurisdictions to see how they handled the issue. If such a court likes the other jurisdiction's decision, it can use the approach taken by that jurisdiction's court. However, it is not bound to follow the other court's decision if that court is not in its jurisdiction.

## Understanding the Case Information

With this in mind, let's take a look at a typical case included in this book. Each of the cases is an actual decision written by a judge. The first thing you will see is the

*case name.* This is derived from the parties involved—the one suing (called *plaintiff* at the district court level) and the one being sued (called *defendant* at the district court level). At the court of appeals or Supreme Court level, the first name generally reflects who appealed the case to that court. It may or may not be the party who initially brought the case at the district court level. At the court of appeals level, the person who appealed the case to the court of appeals is known as the *appellant* and the other party is known as the *appellee.* At the Supreme Court level they are known as the *petitioner* and the *respondent.*

Under the case name, the next line will have several numbers and a few letters. This is called a *case citation.* A case citation is the means by which the full case can be located in a law reporter if you want to find the case for yourself in a law library or a legal database such as LEXIS/NEXIS or Westlaw. Reporters are books in which judges' case decisions are kept for later retrieval by lawyers, law students, judges, and others. Law reporters can be found in any law library, and many cases can be found on the Internet for free on websites such as Public Library of Law (plol.org) or FindLaw.com.

Take a minute and turn to one of the cases in the text. Any case will do. A typical citation would be "72 U.S. 544 (2002)." This means that you can find the decision in volume 72 of the *U.S. Supreme Court Reporter* at page 544 and that it is a 2002 decision. The U.S. reporters contain U.S. Supreme Court decisions. Reporters have different names based on the court decisions contained in them; thus, their citations are different.

The citation "43 F.3d 762 (9th Cir. 2002)" means that you can find the case decision in volume 43 of the *Federal Reporter* third series, at page 762 and that the decision came out of the U.S. Circuit Court of Appeals for the Ninth Circuit in the year 2002. The federal reporters contain the cases of the U.S. Circuit Courts of Appeal from across the country.

Similarly, the citation "750 F. Supp. 234 (S.D. N.Y. 2002)" means that you can find the case decision in volume 750 of the *Federal Supplement Reporters,* which contain U.S. district court cases, at page 234. The case was decided in the year 2002 by the U.S. District Court in the Southern District of New York.

In looking at the chapter cases, after the citation we include a short blurb on the case to let you know before you read it what the case is about, what the main issues are, and what the court decided. This is designed to give you a "heads up," rather than just dumping you into the case cold, with no background on what you are about to read.

The next line you see will have a last name and then a comma followed by "J." This is the name of the judge who wrote the decision you are reading. The "J" stands for "judge" or "justice." Judges oversee lower courts, while the term for them used in higher courts is "justices." "C. J." stands for "chief justice."

The next thing you see in looking at the chapter case is the body of the decision. Judges write for lawyers and judges, not for the public at large. As such, they use a lot of legal terms (which we call "legalese") that can make the decisions difficult for a nonlawyer to read. There are also many procedural issues included in cases, which have little or nothing to do with the issues we are providing the case to

illustrate. There also may be many other issues in the case that are not relevant for our purposes. Therefore, rather than give you the entire decision of the court, we instead usually give you a shortened, excerpted version of the case containing only the information relevant for the issue being discussed. If you want to see the entire case for yourself, you can find it by using the citation provided just below the name of the case, as explained above. By not bogging you down in legalese, procedural matters, and other issues irrelevant to our point, we make the cases more accessible and understandable and much less confusing, while still giving you all you need to illustrate our point.

The last thing you will see in the chapter cases is the final decision of the court itself. If the case is a trial court decision by the district court, it will provide relief either for the plaintiff bringing the case or for the defendant against whom the case is brought.

If a defendant makes a *motion to dismiss,* the court will decide that issue and say either that the motion to dismiss is *granted* or that it is *denied.* A defendant will make a motion to dismiss when he or she thinks there is not enough evidence to constitute a violation of law. If the motion to dismiss is granted, the decision favors the defendant in that the court throws the case out. If the motion to dismiss is denied, it means the plaintiff's case can proceed to trial.

The parties also may ask the court to grant a *motion for summary judgment.* This essentially requests that the court take a look at the documentary information submitted by the parties and make a judgment based on that, as there is allegedly no issue that needs to be determined by a jury. Again, the court will either grant the motion for summary judgment or deny it. If the court grants a motion for summary judgment, it also will determine the issues and grant a judgment in favor of one of the parties. If the court dismisses a motion for summary judgment, the case proceeds to trial.

If the case is in the appellate court, it means that one of the parties did not like the trial court's decision. This party appeals the case to the appellate court, seeking to overturn the decision based on what it alleges are errors of law committed by the court below. Cases cannot be appealed simply because one of the parties did not like the facts found by the lower court. After the appellate court reviews the lower court's decision, the court of appeals will either *affirm* the lower court's decision, which means the decision is allowed to stand, or it will *reverse* the lower court's decision, which means the lower court's decision is overturned. If there is work still to be done on the case, the appellate court also will order *remand.* Remand is an order by the court of appeals to the lower court telling it to take the case back and do what needs to be done based on the court's decision.

It is also possible that the appellate court will issue a *per curiam* decision. This is merely a brief, unsigned decision by the court, rather than a long one.

Following the court's decision is a set of questions that are intended to translate what you have read in the case into issues that you would likely have to think about as a business owner, manager, or supervisor. The questions generally are included to make you think about what you read in the case and how it would impact your

decisions as a manager. They are provided as a way to make you think critically and learn how to ask yourself the important questions that you will need to deal with each time you make an employment decision.

The opening scenarios, chapter cases, and case-end questions are important tools for you to use to learn to think like a manager or supervisor. Reading the courts' language and thinking about the issues in the opening scenarios and caseend questions will greatly assist you in making solid, defensible workplace decisions as a manager or supervisor.

Part 1

# The Regulation of the Employment Relationship

Chapter 1

# The Regulation of Employment

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## Learning Objectives

After completing this chapter, you should be able to:

- **LO1** Describe the balance between the freedom to contract and the current regulatory environment for employment.
- **LO2** Identify who is subject to which employment laws and understand the implication of each of these laws for both the employer and employee.
- **LO3** Delineate the risks to the employer caused by employee misclassification.
- **LO4** Explain the difference between an employee and an independent contractor and the tests that help us in that determination.
- **LO5** Articulate the various ways in which the concept "employer" is defined by the various employment-related regulations.
- **LO6** Describe the permissible parameters of non-compete agreements.

# Opening Scenarios

## SCENARIO 1

1 Scenario

Dalia worked on a contract basis as an auto mechanic for the clients of an auto repair shop. Whenever there was too much work for the employees of the shop, Dalia would receive a call and be assigned by the shop to do specific repairs on a particular vehicle.

Dalia's specialty was rebuilding engines, and the firm would often contact her to handle complex breakdowns for which they did not have sufficient time, since she worked much faster than the other four mechanics it had on staff. When the job was completed, she was paid a commission for her work based on the amount charged to that client by the auto shop. This commission was established in advance in the contract Dalia was offered when she accepted the position.

During the time she was working, Dalia was paid weekly, was free to use the shop's garage, and also could use whatever equipment and supplies were necessary to complete the job. In order to ensure a consistent quality among all of its workers as well as to be sure that it complied with all regulations that might govern the job, the firm's head mechanic would check the car before the client was called to pick up the vehicle. This process ensured that clients saw all of the shop's workers and contractors as equivalent quality.

Dalia is laid off in the middle of a job, and she files for unemployment compensation. The shop defends the claim, arguing that she was not an employee. Was Dalia an employee or an independent contractor?

## SCENARIO 2

2 Scenario

Soraya worked as an administrative assistant for Illusionary Industry Inc. (III), and Raphael was her supervisor. Whenever Raphael and Soraya were alone in the office, Raphael engaged in physical contact toward Soraya that she made clear that she did not want. When he tried to kiss her or touch her, she would tell him to stop, move away from him, and even push him away at times. He continued to make sexual advances and lewd suggestive comments, all of which rose to the level of sexual harassment. Raphael even followed Soraya home one day and watched her house for over an hour from across the street. When she finally opened the door and confronted him, Raphael claimed that he had been merely on his way to a nearby market despite the fact that he lived on the other side of town near other markets.

After Soraya rejected Raphael's advances, he retaliated by writing her a poor performance review and then denied her a promotion. Soraya complained to III's Human Resources department, initially asking the department to keep her complaint confidential. However, she later informed the department that she could no longer work with Raphael. III investigated her complaint and subsequently suspended Raphael for one month with pay. Soraya appreciates III's action but remains frustrated that Raphael is simply suspended and finds that she really has no remedy against Raphael through III. She files a complaint against him with the Equal Employment Opportunity Commission. Will the EEOC case be successful? Why or why not?

## SCENARIO 3

3 Scenario

For two years, Mya worked for a tire supply company as an outside sales representative. Of the firm's 4,000 clients across several states in the southern United States, Mya was responsible for 100 clients, spread throughout western Texas. She visited these customers on a regular basis and maintained very close relationships with them. She was the only connection that most of these customers had with the firm, and these clients might not even have known how else to reach the firm except through Mya.

When Mya joined the firm, she signed a non-compete agreement that stipulated that, if she were to stop her relationship with the company, *she would not engage in any business of any kind with any customer of the firm for a period of two years.*

Because of her success in building client relationships, Mya is courted by a competing firm that does business all over the United States. She accepts an offer and begins to contact both her original customers and other customers of her previous employer to encourage them to change tire companies. Mya's previous employer files a cause of action for breach of the non-compete. What are her strongest arguments in her defense?

## Introduction to the Regulatory Environment

How is the employer regulated? To what extent can Congress or the courts tell an employer how to run its business, whom it should hire or fire, or how it should treat its employees?

If an employer wants to hire someone to work every other hour every other week, it should be allowed to do that, as long as it can locate an employee who wants that type of job. Or if an employer requires that all employees wear a purple chicken costume throughout the workday, there is no reason why that requirement could not be enforced, as long as the employer can find employees to accept that agreement. While an employer can require that an employee wear a particular uniform, can the employer require that the employee be happy about it? Probably! A recent ruling by the Fifth Circuit Court of Appeals found that a company's handbook requirements that ". . . encouraged employees to maintain a positive work environment" and "prohibited arguing or fighting, failing to treat others with respect" were reasonable regulations set forth by an employer.[1]

The freedom to contract is crucial to freedom of the market; an employee may choose to work or not to work for a given employer, and an employer may choose to hire or not to hire a given applicant.

**LO1** Describe the balance between the freedom to contract and the current regulatory environment for employment.

As a result, though the employment relationship is regulated in some important ways, Congress tries to avoid telling employers how to manage their employees or whom the employer should or should not hire. It is unlikely that Congress would enact legislation that would require employers to hire certain individuals or groups of individuals (like a pure quota system) or that would prevent employers and employees from freely negotiating the responsibilities of a given job. (See Exhibit 1.1, "Realities about the Regulation of Employment.")

Employers historically have had the right to discharge an employee whenever they wished to do so. In one example, the director of the Iowa Department of Human Services was fired the day after he sent out a large email blast to all 4,900 employees of the agency to commemorate his work anniversary and also the rapper Tupac's birthday. He chose to include lyrics from one of Tupac's

### Exhibit 1.1 *Realities about the Regulation of Employment*

1. Generally, you do not have a right to your job.
2. This means that, once you are hired, your employer may choose to fire you, even for reasons that seem unjustified, as long as the termination is not in violation of a contract or for one of the few bases discussed in this textbook. But, basically, there are far more reasons a boss can fire you than not.
3. As an employer, you may fire someone for a good reason, for a bad reason, or even for no reason, just not for an illegal reason.
4. You may terminate someone simply because you do not get along with them. However, you must ensure that bias or perception, which might serve as the basis of a discrimination claim, is not interfering with judgment.

songs in the email as well and was fired for doing so. The lesson learned is that Title VII (or any other statute, for that matter) does not protect on the basis of music preferences.[2]

However, Congress has passed employment-related laws when it believes that there is some *imbalance of power* between the employee and the employer. For example, Congress has passed laws that require employers to pay minimum wages and avoid using certain criteria such as race or gender in reaching specific employment decisions. These laws reflect the reality that employers stand in a position of power in the employment relationship. Legal protections granted to employees seek to make the "power relationship" between employer and employee one that is fair and equitable.

## Is Regulation Necessary?

**See Chapter 2 to revisit key concepts.**

There are scholars who do not believe that regulation of discrimination and other areas of the employment relationship is necessary. Proponents of this view believe that the market will work to encourage employers' rational, non-biased behavior. For example, one of the main subjects of this textbook—Title VII of the Civil Rights Act of 1964 (Title VII)—prohibits discrimination based on race and gender, among other characteristics. (For detailed discussion of Title VII, see Chapter 3.) Some economists have argued that rational individuals interested in profit maximization will never hesitate to hire the most qualified applicants, regardless of their race. Decisions that are dependent on race or gender would be inefficient, they argue, since they are based on the (generally) incorrect belief that members of one class are less worthy of a job than those of another. The employers who are blind to gender or race, for instance, know that, if they were to allow their prejudices to govern or to influence their employment decisions, they may overlook the most qualified applicant because that applicant was African American or a woman. Therefore, they will not let prejudices cause them to hire less-qualified individuals and employ a less-efficient workforce.

However, opponents of this position contend that discrimination continues because often employers are faced with the choice of two *equally* qualified applicants for a position. In that case, the prejudiced employer suffers no decrease in efficiency of her or his firm as a result of choosing the white or male applicant over the minority or female applicant. In addition, human beings do not always act rationally or in ways that society might deem to be in the best interests of society as a whole. As Judge Richard Posner (retired) of the Seventh Circuit explained, "[t]he pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people around them, but not all workers are civilized all the time."[3] Finally, given the composition of the workforce, if a biased firm chooses only from the stock of white males, it still might have a pretty qualified stock from which to choose; subsequently, it can remain awfully competitive. Therefore, economic forces do not afford absolute protection against employment discrimination where the discrimination is based on race, gender, national origin, or other protected categories.

## Who Is Subject to Regulation?

**LO2** Identify who is subject to which employment laws and understand the implication of each of these laws for both the employer and employee.

The issue of whether someone is an employer or employee is a critical one when it comes to regulation, but like many areas of the law, it is not one with an easy answer. (See Exhibit 1.2, "Realities about Who Is an Employee and Who Is Not.") Business decisions made in one context, for instance, may give rise to liability when there may be no liability in another (depending on factors such as the size of the business organization). In addition, defining an individual as an employee allows that person to pursue a claim that an independent contractor might not have.

In this section, we will examine who is considered to be an employer and an employee and how it is decided. These definitions are not just the concern of the employer's lawyer and accountant. Instead, concepts such as temporary help, leased workers, independent contractors, vendors, outsourcing, and staffing firms have become common elements of the employment landscape. While employers might not consider some of these workers to be employees, mere labels will not stop a court or agency from determining that the worker has been misclassified and that an employment relationship exists.[4]

## Origins in Agency Law

The law relating to the employment relationship is based on the traditional law called *master and servant,* which evolved into the law of agency. It may be helpful to briefly review the fundamentals of the law of agency in order to gain a better perspective on the legal regulation of the employment relationship that follows.

In an agency relationship, one person acts on behalf of another. The actor is called the *agent,* and the party for whom the agent acts and from whom that agent derives authority to act is called the *principal.* The agent is basically a substitute appointed by the principal with power to do certain things. In the employment context, an employee is the agent of the employer, the principal. For example, if Alex hires Emma as an employee to work in his store selling paintings on his behalf, Alex would be the principal and employer, and Emma would be his agent and employee.

### Exhibit 1.2 *Realities about Who Is an Employee and Who Is Not*

1. You are not an employee simply because you are paid to work.
2. Choosing how to perform your job is not a clear indicator of independent contractor status.
3. Just because you hire a worker does not mean that you are necessarily liable for anything that the employee does in the course of his or her employment.
4. If you are an employee under one statute, you are not always considered an employee under all employment-related statutes.
5. If you are considered an employer for purposes of one statute, you are not always considered an employer for all statutes.
6. It is not always better to hire someone as an independent contractor rather than as an employee.
7. A mistake in the categorization of a business's workers can be catastrophic to that business from financial and other perspectives.

In an employment–agency relationship, the employee–agent is under a specific duty to the principal to act only as *authorized.* As a rule, if an agent goes beyond her authority or places the property of the principal at risk without authority, the principal is not responsible to the third party for all loss or damage naturally resulting from the agent's unauthorized acts (while the agent remains liable to the principal for the same amount). In other words, if Alex told Emma that one of the paintings in the store should be priced at $100 and she sells it instead for $80, she would be acting without authority. Emma would be liable to Alex for his losses up to the amount authorized, $20, but Alex would still be required to sell the painting for the lower price because a customer in the store would reasonably believe the prices as marked. In addition, an agent has a duty to properly conduct herself when representing the principal and is liable for injuries resulting to the principal from her unwarranted misconduct. So, if Emma oversleeps and misses an appointment at which someone intended to purchase the painting, again she would be liable.

Throughout the entire relationship, the principal/employer has the obligation toward the agent to exercise good faith in their relationship, and the principal has to use care to prevent the agent from coming to any harm during the agency relationship. This requirement translates into the employer's responsibility to provide a safe and healthy working environment for the workers.

In addition to creating these implied duties for the employment relationship, the principal–agent characterization is important to the working relationship for other reasons, explained in the next section.

## Why Is It Important to Determine Whether a Worker Is an Employee?

**independent contractor**
Generally, a person who contracts with a principal to perform a task according to her or his own methods and who is not under the principal's control regarding the physical details of the work.

You just received a job offer. How do you know if you are being hired as an employee or as an **independent contractor**? While some workers may have no doubt about their classification, the actual answer may vary depending on the statute, case law, or other analysis to be applied. The courts, employers, and the government are unable to agree on one definition of "employee" and "employer," so it varies depending on the situation and the law being used. In addition, some statutes do not give effective guidance. For instance, the Employee Retirement Income Security Act (ERISA, discussed in detail in Chapters 12 and 16) defines *employee* as "any individual employed by an employer."[5] But, as the Supreme Court chastised the legislators who wrote it, this nominal definition is "completely circular and explains nothing."[6] The distinction, however, is significant for tax law compliance and categorization, for benefit plans, for cost reduction plans, and for discrimination claims. For instance, Title VII applies to employers and prohibits them from discriminating against employees. It does not, however, cover discrimination against independent contractors. In addition, employers will not be liable for most torts committed by an independent contractor within the scope of the working relationship.

The definition of employee is all the more important as companies hire supplemental or contingent workers on an independent-contractor basis to cut costs. Generally, an employer's responsibilities increase when someone is an employee. This section of the chapter will discuss the varied implications of this characterization and why

it is important to determine whether a worker is an employee. A later section in this chapter—"The Definition of 'Employee'"—will present the different ways to figure it out.

### *Employer Payroll Deductions*

An employer paying an employee is subject to requirements different from those for paying an independent contractor. An employer who maintains employees has the responsibility to pay Social Security (FICA), the FICA excise tax, Railroad Retirement Tax Act (RRTA) withholding amounts, federal unemployment compensation (FUTA), IRS federal income tax withholdings, Medicare, and state taxes. In addition, it is the employer's responsibility to withhold a certain percentage of the employee's wages for federal income tax purposes.

On the other hand, an independent contractor has to pay all of these taxes on his or her own. This is usually considered to be a benefit for the employer because it is able to avoid the tax expenses and bookkeeping costs associated with such withholdings.

### *Benefits*

When you have taken jobs in the past, were you offered a certain number of paid vacation or sick days, a retirement plan, a parking spot, a medical or dental plan? These are known as *benefits,* and they cost the employer money outside of the wages the employer must pay the employee. In an effort to attract and retain superior personnel, employers offer employees a range of benefits that generally are not required to be offered such as dental, medical, pension, and profit-sharing plans. Independent contractors have no access to these benefits.

We will discuss the Fair Labor Standards Act of 1938 (FLSA) in detail in Chapter 16 but introduce it here merely to identify it as another vital reason to ensure correct classification of workers. The FLSA was enacted to establish standards for minimum wages, overtime pay, employer record keeping, and child labor. Where a worker is considered an employee, the FLSA regulates the amount of money an employee must be paid per hour and overtime compensation. Employers may intentionally misclassify employees in order to avoid these and other costs and liabilities. A willful misclassification under FLSA may result in up to a $10,000 fine, imposed by the Department of Labor. A second violation could lead to imprisonment.

### *Discrimination and Affirmative Action*

**See Chapter 2 to revisit key concepts.**

As you will learn in Chapter 3, Title VII and other related antidiscrimination statutes only protect *employees* from discrimination by employers; therefore, an independent contractor cannot hold an employer liable for discrimination on this basis, and employers are protected from some forms of discrimination and wrongful discharge claims where the worker is an independent contractor. (Coverage of employers by various statutes is discussed later in the chapter.) Status often is determinative. A regular on-air contributor to a Fox Business Network television show filed a Title VII claim against the network on the basis of sexual harassment and discrimination after she was raped and then coerced into a quid pro quo sexual relationship with

a Fox anchor. However, a New York court barred her from pursuing her claims because it deemed her to be an independent contractor due to her unpaid status.[7]

Yet, as will be explored throughout this chapter, merely labeling a worker as an "independent contractor" does not protect against liability under federal antidiscrimination statutes such as Title VII. Courts and the EEOC will examine a variety of factors to determine the true meaning of the relationship between the worker and the organization. If the worker is more appropriately classified as an employee, then the label will be peeled off, allowing for antidiscrimination statutes to apply.

Additionally, the National Labor Relations Act of 1935 (NLRA) protects only employees and not independent contractors from unfair labor practices. Note, however, that independent contractors may be considered to be *employers,* so they may be subject to these regulations from the other side of the fence.

### *Cost Reductions*

It would seem to be a safe statement that an objective of some, if not most, employers is to reduce cost and to increase profit. The regulations previously discussed require greater expenditures on behalf of employees, as does the necessity of hiring others to maintain records of the employees. In addition to avoiding those costs, hiring independent contractors also avoids the cost of overtime (the federal wage and hour laws do not apply to independent contractors), and the employer is able to avoid any work-related expenses such as tools, training, or traveling. The employer is also guaranteed satisfactory performance of the job for which the contractor was hired because it is the contractor's contractual obligation to adequately perform the contract with the employer, while the employee is generally able to quit without incurring liability (the at-will doctrine). If there is a breach of the agreement between the employer and the independent contractor, the independent contractor not only stands to lose the job but also may be liable for resulting damages. An employee is usually compensated for work completed with less liability for failure to perfectly perform. Some managers also contend that independent contractors are more motivated and, as a result, have a higher level of performance as a consequence of their freedom to control their own work and futures.

**vicarious liability**
The imposition of liability on one party for the wrongs of another. Liability may extend from an employee to the employer on this basis if the employee is acting within the scope of her or his employment at the time the liability arose.

In addition, the employee may actually cause the employer to have greater liability exposure. An employer has **vicarious liability** if the employee causes harm to a third party while the employee is in the course of employment. For instance, if an employee is driving a company car from one company plant to another and, in the course of that trip, sideswipes another vehicle, the employer may be liable to the owner of the other vehicle. While the employee may be required to reimburse the employer if the employer has to pay for the damages, generally the third party goes after the employer because the employee does not have the funds to pay the liability. The employer could, of course, seek repayment from the employee but, more likely, will write it off as an expense of doing business.

Questions might arise in connection with whether the worker is actually an employee of the employer and, therefore, whether the employer is liable at all, a question examined later in this chapter. For instance, if a hospital is sued for the malpractice of one of its doctors, the question of the hospital's vicarious liability

will be determined based on whether the doctor is an employee or an independent contractor of the hospital. However, in certain situations, businesses will be liable for the acts of their independent contractors, including when those contractors are involved in "inherently dangerous activities."[8]

In some situations, notwithstanding the decrease in the amount of benefits that the employer must provide, independent contractors may still be more expensive to employ. This situation may exist where the employer finds that it is cheaper to have its employees perform certain types of work that are characteristically expensive to contract. Often a large firm will find it more profitable to employ a legal staff, and pay their benefits and salaries, than to employ a law firm every time a legal question arises. Or a school may find it less expensive to maintain a full janitorial staff than to employ a professional cleaning crew whenever something needs to be taken care of at the school.

### *The Cost of Mistakes*

**LO3** Delineate the risks to the employer caused by employee misclassification.

Workers and employers alike make mistakes about whether a worker is an independent contractor or an employee. If a worker is classified as an independent contractor but later is found to be an employee, the punishment by the IRS is harsh. The employer not only is liable for its share of FICA and FUTA taxes but also is subject to an additional penalty equal to 20 percent of the FICA taxes that should have been withheld. In addition, the employer is liable for 1.5 percent of the wages received by the employee.[9] These penalty charges apply if 1099 forms (records of payments to independent contractors) have been compiled for the worker and the classification is found to be a mistake by the employer. If, on the other hand, the forms have not been completed and the employer was attempting to commit fraud or intentional misconduct, the penalties increase to 40 percent of the FICA taxes and 3 percent of wages. Where the IRS determines that the worker was *deliberately* classified as an independent contractor to avoid paying taxes, the fines and penalties can easily run into six figures for even the smallest business. The IRS estimates that millions of employees are incorrectly classified each year as independent contractors.[10]

In addition to potential IRS violations, an employer may be liable for violations of the National Labor Relations Act, the Fair Labor Standards Act (FLSA), the Social Security Act, and state workers' compensation and unemployment compensation laws. The fines for each violation are substantial. In a 2018 case, the U.S. Department of Labor received a judgment against a direct mail company in Virginia for misclassifying its workers as independent contractors and for failing to pay overtime. The company was ordered to pay over $740,000 in back wages and liquidated damages to 73 employees to resolve violations of overtime and record-keeping provisions of the Fair Labor Standards Act plus $32,099 in penalties to the Department of Labor.[11]

The U.S. Department of Labor takes employee misclassification seriously and works in cooperation with the Internal Revenue Service to reduce the incidence of employee misclassification and to improve compliance with federal labor laws.[12] In addition, the DOL has signed memoranda of understanding with 45 states to share information and coordinate enforcement efforts.[13] On the federal level, the Payroll Fraud Prevention Act of 2018 was (re)introduced in Congress, for the fourth time, since it did not make it

out of committee during any of the prior processes. The legislation seeks to amend the FLSA to require employers to keep records on and to notify workers of their employment or independent contractor classification as well as their right to challenge that classification. It would also increase civil penalties under the FLSA (up to $1,100 per employee for first offenders and $5,000 per employee for repeat or willful violations) on employers that misclassify employees as independent contractors.[14]

Meanwhile, many states are searching for these misclassifications through special task forces and asking for new legislation.[15] Because of the tremendous costs to a state of misclassification, Colorado has implemented a statewide crackdown on worker misclassification. The state has new, unambiguous ways to assess how workers are categorized and is using aggressive government audits. There are increased fines for businesses that misclassify, and companies are prohibited from receiving funds from state contracts after a first offense.[16] In 2018, the Government Against Misclassified Employees Operational Network (GAME ON) task force in Louisiana began ramping up its efforts to identify the misclassification of employees as independent contractors. Companies found to have willfully misclassified employees as independent contractors will have to pay taxes on the unreported wages, pay penalties of up to $1,000 per misclassified employee, and face potential imprisonment and barring from receiving state or government contracts.[17]

Why is the government so intent on ensuring that improper classification does not occur? Misclassified workers are a significant portion of the employment tax gap, but just how big a portion is unknown because the IRS's last comprehensive misclassification estimate was in 1984! At that time, the IRS found that 15 percent of employers misclassified 3.4 million workers as independent contractors, causing an estimated loss of $1.6 billion in Social Security tax, unemployment tax, and income tax. A 2017 report by the U.S. Government Accountability Office (GAO) found that noncompliance in reporting taxable wages most frequently involved how workers were classified (and whether employers had to withhold and pay employment taxes for them) to the tune of $44 billion in wage adjustments over just two years![18] Though recent nationwide data is not available, surveys across different states have estimated that worker misclassification affects 10 to 30 percent of all firms.[19] Rhode Island estimated that more than 6 percent of its workers were improperly classified as independent contractors, costing the state an estimated $50 million in uncollected income, unemployment, and other payroll taxes. A study on misclassification in Illinois showed that the state lost close to $125 million in income tax revenue over a four-year period. A New York task force investigating workplace fraud found that, in one year, misclassification cost the state more than $4.8 million in unemployment taxes alone, a significant loss when that tax revenue is needed to pay unemployment claims.[20] Misclassification is substantially higher in certain industries: construction, janitorial, transportation and warehousing, and meat and poultry processing.[21] As one scholar reported, IRS agents are told, "Go forth and find employees!" The IRS will generally attempt to "match" workers who claim to be independent contractors with their companies. If an independent contractor earned more than $10,000 from one source during a one-year period, the independent status of that individual is suspect.