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Employment Law for Human Resource Practice

David J. Walsh

5E

EMPLOYMENT LIFE CYCLE APPROACH

Future managers and human resource professionals need to understand the employment life cycle: hiring, managing, and terminating. Employment law affects every stage of the cycle. This text shows how these laws apply to human resource practice.

Part 1

Introduction to Employment Law

- Employment Relationship
- Employment Discrimination

Part 2

The Hiring Process

- Recruitment
- Interviews
- Background Checks
- Employment Tests

Part 3

Managing a Diverse Workforce

- Affirmative Action
- Harassment
- Diversity Issues
- Work-Life Conflicts

Part 4

Pay, Benefits, Terms and Conditions of Employment

- Wages and Hours
- Benefit Plans
- Collective Bargaining
- Safety and Health

Part 5

Managing Performance

- Performance Appraisals
- Training and Development
- Monitoring and Surveillance
- Investigations

Part 6

Terminating Employment

- Employment at Will with Exceptions
- Just Cause
- Due Process
- Downsizing

Employment Law for Human Resource Practice

FIFTH EDITION

DAVID J. WALSH
Miami University

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Employment Law for Human Resource Practice, 5e
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Brief Contents

Contents

PART 2 The Hiring Process

Preface

This is a book about employment law—the set of legal requirements that govern the workplace. A distinction is often made between "employment law" and "labor law" (the latter describing laws related to unions and collective bargaining), but I will generally use the term "employment law" to refer to both. This book has two main objectives. The first is to *explain the major employment laws and types of legal claims faced by employers.* What things are legal matters? What does the law say about those matters? How are cases decided? The second objective is to *explain what employment law means for human resource practice.* What is it that employers should be doing to comply with the law? What is the legal reasoning behind this practical advice?

Special Features of This Text

Unique Employment Life Cycle Approach

This dual purpose of understanding the substance of employment law and its implications for human resource practice accounts for the way this book is organized. The first three chapters provide broad overviews. The remainder of the book traces the steps in the employment process and addresses the particular legal issues associated with them. We start with issues that lead up to hiring and promotion, including recruitment, interviewing, background checks, references, and employment testing. We then turn to a range of issues that arise when a person is on the job, including harassment, reasonable accommodation of disability, compensation, benefits, performance appraisal, and occupational safety and health. The last two chapters of the book deal with issues related to the termination of employment. This structure is intended to highlight the legal issues that managers regularly confront.

> *The employee life cycle approach to this text offers students the ability to understand the employment process, from beginning to end, while considering the legal environment and its implications for business success. Walsh's personnel law book provides a solid foundation for students to successfully navigate the always changing and rarely certain areas of personnel law within an organization.*
>
> *Professor Sarah Sanders Smith, SPHR, Purdue University*

> *Of all of the texts that I reviewed, this one has the most practical and usable advice for soon-be-HR practitioners. The life cycle approach is strong and the writing easy to read.*
>
> *Nancy K. Lahmers, JD, The Ohio State University*

Practical Focus

This book is full of advice for carrying out human resource activities in a lawful manner. *These guidelines are general principles for sound human resource practice. They cannot be—and do not purport to be—specific legal advice for particular situations that you might encounter. Only a trained legal professional thoroughly familiar with the details of your case can provide the latter.*

> *This text offers a unique human resource perspective of employment law that is typically not afforded attention in other comparable texts.*
>
> *Dr. Kim LaFevor, Athens State University*

Interesting Features Included in Each Chapter

Clippings This feature consists of brief synopses of recent cases, events, or studies that illustrate the issues dealt with in each chapter. The clippings should pique your interest and begin to show how employment law relates to real things that are happening in the world around us.

> *I love the Clippings features—they are well chosen and give the students a great intro into why what we are covering is relevant to their businesses.*
>
> *Alexis C. Knapp, Houston Baptist University*

The Changing Workplace This feature adds a forward-looking flavor to the book by highlighting contemporary developments in the workplace, the workforce, and human resource practices that have particular implications for the law. The business world is nothing if not dynamic. Changes in the workplace raise new legal questions and point to the types of legal disputes that we can expect to see more of in the future.

Just the Facts This feature provides succinct statements of the facts from some interesting court decisions. You are not told the outcomes of the cases; instead, you are given the information needed to make your own determinations ("just the facts").Thinking through these cases and arriving at decisions is a great way to test your grasp of legal concepts.

Practical Considerations Employers need to follow many rules to meet their legal obligations to employees. But legal compliance is not entirely cut-and-dried. Managers have many choices about how to comply with the law, and this feature highlights some of those choices.

Elements of a Claim In any situation that gives rise to a legal dispute, numerous facts might be considered. The facts that we deem most relevant and the order in which we consider them go a long way toward determining the outcome of our deliberations. When judges decide cases, they typically rely on established frameworks that spell out a methodology for deciding those cases. Who has the burden of proof? What must the plaintiff show? What must the defendant show? In what order should certain facts be considered? This feature lays out these frameworks—the "elements" of particular legal claims. Grasping this information gives us real insight into how cases are decided. Judges still exercise considerable discretion and judgment in applying these frameworks, but they make the process of arriving at decisions in legal disputes far more systematic and consistent than it would otherwise be.

Practical Implications of the Law Each chapter in this book contains many suggestions for carrying out human resource activities in a lawful manner. This advice appears in italics to make it stand out from the rest of the text. This advice should be considered in the context of the specific legal problems that it aims to help employers avoid. *It is important to know not only what to do but also why those things should be done.*

The law is a basic determinant of human resource practice and one that cannot be ignored. However, the law is best conceived of as providing a "floor," rather than a "ceiling," for human resource practices. It establishes minimum standards of acceptable treatment of employees, but often it is sensible for employers—based on motivational, pragmatic, or ethical considerations—to go well beyond the bare minimum legal requirements.

Thus, our purpose in understanding what the law requires is not to identify "loopholes" that can be exploited or to advocate superficial measures that look good on paper but fail to realize the underlying purposes (e.g., equal employment opportunity) of the law. Instead, *this book encourages you to embrace the "spirit"—and not merely the "letter"—of the law. It invites you to consider how to achieve these important social purposes by implementing policies and practices that also make sense given the operational realities of the workplace.*

Practical Advice Summary For easy reference, the practical advice sprinkled liberally throughout chapters is collected at the end of each chapter. This summary can be used as a convenient "checklist" for legal compliance.

Legal Cases Each chapter contains three or four substantial excerpts from decisions in court cases. One of the things that is unusual (and admirable) about legal decision making is that the decision makers (e.g., judges) often set down in writing their rationales for the decisions they make in the cases that are brought before them. This gives us the opportunity to read firsthand accounts of legal disputes, to have the decision makers explain the relevant rules of law, and to see how those principles were applied to the facts of cases to arrive at decisions. I describe the law and other cases for you as well, but there is nothing like reading cases to get a real feel for the law. Getting comfortable with reading legal cases is a bit like learning a new language. It will take some doing, but with diligent effort and practice, it will pay off in terms of enhanced ability to access and understand the law.

The words in the case excerpts are the same as those you would find if you looked up the cases online or in print. However, to maximize readability, I have shortened the case decisions by focusing on a brief statement of the facts, the legal issue, and (at greatest length) the explanation of the decision maker's rationale. Where part of a sentence is removed, you will see three dots (. . .). Where more than part of a sentence is removed, you will see three stars (* * *). This is to alert you that text has been removed from the full case decision. Legal decisions are replete with numerous footnotes and citations to previous cases that addressed similar questions. In most instances, I have removed the citations and footnotes from the case excerpts. Occasionally, I have included in brackets [ ] a brief explanation of a legal term.

What Is New in This Edition

This edition of *Employment Law for Human Resource Practice* retains the essential structure and focus of the previous editions. Linking a thorough understanding of principles of employment law to advice on how to conduct human resource practice remains the central aim of this book. Consistent with this aim, the book continues to be organized around stages in the employment process, from the formation of an employment relationship through the termination of that relationship. This fifth edition is the product of a thorough, line-by-line revision of the previous edition, aimed at enhancing clarity and ensuring that the material is as current as possible. Users of this text will find a significant number of new case excerpts. Nearly two-thirds (63 percent) of the chapter cases are new to this edition. If, through a lapse in taste or judgment, I have eliminated one of your favorite cases from the previous edition, chances are the case still appears somewhere in this edition, perhaps as a new end-of-chapter question. I have also included a number of new case problems to puzzle over. My hope is that both students who are reading this book for the first time and instructors who have used previous editions will find it engaging and informative.

Significant Revisions

Here are some highlights of the revised contents of this edition.

- **Chapter 1:** This chapter includes two new excerpted cases. The issue of class-action lawsuits receives updated and more extensive treatment. The *EEOC v. Autozone* case provides an in-depth discussion of remedies.
- **Chapter 2:** This chapter extends and updates the previous edition's discussion of the misclassification of employees as independent contractors. Close attention is also paid to the employment status of unpaid interns, graduate assistants, and student-athletes. The *Glatt v. Fox Searchlight Pictures* case, although still ongoing, is included as a leading case involving the employment status of interns.
- **Chapter 3:** The centrality of EEO laws to employment law is well reflected in this chapter. Three of the four cases excerpted in this chapter are new to this edition. New chapter cases include *Chattman v. Toho Tenax America* (subordinate bias theory of liability) and *Geleta v. Gray* (retaliation). The distinction between "indirect evidence" (pretext) cases and "direct evidence" (mixed-motives) cases receives further elaboration in this edition.
- **Chapter 4:** The discussion of labor trafficking is expanded in this edition. Legal issues surrounding the use of social media for recruiting are considered in this edition. New chapter cases include *NAACP v. North Hudson Regional Fire & Rescue* (statistical evidence of discrimination in recruiting) and *Spears v. Amazon.com KYDC LLC* (fraud).
- **Chapter 5:** Coverage of immigration, undocumented workers, and recent changes in the enforcement of immigration laws is expanded and updated. The discussion of use of criminal history in hiring is updated to reflect the EEOC's most recent guidance on this matter. All three chapter cases are new to this edition, including *Navarete v. Naperville Psychiatric Ventures* (negligent hiring) and *Thompson v. Bosswick* (defamation by references).
- **Chapter 6:** *Kroll v. White Lake Ambulance Authority*, an ADA case on medical testing, is new to this edition.
- **Chapter 7:** The discussion of appearance requirements and the sex-stereotyping theory is expanded in this edition. *Hamilton v. Geithner* (interviews and discrimination) is new to this chapter.
- **Chapter 8:** Recent court cases dealing with the constitutionality of affirmative action and state laws prohibiting affirmative action are discussed. Expanded affirmative action obligations of contractors regarding disabled employees and veterans are outlined. *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland* (constitutional challenge to a consent decree) is new to this edition.
- **Chapter 9:** Two new cases are excerpted in this chapter. The new chapter cases are *Gerald v. University of Puerto Rico* (hostile environment and tangible employment action) and *EEOC v. Management Hospitality of Racine* (harassment of teenage employees, affirmative defense). The Supreme Court's recent decision regarding the definition of a "supervisor" for purposes of applying the affirmative defense is discussed.
- **Chapter 10:** The continuing development of the ADA following enactment of the ADA Amendments Act (ADAA) is tracked. Discussions of leave and reassignment to vacant positions as reasonable accommodations are updated. All three chapter cases are new to this edition, including *Keith v. County of Oakland* (reasonable accommodation of a deaf lifeguard) and *Adeyeye v. Heartland Sweeteners* (reasonable accommodation of religious practice).

- **Chapter 11:** Substantial coverage of the Family and Medical Leave Act is retained and updated. *Lichenstein v. University of Pittsburgh Medical Center* (notification of the need for FMLA leave) is new to this edition.
- **Chapter 12:** New to this chapter are the *Kellar v. Summit Seating* (obligation under the FLSA to pay for all work that is "suffered or permitted") and *Maestras v. Day & Zimmerman LLC* (duties test for FLSA exemptions) cases. A discussion of "outdoor salesmen" is new to this edition, while discussions of tipped employees and compensable time are updated.
- **Chapter 13:** The ongoing legal challenges to the Patient Protection and Affordable Care Act are reviewed. The discussion of the fiduciary duties of employers with defined contribution plans is updated, including the Supreme Court's rejection of the presumption of prudence for plans offering a company's own stock. New chapter cases are *Helton v. AT&T* (breach of fiduciary duty to inform employee about changes to a pension plan) and *Tussey v. ABB* (breach of fiduciary duty to monitor fees charged to 401(k) participants).
- **Chapter 14:** This chapter reflects the recent efforts of the NLRB to breathe new life into the NLRA by applying it more broadly, including to the concerted activity of nonunion employees. Developments regarding agency fees, social media use, voluntary recognition, worker centers, and challenges to the collective bargaining rights of public employees are discussed. *NLRB v. RELCO Locomotives* (discriminatory discharges for union activity) is a new chapter case.
- **Chapter 15:** Two new cases are included in this chapter: *SeaWorld of Florida v. Perez* (application of the general duty clause to the death of a killer whale trainer during a show) and *City of Brighton v. Rodriguez* (whether an unexplained fall arose out of employment for workers' compensation purposes). There is also a new discussion of risk doctrines used by courts in determining eligibility for workers' compensation.
- **Chapter 16:** Three new chapter cases appear in this edition, including *Rachells v. Cingular Wireless Employee Services* (use of performance appraisals in a RIF context), *Compass Environmental v OSHRC* (failure to provide safety training), and *Rosebrough v. Buckeye Valley High School* (reasonable accommodation during training). Discussions of temp worker safety and the enforceability of training contracts are updated.
- **Chapter 17:** The *Koeppel v. Speirs* (intrusion upon seclusion) and *Ehling v. Monmouth-Ocean Hospital Services Corp.* (accessing of employee social media sites) cases are new to this edition. Material on the privacy of employees' electronic communications is updated.
- **Chapter 18:** Three new cases, including *Dorshkind v. Oak Park Place of Dubuque II* (public policy exception to employment at will), *Lockheed Martin v. Administrative Review Board* (whistleblower protection under the SOX Act), and *Lane v. Franks* (First Amendment speech rights of public employees), are excerpted in this chapter. Discussions of whistleblower protection, "similarly situated" employees in discriminatory termination cases, and challenges to tenure are expanded in this edition.
- **Chapter 19:** Chapter cases new to this edition are *Weekes-Walker v. Macon County Greyhound Park* (WARN Act), *Barnett v. PA Consulting Group* (selection for downsizing), and *Nanomech v. Suresh* (enforceability of noncompetition agreements). The use of statistical evidence in downsizing cases and application of restrictive covenants to employees in a wide range of occupations are highlighted in this edition.

Instructor Resources

Instructor's Manual

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The Instructor's Manual for this edition of *Employment Law for Human Resource Practice* provides a succinct chapter outline, answers to questions raised in the "Just the Facts" and "Practical Considerations" features, answers to case questions following excerpted cases, answers to end-of-chapter questions, and suggestions for in-class exercises and discussions (including role-plays, practical exercises, and more). *Citations for the cases from which the "Just the Facts" and end-of-chapter questions were drawn are now found in the instructor's manual.*

Test Bank

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The Test Bank questions for this edition not only test student comprehension of key concepts but also focus on business application and ethical implications. The questions have been updated to reflect the new content and cases of the fifth edition and expanded to include hypothetical questions that ask what the student, as a human resources manager, should do in particular situations. Donna J. Cunningham of Valdosta State University edited and updated the Test Bank for the fifth edition.

PowerPoint Slides

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PowerPoint slides have been created to highlight the key learning objectives in each chapter—including case summaries and hyperlinks to relevant materials. In addition, "Smart Practice" and "What Would You Do?" slides emphasize applying legal concepts to business situations (answers to these questions are provided in "Instructor's Note" slides at the end of the presentation). The PowerPoint slides were prepared by Donna J. Cunningham of Valdosta State University.

Business Law Digital Video Library

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This dynamic online video library features more than sixty video clips that spark class discussion and clarify core legal principles, including fourteen videos that address employment law topics (such as employment at will, employment discrimination, and employee privacy). The library is organized into four series:

- **Legal Conflicts in Business** includes specific modern business and e-commerce scenarios.
- **Ask the Instructor** contains straightforward explanations of concepts for student review.
- **Drama of the Law** features classic business scenarios that spark classroom participation.
- **LawFlix** contains clips from many popular films, including *Bowfinger*, *The Money Pit*, *Midnight Run*, and *Casino*.
- Access to the Business Law Digital Video Library is available at no additional charge as an optional package with each new student text. Contact your South-Western sales representative for details.

Note to the Instructor

Since I have been touting the contents of this book, it is only fair to acknowledge material that is largely omitted. Beyond a glancing blow struck in Chapter 1, this book provides relatively little information about such matters as the legislative process, courtroom procedures, and the historical development of employment laws. These are all worthwhile topics, but they are not emphasized in this book because its focus is the current substance of employment law and the implications for human resource practice. The treatment of labor law in this book does not reach a number of the more specialized issues in this area, but I do attempt to show how labor law continues to be relevant to both unionized and nonunion workplaces. Additionally, while cross-national comparisons can enhance our understanding of U.S. law, a comparative perspective is beyond the scope of this book.

For Susan and for Lulu.

Acknowledgments

Thanks to the many faculty and students who have used *Employment Law for Human Resource Practice*. I hope that this edition will serve your needs even better. If you are not presently using this book, I hope that you will consider adopting it. Please do not hesitate to contact me regarding any questions you have about the book (and ancillary materials) or suggestions for improvement (walshdj@miamioh.edu).

Many thanks also to numerous others at Cengage and its business partners. Being an author provides a small glimpse of the "cast of thousands" who are needed to produce a work of this type.

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PART 1

Introduction to Employment Law

CHAPTER 1

Overview of Employment Law

The purpose of this first chapter is to present a big picture of the body of law that we will apply to particular human resource practices throughout this book. This chapter contains an overview of employment laws, the rights they confer on employees, and the processes involved in enforcing these laws. Special attention is given to the use of alternatives to litigation to resolve employment disputes.

Heard at the Staff Meeting

Congratulations on your new job as human resources manager! You pour a cup of coffee and settle into your seat to hear the following reports from staff members:

> *"We've lined up some interns from a local college to take the place of vacationing staff members this summer. We won't pay the interns, of course, but hopefully they will be self-starters who can make a real contribution."*
>
> *"In the interest of security, we now have a firm that checks the backgrounds of our job candidates. Anyone with an arrest or conviction is immediately dropped from consideration for employment."*
>
> *"A number of our employees are in the Army Reserves. One of them has been deployed to Afghanistan twice and has missed more than two years of work. She will be returning to the United States soon and has indicated that she wants her job back. Her supervisor believes that since her job skills are now out of date and she might be deployed again at any time, it would be best not to reinstate her."*
>
> *"With health insurance being so expensive these days, we're requiring all of our applicants to complete lengthy medical histories, including whether certain diseases run in their families."*

You get up to get another—large—cup of coffee and feel fortunate that you were paying attention during that employment law class you took.

What legal issues emerged during this staff meeting? What should this company be doing differently to better comply with the law? Although you might not encounter this many legal problems in one sitting, employment law pervades virtually every aspect of human resource practice, and managers regularly confront employment law questions.

U.S. Employment Law Is a Fragmented Work in Progress

"Just tell me what the law is, and I'll follow it." Were matters only that simple! No single set of employment laws covers all workers in the United States. Instead, the employment law system is a patchwork of federal, state, and local laws. Whether and how laws apply also depend on such things as whether the employees work for the government or in the private sector, whether they have union representation, and the size of their employer. Our principal focus will be on federal laws because these reach most widely across U.S. workplaces and often serve as models for state and local laws. However, we will also mention significant variations in the employment laws of different states.

There is another problem with the idea of just learning the legal rules and adhering to them. Employment law is dynamic. New law is created and old law is reinterpreted continuously. Further, changing workplace practices pose new legal questions. At any point in time, there are "well-settled" legal questions on which there is consensus, other matters that are only partially settled (perhaps because only a few cases have arisen or because courts have issued conflicting decisions), and still other questions that have yet to be considered by the courts and other legal decision makers. Attaining a solid grasp of employment law principles will allow you to make informed judgments in most situations. You must be prepared to tolerate some ambiguity and keep learning, however, as the law of the workplace continues to develop.

Sources of Employment Law

What comes to mind when you think of the law? Judges making decisions in court cases? Congress legislating? The Constitution? All of these are parts of the law in general and employment law in particular. Legal rules governing the workplace are found in the U.S. Constitution and state constitutions, statutes enacted by legislatures, executive orders issued by presidents and governors, regulations created by administrative agencies, and judicially authored common law. All of these pieces of law are regularly interpreted and expanded on by the courts as they are presented with specific legal disputes (cases) to decide. Distinguishing between these basic sources of law is useful because some forms of law are more authoritative than others, apply to particular groups of employees, or provide for different enforcement mechanisms and remedies.

Constitutions

Constitutions are the most basic source of law. **Constitutions** address the relationships between different levels of government (e.g., states and the federal government) and between governments and their citizens. A legal claim based on a constitution must generally assert a violation of someone's constitutional rights by the government (in legal parlance, the element of "state action" must be present). In practical terms, this means that usually only employees of government agencies—and not employees of private corporations—can look to the U.S. Constitution or state constitutions for protection in the workplace. Constitutional protections available to government employees include speech rights, freedom of religion, protection from unreasonable search and seizure, equal protection under the law, and due process rights.

Statutes

In our system of government, voters elect representatives to legislative bodies such as the U.S. Congress. These bodies enact laws, or **statutes**, many of which affect the workplace. Among the many important statutes with implications for human resource practice are

Title VII of the Civil Rights Act, the National Labor Relations Act, the Equal Pay Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act.

Executive Orders

The executive branch of government has the power to issue executive orders that affect the employment practices of government agencies and companies that have contracts to provide goods and services to the government. **Executive orders** function much like statutes, although they reach fewer workplaces and can be overridden by the legislative branch. One important example of an executive order affecting employment is Executive Order (E.O.) 11246, which establishes affirmative action requirements for companies that do business with the federal government.

Regulations, Guidelines, and Administrative Decisions

When Congress enacts a statute, it often creates an agency, or authorizes an existing one, to administer and enforce that law. Legislators do not have the expertise (and sometimes do not have the political will) to fill in all the details necessary to put statutes into practice. For example, Congress mandated in the Occupational Safety and Health Act that employers provide safe workplaces but largely left it to the Occupational Safety and Health Administration (OSHA) to give content to that broad principle by promulgating safety standards governing particular workplace hazards. Formal **regulations** are put in place only after an elaborate set of requirements for public comment and review has been followed. Regulations are entitled to considerable deference from the courts (generally, they will be upheld when challenged), provided that the regulations are viewed as reasonable interpretations of the statutes on which they are based.[1] Agencies also contribute to the law through their decisions in individual cases that are brought before them and the guidance that they provide in complying with laws.

Common Law

Many disputes are resolved through courts interpreting and enforcing the types of law discussed earlier. However, sometimes courts are asked to resolve disputes over matters that have not been objects of legislation or regulation. Over time, courts have recognized certain **common law** claims to remedy harm to people caused by other people or companies. Common law is defined by state courts, but broad similarities exist across states. One branch of common law is the traditional role of the courts in interpreting and enforcing contracts. The other branch is recognition of various **tort** claims for civil wrongs that harm people. Tort claims relevant to employment law include negligence, defamation, invasion of privacy, infliction of emotional distress, and wrongful discharge in violation of public policy.

Substantive Rights Under Employment Laws

Employment laws confer rights on employees and impose corresponding responsibilities on employers. Paradoxically, the starting point for understanding employee rights is a legal doctrine holding that employees do not have any right to be employed or to retain their employment. This doctrine, known as **employment at will**, holds that in the absence of a

[1] *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

contract promising employment for a specified duration, the employment relationship can be severed at any time and for any reason not specifically prohibited by law. Statutory and other rights conferred on employees have significantly blunted the force of employment at will. But in the absence of any clear right that employees can assert not to be terminated, employment at will is the default rule that permits employers to terminate employment without needing to have "good" reasons for doing so.

Broadly speaking, employees have the following rights under employment laws.

Nondiscrimination and Equal Employment Opportunity

A central part of employment law is the set of protections for employees against discrimination based on their race, sex, age, and other grounds. The equal protection provisions of the U.S. Constitution (Fourteenth Amendment), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act are examples of federal laws that prohibit discrimination in employment and express the societal value of equal employment opportunity.

Freedom to Engage in Concerted Activity and Collective Bargaining

Another approach to protecting workers is to provide them with greater leverage in dealing with their employers and negotiating contractual standards of fair treatment. Labor laws exist to protect the rights of employees to join together to form labor unions and attempt to improve their terms and conditions of employment through collective bargaining with their employers. Important federal labor laws include the National Labor Relations Act, the Railway Labor Act, and the Civil Service Reform Act (covering collective bargaining by federal government employees).

Terms and Conditions of Employment That Meet Minimum Standards

Some employment laws protect workers in a more direct fashion by specifying minimum standards of pay, safety, and other aspects of employment. Federal laws exemplifying this approach include the Fair Labor Standards Act (minimum wage and overtime pay requirements), the Occupational Safety and Health Act (workplace safety standards), and the Family and Medical Leave Act (leave policy requirements).

Protection of Fundamental Rights

Some legal challenges to employer practices are based on broader civil liberties and rights. For example, a variety of privacy protections exist, including privacy torts, the Electronic Communications Privacy Act, the Employee Polygraph Protection Act, and the Fair Credit Reporting Act.

Compensation for Certain Types of Harm

Employees can take legal action to recover damages when, for example, they are the victims of employer negligence, are defamed, or have emotional distress inflicted upon them; their employment contract is breached; or they are wrongfully discharged.

In the *Casias v. Wal-Mart Stores* case that follows, a terminated employee sues his former employer. Although one might sympathize with the employee under the facts of this case, it is apparent from this decision that *employment at will* still presents a large hurdle for terminated employees.

Casias v. Wal-Mart Stores
695 F. 3d 428 (6th Cir. 2012)

OPINION BY CIRCUIT JUDGE CLAY:

In this wrongful discharge action, Plaintiff Joseph Casias, a former Wal-Mart employee, appeals the district court's . . . dismissal [of his lawsuit] for failure to state a claim following his termination for failing a drug test in violation of Defendants' drug testing policy. . . . [W]e AFFIRM the judgment of the district court.

* * * Plaintiff was an employee of Wal-Mart's Battle Creek, Michigan store from November 1, 2004 until November 24, 2009, when Plaintiff was terminated from Wal-Mart after he tested positive for marijuana, in violation of the company's drug use policy.

Plaintiff was diagnosed with sinus cancer and an inoperable brain tumor at the age of 17. During his employment at Wal-Mart, Plaintiff endured ongoing pain in his head and neck. Although his oncologist prescribed pain relief medication, Plaintiff continued to experience constant pain as well as other side effects of his medication. After Michigan passed the MMMA [Michigan Medical Marihuana Act] in 2008, Plaintiff's oncologist recommended that he try marijuana to treat his medical condition. The Michigan Department of Community Health issued Plaintiff a registry card on June 15, 2009, and, in accordance with state law, he began using marijuana for pain management purposes. Plaintiff stated that the drug reduced his level of pain and also relieved some of the side effects from his other pain medication. Plaintiff maintains that he complied with the state laws and never used marijuana while at work; nor did he come to work under the influence. Instead, Plaintiff used his other prescription medication during the workday and only used the marijuana once he returned home from work.

In November 2009, Plaintiff injured himself at work by twisting his knee the wrong way while pushing a cart. Plaintiff contends that he was not under the influence of marijuana at the time of his accident. Although Plaintiff came to work the next day, he had trouble walking and was driven to the emergency room by a Wal-Mart manager to receive treatment. Since Plaintiff was injured on the job, he was administered a standard drug test at the hospital in accordance with Wal-Mart's drug use policy for employees. Prior to his drug test, Plaintiff showed his registry card to the testing staff to indicate that he was a qualifying patient for medical marijuana under Michigan law. Plaintiff then underwent his drug test, wherein his urine was tested for drugs.

One week later, Defendant notified Plaintiff that he tested positive for marijuana. Plaintiff immediately met with his shift manager to explain the positive drug test. Plaintiff showed the manager his registry card and also stated that he never smoked marijuana while at work or came to work under the influence of the drug. Plaintiff explained that the positive drug test resulted from his previous ingestion of marijuana within days of his injury in order to treat his medical condition. The shift manager made a photocopy of Plaintiff's registry card.

The following week, Wal-Mart's corporate office directed the store manager . . . to fire Plaintiff due to the failed drug test, which was in violation of the company's drug use policy. Wal-Mart did not honor Plaintiff's medical marijuana card. Plaintiff sued Wal-Mart . . . for wrongful discharge and violation of the MMMA, arguing that the statute prevents a business from engaging in disciplinary action against a card holder who is a qualifying patient. * * * [T]he district court held that the MMMA does not protect Plaintiff's right to bring a wrongful termination action because the MMMA does not regulate private employment. Plaintiff now appeals.

* * * According to the MMMA,

> *A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act. . . .*

The parties' dispute focuses on the use of the word "business" and whether the word simply modifies the words "licensing board or bureau," or in the alternative, whether "business" should be read independently from "licensing board or bureau." * * * The district court concluded that "the MMMA does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse action by the state." Specifically, the court concluded that the "MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or

that it otherwise limits the range of allowable private decisions by Michigan businesses." * * *

We agree with the district court and find that the MMMA does not impose restrictions on private employers, such as Wal-Mart. * * * Based on a plain reading of the statute, the term "business" is not a stand-alone term as Plaintiff alleges, but rather the word "business" describes or qualifies the type of "licensing board or bureau." Read in context, and taking into consideration the natural placement of words and phrases in relation to one another, and the proximity of the words used to describe the kind of licensing board or bureau referred to by the statute, it is clear that the statute uses the word "business" to refer to a "business" licensing board or bureau, just as it refers to an "occupational" or "professional" licensing board or bureau. The statute is simply asserting that a "qualifying patient" is not to be penalized or disciplined by a "business or occupational or professional licensing board or bureau" for his medical use of marijuana.

Plaintiff also argues that the plain language of the statute somehow regulates private employment relationships, restricting the ability of a private employer to discipline an employee for drug use where the employee's use of marijuana is authorized by the state. We find, however, that the statute never expressly refers to employment, nor does it require or imply the inclusion of private employment in its discussion of occupational or professional licensing boards. The statutory language of the MMMA does not support Plaintiff's interpretation that the statute provides protection against disciplinary actions by a business, inasmuch as the statute fails to regulate private employment actions.

We also note that other courts have found that their similar state medical marijuana laws do not regulate private employment actions. Thus, in addition to being unpersuasive on its face, Plaintiff's interpretation of the MMMA, which would proscribe employer terminations of qualified medical marijuana users, is in direct conflict with other states which have passed similar legislation.

For similar reasons, we dismiss Plaintiff's argument that Plaintiff's discharge was contrary to public policy. The district court held that * * * accepting Plaintiff's argument would create a new category of protected employees, which would "mark a radical departure from the general rule of at-will employment in Michigan." We agree with the district court that accepting Plaintiff's public policy interpretation could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marijuana in accordance with the Act. Such a broad extension of Michigan law would be at odds with the reasonable expectation that such a far-reaching revision of Michigan law would be expressly enacted. * * * The MMMA does not include any such language nor does it confer this responsibility upon private employers. We therefore reject Plaintiff's policy argument.

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. Why do you suppose that the employer ordered a drug test following the workplace injury and decided to terminate the employee despite being aware of his lawful medical use of marijuana?
3. What does employment at will mean? How does it figure into the decision in this case?
4. Do you agree with the decision in this case? Why or why not?

The foregoing excerpt from *Casias v. Wal-Mart Stores* is the first of a number of employment law cases that you will have the opportunity to read in this text. The words are those of the judge who wrote the decision. You would find the same words if you looked up the case—which you can easily do by using an online legal database and searching for either the names of the parties or the citation that appears below the names of the parties. The only difference is that we have shortened the case by selecting only the most essential details and by removing internal citations and footnotes. By seeing the law applied to particular factual circumstances and reading the judges' rationales for their decisions, you will gain a fuller understanding of the law.

When reading cases, it is important to pay attention to how the legal issues are framed. One might be tempted to say that the legal issue in the *Casias* case was whether the store had the right to terminate this employee for his lawful use of marijuana to manage pain resulting from cancer and a brain tumor, or more generally, whether the termination was fair. But these statements do not get to the heart of the *legal* issue in this case. Under

employment at will, a termination is lawful unless the terminated employee proves that he or she had some specific right not to be terminated under the circumstances. Not finding express protection for employees of private businesses from termination for medical marijuana use under the state's medical marijuana law, nor more generally, a clear public policy that would be jeopardized by allowing such terminations, the court fell back on the principle of employment at will. Whether the termination was necessary, wise, or fair was irrelevant to the legal issue of whether it was lawful under employment at will.

Determining Which Employment Laws Apply

Because U.S. employment law is a patchwork of legal protections that apply to some groups of employees but not others, it is necessary to briefly elaborate on some of the key contextual factors that determine which, if any, employment laws apply in a given situation. You will need to consider these factors when presented with situations posing potential legal problems.

Public or Private Sector Employment

The legal environment differs substantially depending on whether **public sector** (i.e., government) employees or **private sector** employees are being considered. Public and private sector does not refer to whether a company trades its stock on the stock market (i.e., publicly traded versus privately held companies), but rather whether the employer is a government agency or a corporation (including private, nonprofit agencies). Public employees make up roughly 15 percent of the workforce. One reason that public employees are a different case has already been mentioned. In general, constitutional protections pertain only to public employees and not to private-sector employees. Beyond this, public employees are often covered by state or municipal civil service laws and tenure provisions.

Not all comparisons favor public employees. Public employees are subject to restrictions on their political activities, excluded from coverage under the National Labor Relations Act and the Occupational Safety and Health Act, and limited in their ability to sue for violations of federal law. This last point should be underscored. A series of U.S. Supreme Court decisions has held, based on the Eleventh Amendment and the broad concept of state sovereignty, that state governments cannot be sued by their public employees, whether in state or federal court, for violations of such federal employment laws as the Fair Labor Standards Act and the Americans with Disabilities Act (however, the Court reached the opposite decision regarding certain suits brought under the Family and Medical Leave Act).[2] Thus, even though these federal laws still apply to state government employees, options for enforcement are limited.

Unionized or Nonunion Workplace

When employees opt for union representation and negotiate a collective bargaining agreement with their employer, the employer is contractually committed to live up to the terms of the agreement. In contrast to the vast majority of employees who lack employment contracts, unionized employees have many of their terms and conditions of employment spelled out in enforceable labor agreements. These contractual terms typically go well beyond the minimum requirements of the law (e.g., by providing for daily overtime rather than the weekly overtime required by federal law). Employers in unionized workplaces are

[2]*Alden v. Maine*, 527 U.S. 706 (1999); *University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Coleman v. Ct. of App. of Md.*, 132 S. Ct. 1327 (2012).

also more limited in their ability to make unilateral changes in workplace practices without first negotiating those changes with unions. Discipline or discharge of a unionized employee is contractually limited to situations where the employer can establish "just cause" for the discipline or discharge, which stands in stark contrast to the at-will employment of most nonunion workers.

Employer Size

The legal environment also varies depending on the size of the employer. Size can be variously construed. For purposes of some statutes, including the Fair Labor Standards Act and the National Labor Relations Act, size is measured in financial terms and coverage is limited to employers that exceed a minimum level of revenue (e.g., the general minimum for coverage under the Fair Labor Standards Act is $500,000). More often, statutes specify a minimum employer size in terms of number of employees. For instance, both Title VII of the Civil Rights Act and the Americans with Disabilities Act limit coverage to companies that have fifteen or more employees, the Age Discrimination in Employment Act applies to employers with twenty or more employees, and the Family and Medical Leave Act applies only to employers with fifty or more employees.

These size limitations are not trivial. Table 1.1 shows that 90 percent of firms in the United States had fewer than twenty employees in 2010. This means that the vast majority of firms remain outside the reach of federal employment laws. There are two countervailing factors to consider, however. First, the minority of companies that are covered nonetheless employ most U.S. workers (because each larger company employs many more people). Thus, the approximately 10 percent of all firms that had twenty or more employees in 2010 employed almost 82 percent of the workforce. The second important factor is that most states have enacted laws that mirror federal employment laws and that apply to smaller workplaces. For example, the Ohio Civil Rights Act covers employees whose employer has four or more employees.[3] Thus, in Ohio, employers with between four and fourteen employees would fall under state law, but not federal law, whereas employers with fifteen or more employees would be subject to both federal law and state law. Only employers with fewer than four employees would not be subject to civil rights statutes.

There is another aspect to the size issue. Counting the number of employees that an employer has is more complex than it first appears. For one thing, employment levels can change rapidly. A smaller company could easily vacillate above and below the minimum

TABLE 1.1 EMPLOYMENT SIZE OF FIRMS (2010)

EMPLOYMENT SIZE (NO. OF EMPLOYEES)	FIRMS		EMPLOYEES	
	N	%	*N*	%
0–4	3,575,240	62.3	5,926,452	5.3
5–9	968,075	16.9	6,358,931	5.7
10–19	617,089	10.8	8,288,385	7.4
20–99	475,125	8.3	18,554,372	16.6
100–499	81,773	1.4	15,868,540	14.2
500+	17,236	0.3	56,973,415	50.9
Total	5,734,538	100.0	111,970,095	100.1

Source: Adapted from U.S. Census Bureau, *Statistics of U.S. Business*, viewed July 10, 2013 (http://www.census.gov/econ/susb/).

[3] O.R.C. Ann. § 4112.01(A)(2) (2013).

number of employees specified in a statute. When must the employer have the requisite number of employees? At the time of the alleged violation? When the claim is filed? Over some longer period of time? Part-time employees present another complication. Should part-time employees be counted the same as full-time employees?

Congress addressed these questions partially in Title VII of the Civil Rights Act of 1964 (parallel language appears in other employment statutes). An employer is defined as someone "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ."[4] "Current" calendar year refers to the year in which the alleged discrimination occurred. The Supreme Court has ruled that the proper method for counting employees is the **payroll method**. Under this method, an employee is counted for each full week between when she is hired and when she leaves employment, regardless of the number of days or hours the employee worked during those weeks.[5]

Geographic Location

An employee's rights are affected by where he happens to live. Some states and cities go much further than others, and also further than the federal government, in conferring rights on workers. States and cities have become increasingly important as sources of employment laws in recent years. The interrelationship between federal and state laws is a complex legal matter. At the risk of oversimplification, states are free to enact laws pertaining to issues not addressed by federal law. State laws also can match or exceed the protections available under federal laws dealing with the same matters, but they cannot reduce the rights employees have under federal law. Thus, state laws are important not only because they reach smaller workplaces than federal employment laws but also because they sometimes provide employees with rights not available under federal law. Examples of state laws that exceed federal law include higher minimum wages in some states, laws regulating the handling of personnel records, limitations placed on drug testing, and prohibitions against discrimination based on sexual orientation.

Practical Considerations How should employers that operate in different states and cities deal with lack of uniformity in employment laws?

Government Contracts

Federal, state, and local governments sometimes use the contracting process as leverage to get employers to implement desired workplace practices. Employers that contract to do business with the federal government (e.g., defense contractors, construction companies, and computer suppliers) and that meet certain other criteria are required to engage in affirmative action as a condition of their contracts. Likewise, both the Drug-Free Workplace Act (requiring that employers take certain actions to stop workplace drug use) and the Rehabilitation Act (prohibiting discrimination against and requiring affirmative action on behalf of disabled persons) apply to private employers based on their contracts with the federal government.

Industry and Occupation

Most employment laws apply to any industry, but some are more narrowly targeted. For example, the Omnibus Transportation Employees Testing Act of 1991 mandates extensive drug (and alcohol) testing, but only for employees in industries regulated by the Department of Transportation (e.g., airlines, railroads, trucking companies). Likewise, employees in the historically dangerous mining industry are not covered under the Occupational

[4]42 U.S.C.S. § 2000e(b) (2013).

[5]*Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997).

Safety and Health Act, but instead under a separate statute, the Mine Safety and Health Act. Agricultural workers, despite their generally poor working conditions, are wholly or partly excluded from the protection of many employment laws, including the National Labor Relations Act, the Fair Labor Standards Act, and state workers' compensation statutes. An important example of an occupation-based distinction is the National Labor Relations Act's exclusion of supervisors and managers.

Historical Development of U.S. Employment Law

Detailing what the law said previously and how it has changed over time is beyond the scope of this book. However, you should have some sense of when employment laws came into existence. Figure 1.1 is a timeline of major employment laws (ignoring, for the most part, amendments to these laws).

FIGURE 1.1 Timeline of Major U.S. Employment Laws

1900	Workers' Compensation (most states between 1911 and 1920)
1920	Railway Labor Act (1926)
	National Labor Relations Act (Wagner Act) (1935)
	Social Security Act (1935)
	Fair Labor Standards Act (1938)
1940	Labor-Management Relations Act (Taft-Hartley Act) (1947)
1960	Equal Pay Act (1963)
	Title VII of the Civil Rights Act (1964)
	Executive Order 11246 (1965)
	Age Discrimination in Employment Act (1967)
1970	Occupational Safety and Health Act (1970)
	Rehabilitation Act (1973)
	Employee Retirement Income Security Act (1974)
	Pregnancy Discrimination Act (1978)
1980	Common Law Wrongful Discharge Claims (majority of states adopted one or more of these from the late 1970s through the 1980s)
	Consolidated Omnibus Budget Reconciliation Act (COBRA) (1985)
	Immigration Reform and Control Act (1986)
	Employee Polygraph Protection Act (1988)
	Worker Adjustment and Retraining Notification Act (1988)
1990	Americans with Disabilities Act (1990)
	Older Workers Benefit Protection Act (1990)
	Civil Rights Act of 1991 (1991)
	Family and Medical Leave Act (1993)
	Uniformed Services Employment and Reemployment Rights Act (1994)
	Health Insurance Portability and Accountability Act (1996)
2000	Pension Protection Act (2006)
	ADA Amendments Act (2008)
	Genetic Information Nondiscrimination Act (2008)
	Patient Protection and Affordable Care Act (2010)

At the turn of the twentieth century, employment law was virtually nonexistent in the United States. The first significant departure from an unregulated workplace was the adoption of state workers' compensation laws to deal with the severe problem of injured workers. A major breakthrough came in the 1930s, when the National Labor Relations Act and the Fair Labor Standards Act were enacted. Employment law took large strides forward in the 1960s with the passage of major antidiscrimination statutes, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Equal Pay Act. Common law claims, particularly for wrongful discharge, came into vogue in the late 1970s and throughout the 1980s. Benefits have been the object of a number of employment laws since the 1970s, with health insurance and pensions being at the center of recent legislative efforts.

Legislation does not emerge in a vacuum. Many of our employment laws reflect the work of **social movements**, organized efforts to create needed changes in workplaces and society. The workers' compensation statutes adopted in the early part of the twentieth century were influenced by the progressive movement that addressed the social problems of that time. The National Labor Relations Act was enacted in 1935 during the early part of the New Deal and in the depths of the Depression. The act both reflected and furthered the efforts of ordinary workers and their unions, joined together in the labor movement, to gain some control over their work lives. Likewise, the Civil Rights Act of 1964 was a crowning achievement of the civil rights movement. The civil rights movement had to overcome enormous opposition to obtain legislation protecting the basic civil rights of all people, and the struggle to realize this law's promise continues. Thus, although we will focus on the effects of employment laws on the human resource practices of companies, the major employment laws mean much more than that; they are windows into important periods in our history, express basic societal values, and represent hard-won accomplishments that should not be taken for granted.

The timeline in Figure 1.1 covers more than a century, but most of the laws are clustered in the second half of this period. As a consequence, many interesting legal questions have yet to be resolved by the courts. Is there "too much" employment law now? Certainly, in comparison to the not-so-distant past, the workplace is far more regulated than it used to be. On the other hand, U.S. employers enjoy considerably more freedom to carry out human resource decisions as they see fit than do employers in most of the other major industrialized nations in the world, particularly in Europe.

Procedures for Enforcing Employment Laws

Simply conferring rights on employees is not enough. Means of enforcing those rights must be available when employers do not live up to their legal responsibilities. TV lawyers get cases and emerge victorious in the space of single episodes. In the real world, the process of resolving employment disputes is anything but simple and quick. A wide variety of **enforcement procedures** exist for bringing and resolving claims related to violations of employment laws. The applicable procedure depends on the particular law that forms the basis for the claim. However, it is possible to convey some of the more typical ways in which employment law claims proceed.

What Does an Employee Decide to Do When She Believes That Her Rights Were Violated?

In a few situations, employment laws are enforced by government agencies at their own initiative, such as when OSHA elects to inspect a workplace based on the occurrence of a serious accident or because it operates in a particularly dangerous industry. However, as

a general rule, both the courts and government agencies rely on individual employees to come forward with complaints before enforcement actions are undertaken. Thus, the decision of an employee to challenge some action of her employer is a key part of the enforcement process.

Although there are undoubtedly some frivolous claims brought against employers, it is a mistake to assume that most employee complaints are baseless and rooted in opportunism. Contesting one's employer in the legal system is an expensive, protracted, uncertain, and emotionally draining process. Most likely, the cases that are brought are just the tip of the iceberg. Most employees who have their rights violated by their employers do something other than take legal action; they quit, join a union, withhold commitment and discretionary effort, just let it go, or talk it over with the employer and work things out. Ultimately, although no employer can be expected to like it, our system of employment law depends on employees being willing to come forward and assume the burden of taking legal action to both remedy the harm that was done to them as individuals and to uphold public policy.[6]

How Long Does the Employee Have to Bring a Case?

An important feature of any enforcement procedure is the length of time that an aggrieved person has to come forward with a complaint. This is the **limitations period**. Time limits for filing lawsuits or charges with administrative agencies vary. Unfair labor practice charges must be brought to the National Labor Relations Board within six months of their occurrence. In discrimination cases, employees generally have 300 days to file a charge with the Equal Employment Opportunity Commission (EEOC) (180 days in states that do not have their own state civil rights agencies), but only 90 days to file suit if the EEOC's efforts to resolve the case conclude unsuccessfully. Wage and hour cases brought under the Fair Labor Standards Act can go back as far as three years. A major practical consequence is that *employers must be prepared to defend actions taken well in the past by individuals who might no longer work for their companies. The only way to do this is to maintain solid documentation regarding all human resource decisions.*

Employees who fail to bring charges in a timely fashion generally lose their right to pursue legal action. The clock usually starts ticking on the limitations period when the employee receives unequivocal written or oral notice of a decision (e.g., termination), rather than on the effective date of that decision (if these differ). However, if an employee is unaware of her rights because she was actively misled by her employer or the employer failed to meet its legal obligation to post information in the workplace, a court might excuse an untimely filing.[7] This is known as **equitable tolling**. This doctrine is applied sparingly and generally does not shield employees from the consequences of negligent legal representation. Thus, when an employee's religious discrimination lawsuit was filed late due to a clerical error made by her lawyer's office, the employee's suit was dismissed for lack of timeliness.[8] However, when an employee's legal representatives mistakenly filed a timely claim with the wrong federal enforcement agency and the mistake was not corrected until after the limitations period had expired, the employee's case was allowed to proceed. In deciding to toll the deadline for filing in this case, the court pointed to the facts that the employee's lawyers had exercised due diligence in pursuing her claim by promptly filing the charge and repeatedly contacting the agency—which, for its part, inexplicably failed to correct the error and merely informed the lawyers that it was still investigating the case.[9]

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[6]*McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995).
[7]*Mercado v. The Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41 (1st Cir. 2005).
[8]*Harris v. Boyd Tunica Inc.*, 628 F.3d 237 (5th Cir. 2010).
[9]*Granger v. Aaron's Inc.*, 2011 U.S. App. LEXIS 5995, 10–12 (5th Cir.).

When applying limitations periods to discrimination cases, courts distinguish between "discrete acts" (such as nonhiring and termination) that occur at particular points in time and acts that recur and have a cumulative impact. Repeated acts of harassment that, over time, create a "hostile environment" are a prime example of the latter. Employees who claim that they were subjected to a hostile environment can challenge all of the harassing acts, even if these go back well beyond the limitations period, provided that at least one incident of harassment occurred during the limitations period.[10] What about pay discrimination in this light? Is it a discrete act in which a decision is made at a particular point in time to pay an employee a discriminatorily low amount? Or is it an ongoing violation that recurs with each paycheck that is lower than it ought to be if discrimination had not occurred? The Supreme Court had said that it was the former,[11] but Congress subsequently enacted the **Lilly Ledbetter Fair Pay Act**, which established that each discriminatorily low paycheck is a separate violation that starts the limitations period anew.[12] An unlawful employment practice occurs "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages [are] . . . paid."[13]

Can a Lawsuit be Brought? By Whom?

Most employment laws enable employees to enforce their rights through lawsuits against their employers. The Occupational Safety and Health Act is an exception in this regard. When an employee believes that a safety hazard exists in his workplace, he needs to contact OSHA and get an inspector to come. If the inspector does not agree that there is a problem and the employer is not cited, no course of legal action is available to the employee. Likewise, if the appropriate officials of the National Labor Relations Board decline to bring a complaint regarding an alleged unfair labor practice, the employee is out of luck. Suits in discrimination cases can be brought by individuals or the EEOC. However, because the Commission goes to court in only a very small percentage of the cases it receives, the burden of taking legal action to enforce antidiscrimination laws falls mainly on individual employees. Finding an attorney willing to take an employment law case, particularly on a contingent fee basis (the attorney incurs most of the cost of litigation with the promise of a substantial share of any award if the litigation is successful), can be difficult. Employment lawyers accept only an estimated 5 percent of the employment discrimination cases

JUST THE FACTS

A server at a restaurant believed that he was a victim of racial discrimination. He filed a discrimination charge with the EEOC in October 2005. For reasons that are unclear, neither the employee nor the EEOC took any other action regarding the case until October 2011, when the EEOC finally issued a right to sue letter. A lawsuit was filed in December 2011. The employer argued that the case should be dismissed because the lengthy (six-year) delay and the employee's failure to prompt the EEOC to take action sooner unfairly disadvantaged the defense. Should the court allow this case to proceed under these circumstances? Why or why not?

[10] *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002).
[11] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
[12] Pub. L. No. 111-2, 123 Stat. 5 (2009).
[13] 42 U.S.C.S. § 2000e-5 (e)(3)(A) (2013).

brought to them. Lower-wage workers, for whom provable damages are relatively low, are particularly likely to have their cases turned away.[14]

A great deal happens between when a lawsuit is filed and when the case is actually heard in court (if it ever gets that far). Considerable managerial time is spent responding to requests for records, answering interrogatories (sets of questions), and giving sworn depositions (statements) regarding the facts of the case. If you are involved in making human resource decisions, you can expect to experience this part of the litigation process firsthand. *The best advice is to answer questions truthfully and succinctly and to have documentation to back you up*. Settlement negotiations are likely, both at this point and throughout the course of the litigation. Settlements are a common outcome of litigation.

Employment law cases are brought in both state and federal courts. Where the case will end up depends on such factors as the legal basis for the claim, where the parties to the case reside or are incorporated, and the strategic choices of the parties. A case that goes into the federal court system starts at the **district court** (trial court) level. The role of the district court is to establish the facts of the case and to reach a decision about the employee's claim(s). However, many cases filed against employers are dismissed without a trial (this is usually called granting **summary judgment**) because the court determines that even if the allegations of the **plaintiff** (the employee who is suing) are accepted as true, they are not sufficient to support a legal claim. Hence, there are no material facts in dispute that would warrant holding a trial. If a case does go to trial, the plaintiff bears the **burden of proof** to show, generally by a "preponderance" (the majority) of the evidence, that his rights were violated. Cases that go to trial are sometimes decided by juries (a jury trial) and other times by judges (a bench trial). District court decisions can be appealed by either party to a federal **appeals court** (circuit court). Appeals courts typically accept the facts of cases as given and focus on whether the lower courts properly applied the law in deciding cases. Appeals court decisions can be appealed to the **U.S. Supreme Court**. However, because the Supreme Court exercises its discretion as to which cases it hears (when the court decides to hear a case, it issues a writ of **certiorari**), and it hears relatively few cases each year, rarely does a case go that far. Thus, although you will read about many U.S. Supreme Court decisions in this book, these cases are included because they raise important employment law issues and because the Court has decided them authoritatively, not because they are typical cases.

Clippings

A study examining a sample of 1,672 discrimination claims filed in federal court between 1988 and 2003 provides a good picture of typical case outcomes. Overall, about 58 percent of the cases ended in settlements, typically for modest sums but occasionally for much larger amounts. About 37 percent of the cases were dismissed early in the litigation or disposed of prior to any trial through summary judgment for the employer. Only about 6 percent of the cases filed actually went to trial, with the plaintiffs prevailing in a third of these (accounting for 2 percent of the entire sample). The median award to plaintiffs who succeeded at trial was $110,000.

SOURCE: Laura Beth Nielsen, Robert Nelson, and Ryon Lancaster. "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States." *Journal of Empirical Legal Studies* 7, 2 (2010), 184–88.

[14] Elizabeth Hill. "Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association." *Ohio State Journal on Dispute Resolution*, 18 (2003), 777–783.

Clippings

Business people often feel put upon by the demands of government regulators and the courts. But when it comes to the nation's highest court—the U.S. Supreme Court—businesses have rarely had it so good. An empirical study of some 2000 Supreme Court cases decided between 1946 and 2011, in which businesses appeared as one (but not both) of the litigants, found that the Court under Chief Justice John Roberts has been more likely to rule in favor of businesses than any other Court in the post–World War II era. Moreover, of the sixty-five justices that served on the Supreme Court since 1946, two current members of the Court—Samuel Alito and John Roberts—top the list in terms of the percentage of cases in which they voted on behalf of businesses.

SOURCE: Adam Liptak. "Friend of the Corporation." *New York Times* (May 5, 2013), Bu1, 5.

Judges enjoy considerable latitude in deciding cases. However, while courts sometimes change their minds about the law, they have a strong preference for adhering to prior decisions ("precedents")—or at least giving the appearance of doing so. This desire for consistency and stability in the law is captured by the Latin phrase **stare decisis** ("let the decision stand").

Class-Action Lawsuits

Most lawsuits are brought by one, or perhaps a few, named plaintiffs on behalf of themselves. In **class-action lawsuits**, plaintiffs sue on behalf of themselves and some larger group of persons. They claim that their rights and those of other class members were violated in essentially the same manner by the defendant. There are procedures for individuals to opt in or out of class-action lawsuits and any award is shared by the class members.

Class-action lawsuits are controversial. Plaintiffs' counsel see them as an efficient means for pursuing the claims of many individuals who might not otherwise be able to take legal action, whereas corporate defendants tend to see them as collections of disparate allegations strung together by attorneys seeking to maximize their earnings. The class-action lawsuit is a potent weapon for plaintiffs. The prospect of facing a team of lawyers seeking substantial damages on behalf of a large group of plaintiffs is obviously of great concern to an employer. An employer that fails to obtain dismissal of a class-action suit has an especially strong incentive to settle the case rather than risk the outcome of a jury trial.

A key, initial determination that must be made in these cases is whether multiple persons have claims that are sufficiently similar to justify their certification as a "class." In 2011, the Supreme Court was presented with the question of whether a class-action sex discrimination suit brought on behalf of more than a million current and former Wal-Mart employees could go forward. The Court ruled that the plaintiffs had failed to meet the criteria for certifying a class under the applicable Federal Rules of Civil Procedure.[15] The details of these rules go beyond the scope of this book, but in general they require plaintiffs to show that all members of the proposed class suffered the same legal injury, that it is not practical to directly involve so many plaintiffs and their own lawyers in the litigation, that all class members will be adequately represented, and that the types of damages sought and underlying legal claims are consistent with class-based litigation. As the Supreme Court put it in the Wal-Mart case, "[t]he crux of this case is commonality."[16] When the requisite

[15] *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).
[16] *Wal-Mart Stores*, 2550–2551.

commonality is present, determination of the truth or falsity of some aspect of a given class member's case "will resolve an issue that is central to the validity of each one of the claims in one stroke."[17] The Wal-Mart plaintiffs' argument that they were victims of the same "policy" in the form of decentralized decision making that allowed store managers to indulge in stereotyping and discrimination when making pay and promotion decisions failed to impress the Court. The many different ways in which managers might have used their discretion when making employment decisions was "the opposite of a uniform employment practice that would provide the commonality needed for a class action."[18] Importantly, although this case decided only the issue of class certification, the Court indicated that determining the commonality of claims often overlaps with consideration of the merits of those claims, requiring judges, rather than juries, to make early assessments of whether discriminatory practices are affecting all members of proposed classes. Lastly, the Court found fault with the plaintiffs' attempt to use class-based litigation to obtain individualized monetary damages and not simply a court order or other relief that would necessarily apply to employees as a group.

The Supreme Court's resounding rejection of the Wal-Mart plaintiffs' effort to achieve class standing sent a strong message that future class-action lawsuits would be more closely scrutinized and classes less likely to be certified, particularly in the realm of discrimination cases where the circumstances of individual plaintiffs are apt to vary. With a few notable exceptions,[19] plaintiffs in subsequent cases have encountered difficulty advancing class-based discrimination lawsuits.[20] Class-based wage and hour claims have been very prominent in recent years, but also stand to be limited by the Supreme Court's *Wal-Mart* decision.[21] The practical effect of these technical legal issues is quite real: The ability of employees to effectively challenge the policies and practices of large corporations has been diminished.

Is There an Administrative Prerequisite to a Lawsuit?

Some employment laws require that a charge be filed with an administrative agency (e.g., the EEOC or the Wage and Hour Division of the Department of Labor) and that the

Clippings

Clothing retailer Wet Seal agreed to settle a pending class-action lawsuit brought by four named plaintiffs on behalf of all African American managerial employees at the over 500 stores operated by the company. The suit alleged that these employees were subjected to discrimination in pay, promotions, and disciplinary actions; harassment; and retaliation. The agreement calls for creation of a $5.58 million settlement fund, $1.2 million in attorneys' fees, and numerous changes in the company's human resource policies and procedures.

SOURCE: Patrick Dorrian. "Clothier Wet Seal Agrees to Pay $7.5 Million to Settle Black Managers' Class Bias Claims." *Daily Labor Report* 91 (May 10, 2013), A-3.

[17] *Wal-Mart Stores*, 2551.
[18] *Wal-Mart Stores*, 2554.
[19] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 2012 U.S. LEXIS 6143; *Ellis v. Costco Wholesale Corp.*, 2012 U.S. Dist. LEXIS 137418 (N.D. Cal.).
[20] *Ealy v. Pinkerton Government Services*, 2013 U.S. App. LEXIS 5122 (4th Cir.); *Davis v. Cintas*, 2013 U.S. App. LEXIS 10856 (6th Cir.); *Ladik v. Wal-Mart Stores*, 2013 U.S. Dist. LEXIS 77154 (W.D. Wis.).
[21] *Aburto v. Verizon California*, 2012 U.S. Dist. LEXIS 329 (C.D. Cal.); *Leyva v. Medline Industries*, 2013 U.S. App. LEXIS 10649 (9th Cir.).

agency be given the chance to resolve the matter before an employee can go to court. In discrimination cases, an employee usually starts by filing a charge with either the EEOC or a state fair employment practice agency. If the EEOC dismisses the case or fails to achieve **conciliation** (a settlement agreement) between the parties, it issues a **right to sue letter** to the employee alleging discrimination. Only then is the employee able to commence a lawsuit. Other types of legal claims, such as breach of contract or negligence, can proceed directly to court.

Must the Employee Exhaust Internal Dispute Resolution Mechanisms Before Proceeding?

If an employer has a complaint or grievance procedure, the employee does not usually have to use the internal procedure before taking the case to an enforcement agency or court. However, this is an area of the law where profound changes are taking place. The Supreme Court has held that an employer may be able to escape liability for harassment engaged in by a supervisor when an employee unreasonably refuses to avail herself of the employer's complaint procedure.[22] An even more fundamental change has been the rise of alternative dispute resolution procedures intended to take the place of lawsuits (see "The Changing Workplace" feature).

Enforceability of Arbitration Agreements

It is clear that arbitration agreements requiring employees to use arbitration rather than the courts as the means of resolving employment law claims are generally enforceable. In a case involving an arbitration agreement between a broker and the New York Stock Exchange (NYSE), the Supreme Court ruled that the broker would have to use the NYSE's arbitration procedure rather than the courts to pursue an age discrimination claim against his employer. Quoting an earlier case, the Court minimized the differences between arbitration and litigation: "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[23] In a subsequent case that specifically considered employees, the Supreme Court decided that arbitration agreements between employers and employees are covered under the **Federal Arbitration Act (FAA)** and thus generally enforceable (but not when transportation workers are involved, owing to exclusionary language included in the statute).[24] The FAA, enacted by Congress in 1925, requires courts to enforce most written arbitration agreements. The Court's evident enthusiasm for arbitration does not mean that arbitration agreements will always be enforced. In a case involving a disability discrimination suit brought by the EEOC on behalf of an employee who had signed an arbitration agreement, the Supreme Court decided that the agency's suit was not barred by the agreement and that it could seek to recover victim-specific remedies, including back pay and reinstatement.[25] Thus, even with a signed arbitration agreement in hand, an employer is still subject to administrative proceedings and possibly a lawsuit brought on behalf of an employee by an administrative agency. Another issue is that arbitration provisions in the collective bargaining agreements of unionized employees will not bar litigation over violations of individuals' legal rights unless the contract language "clearly and

[22] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
[23] *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991).
[24] *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001).
[25] *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002).

THE CHANGING WORKPLACE

Alternative Dispute Resolution Procedures

There is great interest in **alternative dispute resolution (ADR)** procedures in all areas of the law. Alternative dispute resolution procedures are alternatives to going to court to resolve disputes. Enthusiasm for ADR stems from the belief that these procedures are cheaper, quicker, more private, and less damaging to relationships than litigation. There are many different types of ADR. Two of the most frequently used types are mediation and arbitration. In **mediation**, a neutral third party (the mediator) facilitates negotiations between the disputing parties to help them reach an agreement but does not have the authority to decide the dispute or impose a settlement. In **arbitration**, a neutral third party (the arbitrator) functions more like a private judge. Arbitrators hear disputes and render decisions that are almost always final and binding on the parties.

The EEOC encourages the parties to discrimination charges to use mediation. Rather than decide whether there has been a violation of the law, the mediator (a trained EEOC staff member or contractor) focuses on helping the parties "jointly explore and reconcile their differences." Typically undertaken prior to EEOC investigation of a charge, mediation is voluntary and confidential. If it proves unsuccessful, the case reverts to the typical EEOC enforcement procedure of investigation, conciliation, and possible litigation. The EEOC's mediation program achieved a 76.6 percent settlement rate, resolving discrimination charges in 8,714 of the 11,376 mediations conducted in fiscal year 2012.[1] Cases that went through mediation in 2012 were resolved in an average of 101 days, compared to the average of 200 days consumed by the EEOC's investigative process.[2]

Arbitration has, for decades, been the principal means of enforcing employee rights under collective bargaining agreements in unionized workplaces. This use of arbitration amounts to establishing, through collective bargaining, a private system for resolving disputes about violations of private contractual agreements. What has changed is that many nonunion employers are now requiring arbitration agreements as a condition of employment and arbitration is being used to resolve all employment law disputes—not simply contractual ones. To get (or keep) their jobs, employees have to surrender the ability to go to court to vindicate their rights as employees, and they have to do so prior to any disputes arising.

Precise, current estimates of the extent of ADR use in the workplace are lacking. A 2008 survey of corporate counsel found that some 25 percent of firms required arbitration agreements with their nonunion employees.[3] Another, more systematic, study conducted in 2007 found that arbitration was the most common type of procedure used among nonunion firms with ADR programs of any kind and that nearly 47 percent of the 757 business units responding utilized arbitration.[4] Whatever the exact number of arbitration agreements in use, the consensus is that the use of arbitration agreements has substantially increased over the past decade.[5] Whether the ability of employees to vindicate their rights is enhanced or diminished by the use of arbitration agreements is a disputed matter.[6] One of the most recent and comprehensive studies of the effects of arbitration agreements in employment found that cases were resolved considerably quicker than in litigation, but that employee win rates and awards were lower than those found in some prior studies of litigation outcomes.[7] Additionally, evidence was found supporting a "repeat-player" advantage for employers who fared better due to prior experience with the arbitration process and particular arbitrators.[8] Overall, it appears that the use of mandatory arbitration agreements disadvantages employees in some respects, although reliance on the courts has its own problems.

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[1]U.S. Equal Employment Opportunity Commission. "EEOC Mediation Statistics FY 1999 through FY 2012." Viewed June 27, 2013 (http://www1.eeoc.gov/mediation/mediation_stats.cfm).
[2]U.S. Equal Employment Opportunity Commission. "Questions and Answers about Mediation." Viewed June 27, 2013 (http://www.eeoc.gov/eeoc/mediation/qanda.cfm).
[3]Charles D. Coleman. "Is Mandatory Arbitration Living Up to Its Expectations? A View from the Employer's Perspective." *ABA Journal of Labor & Employment Law* 25, 2 (2010), 227–239.
[4]David Lewin. "Employee Voice and Mutual Gains." *60th Annual Proceedings of the Labor and Employment Relations Association* (2008), 63.
[5]Ronald L. Seeber and David B. Lipsky. "The Ascendancy of Employment Arbitrators in US Employment Relations: A New Actor in the American System?" *British Journal of Industrial Relations* 44, 4 (2006), 733.
[6]David Schwartz. "Mandatory Arbitration and Fairness." 84 *Notre Dame Law Rev.* 1247 (2009).
[7]Alexander J.S. Colvin. "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8, 1 (2011), 5.
[8]Colvin, 15.

unmistakably" requires arbitration of both legal and contractual disputes.[26] To meet this standard, a collective bargaining agreement "must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that specifically refers to statutory claims."[27]

There are additional limitations on the enforceability of mandatory arbitration agreements. Fundamentally, arbitration agreements are contracts. Courts decline to enforce contracts when fraud is involved, the contract was entered into under extreme duress, or the contract is unconscionable. Contracts are **unconscionable** when the process of contract formation essentially involves a "take-it-or-leave-it" offer of an agreement drafted by a more powerful party (a "contract of adhesion") *and* when the contents of the agreement unreasonably favor the more powerful party. Arbitration agreements have *sometimes* not been enforced by courts (i.e., the employee was allowed to go to court despite the existence of the agreement) on the grounds that they are unconscionable. *Nino v. The Jewelry Exchange* is one such case.

Nino v. The Jewelry Exchange
609 F.3d 191 (3d Cir. 2010)

OPINION BY CIRCUIT JUDGE FUENTES:

Rajae Nino brought this action against his former employer, alleging that he was discriminated against on account of his gender and national origin. . . . [T]he employer invoked an arbitration provision in Nino's employment contract and moved the District Court to compel the parties to arbitrate their dispute. Nino opposed the motion, arguing that the arbitration agreement was unconscionable and, therefore, unenforceable. . . . The District Court concluded that although the arbitration agreement contained unconscionable terms, those provisions could be severed from the contract and the remainder of its terms could be enforced. * * *

In our view, the pervasively one-sided nature of the arbitration agreement's terms demonstrates that the employer did not seek to use arbitration as a legitimate means for dispute resolution. Instead, the employer created a system that was designed to give it an unfair advantage through rules that impermissibly restricted employees' access to arbitration and that gave the employer an undue influence over the selection of the arbitrator. We hold that it is not appropriate, in the face of such pervasive one-sidedness, to sever the unconscionable provisions from the remainder of the arbitration agreement. * * * We will thus reverse the District Court's order compelling the parties to arbitrate.

* * * We have repeatedly recognized that the Federal Arbitration Act ("FAA") establishes a "strong federal policy in favor of the resolution of disputes through arbitration." Under the FAA, arbitration agreements "are enforceable to the same extent as other contracts." "A party to a *valid and enforceable* arbitration agreement is entitled to a stay of federal court proceedings pending arbitration as well as an order compelling such arbitration."

* * * Under Virgin Islands law, "[t]he doctrine of unconscionability involves both 'procedural' and 'substantive' elements." The procedural component of the unconscionability inquiry looks to the "process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language." We have consistently found that adhesion contracts—that is, contracts prepared by the party with greater bargaining power and presented to the other party "for signature on a take-it-or-leave-it basis"—satisfy the procedural element of the unconscionability analysis. "A contract, however, is 'not unconscionable merely because the parties to it are unequal in bargaining position.'" Instead, a party challenging a contract on unconscionability grounds must also show that the contract is substantively unconscionable by demonstrating that the contract contains "terms unreasonably favorable to the stronger party." * * *

[26] *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009).
[27] *Ibarra v. UPS*, 695 F.3d 354, 360 (5th Cir. 2012).

Looking first to the question of procedural unconscionability, we agree with the District Court that Nino had no opportunity to negotiate with DI [Diamonds International—the name under which the Jewelry Exchange does business] over the contract's terms, that DI was the stronger contractual party, and that the arbitration agreement is thus procedurally unconscionable. First and most significantly, as the District Court expressly found, DI presented the arbitration agreement to Nino "for signature on a take-it-or-leave-it basis." As Nino explained in his deposition, during his first week at the St. Thomas store, DI's human resources manager provided him with a copy of the company's employment contract and instructed him to "read it and sign it," without affording him any opportunity to negotiate over its terms. * * *

We likewise conclude that the arbitration agreement is substantively unconscionable because it contains terms unreasonably favorable to DI, the stronger party. * * * First, . . . the arbitration agreement's provision requiring that an employee file a grievance within five days of the complained-of incident in order to preserve his or her opportunity to arbitrate the dispute is substantively unconscionable. We have twice held in no uncertain terms that a thirty-day filing requirement in an arbitration agreement is substantively unconscionable. . . . [W]hile "a provision limiting the time to bring a claim or provide notice of such a claim to the defendant is not necessarily unfair or otherwise unconscionable," the time period designated by the agreement must still be reasonable. If a thirty-day filing window is "clearly unreasonable" [as held in a prior case], then the five-day filing requirement imposed by the parties' contract in this case is even more unduly favorable to DI. . . . Indeed, the filing requirement in Nino's arbitration agreement is particularly unreasonable because it is both inflexible and one-sided. With regard to its inflexibility, the agreement states that its filing requirements "are binding and may not be waived except by written agreement of both parties." * * * DI's "unfair advantage is only compounded by the fact that [DI itself] is apparently not required to provide detailed and written notice to an employee of any of its own claims within a strictly enforced [five]-day time period." Indeed, the arbitration agreement in this case imposes no notice requirement upon DI whatsoever. * * * The one-sided five-day filing requirement is manifestly unreasonable and is substantively unconscionable under Virgin Islands law.

Nino likewise argues, and the District Court found, that the arbitration agreement's requirement that the parties bear their own attorney's fees, costs, and expenses is substantively unconscionable. We agree. * * * [I]f arbitration is to offer claimants the full scope of remedies available under Title VII, arbitrators in Title VII cases, just like courts, must . . . ordinarily grant attorney fees to prevailing claimants rather than be restricted by private contractual language. Provisions in arbitration clauses requiring parties to bear their own attorney's fees, costs, and expenses work to "the disadvantage of an employee needing to obtain legal assistance." * * *

Finally, we turn to the arbitration agreement's provision governing the selection of an arbitrator, which Nino contends is substantively unconscionable. Under the arbitration agreement, . . . DI is required to submit a request to the AAA for a panel of four arbitrators. The parties select a single arbitrator from this list according to the following process: From the panel the Employer will strike the first arbitrator for whatever reason is unacceptable to the Employer. The Employee will then be allowed to strike one arbitrator from the remaining names of panel members. This process will continue until there remains one arbitrator who will be the arbitrator for this grievance or the parties can decide on an arbitrator that would be mutually acceptable. Although it is phrased in neutral, procedural terms, the upshot of this provision is that DI is permitted to strike two arbitrators from the four-member AAA panel, whereas the employee is permitted to strike just one.

This provision is "one-sided in the extreme and unreasonably favorable to [DI]." It confers an advantage upon DI for no discernible purpose other than to stack the deck in its favor. Courts of Appeals have not hesitated to conclude that provisions in arbitration agreements that give the employer an unreasonable advantage over the employee in the selection of an arbitrator are unconscionable. . . . "By agreeing to arbitration in lieu of litigation, the parties agree to trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," but they do not accede to procedures "utterly lacking in the rudiments of even-handedness." * * *

Our final task in addressing Nino's unconscionability challenge to the arbitration agreement is to determine whether the unconscionable terms may be severed from the agreement such that the remainder of its terms may be enforced. * * * [T]wo lines of inquiry are relevant to the question of severability. The

first of these is whether the unconscionable aspects "of the employment arbitration agreement constitute[] 'an essential part of the agreed exchange' of promises" between the parties. If the unconscionable aspects of the clause do not comprise an essential aspect of the arbitration agreement as a whole, then the unconscionable provisions may be severed and the remainder of the arbitration agreement enforced. * * * The second consideration for the question of severability . . . is whether the unconscionability of the arbitration clause demonstrates "a systematic effort to impose arbitration on an employee, not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage."

* * * We need not discuss whether the unconscionable provisions of the parties' arbitration agreement comprise an essential aspect of the agreement as a whole, because we conclude that the one-sided nature of the arbitration agreement reveals unmistakably that DI "was not seeking a *bona fide* mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage." The provisions in question do not simply accord an advantage upon DI indirectly or by happenstance. Instead, they are baldly one-sided, with only one discernible purpose—to create advantages for the employer that are not afforded to the employee. Of the four members of the arbitration panel, the agreement permits DI to strike two and the employee to strike just one. The employee is required to give notice to DI of the claims he intends to arbitrate, while DI is under no such obligation to provide any notice to the employee. The employee must file a detailed grievance regarding the matter he seeks to arbitrate within five days of the underlying events or lose the right to go to arbitration altogether, while DI is insulated against the risk of default for any failure to adhere to its own filing deadlines. * * *

We conclude . . . that the arbitration agreement is procedurally and substantively unconscionable, and that the pervasively one-sided nature of the agreement forecloses any possibility of severing the unfair provisions from the remainder of the agreement. * * *

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. What does it mean for a contract to be "unconscionable," To be "*procedurally* unconscionable"? "To be *substantively* unconscionable"?
3. What was the evidence that this agreement was procedurally unconscionable? That this agreement was substantively unconscionable?
4. What does it mean to "sever" illegal terms from a contract? Why did the appeals court decline to do so here?
5. What would you advise this employer to do in light of this decision? Should it redraft the language of the arbitration agreement to deal with the court's objections or drop the whole thing?

Some courts require more than a contract drafted by a more powerful party and offered on a take-it-or-leave-it basis to establish that an agreement is *procedurally* unconscionable. Courts may also inquire into the education and legal sophistication of the employee, and whether details of the agreement were adequately explained or hidden away amidst copious fine print.[28] But in any event, the question of enforceability most often turns on the contents of these agreements (i.e., whether they are also *substantively* unconscionable). As in the *Nino* case, one area of particular concern is the procedure for selecting an arbitrator. An essential requirement for a fair arbitration is neutrality. Arrangements that give the employer effective control over who can arbitrate a case or require the use of arbitrators with business ties to the employer are unlikely to be enforced.[29] Courts have also closely scrutinized arbitration agreements that require employees to bear a significant part of the arbitration cost. Although some courts hold that any fee-splitting arrangement is objectionable, most courts look at the facts of the situation and the likelihood that the cost would

[28]*Morrison v. Wal-Mart Stores*, 317 F.3d 646, 666-67 (6th Cir. 2003).
[29]*McMullen v. Meijer*, 355 F.3d 485 (6th Cir. 2004); *Rodriguez v. Windermere Real Estate/Wall Street, Inc.*, 2008 Wash. App. LEXIS 214 (Div. One), *review denied*, 164 Wn.2d 1017 (2008).

deter employees from bringing claims.[30] Remedies that are markedly different from those available through litigation (e.g., reinstatement or punitive damages are not allowed) are also problematic.[31] Limitations periods for filing arbitration claims that are shorter than those that would apply to court proceedings have sometimes, but not always, been deemed unconscionable.[32] However, courts also recognize that the relative informality, quickness, and lower cost of arbitration are precisely what makes it attractive and therefore do not require that arbitration mirror the procedures and remedies of litigation. Thus, arbitration agreements are not invalid simply because they contain language disallowing "classwide" (i.e., class-action) arbitration, even in cases where claims by individual plaintiffs would be prohibitively expensive relative to expected individual damages.[33] Besides delving into the contents of arbitration agreements, courts have considered what adequate notification entails and whether arbitration "agreements" actually existed. As with any valid contract, a clear offer must be made and accepted. An employee who was handed a booklet describing her employer's *Dispute Resolution Procedure* was not held to the arbitration provisions of that procedure because she never provided any written assent to the policy. "For an arbitration agreement to be binding, it must be an agreement, not merely a company policy. Moreover, pursuant to the FAA, the agreement must be in writing."[34] Likewise, an arbitration agreement that was communicated to employees via e-mail was not enforced when the e-mail message did not clearly alert employees to the legal significance of the new

JUST THE FACTS

A fitness center issued an employee handbook that included a section providing that all employment-related disputes would be "resolved only by an arbitrator through final and binding arbitration." It specified that disputes under the Fair Labor Standards Act were among those subject to the mandatory arbitration policy and further stipulated that disputes could not be brought as class actions. A sales representative signed a form acknowledging that he had received the handbook. The acknowledgment reiterated that "if there is a dispute arising out of my employment . . . I will submit it exclusively to binding and final arbitration. . . ." The acknowledgment also stated that the terms of the handbook were subject to change: "I acknowledge that, except for the at-will employment, [the employer] has the right to revise, delete, and add to the employee handbook. Any such revisions to the handbook will be communicated through official written notices approved by the President and CEO. . . ." The sales representative subsequently filed a lawsuit under the Fair Labor Standards Act, alleging that the company failed to provide required overtime pay. The fitness center sought removal of the lawsuit from court and an order to compel arbitration of the dispute. What should the court decide? Why?

[30] *Blair v. Scott Specialty Gases*, 283 F.3d 595, 609–10 (3d Cir. 2002); *Morrison*.
[31] *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1178–79 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004).
[32] *Clark v. DaimlerChrysler Corp*., 286 Mich. App. 138 (2005), *appeal denied*, 475 Mich. 875 (2006); *Ingle*, 1175.
[33] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express v. Italian Colors Restaurant*, 2013 U.S. LEXIS 4700. But see also, *D.R. Horton Inc.*, 357 N.L.R.B. No. 184 (2012).
[34] *Lee v. Red Lobster Inns of America*, 92 Fed. Appx. 158, 161 (6th Cir. 2004).

policy and the employer did not ascertain whether employees clicked on links that would have taken them to the details of the new policy.[35] Communication via e-mail satisfied the requirement that arbitration agreements be written, but the employer's failure to clearly notify employees regarding the policy's legal effect, to track whether employees accessed the linked details, and to obtain from employees acknowledgment that the materials had been read and understood led the court to conclude that employees had received insufficient notice of the arbitration agreement to be bound by it.

Practical Considerations Would you advise an employer to use arbitration agreements? Why or why not?

Employers that opt to use arbitration agreements should clearly communicate those agreements to employees in written form and obtain written statements of assent. Employers should provide for a fair arbitration process and avoid the temptation to draft one-sided agreements that place burdens on employees without imposing corresponding limitations on themselves. The agreements should provide employees with a genuine opportunity to vindicate their legal rights and not leave them much worse off than if their day in court had been available to them.

Remedies for Violations of Employment Laws

If an employee takes legal action against his employer and is successful, what does he get for the trouble? A partial list of **remedies** available in employment cases includes attorneys' fees, court orders, back pay, front pay, reinstatement, hiring, liquidated damages (awarded for serious, intentional violations in amounts up to twice the actual damages incurred), compensatory damages (a wide range of damages beyond loss of wages, including pain and suffering), and **punitive damages** (intended to punish the employer in cases of serious, intentional violations and to create an example to affect the behavior of others). The EEOC has increasingly sought agreements from defendant employers to have their employment practices overseen by external monitors and to institute wide-ranging diversity programs. Not all remedies are available for every type of legal claim (nor are all the remedies for which a successful plaintiff is eligible necessarily awarded by the courts). Under the National Labor Relations Act, for example, employees are eligible for "make-whole" remedies, including reinstatement and back pay, but not compensatory and punitive damages. In contrast, common law tort claims can yield monetary damages, but not reinstatement.

In *EEOC v. AutoZone*, an appeals court reviews the remedies awarded to a successful plaintiff in a disability discrimination case.

EEOC v. AutoZone
707 F. 3d 824 (6th Cir. 2012)

OPINION BY CIRCUIT JUDGE MANION:

The Equal Employment Opportunity Commission filed this employment discrimination case on behalf of John Shepherd, a former employee of AutoZone, and alleged that AutoZone had violated the Americans with Disabilities Act. * * * [A] jury returned a verdict in Shepherd's favor. The magistrate judge then approved $100,000 in compensatory damages, $200,000 in punitive damages, $115,000 in back pay, [and] an injunction on AutoZone's anti-discrimination practices. . . . AutoZone appeals the . . . remedies. We affirm . . . except for a provision in the injunction, which we remand for further proceedings.

Shepherd started working for AutoZone in 1998. He initially worked as a sales clerk—a non-supervisory

[35] *Campbell v. General Dynamics*, 407 F.3d 546 (1st Cir. 2005).

position—but was promoted to parts sales manager a year later. * * * Shepherd averaged the highest sales per customer among the employees at his store in 2003. Although Shepherd received several reprimands at work, he won the AutoZone Extra Miler award, which AutoZone characterized as a "prestigious honor," and AutoZone even asked Shepherd to train new employees.

But Shepherd suffered from a chronic back injury. In 1996, Shepherd had been permanently injured while working for a different employer, and he sought help from his neurologist, Dr. Marc Katchen. Dr. Katchen determined that Shepherd had impairments to his trapezius and rhomboid muscles of the upper-left side of his back, a degenerative-disc disease of the cervical vertebrae, and a herniated disc of the cervical vertebrae. As a result, Shepherd could rotate his torso, but repetitive twisting aggravated his condition and caused "flare-ups," which brought on severe pain in his neck and back.

About 80% of Shepherd's work at AutoZone was devoted to sales and customer service, and these activities did not affect his health. However, soon after starting work at AutoZone, Shepherd began to experience severe flare-ups that caused his back and neck to swell, and would cause pain with the slightest of movements. * * * Dr. Katchen determined that these flare-ups were caused by the repetitive motions involved in mopping AutoZone's floors, which was one of Shepherd's job requirements. Shepherd asked his store manager, Larry Gray, if he could be released from mopping, and Gray informally allowed Shepherd to perform other tasks instead. But when the district manager, Steven Smith, found out that Shepherd was no longer mopping the floors, he directed Gray to have Shepherd resume mopping. Gray complied.

After Shepherd transferred to another AutoZone store in Smith's district, he again sought to avoid mopping the floors. The store manager, Terry Wilmot, was willing to accommodate Shepherd's back injury, but when one of Shepherd's coworkers complained about Shepherd's special treatment, Smith again insisted that Shepherd should mop the floors. Although Wilmot allowed Shepherd to avoid mopping duties when Smith was not around, Smith demoted Wilmot in July 2002, and replaced him with a new store manager, Steven Thompson. * * * Shepherd testified that Thompson and Smith still required him to mop the floors. He stated that he had sent a myriad of health and medical forms—some produced in conjunction with Dr. Katchen—to AutoZone officials, but he never received an accommodation.

In March 2003, Shepherd took a medical leave of absence because his mopping duties had caused his condition to worsen. He returned to work in April, and . . . was still compelled to mop the floors. As a result, he suffered from flare-ups four or five times a week and was unable to perform basic tasks of his daily routine. Shepherd's wife, Susan, had to help Shepherd get dressed, wash his body, and engage in other activities around the house. Shepherd began to suffer from depression and Dr. Katchen prescribed an antidepressant.

Shepherd continued to seek an accommodation that would allow him to stop mopping the floors. Shepherd contacted a number of corporate officials at AutoZone and was quite insistent that he needed an accommodation. Among other corporate officials, Shepherd frequently contacted Jackie Moore, the lead disability coordinator who worked at AutoZone's corporate benefits department in Memphis, Tennessee.

On September 12, 2003, Shepherd was wringing out a mop when he felt a sharp pain. He tried to continue his work, but the pain persisted, and he suffered a disabling flare-up that left him unable to return to work for the rest of the year. Three days after this flare-up, Smith sent Shepherd a written letter that relieved Shepherd of his mopping duties because of his back condition. Over the next few months, Shepherd received extensive treatments from Dr. Katchen, including heat treatment, physical therapy, medications, deep tissue massage, ultrasound, antidepressants, and sleep inducers. When Shepherd tried to return to work in January 2004, he learned that AutoZone would not allow him to return. Instead, AutoZone kept Shepherd on involuntary medical leave until February 2005, when it terminated his employment with AutoZone. * * *

[W]e must now address AutoZone's arguments about the remedies that resulted from that trial. AutoZone raises issues relating to (1) the compensatory damages; (2) the punitive damages; [and] (3) the injunction.

1. Compensatory Damages

AutoZone first argues that the compensatory damages are excessive and should be remitted from $100,000 to $10,000. The jury awarded compensatory damages of $100,000 for the "physical, emotional and/or mental pain [Shepherd] experienced . . . as a result of AutoZone's failure to provide him with reasonable accommodation."

* * * To determine whether an award of compensatory damages is excessive, we consider whether the damages awarded (1) were monstrously excessive; (2) had no rational connection between the award and the evidence; and (3) were roughly comparable to awards made in similar cases. We agree with the magistrate judge that the EEOC provided sufficient evidence to support the award of compensatory damages. First, Shepherd testified about the symptoms of his back condition and the details of his disabling September 12, 2003, back injury. Additionally, evidence from Shepherd's wife provided a detailed account of the effect that Shepherd's injuries had on his daily life while working at AutoZone. Finally, Dr. Katchen testified in great detail about his diagnosis and treatment of Shepherd's myofascial pain. This evidence provides a basis for concluding that the compensatory damages were not monstrously excessive, but were instead rationally connected to Shepherd's pain.

Additionally, the magistrate judge accurately observed that the compensatory damages in this case are approximately the same value as the compensatory damages awarded in comparable cases. In fact, Shepherd's case is more extreme than some of these cases because Shepherd experienced near-daily pain that left him incapable of performing common activities, such as putting on his clothes and taking a shower. We have recognized that cases that include even the slightest "physical element" are often associated with more substantial compensatory-damages awards.

We conclude that all three factors used to determine whether compensatory damages are excessive weigh in favor of the EEOC. The magistrate judge therefore did not abuse his discretion when he upheld the award of $100,000 in compensatory damages for Shepherd's pain and suffering.

2. Punitive Damages

The jury awarded $500,000 in punitive damages against AutoZone, but the magistrate judge reduced the punitive damages to $200,000 to comply with a statutory cap. AutoZone first asks us to vacate the punitive damages for insufficient evidence. If we decline to do so, AutoZone alternatively asks us to remit punitive damages under the Due Process Clause to no more than $10,000. * * *

Punitive damages are available to the EEOC if it can demonstrate that AutoZone engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." [T]he Supreme Court [has] established a three-part framework to determine whether punitive damages are proper. . . . First, the plaintiff must show that the employer acted with "malice" or "reckless indifference" toward the employee's rights under federal law. A plaintiff "may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the anti-discrimination laws" but nonetheless ignored them or lied about their discriminatory activities. The plaintiff has the burden of proving "malice" or "reckless indifference" by a preponderance of the evidence. Second, the plaintiff must establish a basis for imputing liability to the employer based on agency principles. Employers can be liable for the acts of their agents when the employer authorizes or ratifies a discriminatory act, the employer recklessly employs an unfit agent, or the agent commits a discriminatory act while "employed in a managerial capacity and . . . acting in the scope of employment." Third, when a plaintiff imputes liability to the employer through an agent working in a "managerial capacity . . . in the scope of employment," the employer has the opportunity to avoid liability for punitive damages by showing that it engaged in good-faith efforts to implement an anti-discrimination policy. This is a fact-intensive analysis, and "although the implementation of a written or formal anti-discrimination policy is relevant to evaluating an employer's good faith efforts . . . , it is not sufficient in and of itself to insulate an employer from a punitive damages award."

* * * First, a rational jury could have found that AutoZone acted with "reckless indifference" to Shepherd's federal employment rights. AutoZone stipulated that Thompson, Smith, and Moore had all received ADA training. Furthermore, Teresa James, the benefits manager for AutoZone and Moore's supervisor, testified about AutoZone's established procedure for handling employees' accommodation requests. If an AutoZone employee made an accommodation request, the benefits department would obtain the employee's medical documentation, such as a physician's report, then coordinate with AutoZone's legal department to "ensure that there is a consensus on what the request is." The benefits department would then review the physical demands of the employee's position and coordinate with a human resources manager in the field to determine whether AutoZone could accommodate the employee's disability.

* * * Although Moore was aware of Shepherd's situation, her testimony revealed that she did not address Shepherd's disability through AutoZone's typical