WORK LAW: CASES AND MATERIALS

Third Edition
LexisNexis Law School Publishing
Advisory Board

Bridgette Carr
Clinical Professor of Law
University of Michigan Law School

Steven I. Friedland
Professor of Law and Senior Scholar
Elon University School of Law

Carole Goldberg
Jonathan D. Varat Distinguished Professor of Law
UCLA School of Law

Oliver Goodenough
Professor of Law
Vermont Law School

Paul Marcus
Haynes Professor of Law
William and Mary Law School

John Sprankling
Distinguished Professor of Law
McGeorge School of Law
WORK LAW: CASES AND MATERIALS

Third Edition

Marion G. Crain
Vice Provost, Washington University in St. Louis
Wiley B. Rutledge Professor of Law
Washington University School of Law

Pauline T. Kim
Charles Nagel Chair of Constitutional Law and Political Science
Washington University School of Law

Michael Selmi
Samuel Tyler Research Professor of Law
George Washington University Law School
Acknowledgments

The authors would like to thank the authors and publishers for permission to reprint portions of the following copyrighted material:


Blades, Lawrence E., Employment at Will vs. Individual Freedom: On Limiting the
Acknowledgments


Crain, Marion, Managing Identity: Buying into the Brand at Work, 95 IOWA L. REV. 1179 (2010). Copyright © 2010 Iowa Law Review. All rights reserved. Reprinted with permission.


Estlund, Cynthia L., How Wrong Are Employees About Their Rights, and Why Does It
Acknowledgments


Freeman, Richard B., What Will a 10% . . . 50% . . . 100% Increase in the Minimum Wage Do?, 48 IND. & LAB. REL. REV. 830 (1995). Copyright © 1995 Industrial & Labor Relations Review. All rights reserved. Reprinted with permission.


Grossman, Joanna L., Job Security Without Equality: The Family and Medical Leave
Acknowledgments


Hyde, Alan, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH VELOCITY LABOR MARKET 31 (Armonk, NY: M.E. Sharpe 2003). Copyright © 2003 M.E. Sharpe. All rights reserved. Reprinted with permission.


Kim, Pauline T., Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace, 96 NW. U.L. REV. 1497 (2002). Copyright © 2002 Northwestern University Law Review. All rights reserved. Reprinted with special permission of Northwestern University, Northwestern University Law Review.


Acknowledgments

Association. All rights reserved. Reprinted with permission.


RESTATEMENT OF AGENCY. Copyright © 1957 by the American Law Institute. All rights reserved. Reprinted with permission.

RESTATEMENT (SECOND) OF CONTRACTS. Copyright © 1981 by the American Law Institute. All rights reserved. Reprinted with permission.

RESTATEMENT (SECOND) OF TORTS. Copyright © 1977 by the American Law Institute. All rights reserved. Reprinted with permission.


Acknowledgments


Acknowledgments


_U.S. Steel Demolition_ (photograph). Reprinted from The Vindicator, © 2002 The Vindicator Printing Company.


Preface

The law of work has evolved as a patchwork of legal interventions in the labor market, sometimes by statute, and sometimes through the common law of judicial decisions. Most law school curricula divide the law of work into three topical areas—Labor Law, Employment Law, and Employment Discrimination—and offer separate courses in each area. Labor law in the United States is understood to encompass the study of the National Labor Relations Act, the law governing union organizing and collective bargaining. It is the law of collective rights at work. Employment law refers to the statutes and common law governing individual rights at work. It ranges from minimum standards legislation to judicially created doctrines based in tort and contract law. Employment discrimination law deals with the statutes and interpretative case law advancing the antidiscrimination norm in the workplace. These statutes address the problem of status discrimination at work (e.g., discrimination on the basis of race, sex, national origin, ethnicity, religion, disability, or sexual orientation).

Regulation of the employment relation defies such categorical thinking, however. The law has struggled with the tension between the desire to leave things to private contract and market forces, and the impulse to intervene to redress inequitable results occasioned by the imbalance of power between employees and employers. In some areas freedom of contract principles have prevailed. In other areas the law has considered it essential to extend protection to employees to act collectively in dealing with the employer, as in the labor laws. An increasingly prevalent response is government legislation to afford minimum standards of protection to all workers, and particularly to those historically disadvantaged in the American labor market, such as people of color, women, and persons with disabilities. These legal regimes overlap and relate to one another in complex ways that are obscured by categorical study.

We believe that acquaintance with historical context and the multiple legal structures governing the workplace is vital for today’s lawyers. Historical legal context affords important insights about how the law may evolve in the future. Understanding the story behind the decline of labor unions and labor law provides critical assistance in evaluating new employee representation systems and conceptualizing rights. Minimum standards legislation was established partly because gaps in union representation left many workers unprotected at the workplace. Antidiscrimination law responded to union failures to represent the rights of subordinated groups. Is there any logical stopping point to this progression? As each new right is conceptualized and political momentum builds for legal protection, will laws continue to proliferate? Similarly, as groups of employees previously excluded from protection against discrimination press for legal agency, will new employment discrimination statutes be enacted? Where is the sunset? Yet at the same time, the politics of the global economy militate in favor of more flexibility for U.S. employers attempting to compete in an international market. Will employers block such legislation? Will legislative impasse ensue, as it ultimately did in the area of labor law? What, then, might evolve to replace individual statutory rights?

A comprehensive study of the law of work also provides an opportunity to assess critically what form enforcement of rights should take. Should conflicts between employers and employees be channeled into private resolution systems such as collective bargaining or contractual arbitration, or is the public interest sufficient to justify
committing administrative, judicial and legislative resources to it? What is the significance of casting employee rights as collective—and therefore entrusting their enforcement to an employee representative such as a union—versus conceptualizing them as individual? Must such a collective representative be independent of the employer, or do employer-initiated employee committees further worker voice just as effectively? Doesn’t history also warn of the risks of subordinating individual interests to those of the collective, particularly in the context of a diverse workforce with minority groups characterized by race, ethnicity or gender?

Accordingly, we have denominated this text “Work Law” and endeavor here to present basic materials on each system of labor market regulation. We identify core themes of conflict and concern in the workplace, canvass the governing law, and offer a vantage point for assessment. Several themes furnish the organizing structure for the book. We ask how law should mediate the perennial conflict between employer and employee rights; what difference it makes whether employee rights are conceptualized individually or collectively; what significance the increasing racial, ethnic, and gender diversity of the workforce should have for legal policy; whether dispute resolution systems should be privatized (via collective bargaining or individual contract) or remain in the public fora (courts and legislatures); and whether law is the most effective way to address interests of employers and employees (as contrasted, for example, with human resource practices, employer initiatives, or employee self-help measures).

The book will be most useful in Employment Law courses that address the significance of conceptualizing rights at work individually as opposed to collectively. Its strength, we believe, is its refusal to categorize the law of the workplace in doctrinal boxes that may be out-of-date by the time the book reaches maturity. We advert to Labor Law principles at a number of points throughout the book, but at a policy level rather than a doctrinal level, as a way of introducing and evaluating an alternative model of employee representation; we assume no knowledge of Labor Law on the part of teacher or student and make no effort here to provide a satisfactory substitute for a Labor Law text. We offer some detail in the law of Employment Discrimination but do so primarily with an eye toward surveying the field and assessing antidiscrimination regulation as a response to an increasingly diverse workforce, rather than providing an in-depth study of Employment Discrimination principles.

This text surveys the existing legal landscape, but it does not stop there. Work Law is an exciting and intellectually stimulating practice area because it is of necessity in a constant state of flux, responding to labor market innovations. Flexibility in thinking is vital to this area of practice. We urge students to reject traditional rigid categories and to ask: what new paths might emerge from a holistic conception of Work Law, and the demolition of categorical divides between Labor Law, Employment Law, and Employment Discrimination Law? Toward that end, we offer the following specific questions as a guide for study. We suggest that professors and students consider them in each area covered throughout the course:

1. Which worker desires predominate in this area? Which employer desires predominate? What public interests, if any, are at stake? In short, what is the justification for law to enter the market in this area?

2. What form has the law assumed in this area: e.g., statutory, common law, agency regulation/decisionmaking?
Preface

A. What is the substance of the law?
B. Who is covered by it (how are covered employees defined, which employers are covered)?
C. What are the catalysts for change and is the law in this area receptive to change?

3. What remedies does the law offer for the harms/problems it conceptualizes? Are they adequate?
   A. How is the law enforced and what are the enforcement mechanisms? Who enforces it (e.g., watchdog system or individuals, agency or union, etc.)? Is the law enforced by federal or state authorities?
   B. What is the interaction between systems of law addressing a given area (e.g. collective bargaining and individual statutory rights; federal vs. state regulation)?
   C. Is adjudication private or public? What is the significance of this choice?

4. What extralegal alternatives are available? What human resource strategies have employers developed to manage their workforces? What self-help strategies do employees utilize, both individually and collectively? Are they adequate?

Several colleagues were instrumental in getting this project off the ground. We owe a huge debt to Professor Charles Craver, whose encouragement and vision made this book possible. Without his careful planning, insight, and enthusiasm we might not have attempted this task. Professor Cynthia Estlund collaborated on the outline and philosophy of the text, and was a guiding force in the project’s early days. Much of her work appears throughout these pages, as well. Professor Clyde Summers’ thoughtful scholarly assessment of the law of work was a powerful influence on our conceptualization of the materials presented here and his voice is audible through many excerpts from his work. We are grateful to him, and to the many other authors whose work graces these pages, for permission to use their words to tell the story of Work Law.

We owe thanks to all who have assisted us in our day-to-day work on this project. We offer special thanks to Washington University School of Law and George Washington University Law Center who provided research support; to our hardworking and enthusiastic student research assistants Kelly Behr, Erika Hanson, Lisa Mays, Michelle Seares, Robert Sonnenfelt, Sylvia Tsakos, and Alex Zuckerman and our clerical support, Nancy Cummings.

We have included relevant statutory provisions at appropriate points in the text for convenience; accordingly, use of a Statutory Supplement is not necessary. We chose to edit the cases according to the following conventions: parallel citations and other distracting material have been removed to make the cases as readable as possible. Extraneous detail was omitted to conserve space and focus attention on the issues in the principal cases we included, using ellipses to indicate all deletions of text other than footnotes or citations to authority. Original footnote numbers for included footnotes are shown in brackets at the outset of the footnote. We conformed to bluebook citation format wherever possible to ensure consistency, but ignored the rules when they were silly or unhelpful.

We hope you enjoy this journey through the law of work!

Marion Crain
Pauline Kim
Mike Selmi

xiii
<table>
<thead>
<tr>
<th>TABLE OF CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part One</strong> INTRODUCTION: REGULATING WORK ............. 1</td>
</tr>
</tbody>
</table>

**Chapter 1** ORIGINS .............................................. 3

A. THE MEANING OF WORK ........................................ 4
   Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective* .......................... 4
   Notes ................................................................. 6

B. THE RISE AND FALL OF FREEDOM OF CONTRACT ............ 9
   *Lochner v. New York* ............................................. 11
   Notes ................................................................. 17

C. THE NEW DEAL LABOR LEGISLATION ............................. 21
   1. The Labor Laws .................................................. 22
      *NLRB v. Jones & Laughlin Steel Corp.* ..................... 23
      Notes ................................................................. 25
   2. The Philosophy of Unionism, Industrial Pluralism, and the
      Practice of Collective Bargaining .......................... 28
      Notes ................................................................. 29
   3. The Decline of Unionism, Collective Bargaining, and Labor Law ..... 33

D. THE INDIVIDUAL RIGHTS MODEL ................................ 38
   Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation* ............ 40
   Notes ................................................................. 40

**Chapter 2** THE CONTEMPORARY ERA—SHIFTS IN THE DEMOGRAPHICS AND STRUCTURE OF WORK .......... 43

A. THE WORKFORCE OF THE FUTURE ................................. 44
   Mitra Toossi, *Labor Force Projections to 2022: The Labor Force Participation Rate Continues to Fall* .......................... 44
   Notes ................................................................. 44

B. CHANGES IN THE STRUCTURE OF WORK ......................... 49
Table of Contents

Organizations ................................................................. 50
Marion Crain, Managing Identity: Buying into the Brand at Work .... 56
Notes ................................................................. 57

C. DEFINING THE BOUNDARIES OF THE EMPLOYMENT
   RELATIONSHIP ............................................................ 64
1. What Is the Nature of Employment? ........................................ 65
   O’Connor v. Davis ......................................................... 65
   Notes ................................................................. 69
2. Who Is an “Employee”? ..................................................... 74
   FedEx Home Delivery v. National Labor Relations Board .......... 74
   Alexander v. FedEx Ground Package System ......................... 80
   Notes ................................................................. 89
3. Who Is the Employer? ..................................................... 93

Part Two BALANCING EMPLOYER AND EMPLOYEE
   INTERESTS: INDIVIDUAL VERSUS
   COLLECTIVE RESPONSES ............................................. 97

Chapter 3 CONTRACTING FOR INDIVIDUAL JOB
   SECURITY ................................................................. 101

A. THE PRESUMPTION OF EMPLOYMENT AT-WILL ................. 102
1. Historical Background .................................................... 102
   Jay M. Feinman, The Development of the Employment at
   Will Rule ............................................................. 102
   Notes ................................................................. 104
   Savage v. Spur Distributing Co. ....................................... 109
   Notes ................................................................. 111
2. Alternative Models ....................................................... 113
   a. The Union Sector .................................................... 113
      Roger I. Abrams & Dennis R. Nolan, Toward a Theory of
      “Just Cause” in Employee Discipline Cases ....................... 113
      Cynthia L. Estlund, Free Speech and Due Process in the
      Workplace ........................................................ 114
      Notes ............................................................... 115
   b. Public Employment ................................................... 116
      Board of Regents of State Colleges v. Roth ....................... 116
      Notes ............................................................... 119
3. The Contemporary Era ................................................... 122
B. OVERCOMING THE PRESUMPTION BY AGREEMENT ...... 124
1. Written Contracts ....................................................... 124
   Notes ............................................................... 126
# Table of Contents

2. Oral Contracts .......................................................... 127  
   *Toussaint v. Blue Cross & Blue Shield of Mich.* .......................................................... 127  
   *Rowe v. Montgomery Ward & Co.* .................................................. 128  
   Notes .......................................................... 129  
3. Implied Agreements .................................................. 133  
   *Woolley v. Hoffmann-LA Roche, Inc.* .......................................................... 133  
   Notes .......................................................... 139  
   *Asmus v. Pacific Bell* .................................................. 144  
   Notes .......................................................... 149  
C. WHAT IS “CAUSE”? .................................................. 151  
   *Cotran v. Rollins Hudig Hall International, Inc.* .......................................................... 154  
   Notes .......................................................... 159  
D. OTHER CONTRACT-BASED LIMITS ON EMPLOYMENT-AT-WILL .................................................. 161  
   1. Promissory Estoppel .................................................. 161  
      *Goff-Hamel v. Obstetricians & Gynecologists, P.C.* .................................................. 161  
      Notes .......................................................... 164  
   2. The Implied Covenant of Good Faith and Fair Dealing .................................................. 168  
      *Fortune v. National Cash Register Co.* .................................................. 169  
      *Murphy v. American Home Products Corp.* .................................................. 172  
      Notes .......................................................... 174  
Chapter 4 PUBLIC POLICY PROTECTIONS FOR INDIVIDUAL JOB SECURITY .................................................. 179  
   A. THE PUBLIC POLICY EXCEPTION .................................................. 180  
      *Sheets v. Teddy’s Frosted Foods, Inc.* .................................................. 180  
      Notes .......................................................... 185  
      *Petermann v. International Brotherhood of Teamsters* .................................................. 187  
      *Frampton v. Central Indiana Gas Co.* .................................................. 188  
      *Nees v. Hock* .................................................. 189  
   B. WHAT CONSTITUTES PUBLIC POLICY? .................................................. 190  
      *Hayes v. Eateries, Inc.* .................................................. 191  
      Notes .......................................................... 195  
      *Gantt v. Sentry Insurance* .................................................. 199  
      Notes .......................................................... 203  
      *Kirk v. Mercy Hospital Tri-County* .................................................. 207  
      Notes .......................................................... 210  
   C. WHAT IS A “DISCHARGE”? .................................................. 212  
      *Strozinsky v. School District of Brown Deer* .................................................. 212  
      Notes .......................................................... 214
# Table of Contents

D. THE RELATIONSHIP BETWEEN STATUTORY AND COMMON LAW REMEDIES .................................. 216

E. THE SPECIAL CASE OF ATTORNEYS ......................... 219
   *Crews v. Buckman Laboratories International, Inc.* .................................................. 221
   Notes .......................................................................................................................... 228

F. REVISITING THE PRESUMPTION OF AT-WILL EMPLOYMENT  ................................................. 230
   *Richard A. Epstein, In Defense of the Contract at Will* ............................................. 230
   *Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World* .................................................. 232
   Notes .......................................................................................................................... 234

### Chapter 5  COLLECTIVE JOB SECURITY  ................................................................. 241

A. COMMON LAW CONTRACT, PROPERTY, AND TORT CLAIMS  .............................................. 241
   *Kent Greenfield, The Unjustified Absence of Federal Fraud Protection in the Labor Market* .......................................................... 241
   *Local 1330, United Steel Workers of America v. United States Steel Corp.* .................. 243
   Notes .......................................................................................................................... 250

B. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT  ........................................ 261
   1. The Statute .............................................................................................................. 261
   2. Enforcement and Compliance Issues ...................................................................... 262
   3. Statutory Interpretation Issues ............................................................................... 264
      *Childress v. Darby Lumber, Inc.* ........................................................................... 266
      Notes ....................................................................................................................... 270
      *Ellis v. DHL Express, Inc.* .................................................................................. 272
      Notes ....................................................................................................................... 278

C. COLLECTIVE JOB SECURITY UNDER THE NATIONAL LABOR RELATIONS ACT  .................. 281
   1. Union Organizing Drives ....................................................................................... 282
      *Textile Workers Union v. Darlington Manufacturing Co.* ...................................... 282
      Note ......................................................................................................................... 285
   2. Threats to Close in Response to Union Organizing Activity .................................. 286
      *NLRB v. Gissel Packing Co.* ................................................................................ 286
      Note ......................................................................................................................... 287
   3. Plant Closings Where the Workforce Is Already Unionized .................................... 288
      Notes ......................................................................................................................... 291

D. THE UNEMPLOYMENT INSURANCE SYSTEM  ............................................................ 294
   *Gillian Lester, The Unemployment Insurance and Wealth Redistribution* .................. 295

xviii
Table of Contents

Notes ............................................................................. 296

Chapter 6 EMPLOYEE MOBILITY ................................. 303

A. COVENANTS NOT TO COMPETE .......................... 304
   Hopper v. All Pet Animal Clinic, Inc. ....................... 304
   Notes ....................................................................... 312

B. TRADE SECRETS .................................................. 320
   1. Protecting Trade Secrets ..................................... 320
      Saturn Systems v. Militare .................................. 320
      Notes .................................................................... 324
   2. Inevitable Disclosure .......................... 328
      Pepsico, Inc. v. Redmond .................................. 328
      Notes .................................................................... 333

C. THE DUTY OF LOYALTY .................................. 336
   Augat, Inc. v. Aegis, Inc. ...................................... 336
   Notes ....................................................................... 339
   Problem and Thoughts for the Future .......... 344

D. EMPLOYEE INVENTIONS ................................ 344
   Wommack v. Durham Pecan Co. ......................... 345
   Notes ....................................................................... 350

Chapter 7 DIGNITARY INTERESTS .............................. 353

A. AVOIDING EMOTIONAL HARM .......................... 354
   Wornick Co. v. Casas ........................................ 355
   Notes ....................................................................... 357
   Bodewig v. K-Mart, Inc. ....................................... 358
   Hollomon v. Keadle ............................................. 362
   Notes ....................................................................... 364

B. PRIVACY .............................................................. 368
   1. Constitutional Protection for Public Employees ..... 369
      O’Connor v. Ortega ............................................ 369
      Notes .................................................................... 374
   2. Common Law Protections for Private Employees 377
      a. Intrusion on Seclusion .................................... 378
         K-Mart Corp. Store No. 7441 v. Trotti .......... 378
         Notes ............................................................... 381
      b. Publicity to Private Life ............................ 387
         Borquez v. Robert C. Ozer, P.C. ............... 387
         Notes ............................................................... 390
   3. Collective Approaches to Protecting Employee Privacy. 393
      Colgate-Palmolive Co. and Local 15, International
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chemical Workers Union</td>
<td>394</td>
</tr>
<tr>
<td>Notes</td>
<td>396</td>
</tr>
<tr>
<td>4. Privacy of Electronic Communications</td>
<td></td>
</tr>
<tr>
<td>a. Constitutional Law</td>
<td></td>
</tr>
<tr>
<td>City of Ontario v. Quon</td>
<td>399</td>
</tr>
<tr>
<td>Notes</td>
<td>403</td>
</tr>
<tr>
<td>b. Reasonable Expectations of Privacy</td>
<td></td>
</tr>
<tr>
<td>Stengart v. Loving Care Agency, Inc.</td>
<td>405</td>
</tr>
<tr>
<td>Notes</td>
<td>409</td>
</tr>
<tr>
<td>c. Statutory Protections</td>
<td></td>
</tr>
<tr>
<td>Pure Power Boot Camp v. Warrior Fitness Boot Camp</td>
<td>413</td>
</tr>
<tr>
<td>Notes</td>
<td>416</td>
</tr>
<tr>
<td>d. Social Media</td>
<td></td>
</tr>
<tr>
<td></td>
<td>418</td>
</tr>
<tr>
<td>C. OFF-DUTY CONDUCT AND ASSOCIATIONS</td>
<td></td>
</tr>
<tr>
<td>McCavitt v. Swiss Reinsurance America Corp.</td>
<td>422</td>
</tr>
<tr>
<td>Notes</td>
<td>425</td>
</tr>
<tr>
<td>D. TESTING, SCREENING, AND MONITORING</td>
<td></td>
</tr>
<tr>
<td>1. Genetic Testing</td>
<td></td>
</tr>
<tr>
<td>2. Drug Testing</td>
<td></td>
</tr>
<tr>
<td>Notes</td>
<td>435</td>
</tr>
<tr>
<td>3. Monitoring and Data Analytics</td>
<td></td>
</tr>
<tr>
<td></td>
<td>437</td>
</tr>
<tr>
<td>E. REPUTATION</td>
<td></td>
</tr>
<tr>
<td>Zinda v. Louisiana Pacific Corp.</td>
<td>439</td>
</tr>
<tr>
<td>Notes</td>
<td>444</td>
</tr>
<tr>
<td>Chambers v. American Trans Air, Inc.</td>
<td>447</td>
</tr>
<tr>
<td>Notes</td>
<td>450</td>
</tr>
</tbody>
</table>

**Chapter 8**  
**EMPLOYEE VOICE**  

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. EMPLOYEE INTERESTS IN VOICE</td>
<td>457</td>
</tr>
<tr>
<td>Note</td>
<td>460</td>
</tr>
<tr>
<td>B. CONSTITUTIONAL PROTECTIONS</td>
<td>460</td>
</tr>
<tr>
<td>Connick v. Myers</td>
<td>462</td>
</tr>
<tr>
<td>Notes</td>
<td>467</td>
</tr>
<tr>
<td>Garcetti v. Ceballos</td>
<td>472</td>
</tr>
<tr>
<td>Notes</td>
<td>478</td>
</tr>
<tr>
<td>C. THE COMMON LAW</td>
<td>482</td>
</tr>
<tr>
<td>Novosel v. Nationwide Insurance Co.</td>
<td>482</td>
</tr>
<tr>
<td>Edmondson v. Shearer Lumber Products</td>
<td>486</td>
</tr>
<tr>
<td>Notes</td>
<td>490</td>
</tr>
</tbody>
</table>
### Table of Contents

**D. STATUTORY PROTECTIONS FOR EMPLOYEE SPEECH**

1. State Statutory Protection for Speech and Political Activity 494
2. Statutory Protections Against Retaliation 496
3. Whistleblower Protections of the Sarbanes-Oxley Act 498
   a. Who Is Protected? 501
      - *Lawson v. FMR LLC* 501
      - Notes 508
   b. What Is Protected Activity? 509
      - *Wiest v. Lynch* 509
      - Notes 517
   a. The Bounty Provisions 521
   b. The Interaction Between Dodd-Frank and Sarbanes-Oxley 523

**E. COLLECTIVE VOICE PROTECTIONS—THE NLRA**

1. The Voice-Protection Function of NLRA § 7 526
2. Balancing Employer Rights to Manage and Control the Business Against Employees’ § 7 Rights 527
   - Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere* 529
   - Notes 531
3. NLRA § 7 Rights in the NonUnion Workplace 534
   - *NLRB v. Washington Aluminum Co.* 535
   - *Timekeeping Systems, Inc.* 538
   - Notes 543
4. NLRA § 7 Rights on Social Media 547
   - *Hispanics United of Buffalo, Inc.* 547
   - Notes 550
5. Employer Policies Restricting Collective Employee Speech 551
   - *Karl Knaus Motors, Inc.* 551
   - Notes 556

---

**Part Three  FREEDOM FROM DISCRIMINATION VERSUS FLEXIBILITY** 561

**Chapter 9  EMPLOYMENT DISCRIMINATION LAW** 563

A. INTRODUCTION 563

B. CLAIMS OF INTENTIONAL DISCRIMINATION: THE DISPARATE TREATMENT MODEL 567

1. Individual Claims of Intentional Discrimination 567
Table of Contents

McDonnell Douglas Corp. v. Green .......................... 569
Notes .................................................... 571
St. Mary’s Honor Center v. Hicks .......................... 572
Notes .................................................... 580
2. The Mixed-Motives Proof Structure .................... 585
Desert Palace, Inc. v. Costa .............................. 585
Notes .................................................... 589
3. The “Cat’s Paw” Theory ................................. 592
Staub v. Proctor Hospital .................................. 592
Notes .................................................... 597
4. Intentional Discrimination Class Claims: Pattern or Practice and the
   BFOQ ................................................... 603
   a. Pattern or Practice Claims ......................... 604
      Wal-Mart Stores, Inc., v. Dukes .................. 606
      Notes ............................................... 615
   b. The BFOQ Defense ................................... 617
C. DISPARATE IMPACT CLAIMS AND THEIR RELATION TO
   OTHER THEORIES OF DISCRIMINATION ............... 619
   Griggs v. Duke Power Co. ............................ 619
   Notes .................................................. 623
D. SEXUAL HARASSMENT LAW ............................. 630
   1. The Hostile Working Environment Theory .......... 631
      Billings v. Town of Grafton ....................... 631
      Notes ............................................... 637
   2. Employer Liability ................................... 643
      Burlington Industries, Inc. v. Ellerth ............ 643
      Notes ............................................... 652
E. DISABILITY DISCRIMINATION: THE AMERICANS WITH
   DISABILITIES ACT ................................. 658
   1. Defining Disability .................................. 659
      Weaving v. City of Hillsboro ....................... 661
      Notes ............................................... 671
   2. The Duty to Accommodate ........................... 673
      US Airways, Inc. v. Barnett ....................... 673
      Notes ............................................... 681
F. CONTEMPORARY WORKPLACE ISSUES .................... 686
   1. Age Discrimination .................................. 686
   2. Diversity in the Workplace .......................... 692
Table of Contents

Chapter 10  CHALLENGES TO EQUALITY IN A
DIVERSIFYING WORKPLACE  ................. 699

A.  THE IMMIGRANT WORKFORCE ................. 699
   1.  The Impact of Immigrant Labor ............. 700
      Frances Lee Ansley,  Rethinking Law in Globalizing
      Labor Markets  ........................... 700
      Notes ..................................... 702
   2.  Undocumented Workers ....................... 703
      Hoffman Plastic Compounds, Inc. v. NLRB ...... 703
      Notes ..................................... 709
      Williams v. Mohawk Industries, Inc. .......... 714
      Notes ..................................... 722
   3.  Language and Accent Discrimination .......... 727
      Maldonado v. City of Altus ................... 728
      Notes ..................................... 734

B.  BALANCING WORK AND FAMILY ................. 737
   1.  The FMLA and Gender Equality .............. 738
      Nevada Dept. of Human Resources v. Hibbs ...... 739
   2.  The FMLA’s Provisions and Its Effects .......... 741
   3.  The Policy Debate .......................... 744
      Joan Williams,  Our Economy of Mothers and Others:
      Women and Economics Revisited .............. 745
      Michael Selmi & Naomi Cahn,  Caretaking and the
      Contradictions of Contemporary Policy .......... 748
      Notes ..................................... 752
   4.  Stereotypes About Working Mothers ........... 755
      Back v. Hastings on Hudson Union Free Sch. Dist. . 755
      Notes ..................................... 759

Part Four  GOVERNMENT INTERVENTION FOR THE
PUBLIC GOOD: LEGISLATING A SAFETY NET .... 761

Chapter 11  THE REGULATION OF WAGES AND HOURS .... 765

A.  HISTORICAL ORIGINS ......................... 766
   Scott D. Miller,  Revitalizing the FLSA .......... 766
   West Coast Hotel Co. v. Parrish ................ 769
   Notes ..................................... 773

B.  OVERVIEW OF THE FLSA ....................... 776
   1.  Minimum Wage Provisions .................... 776
   2.  Overtime Pay Provisions ..................... 779
   3.  The Child Labor Provisions ................... 780
Table of Contents

4. Enforcement of the FLSA .................................................. 782  
a. Basics ........................................................................ 782  
b. Retaliation Complaints ............................................... 784  
c. Defenses and Limitations on Liability ....................... 786  
d. State Wage and Hour Laws ....................................... 787  
e. Rule 23 Class Actions and FLSA Collective Actions ........... 788  
f. Public Sector Employment ........................................ 791  
C. THE FLSA’S PURPOSES: WEALTH REDISTRIBUTION AND WORK-SPREADING ........................................... 792  
1. The Minimum Wage Provisions .................................... 792  
   Daniel Shaviro, The Minimum Wage, the Earned Income .... 793  
   Richard B. Freeman, What Will a 10% . . . 50% . . . 100% Increase in the Minimum Wage Do? ....................... 796  
   Brishen Rogers, Justice at Work: Minimum Wage Laws and Social Equality ...................................................... 797  
   Notes ........................................................................ 799  
2. The Overtime Pay Provisions and the “White-Collar” Exemptions ................................................................. 803  
   Deborah C. Malamud, Engineering the Middle Classes: Class Line-Drawer in New Deal Hours Legislation .............. 803  
   Notes ........................................................................ 805  
D. WHO IS COVERED? ............................................................ 810  
1. Individual or Enterprise Coverage of Employees .................. 810  
2. The Existence of an Employment Relationship ......................... 810  
3. Exemptions from Coverage ........................................ 812  
4. Applications .................................................................. 815  
   a. Independent Contractors ......................................... 815  
      Heath v. Perdue Farms, Inc. ........................................ 815  
      Notes ................................................................ 821  
   b. Trainees and Interns ................................................ 823  
      Glatt v. Fox Searchlight Pictures Inc. ......................... 825  
      Wang v. Hearst Corp. ............................................. 831  
      Notes ................................................................ 835  
E. WHAT IS COVERED WORK? ................................................... 839  
1. “Off-the-clock” Work .................................................. 839  
   Davis v. Food Lion ...................................................... 839  
   Notes ........................................................................ 843  
2. “On-call” time .............................................................. 847  
   Dinges v. Sacred Heart St. Mary’s Hospitals, Inc. .......... 848  
   Notes ........................................................................ 851  
3. Rest and Meal Periods .................................................. 854  
4. Training Time ............................................................... 855  
5. Travel Time ................................................................. 856

xxiv
Table of Contents

6. “Preliminary and Postliminary” Activities ................................. 858
   IBP Inc. v. Alvarez; Tum v. Barber Foods, Inc. ......................... 858
   Notes ........................................... 860

F. THE OVERTIME EXEMPTIONS ............................................. 864
   1. Traditional White-Collar Employees: Executives, Administrative
      Employees, Professionals, and Outside Salespersons ............. 865
      a. Executive Employees ..................................... 867
         Morgan v. Family Dollar Stores .............................. 867
         Grace v. Family Dollar Stores ............................. 868
         The Starbucks Cases .................................... 869
      b. Administrative Employees ................................. 870
         Roe-Midgett v. CC Servs., Inc. ............................... 871
         Desmond v. PNGI Charles Town Gaming LLC ................. 872
         Kennedy v. Commonwealth Edison ............................ 876
      c. Professional Employees ................................... 876
         Dalheim v. KDFW-TV ....................................... 882
         Freeman v. NBC, Inc. ....................................... 882
         Reich v. Gateway Press, Inc. ................................. 882
         Sherwood v. Washington Post ................................ 882
      d. Outside Sales Employees .................................... 884
         Christopher v. SmithKline Beecham Corp. d/b/a Glaxo-SmithKline 885

2. Computer professionals .................................................. 888
   Martin v. Indiana Michigan Power Co. ................................. 889

3. The Combination and Highly Compensated Exemptions ............. 890

Chapter 12 HEALTH AND PENSION PLANS—ERISA REGULATION .......... 893

A. HEALTH BENEFITS .................................................. 894

B. PENSION BENEFITS .................................................. 897
   1. Defined Benefit Plans ........................................... 900
      a. Vesting of Benefits ........................................ 900
      2. Defined Contribution Plans, 401(k)s, and Their Investments .. 901
         LaRue v. DeWolff, Boberg & Associates, Inc. ............... 901
         Notes ............................................... 904
         Fifth Third Bancorp v. Dudenhoeffer ........................ 905
         Notes ............................................... 913

Chapter 13 HEALTH AND SAFETY ......................................... 919

A. WORKERS’ COMPENSATION ........................................... 920
   1. The Origins of Workers’ Compensation Laws ..................... 920

xxv
Table of Contents

1. The Common Law Approach .................................................. 921
   Farwell v. The Boston and Worcester Rail Road Corp. ................. 921
   Notes ............................................................................. 924

2. The Compensation Acts .......................................................... 928
   Compensation ................................................................. 928
   New York Central Railroad Co. v. White ................................. 929
   Notes ............................................................................. 932

2. Basic Benefits and Coverage .................................................. 933
   a. Benefits and Procedures .................................................... 934
   b. Who Is an Employee? ....................................................... 936
   c. “Arising out of and in the Course of Employment” .................. 938
      Prows v. Industrial Commission of Utah ............................... 939
      Notes ............................................................................. 944
      Houzer v. BI-LO, Inc. ....................................................... 945
      Notes ............................................................................. 948

3. Exclusivity of Remedies .......................................................... 949
   a. The Fundamental Bargain .................................................... 949
      Eckis v. Sea World Corp. .................................................... 949
      Notes ............................................................................. 953
   b. Exception for Intentional Acts ............................................. 954
      Whitaker v. Town of Scotland Neck ..................................... 955
      Notes ............................................................................. 958
   c. Non-Physical Torts ............................................................ 962
      Cole v. Fair Oaks Fire Protection District ......................... 963
      Notes ............................................................................. 966

B. OSHA ................................................................................. 969
   1. The Structure of the Statute ............................................... 970
      a. Promulgating Standards .................................................. 970
         i. Ergonomics Standards ................................................. 970
         ii. Other Enforcement Means ......................................... 972
      b. Inspection and Enforcement Scheme ............................... 972
   2. The General Duty Clause .................................................... 973
      Seaworld v. Perez ............................................................ 973
      Notes ............................................................................. 982
   3. Employee Rights ............................................................... 985
      Whirlpool Corp. v. Marshall, Secretary of Labor .................. 985
      Notes ............................................................................. 991

C. REFLECTIONS ON WORKER SAFETY ................................. 992
# Table of Contents

<table>
<thead>
<tr>
<th>Part Five</th>
<th>SYSTEMS OF JUSTICE: PUBLIC VERSUS PRIVATE, COLLECTIVE VERSUS INDIVIDUAL</th>
<th>995</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 14</td>
<td>ARBITRATION OF WORKPLACE DISPUTES</td>
<td>997</td>
</tr>
<tr>
<td>A.</td>
<td>ARBITRATION AS A WORKPLACE DISPUTE RESOLUTION MECHANISM: ORIGINS AND EVOLUTION</td>
<td>997</td>
</tr>
<tr>
<td></td>
<td>RICHARD A. BALESS, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT</td>
<td>997</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1000</td>
</tr>
<tr>
<td>B.</td>
<td>LABOR ARBITRATION AND THE PROBLEM OF OVERLAPPING REMEDIES</td>
<td>1003</td>
</tr>
<tr>
<td></td>
<td>Alexander v. Gardner-Denver Co.</td>
<td>1003</td>
</tr>
<tr>
<td></td>
<td>Note</td>
<td>1006</td>
</tr>
<tr>
<td>C.</td>
<td>ARBITRATION IN THE NONUNION WORKPLACE</td>
<td>1006</td>
</tr>
<tr>
<td></td>
<td>Gilmer v. Interstate/Johnson Lane Corp.</td>
<td>1006</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1013</td>
</tr>
<tr>
<td>D.</td>
<td>THE USES AND LIMITS OF PREDISPUTE EMPLOYMENT ARBITRATION AGREEMENTS</td>
<td>1015</td>
</tr>
<tr>
<td></td>
<td>1. Effective Vindication of Statutory Rights</td>
<td>1016</td>
</tr>
<tr>
<td></td>
<td>Note</td>
<td>1018</td>
</tr>
<tr>
<td></td>
<td>2. State Contract Law Principles</td>
<td>1019</td>
</tr>
<tr>
<td></td>
<td>Hooters of America, Inc. v. Phillips</td>
<td>1019</td>
</tr>
<tr>
<td></td>
<td>Alexander v. Anthony Int’l, L.P.</td>
<td>1021</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1022</td>
</tr>
<tr>
<td></td>
<td>3. Provisions Barring Class Claims</td>
<td>1024</td>
</tr>
<tr>
<td></td>
<td>a. Statutes That Provide for Group Litigation as an Enforcement Mechanism</td>
<td>1025</td>
</tr>
<tr>
<td></td>
<td>Sutherland v. Ernst &amp; Young LLP</td>
<td>1025</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1031</td>
</tr>
<tr>
<td></td>
<td>Chavarria v. Ralphs Grocery Co.</td>
<td>1033</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1036</td>
</tr>
<tr>
<td></td>
<td>b. NLRA Rights</td>
<td>1036</td>
</tr>
<tr>
<td></td>
<td>D.R. Horton, Inc.</td>
<td>1037</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1039</td>
</tr>
<tr>
<td></td>
<td>4. The Impact of Arbitration Agreements on the Public Interest</td>
<td>1041</td>
</tr>
<tr>
<td></td>
<td>Equal Employment Opportunity Commission v. Waffle House, Inc.</td>
<td>1041</td>
</tr>
<tr>
<td></td>
<td>Notes</td>
<td>1042</td>
</tr>
<tr>
<td>E.</td>
<td>RECONSIDERING EMPLOYER-PROMULGATED ARBITRATION SYSTEMS</td>
<td>1043</td>
</tr>
</tbody>
</table>
**Table of Contents**

Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements* . . . . 1046
Notes . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1049

<table>
<thead>
<tr>
<th>Chapter 15</th>
<th>SELF-REGULATION</th>
<th>1053</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. EMPLOYER SELF-REGULATION</td>
<td>1053</td>
<td></td>
</tr>
<tr>
<td>Cynthia Estlund, <em>Rebuilding the Law of the Workplace in an Era of Self-Regulation</em></td>
<td>1053</td>
<td></td>
</tr>
<tr>
<td>Notes</td>
<td>1061</td>
<td></td>
</tr>
<tr>
<td>B. WORKER REPRESENTATION AND SELF-GOVERNANCE</td>
<td>1063</td>
<td></td>
</tr>
<tr>
<td>1. Identity Caucuses and Worker Centers</td>
<td>1064</td>
<td></td>
</tr>
<tr>
<td>2. Employer-Initiated Vehicles for Collective Voice</td>
<td>1067</td>
<td></td>
</tr>
<tr>
<td>Notes</td>
<td>1071</td>
<td></td>
</tr>
<tr>
<td>3. Works Councils</td>
<td>1072</td>
<td></td>
</tr>
</tbody>
</table>

**Table of Cases**

| TC-1 |

**Index**

| I-1 |