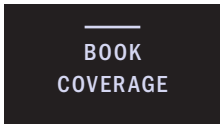

PART I: INTRODUCTION

CHAPTER 1

Introduction to *Law at Work*



BOOK
COVERAGE

This Introduction to *Law at Work* will orient you to the chapters that follow. Business operations large and small confront personnel issues regularly, so a working knowledge of common legal pitfalls will assist anyone dealing with Human Resources (HR). This text contains not only the existing “rules” that every HR professional should know but also problem materials to explore the ambiguous nature of legal situations that arise in the workplace. The goal is to help you develop good instincts for the resolution of issues in a way to minimize legal exposure. This approach is also beneficial to workers who will be accorded the treatment that the law demands for their benefit.



The purpose of the problem materials in this book is to develop your instincts for categorizing situations in one of these ways: (1) the circumstances present no “red flags” alerting you to potential legal problems; (2) the situation suggests the exercise of caution to avoid legal problems; or (3) there is already a legal problem and you should take the issue to legal counsel.

This Introduction offers an overview of the types of issues addressed in the chapters that follow. It is designed to give a sense of what lies ahead. Topics in *Law at Work* include:

- An overview of the American legal system (Chapter 2)
- The employment relationship, including who is an “employer” and “employee” (Chapter 3)
- Discrimination under federal anti-discrimination laws, including race, sex, national origin, religion, age, disability, and military service (Chapter 4)
- Responding to notice from the Equal Employment Opportunity Commission (EEOC) that a complaint has been filed against the employer (Chapter 5)
- Best practices in hiring and promotion to avoid legal difficulties (Chapter 6)
- Immigrant workers, including the Immigration Reform and Control Act of 1986 (Chapter 7)
- An employer’s duty of accommodation for disability, pregnancy, military service, and religion (Chapter 8)
- Harassment in the workplace, including sexual, gender, race, national origin, religion, age, and disability harassment (Chapter 9)
- Privacy in the workplace, including drug testing, searches, monitoring of communications, surveillance, and off-duty use of alcohol and tobacco (Chapter 10)
- Limiting expression through appearance codes and English-Only rules (Chapter 11)
- Safety and health on the job, including Occupational Health and Safety Act and workers’ compensation (Chapter 12)
- Compensation, including Fair Labor Standards Act and Equal Pay Act (Chapter 13)
- Benefits, including pension benefits under the Employee Retirement Income Security Act and health insurance (Chapter 14)

- Medical leave and family leave under the Family and Medical Leave Act (Chapter 15)
- Discipline and termination, including discrimination, plant layoffs, reductions in force (Chapter 16)
- Retaliation and whistleblowing (Chapter 17)
- Unemployment compensation (Chapter 18)
- Post-employment restraints on competition, including non-competition agreements and protection of trade secrets (Chapter 19)
- Constitutional protections for public sector employees, including free speech and privacy (Chapter 20)
- Unionization and collective bargaining in the private and public sectors (Chapter 21)

Structural Features of Chapters

There are structural features in this book that are designed to assist your study by providing guideposts, clarification, and feedback. These structural features are illustrated below.



Chapters begin with an overview called “**Chapter Coverage**” and “**Key Information.**” Here is a sample from Chapter 13 on Compensation.

CHAPTER COVERAGE

This chapter addresses issues concerning hours of work and compensation of employees, including requirements imposed on employers with respect to the hours that employees can be required to work, restrictions on child labor, and the compensation that employees must receive for their work on the employer’s behalf; that material is in Section A. In Section B, this chapter addresses the requirement that men and women be paid equally for equal or substantially equal work.



- The primary federal law that regulates the hours and compensation of employees is the Fair Labor Standards Act (FLSA). The federal Department of Labor (DOL) enforces the FLSA.
- The FLSA requires employers to pay most employees a minimum wage, places restrictions on the hours that children can work, and requires employers to pay premium wages for hours worked over a specified number in a work period.
- Some states and localities have their own minimum wage and overtime requirements that apply to employees if those provisions are more protective of employees than the federal Act.



Many chapters have multiple sections. Each section has its own “**Section Coverage**” and “**Key Information**.”



Early in each chapter or section, there is a “**Try Your Hand**” to introduce the material that follows and sometimes to call attention to points that may be counter-intuitive. Here is a sample from Chapter 4 on Prohibited Discrimination.

TRY YOUR HAND

Try answering the following questions based on your general knowledge. The correct answers are revealed in the material that follows.

1. Federal anti-discrimination law protects racial minorities but not Caucasians.
 - Probably True
 - Inaccurate
2. The Title VII prohibition against religious discrimination includes atheists.
 - Probably True
 - Inaccurate

3. The ADA prohibits an employer from rejecting left-handed applicants on the grounds that the machines they would be using are designed for right-handed operation.
 - Probably True
 - Inaccurate
4. Federal employment law does not require employers to hire unqualified people, such as women who cannot pass weight lifting requirements essential to a job like firefighter, but an employer cannot refuse to test all women applicants on the grounds that most women will not pass anyway.
 - Probably True
 - Inaccurate

As you read through the chapter or section, you learn the answers to these questions. In this example from Chapter 4, the first answer is “Inaccurate,” the second is “Probably True,” and the third is “Inaccurate,” and the fourth is “Probably True.”



Each section includes “**Building the Basics**” to explain terms and concepts in plain language. Anything in **bold** is explained more fully later in the chapter. Here is a sample from Chapter 10 on Privacy. In this sample, the terms in bold are **oral communications**, **wire communications**, and **electronic communications**—all defined and explained soon afterwards in the chapter.



Terms and Concepts: Employer Monitoring of Employee Communications; Oral Communications; Wire Communications: Telephone Calls; Electronic Communications: Voice Mail, Email, Texts, and Other Electronic Messages; Employer Monitoring of Employee Social Media

**Employer Monitoring of
Employee Communications**

The federal Wiretap Act regulates employer actions of listening in on, recording, reviewing, or otherwise monitoring employee communications. The extent to which employers are limited in taking such actions depends on the nature of the communication involved—how the communication occurs and whether it is business-related or personal in nature. The three types of communications under the federal Wiretap Act are **oral communications**, **wire communications**, and **electronic communications**.



Some chapters contain a description of a “**Notable Case**” decided on the subject, usually by the United States Supreme Court. The following example is from Chapter 11 on Appearance Codes.



*EEOC v. Abercrombie & Fitch Stores, Inc.*¹ is a United States Supreme Court case involving a Muslim woman named Samantha Elauf who wore a headscarf to the interview with a retailer. She was not hired despite being rated as qualified to hire because the company had an appearance code called the Look Policy and that policy precluded headwear of any sort. The interviewer double-checked with the manager of the store, asking whether there was a problem with wearing the headscarf for religious purposes, and the manager replied that all headwear would violate the Look Policy, religious or otherwise. Elauf contacted the EEOC, who sued the store under Title VII for its failure to accommodate her religious practice. The issue turned on whether Elauf needed to give explicit notification to the store of the religious nature of her practice, and the Supreme Court held that such notification is not necessary if the employer's action was motivated by a desire to avoid religious accommodation. Although notification makes it easier to prove the employer's motivation, it is not strictly necessary.



Another structural feature of the book is “**Pointers for the Professional.**” These are comments set off with an arrow to convey practical points useful for an HR professional. They represent the opinions of the authors in a general way that may not apply to every case. Here is an example from Chapter 12 on Health and Safety on the Job.



Although employers have a legal right to require that OSHA inspectors obtain a warrant from a court before allowing the inspector access to the premises, most employers do not require a warrant, in part because they do not want to appear to be uncooperative or to be hiding health or safety problems.



When the text comes to an area where the law may be changing, you are alerted to that fact with a “**Development Alert**” and explanation. Here is an example from Chapter 9 on Harassment in the Workplace.



A number of recent cases have reached conflicting results on whether harassment on the basis of sexual orientation is unlawful sexual harassment under Title VII. This issue may soon be resolved by the United States Supreme Court. You should be alert to a possible change in the law.



Throughout the book, there are “**Illustrations**” taken from real cases or based on common scenarios to bring the principles to life. Here is an example from Chapter 21 on Unionization and Collective Bargaining.

ILLUSTRATION 2

An employee in a nonunionized workplace posted a message on her Facebook page, complaining that a co-worker was claiming that she and other workers were not doing their job and that the co-worker intended to bring that complaint to management. That message asked other employees “how do u feel?” about the issue. Four other employees posted comments on the first employee’s Facebook page, objecting to the notion that their work was substandard. The employer fired the employees after the co-worker brought the comments to the attention of the employer, claiming that she was being bullied. The NLRB found that the Facebook comments constituted “concerted action for mutual aid or protection” because the employees were working together to protest criticisms of their work and preparing to defend themselves against accusations made by the co-worker. The NLRB rejected the employer’s claim that the Facebook posts were unprotected, concluding that the comments were not bullying of the co-worker simply because she was offended by the comments.²



At the end of each section or chapter, the book presents “**Review**” questions. The answers can be found in the preceding text. Here is an example from Chapter 7 on Federal Immigration Law.

Review: Chapter 7

1. What actions does IRCA prohibit an employer from engaging in?
2. What obligations does IRCA impose on an employer?
3. Who is authorized to work in the United States under IRCA?
4. What are four examples of an Unfair Immigration-Related Employment Practice?
5. What kind of employer conduct can result in prison or jail time?



In every chapter, there are one or more problems to practice your understanding of the text and build on it. The problems are called “**Developing Your Instincts**” because the situation in each problem illustrates the difficulty of applying principles to everyday life.

Each problem presents a unique fact situation and asks you to think through which multiple choice answer is the best response. The answers to these multiple choice questions are given in the back of the book in the Appendix.

Below is an abbreviated example of a Developing Your Instincts from Chapter 8 on Employer Duties of Accommodation. Earlier material in this chapter explored the requirements of the Uniform Services Employment and Reemployment Rights Act (USERRA). Under this Act, all employers must accommodate work interruptions by employees who engage in military service. Employers must grant returning service members their “rightful place,” meaning the employment situation that they would have attained if they had not been absent for military service. The text explains that under this rule, the employer must give returning employees the same seniority,

status, and pay, as they would have had without the military absence. The problem gives an opportunity to apply this principle.

Developing Your Instincts: Section 11C

Apply your knowledge from this section and use your instincts to consider the following problem. You will find whether your choice(s) are correct in the Appendix at the end of the book.

You are the HR manager for a 200-person company that does billing for small medical practices. There are regular opportunities for promotion within the company, such that HR offers every six months a promotional exam testing knowledge of assorted regulations that supervisors must know because they affect the business. There is a packet of information that those interested in promotion may study during their own time. After the exam, HR ranks applicants by score for upcoming vacancies.

One of your employees, Megan, took a leave of absence for a week relating to her participation in the National Guard. During that time, the previously announced exam date occurred and Megan was unable to take the test because of her service. When she returned, she came to your office and said that she has been studying the packet for weeks and wants to take the test now rather than wait for the next administration in six months.

What are your instincts?

- a. Tell Megan that she can take the test immediately and find her place in the promotion list on the basis of her score. (Solution # 1)
- b. Place Megan at the top of the promotion list without administering the test. (Solution # 2)
- c. Tell Megan that she must wait six months for the next administration of the test. (Solution # 3)

- d. Tell Megan that she can take the test immediately but put her at the bottom of the promotion list regardless of her score because she had extra time to study. (Solution # 4)

Solutions to Developing Your Instincts:

You are asked to consider these multiple choice possibilities and choose, as a matter of self-study, the answer you think is best. The choices are keyed (such as, Solution # 1) for immediate feedback from answers available in the Appendix in the back of the book. The comments in the Solutions explain which answer is most correct and why other answers are flawed.

Here is an example of Solution answers from the Developing Your Instincts problem (above). You will normally find these responses in the Appendix with scrambled numbering, but these are provided here in order for your convenience in this Introduction.

1. This answer is the best. The USERRA requires “rightful place,” which in this instance would be to take the test and receive placement on the promotion list based on the test result. At least one court has found that, under such circumstances, the Act requires offering a make-up promotional exam immediately upon returning from service.
2. This answer is not the best one. The concept of “rightful place” does not require putting the returning service member in a better position than he or she would have attained without the service.
3. This answer is incorrect. Requiring Megan to wait for the next administration of the test would be a disadvantage caused by her military service that probably violates the USERRA.
4. This answer is incorrect. Putting Megan at the bottom of the list is a disadvantage based on her military service.

Introductory Problems

The following problems provide an introduction to employment law issues that arise in this course.



INTRODUCTORY PROBLEM ONE

You work in HR at a firm with roughly 200 employees. One of the firm’s supervisors, Joan, comes to your office and tells the following story:

“An employee named Ruth, a member of my work group, said something last night that disturbs me. I had sent her an email with a question about a project that we are working on together, and she replied she had to stop thinking about work that evening. I started a chat with her and asked her why, because we often communicate at night like that.

‘Ruth chatted back, ‘Can I trust you?’ I said, ‘Of course.’ She said she was disturbed by the office party that day. We had a baby shower for Kelly, a co-worker, who is pregnant and whose baby is due on Christmas Day. So we had a little Christmas theme, and Ruth said it offended her because she is Jewish. I said it was no big deal and that she shouldn’t be so sensitive. Then she said she often feels stabbed in the back in our company.

‘I think you should know because it is unprofessional for Ruth to talk about the company like that—saying she feels it is stabbing her in the back. I want to fire her.’”

You speak to Ruth after this report, and you ask her if she said that she often feels stabbed in the back in the workplace. Ruth admitted to the statement and said that it is true she often feels that way. When you asked her why, she responds,

“Well, I am the only Jew in my work group and no one seems to notice how many Christian things there are here. And now Joan has already said that Kelly can have a flexible schedule after her maternity leave, but she threw a fit when I asked her for time off for a Jewish holiday. And she gave me no flexibility after I returned from surgery, even when I told her I was having trouble with pain. And while I’m at it, I am paid less than Gary, who does the same job.”

You make a record of these two discussions for the file and then contemplate (1) what immediate action is justified, if any, and (2) whether the information you have heard from these conversations suggests any general issues HR should address as a policy matter.

**Issue
Exploration**

What aspects of this story raise red flags? This book will guide you through the issues presented in this problem. There are issues of religious accommodation, pregnancy accommodation, disability accommodation, medical leave, salary, and termination.

Accommodations issues include:

1. whether the employer should grant Ruth leave for the Jewish holidays (Chapter 8);
2. whether there is any problem with the employer for failure to grant accommodation for medical conditions (Chapters 8 and 15);
3. when an employer should grant family leave or make accommodation for family obligations (Chapter 15);
4. when an employer should grant accommodation for medical leaves (Chapter 15).

Other issues in the problem include:

5. whether an employer can pay men and women different salaries for the same work (Chapter 13);
6. whether a supervisor can terminate an employee for expressing her opinion about discriminatory conditions (Chapters 16 and 17).



INTRODUCTORY PROBLEM TWO

You are a director in charge of personnel policy for a national general retail store. You are attending a marketing meeting in which you have been asked to comment on the following proposal:

In an effort to compete with online retailers, this company will have employees deliver online orders on their way home from work in their own cars. The employees will be regular retail staff who do this extra delivery work after finishing their shifts.

You do not have time to study and prepare an answer, so your instincts will govern your response in the meeting. After noting that you could give a more complete answer after there is time to consider and evaluate the proposal, what else do you say as an initial response to this idea?

This proposal presents a number of issues with respect to employees, including:

1. Safety of workers (Chapter 12);
2. Pay to workers (Chapter 13);
3. Privacy of workers (Chapter 10).

The plan presents a number of **safety and injury compensation** issues to workers. Employees will operate their own cars for company business. A certain number of car accidents are inevitable. If a worker is injured during a delivery, workers' compensation is likely to be the source of recovery for the worker's injuries, even if the accident is the fault of the worker. If the accident occurs on the way home after the delivery, workers' compensation is unlikely to be available because then the worker is simply commuting. (Chapter 12)

The plan also presents problems with **pay to workers**. Assuming that the employees making deliveries are hourly workers, does the delivery time put them over 40 hours a week? If so, then the company will incur overtime obligations. Conversely, does the

expense of extra gas and maintenance put them under minimum wage? If so, then it can be a violation of federal wage laws. (Chapter 13)

The **privacy** issue arises if the company plans to monitor the deliveries with GPS trackers to assure that workers are not padding their delivery time with long routes. What if an employee stops off to pick up another person? Or stops at an adult bookstore along the way? (Chapter 10)

Further, the plan also creates concerns about the delivery employees possibly injuring others (non-employees), so the employer may want to conduct background checks on the employees making deliveries. If a worker is at fault in a car accident in which a third party is injured, the employer is likely to be responsible for the damage to that third party. Similarly, if the worker becomes violent with the recipient of a package, the employer may be liable. Background checks on the worker's driving and criminal records before permitting that individual to make deliveries might be desirable, but may run afoul of legal protections. Background checks can lead to possible discrimination in violation of federal and state anti-discrimination employment law. (Chapter 6)

This book will guide you through the issues presented in these introductory problems. At the end of the course, you may wish to return to these problems and consider them in light of the greater knowledge attained—to review for a final examination and to consolidate your overall perspective on the subject.



Endnotes

- 1 *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, ___ U.S. ___, 135 S. Ct. 2028 (2015).
- 2 The facts of this illustration are based on *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 368 (2012).