

TABLE OF CONTENTS

PREFACE	V
ACKNOWLEDGMENTS	VII
FOREWORD.....	IX
THE LABOR LAW GROUP.....	XV
TABLE OF CASES	XLI
Chapter I. The Institution of Waged Work.....	1
A. Between Rome and Jerusalem: The Role of Law in Historical Context... 1	1
B. Waged Work and the Law in the United States: The Nineteenth and Twentieth Century.....	2
1. From the Federal Period to the Gilded Age.....	2
2. The Gilded Age: The Rise to Dominance of Laissez-Faire.....	3
a. In Public Law	3
b. In Private Law	4
Payne v. The Western & Atlantic Railroad Co.	4
Notes and Questions for Discussion	8
3. The New Deal	11
4. At Century’s Turn.....	13
C. Into the Twenty-First Century.....	14
1. Globalization.....	14
2. Job Polarization	15
3. Job Segmentation	15
4. Fissurization	17
5. Technology	18
6. Union Decline	19
7. The Decline of the American Working Class	19
D. The Role of Law Redux	22
Chapter II. Who Is an Employee? Who Is the Employer?	25
A. Who Is an Employee?	25
Hargrove v. Sleepy’s, LLC	26
Notes and Questions	39
B. Who Is the Employer?	49
1. Vicarious and Direct Responsibility.....	51
Depianti v. Jan-Pro Franchising Int’l, Inc.....	51
Notes and Questions	59
2. Joint Employment	59
Becerra v. Expert Janitorial, LLC.....	59
Notes and Questions	66

Chapter III. Passing Through the Employment Portal	71
A. Introduction	71
B. Interviews	73
1. Limits on Interview Questioning.....	74
Question for Discussion.....	74
2. Social Media.....	75
Question for Discussion.....	75
3. Facial Recognition Technology	75
Question for Discussion.....	77
C. Testing	77
1. Medical Screening	77
Questions for Discussion	78
2. Ability, Personality and “Honesty” Testing.....	79
a. Ability Testing	79
b. Personality and “Honesty” Testing.....	79
Questions for Discussion	81
3. Drugs	82
a. The Technology of Drug Testing	82
b. The Extent of Drug Use.....	83
c. The Extent of Drug Testing	83
d. The Usefulness of Drug Screening and Testing	84
e. The Law.....	85
Baughman v. Wal-Mart Stores, Inc.....	86
Notes and Questions.....	89
f. Marijuana: Lawful Medical and Recreational Use.....	89
D. Background Checks.....	90
1. The Reference Problem	91
Notes and Questions	92
2. Commercial Background Reporting: The FCRA	93
a. Disclosure and Consent.....	94
Walker v. Fred Meyer, Inc.	94
Notes and Questions.....	102
b. The Standard of Care	102
Watson v. Caruso.....	102
Notes and Questions.....	114
c. Action on or Receipt of the Credit Report	114
Walker v. Fred Meyer, Inc.	114
Notes and Questions.....	117
3. Some Specific Areas for Background Checking.....	118
a. Criminal Histories	118
Notes and Questions.....	119
b. Creditworthiness	120
Notes and Questions.....	121
c. Unemployment Status.....	121
Notes and Questions.....	121
E. The Role of Law Redux	121

Chapter IV. Establishing Terms and Conditions of Employment....	125
A. Introduction	125
B. Employer Policy Manuals and Employee Handbooks.....	127
Woolley v. Hoffmann-La Roche, Inc.	128
Notes and Questions	139
A Note on Disclaimers.....	143
Ortega v. Wakefield Thermal Solutions, Inc.	143
Notes and Questions	149
C. Promissory Estoppel.....	151
Grouse v. Group Health Plan	151
Notes and Questions	153
D. Changing Terms of Employment.....	156
Notes and Questions	157
Doyle v. Holy Cross Hospital.....	158
Notes and Questions	160
E. Mandatory Arbitration.....	162
1. The Background.....	163
2. An Exemplar.....	165
Ernst & Young Common Ground Dispute Resolution Program....	165
Notes and Questions	169
3. Preclusion of Group Participation	172
Epic Sys. Corp. v. Lewis.....	174
Notes and Questions	195
Concerted Activity for Mutual Aid or Protection	195
Bilateralism as a “Fundamental” Aspect of Employment Arbitration	197
4. Empirical Evidence & Policy Implications	199
Notes and Questions	200
F. Employee Voice in Determining Terms and Conditions of Employment.....	201
E.I. du Pont de Nemours & Co.	202
Notes and Questions	205
Chapter V. Obligations of Employees.....	207
A. The Employee’s Duty of Faithfulness at Common Law.....	207
Nichol v. Martyn.....	207
Note	208
Quality Systems, Inc. v. Warman	209
Notes and Questions	210
A Note on Product or Employer Disparagement and Labor Speech....	212
Questions	213
B. Trade Secrets & Confidential Business Information	214
Dicks v. Jensen.....	214
Notes and Questions	220
A Note on Accessing Electronically Stored Information.....	224
C. Covenants Not to Compete	225
Buffkin v. Glacier Group.....	226

Notes and Questions	232
An Exemplar	237
Notes and Questions	241
D. Employee Creative Work	243
Notes and Questions	244
Chapter VI. Monitoring and Control	249
A. Video Surveillance	249
Hernandez v. Hillside, Inc.	249
Notes and Questions	266
Note on Workplace Surveillance of the Spoken Word	268
Questions	268
B. Electronic Monitoring	269
1. Interception or Retrieval	269
Notes and Questions	270
2. Search	272
Stengart v. Loving Care Agency, Inc.	272
Notes and Questions	283
3. Electronic Monitoring of Location	285
Questions	285
A Note on Biometric Controls	286
Questions	289
C. Informational Self-Determination	290
Bodah v. Lakeville Motor Express, Inc.	290
Notes and Questions	295
D. Drug Testing	297
Questions	298
E. Control of Employees	299
1. Personal Relationships	299
Rulon-Miller v. International Business Machines Corp.	299
Notes and Questions	306
2. Political Speech and Association	307
Notes and Questions	308
3. Workplace Speech and Association	308
NLRB v. Coca-Cola Co. Foods Div.	308
Notes and Questions	310
4. Dress and Grooming	311
Jespersen v. Harrah's Operating Co.	311
Notes and Questions	313
5. Economic Liberty	315
Question	316
Chapter VII. Termination of Employment: A Century After the Apotheosis of <i>Laissez-Faire</i>	317
A. The Tenacity—or Tenuousness—of the At-Will Rule	317
Wisehart v. Meganck	317
Notes and Questions	327

B.	Contract	329
1.	Contracts for a Stated Term	329
	Krizan v. Storz Broadcasting Co.	329
	Notes and Questions	333
	Note on the Employee Who Quits.....	336
2.	Employee Handbooks	336
	Ortega v. Wakefield Thermal Solutions, Inc.	336
	Notes and Questions	336
C.	Tort: Discharge in Violation of Public Policy.....	338
	Gardner v. Loomis Armored Inc.	339
	Notes and Questions	351
D.	The Implied Covenant of Good Faith and Fair Dealing	354
	Mitchell v. Teck Cominco Alaska, Inc.	354
	Notes and Questions	359
E.	Statutory Regulation.....	363
1.	Specific Anti-Retaliation Laws	363
2.	“WhistleBlower” Laws.....	364
a.	Anti-Retaliation	364
	Questions.....	367
b.	“Structural” Encouragement.....	368
	Notes and Questions.....	368
3.	General Law of Wrongful Dismissal	369
F.	Manner of Termination.....	374
1.	Common Law and Statutory Restrictions.....	374
	Stringer v. Wal-Mart Stores, Inc.	374
	Notes and Questions	383
2.	Constitutional Protections for Public Employees.....	386
	Perry v. Sindermann	386
	Notes and Questions	390
Chapter VIII. Regulating Pay and Hours of Work		395
A.	Introduction	395
1.	The Economics of Employment Regulation	395
a.	The Neoclassical Analysis.....	395
b.	Economic Analyses Beyond the Neoclassical Model	399
2.	Impact of Law on Labor Costs	406
B.	The Regulation of Wages and Hours.....	408
1.	A Brief History of the Statutory Regulation of Pay and Hours.....	408
2.	The Efficacy of Wage and Hour Regulation.....	412
C.	The Fair Labor Standards Act.....	416
1.	Covered Employment	416
a.	“Employer” Status (Including the Concept of “Enterprise”)	417
	Brennan v. Arnheim and Neely, Inc.	418
	Notes and Questions.....	422
b.	“Employee” Status	424
	Glatt v. Fox Searchlight Pictures, Inc.	424

	Notes and Questions.....	431
c.	Exclusions from Coverage.....	433
	i. Executive, Administrative and Professional	
	Employees	433
	In re Family Dollar FLSA Litigation.....	434
	Notes and Questions.....	443
	ii. Domestic Service Workers.....	447
	Home Care Ass’n of America v. Weil	447
	Notes and Questions.....	459
	iii. Other Exemptions.....	460
2.	Compensable Activity.....	462
	IBP, Inc. v. Alvarez.....	462
	Integrity Staffing Solutions, Inc. v. Busk	471
	Notes and Questions	478
	Pabst v. Oklahoma Gas & Elec. Co.	481
	Notes and Questions	488
3.	Determining the Amount of Cash Payment Required	490
	a. “Regular Rate” and the Determination of Overtime Pay	
	Liability	490
	Dufrene v. Browning-Ferris, Inc.....	490
	Notes and Questions.....	494
	b. Allowable Payments in Kind.....	496
	Caro-Galvan v. Curtis Richardson, Inc.	496
	Notes and Questions.....	500
	c. Tipped Employees.....	501
	Notes and Comments	505
4.	Enforcement Issues	506
	a. FLSA Procedures	506
	b. Problems of Procedure and Proof.....	513
	Morgan v. Family Dollar Stores, Inc.	513
	Notes and Questions.....	520
	Genesis Healthcare Corp. v. Symczyk.....	522
	Questions.....	534
	c. Time Limits and Liquidated Damages.....	534
	Morgan v. Family Dollar Stores, Inc.	534
	Notes and Questions.....	536
	d. Settled Claims.....	537
	Lynn’s Food Stores, Inc. v. United States	537
	Notes and Questions.....	539
5.	Retaliation.....	541
	Kasten v. Saint-Gobain Performance Plastics Corp.	541
6.	Precarious Hours	549
	Notes and Questions	552
7.	Child Labor Regulation.....	552
	Martin v. Funtime, Inc.....	554
	Notes and Questions	560

D.	Wage Payment, Garnishment, and Assignment Laws	561
1.	Wage Payment	561
	Runyon v. Kubota Tractor Corp.	562
	Notes and Questions	567
2.	Wage Garnishment.....	569
	Donovan v. Southern California Gas Co.	569
	Notes and Questions	573
3.	Assignment of Wages	575
	Excerpts from Report, Federal Trade Commission.....	576
	Rule Adopted by the FTC.....	577
	Notes and Questions	578
E.	Collection of Pay and Benefits from Insolvent Employers	578
Chapter IX. Paying for Employee Illness and Injury		581
A.	Introduction	581
B.	The Common Law Response to Employee Injuries	583
	Farwell v. Boston and Worcester Rail Road Corporation.....	583
	Notes and Questions	587
C.	Specific Remedies for Railroad Workers and Seafarers	591
D.	Workers' Compensation Programs.....	592
1.	Introduction to the Development of Workers' Compensation.....	592
	A Note on Economic Theory, Compensating Wages, and Perfecting the Market by Requiring Employer Paid Compensation Insurance.....	598
	Notes and Questions.....	600
2.	What Parties Are Covered?.....	601
a.	"Employer" and "Employee"	601
	Cloverleaf Express v. Fouts	601
	Notes and Questions.....	605
b.	Other Problems in Determining Covered Party Status	606
i.	"Borrowed" Workers	606
	Alday v. Patterson Truck Line, Inc.....	606
	Notes and Questions.....	610
ii.	Specific Exclusion and Inclusions	611
	Harbor Tug & Barge Co. v. Papai.....	613
	Notes and Questions.....	617
3.	Resolving Contested Benefit Entitlement Claims.....	618
a.	Time, Place and Manner of Injury: When Does an Injury "Arise out of and in the Course of Employment"?	619
	Santa Rosa Junior College v. Workers' Compensation Appeals Board	620
	Notes and Questions.....	626
	Kolomiets v. Syncor International Corporation.....	627
	Notes and Questions.....	632
	Coleman v. Armour Swift-Eckrich.....	633
	Notes and Questions.....	636
	Wait v. Travelers Indemnity Co. of Illinois.....	638

	Notes and Questions.....	646
	Nippert v. Shinn Farm Construction Company	646
	Notes and Questions.....	649
b.	Nature of Injury.....	651
	Matter of Klimas v. Trans Caribbean Airways, Inc.	651
	Matter of Wolfe v. Sibley, Lindsay & Curr Co.	656
	Matter of DePaoli v. Great A & P Tea Co.	661
	Notes and Questions.....	662
c.	Occupational Disease Coverage.....	664
	Johnson v. City of Winston-Salem.....	665
	Notes and Questions.....	668
4.	Calculating Benefits and Liabilities.....	672
a.	Medical Benefits	672
	American Manufacturers Mutual Insurance Co. v. Sullivan.....	672
	Notes and Questions.....	681
b.	Disability Benefits	682
	Jones v. Crenshaw	682
	Notes and Questions.....	684
	Keenan v. Director for the Benefits Review Board.....	685
	Notes and Questions.....	691
	Crelia v. Rheem Manufacturing Co.....	694
	In the Matter of Barsuk v. Joseph Barsuk, Inc.	695
	Notes and Questions.....	696
c.	Death Benefits	697
	Carey's Case.....	697
	Notes and Questions.....	701
	In the Matter of Langan v. State Farm Fire & Casualty.....	702
	Notes and Questions.....	706
d.	Special Problems: Successive and Concurrent Harms.....	707
	Geathers v. 3V, Inc.	708
	Notes and Questions.....	712
	Deschenes v. Transco, Inc.	713
	Notes and Questions.....	721
	E.P. Paup Co. v. Director, Office of Workers Compensation Programs	722
	Notes and Questions.....	727
5.	Financing Benefits	730
6.	Scope of the "Exclusive Remedy" Defense	731
	Alday v. Patterson Truck Line, Inc.	731
	Notes and Questions	732
	Suarez v. Dickmont Plastics Corporation	733
	Notes and Questions	741
	Messer v. Huntington Anesthesia Group, Inc.	742
	Notes and Questions	752
7.	Modification of Awards	753
	Lowe v. Drivers Management, Inc.	753

	Notes and Questions	758
E.	Social Insurance Programs	759
	1. State Disability Insurance	759
	2. The Social Security Disability Insurance Program	760
	Tackett v. Apfel.....	762
	Notes and Questions	771
F.	Private and Public Sector Insurance Programs	772
	Blue Cross & Blue Shield of Mississippi, Inc. v. Larson.....	774
	Notes and Questions	779
G.	Third Party Recovery	779
	Alday v. Patterson Truck Line, Inc.	779
	Notes and Questions	779
	Estate of Cowart v. Nicklos Drilling Co.....	780
	Notes and Questions	790

Chapter X. Protection of Physical Integrity—Occupational

	Health and Safety	793
A.	Introduction	793
B.	Overview of the Occupational Safety and Health Act	797
	1. Substantive Duties	797
	2. Enforcement Procedure.....	798
	3. Role of State Legislation	799
	4. National Institute for Occupational Safety and Health	800
	5. Coordination with Activities of Other Federal Agencies	800
C.	Federal Mine Safety and Health Act	800
D.	Adoption of Standards	802
	American Iron and Steel Institute v. Occupational Safety and Health Administration.....	802
	Notes and Questions	813
	American Textile Manufacturers Institute Inc. v. Donovan	815
	Notes and Questions	830
	United Steelworkers of America v. Auchter.....	835
	Notes and Questions	847
E.	Administrative Interpretation of Standards	850
F.	Enforcement of Employer Obligations	850
	1. Inspection.....	850
	a. Requirement of a Warrant.....	851
	b. OSHA Efforts to Reduce Inspections.....	853
	2. Post Inspection Procedures.....	854
	3. Employee and Employee Representative Participation in Enforcement.....	856
	Oil, Chemical and Atomic Workers v. O.S.H.R.C.....	857
	Notes and Questions	865
G.	Establishing Violations of the General Duty Clause and of Standards.....	867
	Pratt & Whitney Aircraft v. Secretary of Labor.....	867
	Notes and Questions	878

SeaWorld of Florida, LLC v. Perez.....	881
Notes and Questions	887
Note: OSHA Remedies	887
H. Multi-Employer Responsibility	891
Solis v. Summit Contractors, Inc.	891
Notes and Questions	902
I. Employer Defenses.....	904
P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Commission.....	904
Notes and Questions	912
New York State Electric & Gas Corp. v. Secretary of Labor.....	913
Notes and Questions	924
Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Commission.....	926
Notes and Questions	936
J. State Efforts to Promote Safety and Health.....	937
1. Section 18 Plans	937
AFL-CIO Industrial Union Department v. Marshall.....	937
Notes and Questions	944
2. Preemption of Non-Approved “Plans”	945
Gade v. National Solid Wastes Management Association	945
Notes and Questions	955
K. Additional Means to Protect Workers Beyond Inspection and Citation	957
1. Self-Help—Under the OSH Act and the National Labor Relations Act.....	957
Whirlpool Corporation v. Marshall	957
Notes and Questions	965
ASARCO, Inc. v. National Labor Relations Board.....	968
Notes and Questions	973
2. Detering Unsafe Conditions Through Actions for Damages.....	975
Teal v. E.I. Dupont De Nemours and Company	975
Notes and Questions	977
Chapter XI. Unemployment Compensation	981
A. Background.....	981
1. Unemployment	981
2. Development of Unemployment Insurance	983
a. History of Unemployment Insurance	983
b. Unemployment Insurance.....	984
c. Maintenance and Reform	985
d. The COVID-19 Pandemic.....	986
3. Basic Characteristics of Unemployment Compensation Insurance	987
a. Financing Benefits.....	987
b. Scope of Coverage and Benefit Levels.....	991
Notes and Questions.....	995

c.	Disqualification.....	995
B.	Disqualification from Benefits.....	997
1.	Interaction Between Unemployment and Workers’ Compensation Income Maintenance	997
	Appeal of Kenneth Peterson (New Hampshire Dep’t Emp’t Sec.).....	997
	Notes and Questions	1000
2.	Dismissal—Substantive Grounds and Proof of Just Cause.....	1001
	Fondel v. Com., Unemployment Comp. Bd. of Rev.	1001
	London v. Com., Unemployment Comp. Bd. of Rev.	1003
	Notes and Questions	1004
	Merlino v. Com., Unemployment Comp. Bd. of Rev.	1006
	Notes and Questions	1008
	Stepp v. Employment Security Division Review Board	1009
	Notes and Questions	1012
3.	Concerted Withholding of Work	1014
4.	Quitting Work and Eligibility for Benefits	1016
	Problem	1016
	Holbrook v. Minnesota Museum of Art	1017
	Murphy v. Employment Security Department	1020
	Notes and Questions	1025
	Wimberly v. Labor and Industrial Relations Commission of Missouri.....	1030
	Notes and Questions	1034
	Tru-Stone Corporation v. Gutzkow	1037
	Notes and Questions	1039
	Hobbie v. Unemployment Appeals Commission of Florida	1041
	Notes and Questions	1045
C.	Group Health Plan Continuation.....	1046
D.	Federal Plant Closing Act.....	1047
	Notes and Questions	1052
E.	Return to Work Programs.....	1055
Chapter XII. Retirement and Welfare Benefit Programs		1059
A.	Introduction	1059
B.	General Structure of ERISA.....	1063
C.	Coverage.....	1065
	Fort Halifax Packing Co., Inc. v. Coyne.....	1066
	Notes and Questions	1071
D.	Transparency: Reporting and Disclosure	1072
	Hicks v. Fleming Companies, Inc.....	1074
	Notes and Questions	1079
	CIGNA Corp. v. Amara	1080
	Notes and Questions	1089
	A Note on Defined Benefit Plans, Defined Contribution Plans and Hybrid Plans.....	1091
	Question	1094

E.	Minimum Plan Content Standards	1094
1.	Health Care Plans	1094
2.	Pension Plans	1097
	Central Laborers' Pension Fund v. Heinz.....	1097
	Notes and Questions	1102
	Kennedy v. Plan Administrator for Dupont Savings and Investment Plan	1105
	Notes and Questions	1110
F.	ERISA Remedies	1112
	Firestone Tire and Rubber Company v. Bruch	1112
	Notes and Questions	1120
	US Airways, Inc. v. McCutchen.....	1123
	Notes and Questions	1128
G.	Fiduciary Status and Conduct.....	1131
	LaRue v. DeWolff, Boberg & Associates, Inc.	1131
	Metropolitan Life Insurance Co. v. Glenn	1134
	Notes and Questions	1142
	In re Enron Corporation Securities, Derivative & "ERISA" Litigation.....	1145
	Notes and Questions	1163
	Fifth Third Bancorp v. Dudenhoeffer	1167
	Notes and Questions	1174
H.	Plan Termination and Funding.....	1175
	Beck v. Pace International Union	1177
	Notes and Questions	1183
I.	Interference with Benefit Accrual.....	1185
	Inter-Modal Rail Employees Assoc. v. Atchison, Topeka & Santa Fe Railway Co.	1185
	Notes and Questions	1189
J.	Preemption.....	1190
	Kentucky Association of Health Plans, Inc. v. Miller	1191
	Note	1196
	Aetna Health Inc. v. Davila	1197
	Notes and Questions	1206
K.	Mandated Benefit Programs.....	1207
1.	Workers Compensation, State Disability Insurance, and Social Security Disability Insurance	1207
2.	Unemployment Compensation	1207
3.	Family and Medical Leave Act	1207
	Ragsdale v. Wolverine World Wide, Inc.	1207
	Notes and Questions	1214
4.	Social Security	1215
	Parker v. Sullivan.....	1219
	Notes and Questions	1221
	Social Security and Older Workers	1224

TABLE OF CONTENTS

xxxix

Notes and Questions	1227
INDEX.....	1229