

TABLE OF CONTENTS

PREFACE V

PART 1. THE NATURE OF LABOR MARKETS

Chapter 1. The Regulation of Labor Markets 3

A. The Model of Competitive Labor Markets 3

B. Reasons for Regulation of Labor Markets 5

 1. Redistribution 5

 2. Evolving Social Norms or Preference Transformation 6

 3. Correcting “Market Failure” 7

C. Objections to Regulation 10

D. Modes of Regulation 12

 1. Taxing and Spending Measures 12

 2. “Minimum Terms” Laws or Mandates 12

 3. Regulation of the Process of Bargaining 12

Chapter 2. The Employment Relationship 15

A. What Is at Stake? 15

B. The Nature of the Employment Relationship 16

C. Tests for Employee Status 18

 1. Common Law or “Right of Control” Test 18

 2. The “Economic Realities” or “Economic Dependency”
 Test 22

 3. Areas of Difficulty Under the Common Law or “Right
 of Control” Test 25

 4. The Rise of “Gig” Work and “Platform” Companies:
 The “ABC” Test in California and Elsewhere 28

D. Laws Distinguishing Among Employees 29

E. Joint Employment 33

PART 2. THE COMMON LAW OF THE EMPLOYMENT RELATIONSHIP

Chapter 3. Employment Contracts 39

A. Formation and Modification of Employment Contracts 39

B. The Presumption of Employment-At-Will and Its
Contractual Exceptions 40

C. Agreements for a Definite Term or for an Indefinite Term
Limiting Termination of Employment 43

 1. General Principles of Contract 43

 2. Agreements for a Definite Term 44

 3. Agreements for an Indefinite Term Limiting
 Termination of Employment 45

 4. Constructive Discharge and “Wrongful Demotion” 48

 5. Statute of Frauds 49

D. Standard of Cause 49

 1. Substantive Dimension 49

 2. Procedural Dimension 52

E.	Employer Promises Enforceable as a Matter of Promissory Estoppel.....	53
F.	Binding Employer Statements	54
1.	Are Statements in Employment Manuals and Handbooks Binding on the Employer?	54
2.	Can Employers Modify or Rescind Commitments Made in Previous Unilateral Statements?.....	58
G.	Implied Duty of Good Faith and Fair Dealing.....	61
Chapter 4. Employment Torts		63
A.	General Principles of Employer Responsibility	63
B.	“Bad Faith Breach”	64
C.	Discharge or Other Discipline in Violation of Clearly Established Public Policy	66
1.	Common Law	66
a.	Source of Established Public Policy	67
b.	Conflicting Duties	68
c.	Clear Adverse Impact on Public Policy	69
d.	No Interference with an Alternative Scheme	70
2.	Whistleblower/“Conscientious Employee” Legislation.....	70
D.	Other Tort Theories for Challenging Termination or Like Decisions	71
1.	Fraud or Deceit	71
2.	Wrongful Interference with Contractual Relations.....	72
3.	Intentional Infliction of Emotional Distress	73
E.	Defamation.....	74
1.	Publication	74
2.	Privilege.....	75
a.	Absolute Privilege	75
b.	Qualified Privilege	76
Chapter 5. Workplace Privacy		77
A.	Constitutional Law	77
1.	Physical Privacy.....	77
2.	Self-Incrimination.....	83
3.	Associational Privacy.....	84
4.	State Constitutional Law	84
B.	Legislation.....	85
1.	Investigative Techniques	85
a.	Polygraphs.....	85
b.	Telephone Monitoring.....	85
c.	Electronic Communication Monitoring	86
d.	Investigation of Consumer Credit Reports.....	87
2.	Areas of Special Concern.....	87
a.	Records Privacy.....	87
b.	Banning Certain Employer Inquiries	88
c.	Identity Privacy/Consumer Privacy.....	88
d.	“Legal Activity” Laws	88
e.	Facial Recognition Regulation	89
C.	Decisional Law.....	89

Chapter 6. Employee Obligations and Inventions	91
A. Introduction	91
B. Common Law Duty of Loyalty	92
C. Trade Secret Law	95
1. Definition of a Trade Secret	95
2. Improper Acquisition, Use or Disclosure	98
3. Inevitable Misappropriation	100
4. Remedies	103
D. Non-Compete and Other Restrictive Covenants	105
1. Legitimate Interests	107
2. Reasonable Duration and Scope	109
3. Reason for Termination of Employment	112
4. Remedies	113
a. Judicial Modification	113
b. Injunction and Damages	114
E. Choice of Law Clauses.....	115
F. Employee Inventions	116

PART 3. STATUTORY INTERVENTIONS

Chapter 7. Workers' Compensation Law	125
A. Origins of Workers' Compensation Legislation	125
B. Rationale for Regulation	128
C. Covered Employers and Employees	130
D. Covered Injuries	132
1. Express Exclusions	132
2. "Arising out of and in the Course of Employment"	133
E. Potential Escape Routes from the "Exclusive" Remedy of Workers' Compensation	134
1. "Dual Capacity" Employer	134
2. Absence of a Remedy Under Workers' Compensation....	134
3. Injuries Outside the "Compensation Bargain"	135
F. Workers' Compensation and the COVID-19 Pandemic	136
G. Other Challenges	138
H. Procedure	138
Chapter 8. Unemployment Insurance	139
A. Overview	139
B. Basic Mechanics of UI Programs.....	141
1. Finance	141
2. Experience Rating.....	143
3. Procedure.....	144
4. Coverage.....	146
C. Eligibility.....	148
1. Monetary Eligibility	148
2. Nonmonetary Eligibility.....	150
a. Voluntary Quits and "Good Cause"	150
b. Misconduct.....	151
c. "Able and Available"	155
d. Refusal of Employment Opportunities	157

Chapter 9. Collective Organization and Collective Bargaining Law	161
A. Rationale for Regulation	161
B. Basic Premises	163
C. Administrative Procedures	165
D. Protected Concerted Activity	167
E. Selection of Exclusive Bargaining Representative.....	168
F. The Process of Collective Bargaining	169
G. Administering the Labor Agreement	173
H. Individual Rights and the Collective Agreement	174
I. Union Democracy.....	175
J. Labor Law and Business Change	176
K. Federal Preemption.....	178
Chapter 10. Wage and Hour Regulation.....	181
A. History.....	181
B. Basic Requirements of the Statute.....	181
1. Minimum Wage.....	181
2. Overtime Premium	183
3. Child Labor Restrictions	183
4. Anti-Retaliation	184
C. Rationale for Regulation	185
D. What Counts as Compensation?.....	187
E. What Counts as Work or Hours Worked?.....	188
F. Covered Employers and Employees	191
1. Enterprise Coverage.....	191
2. Employee Coverage.....	192
a. Employee vs. Independent Contractor	192
b. Employees Personally Engaged in Interstate Commerce.....	193
3. Exemptions.....	193
4. Other Exclusions from Coverage	196
G. Administrative and Private Enforcement.....	197
H. State Wage Payment Laws	198
Chapter 11. Employment Discrimination Law	201
A. Rationale for Regulation	201
1. Supply-Side Explanations	201
2. Demand-Side Explanations.....	201
3. Role of Anti-Discrimination Law	202
B. Title VII.....	203
C. Gender Discrimination	205
D. Religious Discrimination.....	208
E. Age Discrimination	208
F. Disability Discrimination.....	211
G. Retaliation.....	214
H. Affirmative Action	215
I. Administrative Process and Remedies.....	215
J. Arbitration	217

Chapter 12. Occupational Safety and Health	219
A. Rationale for Regulation	219
B. Coverage and Regulatory Scheme	221
1. Covered “Workplace” and “Working Conditions”	222
2. Limited Preemption of State Law	223
3. Exclusive Agency Enforcement	226
C. Standards	227
1. Setting the Standard	227
2. Securing Compliance with OSHA Standards	234
D. General Duty Clause	236
E. Inspections	237
F. Protection Against Discrimination	239
Chapter 13. Employee Benefits Law	241
A. Rationale for Regulation	243
1. Why Do Employers Provide Pensions?	243
2. Why Regulate?	245
3. Implications of the Shift to DC Plans	247
B. Coverage Issues	249
1. Covered “Plans”	249
2. Eligible “Participants”	251
C. Preventing Forfeiture of Pension Benefits	255
1. Vesting Rules	255
2. Prohibition of Discharge for Attaining or Exercising Pension Rights	256
3. Regulating the Rate of Accrual of Pension Benefits	257
4. No Cut-Back of Accrued Benefits	257
5. PBGC Termination Insurance	257
Note on Conversion to “Cash Balance” DB Plans	259
D. Reporting and Disclosure Obligations	262
E. Fiduciary Obligations	265
1. Determining Fiduciary Status	265
2. “Dual Hat” Issues	266
a. Giving Advice to Employee Participants	266
b. Making Benefit Determinations	268
c. Amending the Plan	269
d. Promoting Employer Stock	272
Note on Retiree Healthcare Benefits	272
3. Fiduciary Investing: Prudence	273
Note on Fiduciary Duties in Participant-Directed DC Plans	274
4. Fiduciary Investing: Duty of Loyalty, “Social Investing”, and “Exclusive Benefit” Rule	276
F. Non-“Interference” Obligations	277
1. Application to Welfare Benefit Plans	277
2. Application to “Basic Organizational Decisions”	278
3. “Specific Intent” Requirement	279
4. Targeted Benefit Plan Changes	280
G. ERISA Preemption of State Law	282
1. State Mandates Not Requiring Ongoing Administration of a Plan	283

TABLE OF CONTENTS

- 2. State Mandates Regulating “Payroll Practices” 283
- 3. State Regulation of Insurance 284
- 4. State Regulation of Practices Violative of Federal
Discrimination Law 284
- 5. Arguable Shift Towards Narrower Scope of ERISA
Preemption 285
- Note on Other Federal Regulation of Employee
Benefits 287
- Chapter 14. Plant Closing Notice Law 289**
- Chapter 15. Personal Leave Law 291**
- A. Introduction 291
- B. Basic Requirements 292
- C. Notice and Designation of Leaves 294
- D. Interaction of FMLA with the Americans with
Disabilities Act 295
- E. Paid Leave and Other Policy Issues 296
- Appendix. Stylized Account of Competitive Labor
Market 299**
- TABLE OF CASES 303
- INDEX 315