# JANUARY 2023 UPDATE TO

# LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE

## Sixth Edition

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## CHAPTER II

## A. Who Is An Employee?

**Page 47. Add at the End of Notes and Questions No. 6:**

According to a Pew Research Center report, 16% of Americans have earned money doing household chores and running errands for other people via online apps and websites:

- 30% of people ages 18-29 did such jobs, compared with 18% of people ages 30-49. The ratio was lower among older people.
- 30% of Hispanics did so, compares with 20% of Black people, 19% of Asians, and 12% of White people.
- 25% of lower-income people have done these jobs, compared with 13% of middle-income people and 9% of high-income earners.

More than half of the online gig workers said they wanted to save extra money or cover gaps in their incomes. Roughly six in 10 gig workers said the money they earned has been essential or important for meeting their basic needs.

Bloomberg Law News (Dec. 12, 2021).

The classification of "platform workers" had posed an issue internationally. For how the member states of the European Union have reacted *see* European Commission, Jurisprudence of the National Courts Confronted with Cases of Alleged Misclassification of Platform Workers: Comparative Analysis and Tentative Conclusions (March 2021).

**Page 49. Add to Notes and Questions:**

9. The facts in *Mujo* v. *Jani-King Int'l Inc.*, 13 F.4th 204 (2d Cir. 2021), were set out by the majority and then elaborated on by Judge Guido Calabrese in dissent. First, the majority:

> Jani-King is a national provider of commercial cleaning services that operates using a franchise model. Jani-King markets its cleaning services and contracts with customers to provide cleaning services in accordance with terms negotiated between Jani-King and its customers. Customers remit payment for the cleaning services to Jani-King. Under its franchise model, prospective franchisees initiate a business relationship with Jani-King by entering into a franchise agreement. Franchisees are assigned to service Jani-King's customers. Although the franchisee may choose to decline a customer offered by Jani-King, if a franchisee accepts a customer, it must accept the terms of the customer contract as negotiated by Jani-King. Jani-King deducts certain fees as agreed upon in each franchisee's agreement with Jani-King and remits the remainder of a customer's payments to the franchisee.

> When servicing Jani-King customers, franchisees are required to comply with Jani-King's brand standards, which include the use of certain cleaning protocols and techniques specified by Jani-King. Franchisees and their work product are subject to inspection, and franchisees who do not pass muster may be subject to additional training or termination of their franchises. A Jani-King franchisee, however, is not obligated to perform assigned to cleaning jobs herself: she may hire employees to perform the duties the franchisee agrees to accept from Jani-King. Franchisees may also trade customers with other Jani-King franchisees and may set their own work hours, subject to customer requirements. Finally, franchisees may sell their franchises to third parties, subject to certain conditions.
>
> In order to acquire a Jani-King franchise and take on customers, a prospective franchisee must pay an initial franchise fee down payment and a finder's fee for each customer. Jani-King franchisees are also required to pay additional fees over the course of the franchise relationship. Jani-King collects these fees by deducting them from the revenue it receives from customers. The deducted fees include accounting fees, royalty fees, advertising fees, and insurance fees. All of the deducted fees are prescribed in the Jani-King franchise agreement.
>
> *The Appellants are Connecticut-based Jani-King franchisees*. Appellant Simon Mujo was a Jani-King *franchisee* from 2007 to 2016. He paid $44,175 in initial fees to Jani-King in 2007 and paid other fees over the course of the franchise agreement. Appellant Indrit Muharremi is a current Jani-King *franchisee*. He paid $16,250 in initial fees at the commencement of his *franchisee relationship* with Jani-King in 2014, and Jani-King has continued to deduct other fees from its payments to Muharremi over the *course of the franchise relationship*. [Emphasis added.]

AND NOW JUDGE CALABRESI'S ACCOUNT:

> Simon Mujo and Indrit Muharremi *worked for Jani-King as cleaners*. They paid tens of thousands of dollars to Jani-King in initial fees *to obtain work*: Mr. Mujo paid $44,175, and Mr. Muharremi paid $16,250. By the terms of the *labor contracts* they signed, which are styled as franchise agreements, the size of the initial fees determines *how much the cleaner will receive*. Once work began, Jani-King deducted much of their monthly income for a variety of *post-work fees*, including "finder's fees," insurance payments, supply costs, and "charge-backs." According to their Amended Complaint, for example, Mr. Muharremi earned $4,508.72 for the month of September 2016. After royalty fees, accounting fees, technology fees, a "finder's fee," an advertising fee, a lease fee, franchise supply costs, and over $1,000 in "charge backs," his gross income for the month was reduced to $1,746.80. In July of 2015, Mr. Muho's earnings of $1,403.83

> similarly were reduced to a gross income of $310.45. Jani-King argues that these are all permissible fees pursuant to a legitimate franchise agreement.
>
> Appellants compare the system to indentured servitude. They pay so much money up front, and have so much of their wages deducted for fees, that they are obliged to keep working simply to earn back the money they paid to get the jobs in the first place. They claim that they are employees whom Jani-King intentionally misclassified as independent contractors in order to evade Connecticut labor laws. Specifically, they argue that the initial fees violate Connecticut's anti-kickback statute, Conn. Gen. Stat. § 31-73(b), and that the post-work fees violate the state's minimum wage law, Conn. Gen .Stat. § 31.71e. [Emphasis added.]
>
> ***

Connecticut's Anti-Kickback law provides:

> No employer…shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment. No such person shall require, request or demand that any person agree to make payment of any refund of wages, fee, contribution or deduction from wages in order to obtain employment or continue in employment.

The Minimum Wage Act provides:

> [n]o employer may withhold or divert any portion of an employee's ages unless (1) the employer is required or empowered to do so by state or federal law, or (2) the employer has written authorization from the employee for deductions on a form approved by the commissioner, or (3) the deductions are authorized by the employee, in writing, for [certain health care expenses], or (4) the deductions are for contributions attributable to automatic enrollment [in certain retirement plans organized under state or federal law], or (5) the employer is required under the law of another state to withhold income tac of such other state.
>
> ***
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> ["wages" are defined as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation."]
>
> ***
>
> Under the Connecticut Franchise Act, a "franchise is"

> an…arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial party by a franchisor…and (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate….

If a franchise relationship exists under this statute, the franchisor is subject to certain obligations with respect to its franchisees. For instance, a franchisor must provide written notice to a franchisee before terminating or declining to renew the franchise relationship, and a franchise must be awarded for a term of at least three years. A franchisee has a private right of action to enforce the protections provided by the Connecticut Franchise Act. Connecticut law leaves the terms and conditions of the franchise fee to be decided by the parties to the franchise agreement: for instance, it does not cap franchise fees at a certain percentage of revenue.

***

Under Connecticut law, the ABC test for employee status and the Connecticut Franchise Act's test for franchisee status are independent of each other. Indeed, the Connecticut Appellate Court has held that an individual can be an employee under the ABC test if an application of the ABC test would deem that individual an employee, even if that same individual is also a franchisee. *See Jason Roberts, Inc., v. Administrator*, 127 Conn.App. 780, 15 A.3d 1145, 1150 (2011). If an individual qualifies as both a franchisee and an employee, she would be entitled to the protections of both the Connecticut fFranchise Act and the employment-related provisions of Connecticut law.

***

The District court granted Jani-King's motion for summary judgment on the statutory claims. Was that correct?

## B. WHO IS THE EMPLOYER?

**Page 66. Add after Becerra:**

*Medina* v. *Equilon Enterprises, LLC*, 283 Cal.Rptr.3d 868 (Cal.App. 2021)*

**Page 68. Add at End of Question 3:**

Return to *Medina* v. *Equilon Enterprises, supra*. Assume the Shell station Mr. Medina managed had a number of employees and that the station met the National Labor Relations Board's standards for retail business – $500,000 minimum of gross business volume per year – to assume jurisdiction. Assume the workers and the station unionize. Who can they bring to the table to negotiate their wages and benefits?

**Page 70. Add to Notes and Questions:**

7. The Trump administration's Department of Labor adopted a rule narrowing the definition of a "joint employer" under the Fair Labor Standards Act, effective March 16, 2020. It was successfully attacked by eighteen states under the Administrative Procedure Act. *New York* v. *Scalia*, 490 F.Supp.3d 748 (SDNY 2020). While an appeal was pending the Biden administration withdrew the rule. FR Doc. 2021-15316 (July 30, 2021). The appeal was dismissed as moot.

CHAPTER III

## B. Interviews

### Limits on Interviewer Questioning

**Page 74. Add to Second Paragraph:**

Fourteen states now forbid inquiry into pay history. Several states require employers to post or to inform applicants of the wage or wage range for the position, e.g. Colo. Rev. Stat. Ann. § 85-201 and N.Y. Lab. L. § 194-b.

**Page 77. Add at End of Section 3:**

The use of automation and artificial intelligence systems for employee screening, selection, monitoring, and supervision has become a global fact that presents social and legal issues. *See generally*, *Symposium: Automation, Artificial Intelligence & Labor Law*, 41 Comp. Lab. L. & Pol'y J. 15-285 (2019). One corner of the many facts of these uses is the capacity of such a system to effect bias against groups protected from job discrimination. New York City has adopted an Ordinance, N.Y.C. Admin. Code Subchapter 25 § 20-870 to 874 (eff. Jan. 1, 2021), requiring that a "bias audit" be undertaken of automated employment decision tools (as defined) used by an employer to screen candidates for jobs and disallowing the use of such tools unless the employee is notified of it, is fully informed about it, and is "allowed…to request an alternative selection process or accommodation." Nothing is said of what is to happen after that request is made.

### 1. Medical Testing

**Page 78. Add at End of Text:**

*The COVID-19 Pandemic*. The pandemic has drawn substantial legislative attention to the question of vaccination mandates and the display of records of vaccination. These are being compiled as enacted. https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/ accessed Nov. 19, 2021).

### 3. Drugs

**Page 90. Add at End of Text:**

In 2021, Quest Diagnostics, a leading provider of diagnostic information, released the results of seven million laboratory conducted drug tests in 2020-21. Overall, drug positivity was down in most categories but overall positivity rose in positives for marijuana. In the U.S. general workforce, marijuana positivity increased 16.1 percent in urine testing (3.1% in 2019 versus 3.6% in 2020), 35.2 percent in oral fluid testing (9.1% in 2019 versus 12.3% in 2020) and 22.5 percent in hair testing (7.1% in 2019 versus 8.7% in 2020).

The Drug Testing Index data also showed stark differences between states that have legalized recreational marijuana use versus states that have only legalized medical marijuana use or no form of legal marijuana use. Marijuana positivity surged in states with legal recreational use statutes 118.2 percent from 2012-2020 (2.2% in 2012 versus 4.8% in 2020). In states with only medical marijuana statutes, marijuana positivity increased 68.4 percent (1.9% in 2012 versus 3.2% in 2020). In states with no medical or recreational marijuana statutes, marijuana positives increased 57.9 percent (1.9% in 2012 versus 3.0% in 2020).

The evidence has long been that the use of drug testing to screen applicants especially for marijuana is sensitive to the labor market which recent data echo; that is, the more difficult it is for an employer to find workers the less likely it is to screen out employees in non-safety sensitive positions for marijuana use. Stephen Joyce & Joyce Cutte, *Legal Weeds, Tight Labor Market Has Companies Dropping Drug Tests,* Blomberg Law News (Oct. 22, 2021).

**Question**

Brenda Starr has worked in the billing department of the Emmett Worth Company for some years. She became a patient eligible to use medical marijuana due to her chronic pain, migraines, and fatigue as prescribed by her physician under state law. The law makes no mention of the relationship of allowable medical use to employment. Ms. Starr was scheduled for a random drug test to which she submitted. She informed the Company's human resource department that she would test positive for marijuana; she accompanied her note with a copy of her physician's prescription. She tested positive and, pursuant to Company policy, she was discharged. Does she have a cause of action for wrongful discharge? Palmiter v. Commonwealth Health Sp., 260 A.3d 967 (Pa. Super. 2021). If not, would she be entitled to unemployment insurance benefits? Hubbard v. Unemployment Comp. Bd. of Review, 252 A.3d 1181 (Pa. Cmwlth. 2021). These questions might be returned to when Chapters VII and IX are taken up.

Is the user of medically prescribed marijuana a person with a disability whose use must be accommodated by an employer? *Compare* Emerald Steel Fabricators, Inc. v. Bureau of Labor, 230 P.3d 518 (Or. 2010) *with* Paine v. Ride-Away, Inc., —A.3d— (N.H. 2022).

## 3a. Criminal Histories

**Page 112. Add to Note 1:**

*But see* Cree, Inc. v. Labor & Indus. Rev. Comm'n, 970 N.W.2d 837 (Wisc. 2022), on whether domestic violence relates to the work of a lighting layout specialist.

CHAPTER IV

## B. Employee Handbooks

**Page 150. Add at End of Note and Question 2:**

Dovecote Inc., manufactures specialty coatings in small batches subject to specific order. It has ten full time employees of long tenure including Donald and Ivanka Humphrey – he an accountant, she an office clerk. Dovecote has an Employee Manual that sets out all of its "personnel policies" in detailed sections. Section C deals with "Employee Benefits." It provides that vacation and sick leave are dealt with as Paid Time Off (PTO) and that to encourage long since unused accrued hours will be paid out ("cashed out") when the employee resigns, retires, or dies, and is made subject to a procedure to request it. Section D deals with "discrimination": it sets out a variety of grounds that the company holds to be impermissible – race, sex, age – and a "fair investigation" procedure to enforce it. Section A, headed "General Principles" provides inter alia: "**This is not a contract of employment**."

Dovecote was purchased by a Special Purpose Acquisition Company (SPAC) that saw a potential for enormous growth in its products. The SPAC brought in new management. The managers ridiculed the Humphreys in front of the office staff calling them "too old, fat, and lazy" for the job. Both complained of age discrimination to the new human resources manager under the Employee Manual's "fair investigation" procedure and were laughed at. Donald put in for immediate retirement and applied for his accrued PTO, but the human resource manager told him that as he had to apply two weeks before the retirement date no PTO was due. Ivanka quit in protest over their "harassment" by the new management.

Dovecote's workforce is too small to be covered by federal or state antidiscrimination law. The Humphreys have sued for breach of contract based on the terms of the Employee Manual for age (Donald) and sex (Ivanka) discrimination and, in Donald's case, for his accrued PTO. The Company has moved to dismiss on the ground that there was no contract. How should the court rule? Southern Farm Bureau Life Ins. Co. v. Thomas, 299 So.3d 752 (Miss. 2020); Hall v. City of Plainview, 954 N.W.2d 254 (Minn. 2021).

## C. Promissory Estoppel

**Page 155. Add After Notes and Question 21:**

Betsy Bogg is a registered nurse. After repeated incidents of stalking, abuse, and threats by her former husband she obtained a "harassment protective order" (HPO) from the courts that ordered him to desist from such activity. In early February, Ms. Bogg applied for a

nursing position at Sudbury Memorial Hospital (SMH). After a number of interviews SMH sent her confirmation of her acceptance of the hospital's offer. The letter began, "We are delighted that you have accepted our offer for the Staff Nurse I position in the Orthopedic/General Surgery Unit … in Patient Services-Nursing." The letter stated that the plaintiff's position was full time, with salary and benefits, and that her "start date" was to be March 18. The letter explained that the plaintiff's employment was "at will" and subject to termination at any time, and was contingent on the successful completion of reference, background, and licensure checks, a "pre-employment fitness for duty assessment," and a number of administrative matters, as well as receiving a score of at least eighty-six percent on a "medication assessment test given as per of [her] new hire clinical orientation." SMH subsequently issued the plaintiff a photograph identification card identifying her as a SMH "staff nurse," provided her with an SMH employee identification number, and assigned her a training schedule.

On February 26, Ms. Boggs received a number of alarming threats from her former husband on social media. She notified the police, the court, and SMH providing its HR office with a copy of the HPO. A week later Ms. Boggs received a letter from SMH withdrawing its offer. The letter stated that "the work clearance process is not able to be initiated, so we are unable to complete the onboarding process at this time."

The state has enacted a Domestic Violence and Abuse Leave Act requiring employers to allow leave for victims of domestic violence to allow them to undertake efforts to stop the abuse. It contains a "non-interference" provision that provides that: "no employer shall coerce, interfere with, restrain" employees in the exercise of rights the law sets out.

Ms. Boggs has sued SMH for violation of the Act. The Hospital has moved to dismiss on the ground that as it was never Ms. Boggs employer no statutory right was violated – citing other antidiscrimination laws whose use of "employer" and "employee" were held to exclude applicants. How should the court rule? Osborne-Trussell v. Children's Hospital Corp., 772 N.E.3d 737 (Mass. 2021).

**Page 155. Add to Note 3:**

Section 970 of the California Labor Code prohibits employers from inducing employees to relocate and accept employment by falsely representing the kind, character, or existence of work or the length of time it will last. An employee based in Washington was offered a position in California to take charge as a project leader, to reorganize and develop additional project leaders. He signed the offer indicating that the job was held at will. Five months later he was terminated. He has sued for violation of section 970 on the ground that the Company's offer was made only to get his ideas about reorganization. The Company has moved for summary

judgment on the ground that any assurances it made of the long term nature of his responsibilities was inactionable in view of his written agreement to the at will nature of the job. How should the court rule? White v. Smule, Inc., 290 Cal. Rptr, 3d 328 (Cal. App. 2022).

### D. Changing Terms of Employment

**Page 158. Add at End of Note 2:**

*Economic Duress*. It would be well to reconsider the modern role – and content – of the doctrine of economic duress here and when taking up the capacity of an employer to require employees to submit their legal claims exclusively to the employer's arbitration system in section E, *supra*. The issue is put in comparative context by Matthew Finkin, *Hard Bargains: Economic Duress in German, French, and U.S. Employment Law* in DEUTSCHES, EUROPÄISCHES UND VERGLECHENDES WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR WERNER F. EBKE 231 (Boris Paal, Döorte Pelzib & Oliver Fehrenbacher eds. 2021).

### E. Mandatory Arbitration

**Page 170. Add to Note and Question 3:**

*See also Johnson* v. *Menard, Inc.*, 632 S.W.3d 791 (Mo. App. 2021)

**Page 171. Under *Procedural Unconscionability*:**

Returns to the note on "economic duress" in this Supplement, above.

**Page 172. Under *Substantive Unconscionability*:**

Are any of these provisions unconscionable:

1. Requiring the employer to submit his or her claim to arbitration within the period for submission under the applicable statute of limitations for filing to an administrative agency.
2. Allowing the arbitrator to award those attorney fees and costs to the prevailing party which could have been allowed had the claim been heard in court.
3. Providing for the payment of attorney fees by a party that has resisted arbitration in a judicial proceeding to be paid to the party seeking successfully to secure arbitration.

Ramirez v. Charter Communications, Inc., 290 Cal. Rptr. 3d 429 (Cal. App. 2022).

*Sexual harassment*. S.2342, 117th Cong., 1st sess. (2021), prohibits the waiver of the judicial forum, individually or collectively, for any claim of sexual harassment.

**Page 199. Add to Note and Question 3:**

The prospect, of mass arbitration claims is canvassed in PROLIFERATION OF MASS ARBITRATION: BALLOONING COST AND EMERGING TACTICS, https://www.jdsupra.com/legalnews/lead-article-proliferation-of-mass-7129882/ (Dec. 2, 2021):

> [The American Arbitration Association] charges $300 to individuals and $2,650 to companies to cover the initial filing and case management fees for each individual arbitration demand. *See, e.g.*, AAA Employment Arbitration Rules. In California, a new state law provides that arbitration fees must be paid within 30 days of the due date set by the arbitration provider. Cal. Civ. Proc. Code § 1281.97.
>
> Recently, more than 6,000 couriers filed arbitration demands against DoorDash, a food delivery service provider. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020). DoorDash's employment agreement contained a "Mutual Arbitration Provision" that required employees to resolve "any and all disputes" through arbitration with the AAA. *Id.* The court compelled DoorDash to proceed with the individual arbitrations. *Id.* Pursuant the AAA's rules, the plaintiffs were required to pay $1.2 million to initiate arbitration, while DoorDash was saddled with a $12 million upfront bill. *Id.*
>
> Similarly, Uber faced 12,501 individual arbitration demands from its drivers over a three-month period in 2018. Pet. for Order Compelling Arbitration, *Abadilla v. Uber Technologies, Inc.*, Case No. 3:18-cv-7343 (N.D. Cal. Dec. 5, 2018). The drivers contended that they were improperly classified as independent contractors rather than employees. *Id.* Eventually, Uber settled the cases for between $146 million and $170 million rather than undertake an impending mass arbitration battle.
>
> ***
>
> [C]ompanies have tried taking other steps to curb the impact of mass arbitrations. For example, some companies have attempted to negotiate aggregated "bellwether" arbitrations, where a certain number of claims go through the arbitration process, and the results are extrapolated to cover the remaining claims.
>
> Arbitration providers have also tried to adapt to the mass arbitration phenomenon. The International Institute of Conflict Prevention and Resolution ("CPR") created a process for mass employment arbitration, which provides that when 30 or more employees file similar claims against an employer, ten are randomly selected as bellwethers. After the initial arbitrations are complete, a CPR mediator uses the results to attempt to strike a class-wide deal agreeable to both sides. If the process does not result in a

settlement, the parties can proceed in arbitration or in court. *See* CPR Mass Claims Protocol and Procedure.

**Page 201. Amend Note and Question 4:**

Omit *Chamber of Commerce* v. *Becerra* and add *Chamber of Commerce* v. *Bonta,* 13 F.4th 766 (9th Cir. 2021) (holding California's law protecting the right to judicial access for the vindication of employment discrimination claims not to be preempted by the FAA) (motion for reconsideration *en banc* pending).

Some states have prohibited non-disclosure agreements regarding sexual harassment. New Mexico's H321 (2020) provides that:

> An employer shall not, as a term of employment, require an employee to sign a nondisclosure provision of a settlement agreement relating to a claim of sexual harassment or sexual assault in the workplace brought by the employee or prevent the employee from disclosing a claim of sexual harassment or sexual assault occurring in the workplace or at a work-related event coordinated by or through the employer.

Would this apply to the claims made or heard in an employment arbitration or to the terms of an award in such a case? If so, is the law federally preempted?

## B. Business Information

**Page 212. Add to Note on Employer Disparagement:**

In the wake of the "Me Too" Movement, several states have rendered unlawful non-disclosure provisions in employee agreements to settle such claims, *e.g.* Hawai'i Rev. Stat. § 378-2.2, Wash M.B. 1795 (2020). New Jersey's is a good example:

> A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a "non-disclosure provision") shall be deemed against public policy and unenforceable against a current or former employee…who is a party to the contract or settlement. If the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable, then the nondisclosure provision shall also be unenforceable against the employer.

N.J. Stat. Ann. § 10:5-12.8(a).

Would the following provision in an agreement setting an employee's claim of sex discrimination be enforceable?

> The parties agree not to make any statements written or verbal, or cause or encourage others to make any statements, written or verbal regarding the past behavior of the parties, which statements would tend to disparage or impugn the reputation of any party. The parties agree that this non[-]disparagement provision extends to statements, written or verbal, including but not limited to, the news media, radio, television, internet postings of any kind, blogs, social media, (e.g., Facebook, Instagram, Twitter, or the like)….

Were the former employee to respond in a press interview by accusing the employer of running a "good ol' boy system" that does not want women would she be liable for the penalties the settlement sets out for breach of the non-disparagement provision? Savage v. Twp. Of Neptune, 2022 N.J. Super. Lexis 74 (N.J. App., May 31, 2022).

**Page 225. Add to Discussion of Stored Information:**

The dispute in the courts over when accessing an employer's computer is in "excess of authorization" was resolved by the United States Supreme Court in *Van Buren* v. *United*

*States*, 141 S.Ct. 1648 (2021) in the context of a police officer who accessed license plate information, which he was contrary to his duties, via the department computer system to which his access was authorized. The Court affirmed the majority view that if the employee was allowed technical access his doing so could not be without or in excess of authorization irrespective of his motive. An employee "exceeds authorized access" in violation of the statute when they obtain information located in specific areas of a computer, such as particular files, folders, or databases, that the employee is never authorized to access.

### C. Covenants Not to Compete

**Page 233. Add to *Training Costs*:**

Louisiana takes the position that a contract that requires an employee to repay an employer for training costs when exiting employment works a forfeiture of wages in violation of state wage payment laws. Gallo v. Greenpath International, Inc., 334 So. 3d 379 (La. App. 2021). Could training costs nevertheless provide lawful support for a covenant not to compete in Louisiana?

**Page 237. Add to Note and Question 8:**

*See* Exec. Order 14036, 86 Fed. Reg. 36987 (July 14, 2021) ("Promoting Competition in the American Economy"); *see also* U.S. Dept. of Treasury, The State of Labor Market Competition 13-18 (March 7, 2022) ("Restrictive Employment Agreements and No-Poach Agreements").

**Page 242. Delete first paragraph of Note 7 and replace with:**

According to information collected by Indeed, Jimmy Johns hourly in-shop sandwich makers now earn on average about $13.00 per hour, while delivery drivers average about $16.00 per hour. *See* Jimmy Johns Sandwiches, INDEED, https://www.indeed.com/cmp/Jimmy-John's-Sandwiches/salaries/Sandwich-Maker; https://www.indeed.com/cmp/Jimmy-John's-Sandwiches/salaries/Delivery-Driver (last visited December 23, 2022). Why would the company have required these restrictive contracts of delivery drivers and sandwich makers?

In 2016, Jimmy Johns entered into a settlement agreement with the State of Illinois in a case challenging the use of restrictive non-competes. As part of the settlement, Jimmy Johns agreed to notify all current and former employees in Illinois that their non-competes were unenforceable and pay $100,000 to the Attorney General's Office for use in educating the public about the enforceability of non-competes. Jimmy Johns had previously settled a similar case with the State of New York. Following the Illinois settlement, Jimmy Johns indicated

that it had already taken steps to rescind the agreements and that there was no evidence it had ever enforced the agreement against an hourly worker. *Jimmy John's Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS, https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA (Dec. 7, 2016). If Jimmy Johns never tried to enforce the agreement against hourly workers, why would it have initially required them to sign it?

**Page 243. Add to Note and Question 8:**

This section notes that two states – Illinois and Maine – have legislated to prohibit covenants not to compete for low wage workers. The list has grown. It now includes: Colorado, Hawai'i, Idaho, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Utah, Virginia, and Washington, with varying tests for preclusion.

Illinois has expanded the scope of this employee freedom by insulating employees who make up to $90,000 per year, by 2037, and capping covenants not to solicit co-workers and clients to $52,500 by that year. 820 ILCS 90/97 (2022).

## D. Creative Work

**Page 246. Add to Note and Question 2**

Assume Mr. Worth's contract provided:

> Assignment: In consideration of compensation paid by Company, Employee agrees that all right, title and interest in all inventions, improvements, developments, trade-secret, copyrightable or patentable material that Employee conceives or here-after may make or conceive, whether solely or jointly with others:
>
> (a) with the use of Company's time, materials, or facilities; or
>
> (b) resulting from or suggested by Employee's work for Company; or
>
> (c) in any way connected to any subject matter within the existing or contemplated business of Company
>
> shall automatically be deemed to become the property of Company as soon as made or conceived, and Employee agrees to assign Company, its successors, assigns, or nominees, all of Employee's rights and interests in said inventions, improvements, and developments in all countries worldwide. Employee's obligation to assign the rights to

such inventions shall survive the discontinuance or termination of this Agreement for any reason.

and provided that it was to be governed by California law.

Section 2870(a) of the California Labor Code provides:
Any provision in an employment agreement which provides that an employee shall assign, or offer to assign, any of his or her rights in an invention to his or her employer shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information except for those inventions that either:

(1) Relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer; or

(2) Result from any work performed by the employee for the employer.

Again, Worth is sued by his former employer to compel him to assign the patent to it. How should the court rule? Whitewater West Indus., Ltd. V. Alleshouse, 981 F.3d 1045 (Fed. Cir. 2020).

**Non-Poaching Agreements**

Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC, 249 A.3d 918 (Pa. 2020)*

CHAPTER VI

## Note on the Spoken Word

**Page 268. Add at end of Note:**

*See also* Smith v. Loanme, Inc., 485 P.3d 869 (Cal. 2021) on what "all parties" mean.

**Page 272. Add after Notes and Questions:**

## Management by Algorithm

Electronic devices have been deployed not only to select workers but to manage – to assign, evaluate, reward, and even to discipline – without human interaction and, in some instances, without the capacity to appeal for human interaction. Public attention in the United States has so far been largely drawn to Amazon: Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon Customers Don't See*, N.Y. Times (June 15, 2021) at p. A1; and, Spencer Soper, *Fired by Bot at Amazon: 'It's You Against the Machine'*, Bloomberg Law News (July 2, 2021). The deployment of this technology has drawn deep attention in Europe. Eurofound, *Employee monitoring and surveillance: The challenges of digitalization* (2020); Cansu Safak & James Farrar, *Managed By Bots* (Worker Information Exchange Report) (Dec. 2021) (with special emphasis on the gig economy).

Thus far, California has taken the lead. Employees subject to a technologically set work standard – a "quota" – are entitled within 30 days of hire to a written description of each such quota "including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota." Cal. Lab. Code § 2101. This law, geared to warehouse distribution centers, is in addition to California's consumer data protection law that includes employees.

European law has been more aggressive. The EU Data Protection Regulation requires not only notice and consent, it provides that data subjects – people – may not be subject to decisions with legally significant effects based solely on the automated processing of data. Should this or something akin to it be applied in the United States?

It might be instructive to look at Michigan's experience with an algorithmic determination of unemployment compensation benefits fraud described in excruciating detail in Cahoo v. SAS Analytics, Inc., 912 F.3d 887, 892 (8th Cir. 2019), and which resulted in Mich. Comp. L. § 421.62(f):

The unemployment agency shall not make a determination that a claimant made an intentional false statement, misrepresentation, or concealment of material information that is subject to sanctions under this section based solely on a computer-identified discrepancy in information supplied by the claimant or employer. An unemployment agency employee or agent must examine the facts and independently determine that the claimant or the employer is responsible for a willful or intentional violation before the agency makes a determination under this section.

**Page 285. Add at End of Note on Electronic Monitoring of Location:**

At least two states thus far have legislated in the matter of employer electronic tracking of employees: California provides that, "No person or entity…shall use an electronic tracking device to determine the location or movement of a person" subject to narrow exception. CAL. PENAL CODE § 637.7. Hawaii has legislated with specific reference to employment: an employee may not be required to download a mobile application to the employee's personal communication device that enables the employee's location to be tracked. HAW. REV. STAT. § 378.

**Page 285. Add to Question 2:**

Five more states have legislated to forbid employers from "requiring" subcutaneous RFID implantation. No state forbids an employer from "requesting" or an employee to consent. *See generally*, Wes Turner, *Chipping Away at Workplace Privacy: The Implantation of RFID Microchips and the Erosion of Employee Privacy*, 61 J. L. & Pol'y 275 (2020).

### 3. Workplace Speech and Association

### 4.

**Page 311. Add to Note 3:**

Connecticut has also legislated to prohibit employee captive audition on "political matters" including labor organization. Conn. SB 163 (2022). Meanwhile, the General Counsel of the National Labor Relations Board has argued in a case before it to have captive audition on the labor organization made an unfair labor practice. Cemex Construction Materials Pacific, LLC, cases No. 28-CA-230115 *et al* (April 11, 2022). A staffing agency has sued the General Counsel to enjoin her from issuing the guidance that led to the argument being made, as violative of employer first amendment rights. Burnett Specialists v. Abruzzo, U .S. D.C. E.D. Tex. Case 4:22-cv-00605-ALM (July 18, 2022). Would a prohibition of captive audition violate the first amendment?

5. A grocery store has required its employees to wear protective face masks due to the pandemic. May it refuse to allow them to wear masks that display the phrase “Black Lives Matter”? Firth v. Whole Foods Market, Inc., —F.4th— (1st Cir. June 28, 2022).
6.

### 4. Dress and Grooming

**Page 315. Add to Note 4:**

Maine and Tennessee have also enacted “CROWN Act” laws – laws to Create a Respectful and Open World for National Hair.

CHAPTER VII

## C. Public Policy

**Page 352. Add After the First Full ¶ of Note and Question 2:**

In *Werner* v. *United Natural Foods, Inc.*, 513 F.Supp.3d 477 (M.D. Pa. 2021), an employee alleged he was discharged for having complained to his employer and the Pennsylvania Department of Health of his employer's violations of COVID-19 health mandates: not enforcing social distancing and not notifying employees of pandemic contacts. He sued for wrongful discharge in violation of public policy. The court recited Pennsylvania authority that public policy governed by reference to the state constitution, statutes, or state judicial precedent. None could be found to apply; nor, in the absence of a legal duty to make the report, could it be a legal wrong to dismiss the employee for having made it. "[W]e do not excuse [the Company's] conduct," said the court, but "public policy…cannot be based on the whims of an individual judge…." *Id*. at 485.

**Page 353. Add to Question 9:**

An employee of a Home Depot store in Oklahoma complained to his superior of the overbilling of customers and was discharged. He alleged the discharge was the result of his complaint and that it violated the state's public policy found in its consumer protection law. The case was removed to federal court and the Tenth Circuit certified the question to the Oklahoma Supreme Court which put thusly:

> Does the Oklahoma Home Repair Fraud Act, or the Oklahoma Consumer Protection Act, articulate a clear mandate of Oklahoma public policy such that an employer who terminates an employee for reporting the employer's violation for either statute is liable for wrongful termination?
>
> The court answered "no."
> Neither statute at issue here protects the *public* health, safety or welfare; instead, these statutes offer protection to consumers from a variety of unlawful business practices…Not only do the statutes not encompass an area recognized by the Court as protected by public policy, but the argument also fails as the harm is not to the public. The OCPA and the OHRFA protect individuals who may encounter a fraudulent merchant, not Oklahoma citizens in general.

Booth v. Home Depot, U.S.A., Inc., 504 P.3d 1153 (Okla. 2022).

## D. Good Faith and Fair Dealing

**Page 360. Add at End of Note and Question 1:**

Mary Reid worked for UBS Financial in South Carolina; her manager was Curt Hall. Ms. Reed complained of Mr. Hall's sexual advances and he was fired. Mr. Hall denied any untoward conduct, alleged that the allegations were fabricated by Ms. Reid. He sued UBS for breach of the covenant of good faith and fair dealing and Ms. Reid for tortious interference in his contract in federal district court. The court certified three questions to the Supreme Court of Carolina which it accepted and answered. The questions were:

I. Are terminable-at-will employment relationships contractual in nature as a matter of law?

II. Does the implied covenant of good faith and fair dealing arise in the context of terminable-at-will employment relationships, and can an employer's termination of an at-will employee constitute a breach of the relationship such that it may give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?

III. Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, constitute a breach of the relationship such that it may give rise to a claim by the former employee against the third-party employee for tortious interference with a contractual relationship?

The Court answered "yes" to the first. It broke the second question into two parts: "Part A asks if the implied covenant of good faith and fair dealing (the covenant) exists in at-will employment relationships. Part B asks if an employer's termination of an at-will employee can give rise to a claim by the former employee against the employer for breach of the covenant. We answer part A 'yes,' and we answer part B 'no.'"

The Court opined that as the at-will rule means that there can be no breach of contract for a discharge for a bad reason, and as the covenant of good faith and fair dealing is an implied contract term, there can be no discharge of an at-will employee that is in breach of the implied covenant because it rests on a bad reason. It rephrased the third question thusly:

> Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, give rise to a claim by the terminated employee against the third-party employer for tortious interference with a contractual relationship, even when the termination itself was not a breach of the at-will contract?

It expanded the question to apply to any third party's action, not only to another employee, and answered "yes" to it. Hall v. UBS Financial Services, Inc., —S.E.— (S.C. 2021).

### 2. "Whistleblower" Laws

**Page 366. Add after first full ¶:**

*How proved*: Some states apply the three-part burden shifting approach the Supreme Court crafted in *McDonnell Douglas Corp*. v. *Green* to address claims of disparate treatment discrimination under Title VII: the employee must establish a prima facie case of violation; (2) if she does the employer has to articulate a legitimate reason for the action; (3) if it does the burden shifts to the employee to demonstrate that the proffered reason is pretextual. Others states do not follow this scheme. Illinois takes a "proximate cause" approach: the employee must proffer sufficient evidence from which a reasonable jury could infer improper motivation whereupon the employer must provide a legitimate reason. Perez v. Staples Contract & Commercial LLC, 31 F.4th 560 (7th Cir. 2022). The California Supreme Court, in response to a question certified to it by the Ninth Circuit, took the whistleblower law, Cal. Lab. Code § 1102.5, to provide an arguably looser standard:

> [I]t places the burden on the plaintiff to establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was *a contributing factor* in a contested employment action….Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity.

Lawson v. PPG Architectural Finishes, Inc., 503 P.3d 659 (Cal. 2022) (emphasis added).

**Page 367. Add to Question 2:**

Note that the North Dakota statute protects the employee who reports a violation of "federal, state, or local law." Would a discharge be actionable if the employer's conduct complained of was lawful in North Dakota, but was unlawful in the state in which the conduct complained of was engaged? Perez v. Staples Contract & Commercial LLC, 31 F.4th 560 (7th Cir. 2022).

### 3. General Law of Wrongful Dismissal

**Page 371. Add After Second Full Paragraph:**

New York City adopted an Ordinance, effective July 5, 2021, requiring "just cause" for discharge and the observance of progressive discipline for employees of "essential businesses" as defined in state Executive Order NYCC, tit. 20, ch. 12, subchapter 7, §§ 20-1271 to 1275. The Ordinance have been challenged by the N.Y.S. Restaurant Association insofar as it applied to "fast food" workers. Restaurant Law Center v. City of N.Y., U.S. Dist. Ct. S.D.N.Y. Case 1:21-cv-04801 (May 28, 2021).

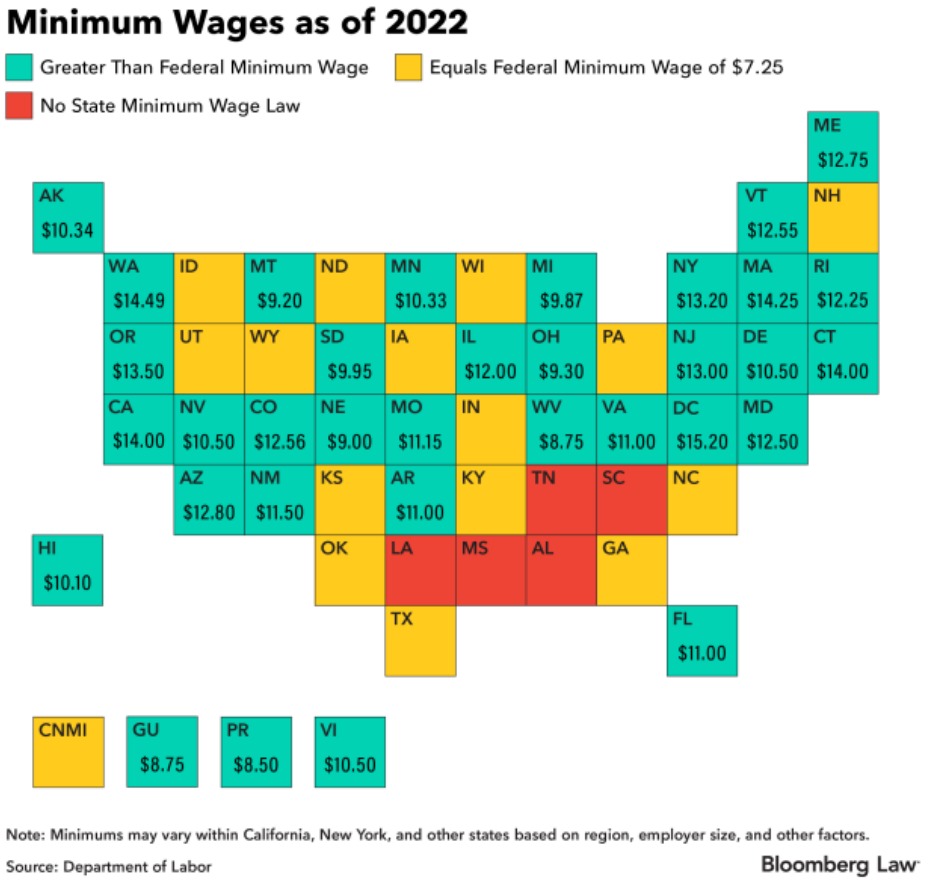
## C. The Fair Labor Standards Act

## B. Regulation of Wages and Hours

### 1. A Brief History

**Page 412. Add at End of Section 1:**

The federal minimum wage sets a national floor. States – and cities that have home rule power – can set a higher minimum, and about half of the states have.



## 1. Covered employment

### a. "Employer" Status

**Page 422. Add Note and Question 1(a):**

Mr. K.S. Tamm has bought a soft ice cream store in Hempstead, New York – Hempstead is on Long Island about ten miles from New York City – and a second store in Patchogue further out on the Island about thirty miles from Hempstead. The first store is owned and run under the corporate name KST, Inc. The second is owned and run under the name ABS, Inc. For the past three years each has one employee; each works ten hours a day, six days a week for $530 a week. The federal minimum wage is $7.25 per hour. The New York minimum wage is $10.40 per hour. According to the corporation's tax returns in the past three years KST, Inc. reported income of $158,893, $159,632 and $161,786. ABS reported income of $170,727, $165,133, and $157,029. Assume the two employees sue Mr. Tamm, KST, and ABS for violation of the FLSA and state minimum wage law. Would they have a valid claim?

### b. "Employee" Status

**Page 433. Add to Questions:**

5. There are about 500,000 students in colleges and universities who participate in sports regulated by the National Collegiate Athletic Association (NCAA). In the 2018 fiscal year, the NCAA reported revenues in excess of a billion dollars much of which is distributed to participating institutions. The students who engage in these sports are not paid and enter their programs with that understanding. Often they must adjust their academic schedules to the program's demands not only in training and practice and for competitions, but for a variety of other public relations activities. Participation can place stress on the student athletes' ability successfully to complete necessary academic work. Are they employees subject to the FLSA? Johnson v. NCAA, 556 F.3d 491 (E.D. Pa. 2021).

## Compensable Activity

**Page 479. Add at End of Note and Question 1:**

In another case involving Amazon, the U.S. Court of Appeals for the Sixth Circuit certified questions to the Supreme Court of Pennsylvania on whether security screening time was "hours worked" within the meaning of Pennsylvania law wage and hour. The

Pennsylvania Supreme Court responded that: "hours worked" under Pennsylvania would be in one of four categories:

- "time during which an employee is required by the employer to be on the premises of the employer,"
- "[time during which an employee is required by the employer] to be on duty or to be at the prescribed workplace,"
- "time spent in traveling as part of the duties of the employee during normal working hours,"
- "and time during which an employee is employed or permitted to work."

Inasmuch as the Sixth Circuit found that Amazon "requires" employees to remain in the warehouse until screened for exit, the Pennsylvania Supreme Court opined that all time spent by the employees waiting to undergo, and undergoing, security screening constitute "time worked" under Pennsylvania law. *In Re Amazon.com, Inc.*, 255 A.3d 191 (Pa. 2021).

1(a). The *de minimis* rule. Note 1 in the text notes that the California Supreme Court rejected the *de minimis* rule in the *Troester* case on grounds *inter alia* that in terms of public policy no wage theft is truly *de minimis* – and certainly not when it aggregates – and the traditional justification, of "impracticality," has been addressed by the technology of time-keeping. The Pennsylvania Supreme Court in the *Amazon* decision, above, also rejected the *de minimis* rule under Pennsylvania law.

Further, even where applicable under the FLSA the *de minimis* rule fails of application where the sums can reasonably be estimated and the aggregate amount would not be insignificant. *See e.g.* Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021) (affirming that time to "boot up" computers was compensable and not *de minimis*: the aggregate impact of loss of $0.48 per shift comes to $125 for the affected worker per year which is not insignificant for a worker earning $13.50 hour.)

### 3. Determining the Amount

### C. Tipped Employees

**Page 503. After 20 CFR § 531.55:**

On the distinction and practical effect between a service charge and a tip *see* Compere v. Nusret Miami, LLC, 28 F.4th 1180 (11th Cir. 2022).

**Page 504. Add at End of Second Paragraph:**

To make the situation even more complicated, the "safe harbor" of § 207(i) – the "7(i) exemption" – for commissions, common a form of wage for the sale of "big ticket" items in department stores – has been applied to charges for group events in hospitality. Wai Man Tom v. Hospitality Ventures LLC, 980 F.3d 1027 (4th Cir. 2020).

### 4. Enforcement Issues

**Page 512: Add Before the Numbered Proposals:**

The Economic Policy Institute has found a rise in criminal prosecutions for wage theft. Terri Gerstein, *How District Attorneys and State Attorneys General are Fighting Workplace Abuses* (May 17, 2021).

**Page 512. Add to Proposal 1:**

The text on page 508 tracks the number of federal wage and hour inspectors from 945 in the year 2000 to 732 in 2007. Note 1 on page 512 states that in 2013 this had risen to 1,050. However, the number began to decline steadily thereafter. In January, 2019, the number was 794.

### b. Problems of Procedure and Proof

**Page 520. Add after *Morgan*:**

The Fifth Circuit has explained the customary two step procedure: there is a none too exacting judicial determination of whether the members of the group the lead plaintiff seeks to assemble are sufficiently "similarly situated" to warrant authorization of an opt-in notice to them; and then a more exacting examination after the group has been assembled. The Fifth Circuit has criticized that approach: it held that "a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated'" and authorize discovery on that more limited basis. In a group claim of misclassification, the court opined that whether the group is similarly situated turns on "how much control the employer had over the independent contractor…If answering this question requires a highly individualized inquiry into each of the *potential* opt-in's circumstances, the collective action would devolve into a cacophony of individual actions," which explains why "misclassification cases rarely make it to trial on a collective basis." *Swales* v. *KLLM Transp. Services, LLC*, 985 F.3d 430, 442 (5th Cir. 2021) (emphasis added).

Before the group has opted in and their similarities and differences laid on the page how can a court know that they are or are not similarly situated. Could the *Morgan* case get to trial in the Fifth Circuit today? What is the relationship of the opt-in action to the vindication of the Act's ends? What procedure better conduces toward it?

Employees who are lawfully bound to arbitrate FLSA claims under policies that preclude participation in a group arbitration could not opt-in to a group action under the FLSA. However, it is not enough that such a policy purporting to have contractual effect be present or even that it be individually executed. To be enforced it must satisfy all the elements of contract – offer, acceptance, consideration – and be otherwise lawful *e.g.* not unconscionable. May an employee secure opt-in notice in order to group those who would like to sue and for whom the lawfulness of the policy as to them might be questionable? *Cf.* A&D Interests, Inc., —F.4th— (5th Cir. 2022). If only those not lawfully covered by an arbitration contract can opt-in, absent notice how is the group representative to know who they are? If the process reveals a group lawfully bound to arbitrate, might they commence multiple individual arbitrations now they know their rights might have been violated?

### c. Time Limits and Liquidated Damages

**Page 537. Add to Notes and Questions:**

4. The courts of appeals are divided on whether the facts supporting a claim of willfulness must be set out in the pleadings or whether an allegation alone will suffice. Whiteside v. Hover-Davis, Inc., 998 F.3d 315 (2d Cir. 2021) (requiring fact pleading) (Judge Chin dissented on the ground that the plaintiff had plausibly alleged a willful violation).

### d. Settled Claims

**Page 541. Add to Notes and Questions:**

5. A proposed settlement of a group FLSA claim includes a provision that releases the employer of "any and all claims, causes of action, demands, debts, obligations, damages, or liability arising prior to" the date of the settlement agreement. It precludes those who have opted in to the group action from "any personal recovery on any action or proceeding that may be commenced on [their] behalf by anyone." Should the court approve? (With regard to the latter provision would be well to consider § 216(c).) Vazquez-Aguilar v. Gasca, 513 F.Supp.3d 675 (E.D. N.C. 2021).

### 6. Precarious Hours

**Page 550. Add after the EPI Report:**

The UCLA Labor Center has reported the wage theft and precarity of hours problems of fast food workers in Los Angeles during the pandemic. *Fast Food Frontline: COVID-19 and Working Conditions in Los Angeles* (Jan. 2022).

## D. Wage Payment

**Page 568. End of Note and Question 3:**

The State's Wage Payment Law (WPL) includes the following:

§ 109. Payment of Wages

(a) Every person, firm, or corporation doing business in this State shall pay its employees at least once every two weeks all the wages due, less authorized deductions and authorized wage assignments, for their work or services in lawful money of the United States, or by the cash order….

(b) No assignment of or order for future wages shall be valid for a period exceeding one year from the date of such assignment or order. Such assignment or order shall be signed by the employee and shall specify thereon the total amount due and collectible by virtue of the same and no assignment or order shall be valid which does not so state upon its face.

Section 101 defines "deductions" and "assignment of earnings" thusly:

(g) The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.

(h) "Assignment of earnings" includes all forms of assignments, deductions, transfers, or sales of earnings to another, either as payment or as security, and whether stated to be revocable or nonrevocable, and includes any deductions except deductions for union, labor organization, or club dues or fees, pension plans, payroll savings plans, charities, stock purchase plans, and any form of insurance offered by an employer.

Corbin Bernstein was a salesman for the Yobota Fork Lift, Inc. He was paid a salary plus 10% commission on all sales paid for by the customer within 180 days of the sale. Fairmont's practice – announced to the sales staff in a circular – is to pay the 10% on all sales made in the preceding two weeks, marked as "advance against commissions". If the sale is not paid by the

customer within the 180-day period after the sale, the salesman's pay would show a reduction in the amount of that "advance."

Bernstein was discharged and demanded all wages due under the state WPL including an amount for "advances on sales not paid." Must Yobota pay those mounts? Fairmont Tool, Inc. v. Davis, 868 S.E.2d 737 (S.C. 2021).

**Page 569. Add at End of *The Payroll Debit Card:***

Many employees live from paycheck to paycheck, but run out of cash before the next pay period ends. Some companies have introduced systems of Earned Wage Access (EWA) to deal with this. Derina Khanna & Arjun Kaushal, *Earned Wage Access at Direct-to-Consumer Advance Usage Trends*, (Financial Health National) (April 2021); Sara Grotta, *On-Demand Earned Wage Access: U.S. Vendor Comparison*, (Mercator Advisory Group) (April, 2020). How these operate was explained by Chris Opfer, *'Early Wage' Apps Aim to Disrupt Payday Loans, Two-Week Cycle*, Bloomberg Law (Aug. 1, 2019):

> Early pay providers operate under two models. Some, like Daily Pay and PayActiv, partner with companies to offer employees advance wages in exchange for a monthly or per-transaction fee. The third-party provider fronts the money—it does transfer money from the user's employer—and then takes the cash back from users either directly out of their next paychecks or through a bank account debit on payday. Some companies subsidize part of the cost, but employees in many cases are on the hook for transaction or membership fees.
>
> Others, such as Earnin, Dave, and Brigit, offer services directly to end users. Those providers recoup the advanced funds directly from user's bank accounts on a set date.
>
> Certain providers have added an income stream by partnering with prepaid card services. Dave and PayActiv offer reloadable Visa cards on which the users can get advance pay transfers.

A founder of Daily Pay explains of the system: "The thesis here is that when employees can access wages when they want, it creates a major life change…If they can access the money when they want, they can also tap a button and then pay bills on time. Because it is a benefit attributed to the employer, the employee actually now stays longer." "What it does not address," said Chris Tilly, a professor of labor economics at UCLA, "is why these people have very little savings in the first place." *Id.*

## C. Overview of the Occupational Safety and Health Act

### 1. Substantive Duties

**Page 798, Add at end of text**

OSHA did issue two Emergency Temporary Standards dealing with COVID-19 in 2021. First, in June 2021 it issued an ETS protecting healthcare workers. *See* 29 C.F.R. §1910.502, *et. seq.* With some exceptions, this ETS required employers in the healthcare industry to adopt COVID plans, require personal protective equipment (PPE), require physical distancing when indoors, implement screening for patients and employees, ensure adequate indoor ventilation and cleaning, and report COVID hospitalizations and deaths to OSHA. In December 2021, OSHA withdrew this ETS after the six-month emergency period expired, and announced that it would continue working toward a permanent standard to protect healthcare workers from COVID risks. *See* Statement on the Status of the OSHA COVID-19 Healthcare ETS (Dec. 27, 2021), https://www.osha.gov/coronavirus/ETS.

Second, on November 5, 2021, OSHA issued a broader, more controversial ETS that covered all employers with 100 or more employees. *See* 29 C.F.R. § 1910.501, 86 Fed. Reg. 61402 (Nov. 5, 2021). This ETS required those employers to insist that their employees obtain COVID-19 vaccination and submit proof of vaccination to the employer, or alternatively, to have any objecting employees undergo weekly COVID-19 testing and wear masks while working indoors. The ETS included exceptions for employees who work entirely remotely or entirely outdoors. The ETS was immediately challenged by several groups, with at least one challenge filed in every regional circuit court of appeals. The Fifth Circuit Court of Appeals issued a stay on November 6, 2021, the day after the ETS was issued. Judicial review of the ETS was randomly assigned to the Sixth Circuit course. *See* 28 U.S.C. § 2112(a). A panel of the Sixth Circuit lifted the stay, but shortly thereafter the U.S. Supreme Court granted an emergency application for a stay of the ETS pending the completion of judicial review.

In granting the stay, the Court held that those challenging the ETS were likely to prevail on the merits, because OSHA likely did not have statutory authority to issue such a sweepingly broad ETS. The Court described the ETS as a "broad public health measure" that did not regulate "occupational" risks. *See* NFIB v. Dept. of Labor, 142 S.Ct. 661 (Jan. 13, 2022). While OSHA could regulate workplaces that present "occupation-specific risks" of contracting COVID-19, such as where workers are researching the virus or where workers are in "particularly crowded or cramped environments," those specific risks differ from the "everyday risk of contracting COVID–19 that all face."

Shortly after the Court issued the stay, OSHA formally withdrew the ETS. Nonetheless, the ETS may have gone some distance toward the administration's policy goal of encouraging large private employers to implement vaccine mandates for their employees.

## F. Enforcement of Employer Obligations

### 1. Inspection

**Page 850, first paragraph of the section. Add after second sentence:**

The COVID-19 pandemic affected OSHA inspection rates. Federal OSHA inspections per year were 21,710 in 2020 and 24,333 in 2021.

**Page 851, second paragraph, change citation to:**

https://www.osha.gov/enforcement/2021-enforcement-summary (2021)

## G. Establishing Violations of the General Duty Clause and of Standards

### Note: OSHA Remedies

**Page 888, Replace penalty information for 2020 with the following:**

**"For 2022, the civil penalty amounts announced by OSHA are as follows:**

Non-serious violations- Up to $14,502

Serious violation- Up to $14,502

Repeated violations- $9,639 to $145,027

Willful violations- $9,639 to $145,027

Failure to correct a violation for which a citation has been issued- Up to $14,502 per day

https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osha-civil-penalties

## J. State Efforts to Promote Safety and Health

### 1. Section 18 Plans

## J. State Efforts to Promote Safety and Health

### 1. Section 18 Plans

**Page 944, note 2, replace second to last sentence with the following:**

In 2020, four states adopted emergency temporary standards requiring employers to take precautions designed to prevent the spread of COVID-19 before the federal OSHA had issued an ETS regulating COVID-19 risks.

**Page 944, add new note 4.**

Even where a state plan obtains final approval, OSHA retains the ability to revoke all or part of that determination if it determines that the state plan does not meet its obligation to provide a program for employee safety and health protection that is at least as effective as the federal OSHA program. States are required to timely adopt changes when the federal OSHA makes changes that strengthen employee protections, including adopting new standards, new emergency temporary standards, or new enforcement policies.

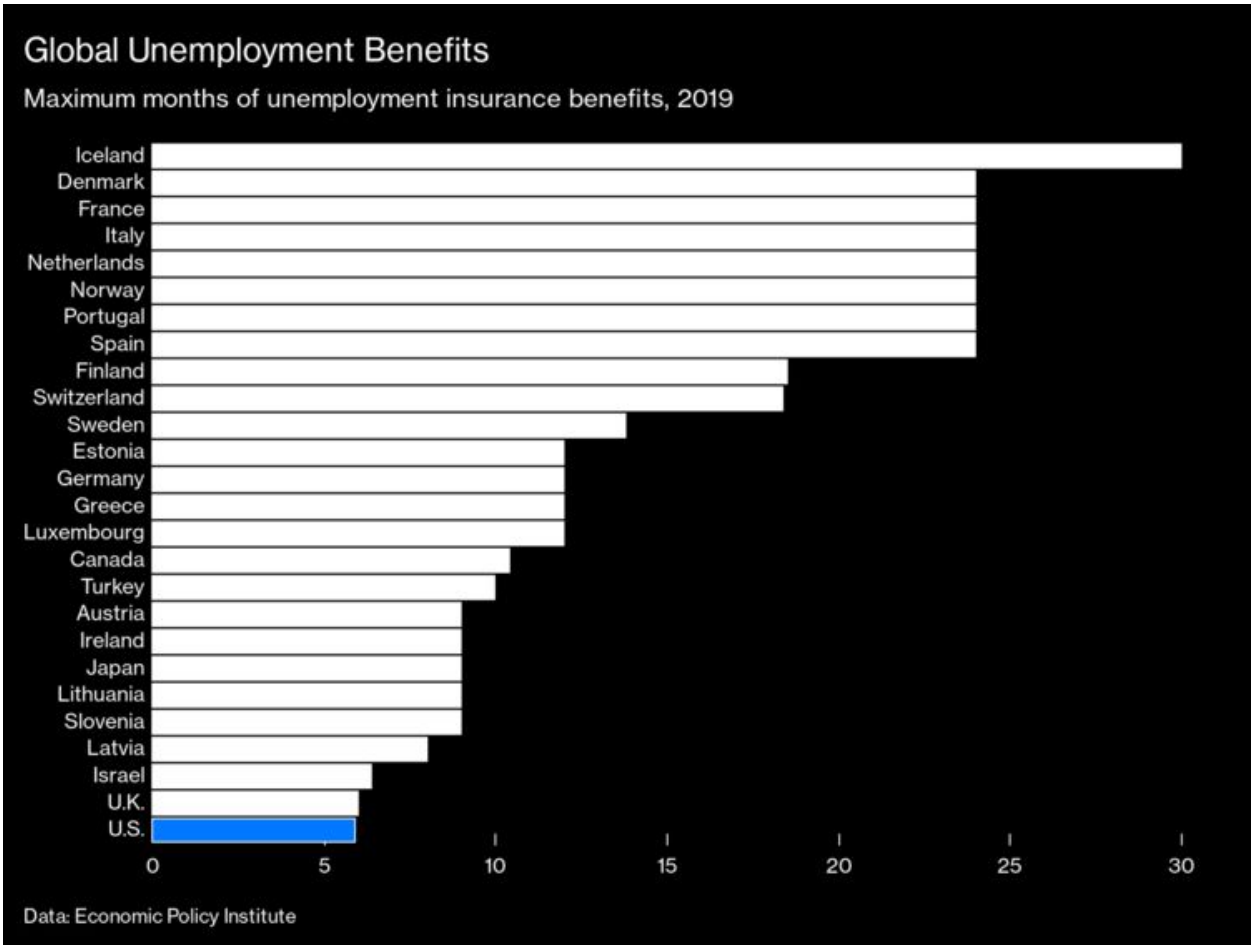
OSHA recently initiated proceedings to reconsider and revoke Arizona's state plan approval. *See* 87 Fed. Reg. 23783 (Apr. 21, 2022). In doing so, OSHA pointed to Arizona's adoption of residential construction fall protection standards that were less effective than the federal standard, its subsequent delay in finally adopting a fall protection standard that comported with the federal standard, and its refusal to adopt the federal OSHA ETS protecting healthcare workers from the risks of contracting COVID-19, as well as other enforcement issues. *See id.*

CHAPTER XI

## 3. BASIC CHARACTERISTICS

### b. Scope of Coverage and Benefit Levels

**Page 997. Add at end of text:**




#### 1. Interaction Between Unemployment and Workers Compensation

**Page 1001. Add to Notes and Questions:**

4. Due to the COVID-19 pandemic, Yo-Yo Dyne, Inc., laid off much of its workforce. It then offered those laid off a "voluntary leave from the company" package. Norma Jean, a laid off employee of thirteen years service, accepted it. She received $27,000, health insurance for two years, life insurance, and lietime flying benefits for her and her family. She took the package because "at least you leave with something. You at least have two years of

insurance versus being laid off and not having anything and not knowing when I get a job." Is she entitled to receive unemployment benefits? Ward v. Delta Airlines, 973 N.W.2d 649 (Minn. App. 2022).

### 4. Quitting Work

**Page 1026. Add to Question 2:**

If an employee is discharged for refusing to accept an assignment to do the work of a co-worker (quarantined due to COVID) in addition to his own, where the company has a rule allowing such assignment, entitled to unemployment benefits? Badawi v. Albin, 973 N.W.3d 714 (Neb. 2022).

**Page 1029. Add to Notes and Questions:**

11. if an employee refuses to come to work because the company has taken no measures to protect workers from exposure to COVID-19, has she voluntarily quit? Would she be eligible for unemployment benefits? Keener v. Director, Dept. of Workforce Services, 618 S.W.3d 446 (Ark. App. 2021).

12. Clarence Thumb was charged with a criminal offense and placed in pretrial detention. He notified his employer, Gee Wiz, LLC, of the reason why he could not report to work. Eight weeks later a grand jury declined to indict him and Thumb was released from jail. In the interim Gee Wiz wrote to Thumb notifying him that he'd been discharged due to absenteeism. Is Thumb entitled to unemployment benefits? Haley v. Board of Review, 246 A.3d 1255 (N.J. 2021).

### Plant Closing

**Page 1050. Add Following the Incomplete ¶ at the Top:**

The law is complex; for example, it distinguishes the treatment of "mass layoff" from "termination" on which the courts are divided: is it to be decided prospectively, when notice is given, or retrospectively, on whether employees are in fact rehired? *See e.g.* Leeper v. Hamilton County Coal, LLC, 939 F.3d 886 (7th Cir. 2019).