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Employment Law for Human Resource Practice

David J. Walsh

5E

EMPLOYMENT LIFE CYCLE APPROACH

Future managers and human resource professionals need to understand the employment life cycle: hiring, managing, and terminating. Employment law affects every stage of the cycle. This text shows how these laws apply to human resource practice.

Part 1

Introduction to Employment Law

- Employment Relationship
- Employment Discrimination

Part 2

The Hiring Process

- Recruitment
- Interviews
- Background Checks
- Employment Tests

Part 3

Managing a Diverse Workforce

- Affirmative Action
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Pay, Benefits, Terms and Conditions of Employment

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Managing Performance

- Performance Appraisals
- Training and Development
- Monitoring and Surveillance
- Investigations

Part 6

Terminating Employment

- Employment at Will with Exceptions
- Just Cause
- Due Process
- Downsizing

Employment Law for Human Resource Practice

FIFTH EDITION

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Miami University

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Employment Law for Human Resource Practice, 5e
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Preface

This is a book about employment law—the set of legal requirements that govern the workplace. A distinction is often made between "employment law" and "labor law" (the latter describing laws related to unions and collective bargaining), but I will generally use the term "employment law" to refer to both. This book has two main objectives. The first is to *explain the major employment laws and types of legal claims faced by employers.* What things are legal matters? What does the law say about those matters? How are cases decided? The second objective is to *explain what employment law means for human resource practice.* What is it that employers should be doing to comply with the law? What is the legal reasoning behind this practical advice?

Special Features of This Text

Unique Employment Life Cycle Approach

This dual purpose of understanding the substance of employment law and its implications for human resource practice accounts for the way this book is organized. The first three chapters provide broad overviews. The remainder of the book traces the steps in the employment process and addresses the particular legal issues associated with them. We start with issues that lead up to hiring and promotion, including recruitment, interviewing, background checks, references, and employment testing. We then turn to a range of issues that arise when a person is on the job, including harassment, reasonable accommodation of disability, compensation, benefits, performance appraisal, and occupational safety and health. The last two chapters of the book deal with issues related to the termination of employment. This structure is intended to highlight the legal issues that managers regularly confront.

> *The employee life cycle approach to this text offers students the ability to understand the employment process, from beginning to end, while considering the legal environment and its implications for business success. Walsh's personnel law book provides a solid foundation for students to successfully navigate the always changing and rarely certain areas of personnel law within an organization.*
>
> *Professor Sarah Sanders Smith, SPHR, Purdue University*

> *Of all of the texts that I reviewed, this one has the most practical and usable advice for soon-be-HR practitioners. The life cycle approach is strong and the writing easy to read.*
>
> *Nancy K. Lahmers, JD, The Ohio State University*

Practical Focus

This book is full of advice for carrying out human resource activities in a lawful manner. *These guidelines are general principles for sound human resource practice. They cannot be—and do not purport to be—specific legal advice for particular situations that you might encounter. Only a trained legal professional thoroughly familiar with the details of your case can provide the latter.*

> *This text offers a unique human resource perspective of employment law that is typically not afforded attention in other comparable texts.*
>
> *Dr. Kim LaFevor, Athens State University*

Interesting Features Included in Each Chapter

Clippings This feature consists of brief synopses of recent cases, events, or studies that illustrate the issues dealt with in each chapter. The clippings should pique your interest and begin to show how employment law relates to real things that are happening in the world around us.

> *I love the Clippings features—they are well chosen and give the students a great intro into why what we are covering is relevant to their businesses.*
>
> *Alexis C. Knapp, Houston Baptist University*

The Changing Workplace This feature adds a forward-looking flavor to the book by highlighting contemporary developments in the workplace, the workforce, and human resource practices that have particular implications for the law. The business world is nothing if not dynamic. Changes in the workplace raise new legal questions and point to the types of legal disputes that we can expect to see more of in the future.

Just the Facts This feature provides succinct statements of the facts from some interesting court decisions. You are not told the outcomes of the cases; instead, you are given the information needed to make your own determinations ("just the facts").Thinking through these cases and arriving at decisions is a great way to test your grasp of legal concepts.

Practical Considerations Employers need to follow many rules to meet their legal obligations to employees. But legal compliance is not entirely cut-and-dried. Managers have many choices about how to comply with the law, and this feature highlights some of those choices.

Elements of a Claim In any situation that gives rise to a legal dispute, numerous facts might be considered. The facts that we deem most relevant and the order in which we consider them go a long way toward determining the outcome of our deliberations. When judges decide cases, they typically rely on established frameworks that spell out a methodology for deciding those cases. Who has the burden of proof? What must the plaintiff show? What must the defendant show? In what order should certain facts be considered? This feature lays out these frameworks—the "elements" of particular legal claims. Grasping this information gives us real insight into how cases are decided. Judges still exercise considerable discretion and judgment in applying these frameworks, but they make the process of arriving at decisions in legal disputes far more systematic and consistent than it would otherwise be.

Practical Implications of the Law Each chapter in this book contains many suggestions for carrying out human resource activities in a lawful manner. This advice appears in italics to make it stand out from the rest of the text. This advice should be considered in the context of the specific legal problems that it aims to help employers avoid. *It is important to know not only what to do but also why those things should be done.*

The law is a basic determinant of human resource practice and one that cannot be ignored. However, the law is best conceived of as providing a "floor," rather than a "ceiling," for human resource practices. It establishes minimum standards of acceptable treatment of employees, but often it is sensible for employers—based on motivational, pragmatic, or ethical considerations—to go well beyond the bare minimum legal requirements.

Thus, our purpose in understanding what the law requires is not to identify "loopholes" that can be exploited or to advocate superficial measures that look good on paper but fail to realize the underlying purposes (e.g., equal employment opportunity) of the law. Instead, *this book encourages you to embrace the "spirit"—and not merely the "letter"—of the law. It invites you to consider how to achieve these important social purposes by implementing policies and practices that also make sense given the operational realities of the workplace.*

Practical Advice Summary For easy reference, the practical advice sprinkled liberally throughout chapters is collected at the end of each chapter. This summary can be used as a convenient "checklist" for legal compliance.

Legal Cases Each chapter contains three or four substantial excerpts from decisions in court cases. One of the things that is unusual (and admirable) about legal decision making is that the decision makers (e.g., judges) often set down in writing their rationales for the decisions they make in the cases that are brought before them. This gives us the opportunity to read firsthand accounts of legal disputes, to have the decision makers explain the relevant rules of law, and to see how those principles were applied to the facts of cases to arrive at decisions. I describe the law and other cases for you as well, but there is nothing like reading cases to get a real feel for the law. Getting comfortable with reading legal cases is a bit like learning a new language. It will take some doing, but with diligent effort and practice, it will pay off in terms of enhanced ability to access and understand the law.

The words in the case excerpts are the same as those you would find if you looked up the cases online or in print. However, to maximize readability, I have shortened the case decisions by focusing on a brief statement of the facts, the legal issue, and (at greatest length) the explanation of the decision maker's rationale. Where part of a sentence is removed, you will see three dots (. . .). Where more than part of a sentence is removed, you will see three stars (* * *). This is to alert you that text has been removed from the full case decision. Legal decisions are replete with numerous footnotes and citations to previous cases that addressed similar questions. In most instances, I have removed the citations and footnotes from the case excerpts. Occasionally, I have included in brackets [ ] a brief explanation of a legal term.

What Is New in This Edition

This edition of *Employment Law for Human Resource Practice* retains the essential structure and focus of the previous editions. Linking a thorough understanding of principles of employment law to advice on how to conduct human resource practice remains the central aim of this book. Consistent with this aim, the book continues to be organized around stages in the employment process, from the formation of an employment relationship through the termination of that relationship. This fifth edition is the product of a thorough, line-by-line revision of the previous edition, aimed at enhancing clarity and ensuring that the material is as current as possible. Users of this text will find a significant number of new case excerpts. Nearly two-thirds (63 percent) of the chapter cases are new to this edition. If, through a lapse in taste or judgment, I have eliminated one of your favorite cases from the previous edition, chances are the case still appears somewhere in this edition, perhaps as a new end-of-chapter question. I have also included a number of new case problems to puzzle over. My hope is that both students who are reading this book for the first time and instructors who have used previous editions will find it engaging and informative.

Significant Revisions

Here are some highlights of the revised contents of this edition.

- **Chapter 1:** This chapter includes two new excerpted cases. The issue of class-action lawsuits receives updated and more extensive treatment. The *EEOC v. Autozone* case provides an in-depth discussion of remedies.
- **Chapter 2:** This chapter extends and updates the previous edition's discussion of the misclassification of employees as independent contractors. Close attention is also paid to the employment status of unpaid interns, graduate assistants, and student-athletes. The *Glatt v. Fox Searchlight Pictures* case, although still ongoing, is included as a leading case involving the employment status of interns.
- **Chapter 3:** The centrality of EEO laws to employment law is well reflected in this chapter. Three of the four cases excerpted in this chapter are new to this edition. New chapter cases include *Chattman v. Toho Tenax America* (subordinate bias theory of liability) and *Geleta v. Gray* (retaliation). The distinction between "indirect evidence" (pretext) cases and "direct evidence" (mixed-motives) cases receives further elaboration in this edition.
- **Chapter 4:** The discussion of labor trafficking is expanded in this edition. Legal issues surrounding the use of social media for recruiting are considered in this edition. New chapter cases include *NAACP v. North Hudson Regional Fire & Rescue* (statistical evidence of discrimination in recruiting) and *Spears v. Amazon.com KYDC LLC* (fraud).
- **Chapter 5:** Coverage of immigration, undocumented workers, and recent changes in the enforcement of immigration laws is expanded and updated. The discussion of use of criminal history in hiring is updated to reflect the EEOC's most recent guidance on this matter. All three chapter cases are new to this edition, including *Navarete v. Naperville Psychiatric Ventures* (negligent hiring) and *Thompson v. Bosswick* (defamation by references).
- **Chapter 6:** *Kroll v. White Lake Ambulance Authority*, an ADA case on medical testing, is new to this edition.
- **Chapter 7:** The discussion of appearance requirements and the sex-stereotyping theory is expanded in this edition. *Hamilton v. Geithner* (interviews and discrimination) is new to this chapter.
- **Chapter 8:** Recent court cases dealing with the constitutionality of affirmative action and state laws prohibiting affirmative action are discussed. Expanded affirmative action obligations of contractors regarding disabled employees and veterans are outlined. *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland* (constitutional challenge to a consent decree) is new to this edition.
- **Chapter 9:** Two new cases are excerpted in this chapter. The new chapter cases are *Gerald v. University of Puerto Rico* (hostile environment and tangible employment action) and *EEOC v. Management Hospitality of Racine* (harassment of teenage employees, affirmative defense). The Supreme Court's recent decision regarding the definition of a "supervisor" for purposes of applying the affirmative defense is discussed.
- **Chapter 10:** The continuing development of the ADA following enactment of the ADA Amendments Act (ADAA) is tracked. Discussions of leave and reassignment to vacant positions as reasonable accommodations are updated. All three chapter cases are new to this edition, including *Keith v. County of Oakland* (reasonable accommodation of a deaf lifeguard) and *Adeyeye v. Heartland Sweeteners* (reasonable accommodation of religious practice).

- **Chapter 11:** Substantial coverage of the Family and Medical Leave Act is retained and updated. *Lichenstein v. University of Pittsburgh Medical Center* (notification of the need for FMLA leave) is new to this edition.
- **Chapter 12:** New to this chapter are the *Kellar v. Summit Seating* (obligation under the FLSA to pay for all work that is "suffered or permitted") and *Maestras v. Day & Zimmerman LLC* (duties test for FLSA exemptions) cases. A discussion of "outdoor salesmen" is new to this edition, while discussions of tipped employees and compensable time are updated.
- **Chapter 13:** The ongoing legal challenges to the Patient Protection and Affordable Care Act are reviewed. The discussion of the fiduciary duties of employers with defined contribution plans is updated, including the Supreme Court's rejection of the presumption of prudence for plans offering a company's own stock. New chapter cases are *Helton v. AT&T* (breach of fiduciary duty to inform employee about changes to a pension plan) and *Tussey v. ABB* (breach of fiduciary duty to monitor fees charged to 401(k) participants).
- **Chapter 14:** This chapter reflects the recent efforts of the NLRB to breathe new life into the NLRA by applying it more broadly, including to the concerted activity of nonunion employees. Developments regarding agency fees, social media use, voluntary recognition, worker centers, and challenges to the collective bargaining rights of public employees are discussed. *NLRB v. RELCO Locomotives* (discriminatory discharges for union activity) is a new chapter case.
- **Chapter 15:** Two new cases are included in this chapter: *SeaWorld of Florida v. Perez* (application of the general duty clause to the death of a killer whale trainer during a show) and *City of Brighton v. Rodriguez* (whether an unexplained fall arose out of employment for workers' compensation purposes). There is also a new discussion of risk doctrines used by courts in determining eligibility for workers' compensation.
- **Chapter 16:** Three new chapter cases appear in this edition, including *Rachells v. Cingular Wireless Employee Services* (use of performance appraisals in a RIF context), *Compass Environmental v OSHRC* (failure to provide safety training), and *Rosebrough v. Buckeye Valley High School* (reasonable accommodation during training). Discussions of temp worker safety and the enforceability of training contracts are updated.
- **Chapter 17:** The *Koeppel v. Speirs* (intrusion upon seclusion) and *Ehling v. Monmouth-Ocean Hospital Services Corp.* (accessing of employee social media sites) cases are new to this edition. Material on the privacy of employees' electronic communications is updated.
- **Chapter 18:** Three new cases, including *Dorshkind v. Oak Park Place of Dubuque II* (public policy exception to employment at will), *Lockheed Martin v. Administrative Review Board* (whistleblower protection under the SOX Act), and *Lane v. Franks* (First Amendment speech rights of public employees), are excerpted in this chapter. Discussions of whistleblower protection, "similarly situated" employees in discriminatory termination cases, and challenges to tenure are expanded in this edition.
- **Chapter 19:** Chapter cases new to this edition are *Weekes-Walker v. Macon County Greyhound Park* (WARN Act), *Barnett v. PA Consulting Group* (selection for downsizing), and *Nanomech v. Suresh* (enforceability of noncompetition agreements). The use of statistical evidence in downsizing cases and application of restrictive covenants to employees in a wide range of occupations are highlighted in this edition.

Instructor Resources

Instructor's Manual

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The Instructor's Manual for this edition of *Employment Law for Human Resource Practice* provides a succinct chapter outline, answers to questions raised in the "Just the Facts" and "Practical Considerations" features, answers to case questions following excerpted cases, answers to end-of-chapter questions, and suggestions for in-class exercises and discussions (including role-plays, practical exercises, and more). *Citations for the cases from which the "Just the Facts" and end-of-chapter questions were drawn are now found in the instructor's manual.*

Test Bank

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The Test Bank questions for this edition not only test student comprehension of key concepts but also focus on business application and ethical implications. The questions have been updated to reflect the new content and cases of the fifth edition and expanded to include hypothetical questions that ask what the student, as a human resources manager, should do in particular situations. Donna J. Cunningham of Valdosta State University edited and updated the Test Bank for the fifth edition.

PowerPoint Slides

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PowerPoint slides have been created to highlight the key learning objectives in each chapter—including case summaries and hyperlinks to relevant materials. In addition, "Smart Practice" and "What Would You Do?" slides emphasize applying legal concepts to business situations (answers to these questions are provided in "Instructor's Note" slides at the end of the presentation). The PowerPoint slides were prepared by Donna J. Cunningham of Valdosta State University.

Business Law Digital Video Library

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This dynamic online video library features more than sixty video clips that spark class discussion and clarify core legal principles, including fourteen videos that address employment law topics (such as employment at will, employment discrimination, and employee privacy). The library is organized into four series:

- **Legal Conflicts in Business** includes specific modern business and e-commerce scenarios.
- **Ask the Instructor** contains straightforward explanations of concepts for student review.
- **Drama of the Law** features classic business scenarios that spark classroom participation.
- **LawFlix** contains clips from many popular films, including *Bowfinger*, *The Money Pit*, *Midnight Run*, and *Casino*.
- Access to the Business Law Digital Video Library is available at no additional charge as an optional package with each new student text. Contact your South-Western sales representative for details.

Note to the Instructor

Since I have been touting the contents of this book, it is only fair to acknowledge material that is largely omitted. Beyond a glancing blow struck in Chapter 1, this book provides relatively little information about such matters as the legislative process, courtroom procedures, and the historical development of employment laws. These are all worthwhile topics, but they are not emphasized in this book because its focus is the current substance of employment law and the implications for human resource practice. The treatment of labor law in this book does not reach a number of the more specialized issues in this area, but I do attempt to show how labor law continues to be relevant to both unionized and nonunion workplaces. Additionally, while cross-national comparisons can enhance our understanding of U.S. law, a comparative perspective is beyond the scope of this book.

For Susan and for Lulu.

Acknowledgments

Thanks to the many faculty and students who have used *Employment Law for Human Resource Practice*. I hope that this edition will serve your needs even better. If you are not presently using this book, I hope that you will consider adopting it. Please do not hesitate to contact me regarding any questions you have about the book (and ancillary materials) or suggestions for improvement (walshdj@miamioh.edu).

Many thanks also to numerous others at Cengage and its business partners. Being an author provides a small glimpse of the "cast of thousands" who are needed to produce a work of this type.

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PART 1

Introduction to Employment Law

CHAPTER 1

Overview of Employment Law

The purpose of this first chapter is to present a big picture of the body of law that we will apply to particular human resource practices throughout this book. This chapter contains an overview of employment laws, the rights they confer on employees, and the processes involved in enforcing these laws. Special attention is given to the use of alternatives to litigation to resolve employment disputes.

Heard at the Staff Meeting

Congratulations on your new job as human resources manager! You pour a cup of coffee and settle into your seat to hear the following reports from staff members:

"We've lined up some interns from a local college to take the place of vacationing staff members this summer. We won't pay the interns, of course, but hopefully they will be self-starters who can make a real contribution."

"In the interest of security, we now have a firm that checks the backgrounds of our job candidates. Anyone with an arrest or conviction is immediately dropped from consideration for employment."

"A number of our employees are in the Army Reserves. One of them has been deployed to Afghanistan twice and has missed more than two years of work. She will be returning to the United States soon and has indicated that she wants her job back. Her supervisor believes that since her job skills are now out of date and she might be deployed again at any time, it would be best not to reinstate her."

"With health insurance being so expensive these days, we're requiring all of our applicants to complete lengthy medical histories, including whether certain diseases run in their families."

You get up to get another—large—cup of coffee and feel fortunate that you were paying attention during that employment law class you took.

What legal issues emerged during this staff meeting? What should this company be doing differently to better comply with the law? Although you might not encounter this many legal problems in one sitting, employment law pervades virtually every aspect of human resource practice, and managers regularly confront employment law questions.

U.S. Employment Law Is a Fragmented Work in Progress

"Just tell me what the law is, and I'll follow it." Were matters only that simple! No single set of employment laws covers all workers in the United States. Instead, the employment law system is a patchwork of federal, state, and local laws. Whether and how laws apply also depend on such things as whether the employees work for the government or in the private sector, whether they have union representation, and the size of their employer. Our principal focus will be on federal laws because these reach most widely across U.S. workplaces and often serve as models for state and local laws. However, we will also mention significant variations in the employment laws of different states.

There is another problem with the idea of just learning the legal rules and adhering to them. Employment law is dynamic. New law is created and old law is reinterpreted continuously. Further, changing workplace practices pose new legal questions. At any point in time, there are "well-settled" legal questions on which there is consensus, other matters that are only partially settled (perhaps because only a few cases have arisen or because courts have issued conflicting decisions), and still other questions that have yet to be considered by the courts and other legal decision makers. Attaining a solid grasp of employment law principles will allow you to make informed judgments in most situations. You must be prepared to tolerate some ambiguity and keep learning, however, as the law of the workplace continues to develop.

Sources of Employment Law

What comes to mind when you think of the law? Judges making decisions in court cases? Congress legislating? The Constitution? All of these are parts of the law in general and employment law in particular. Legal rules governing the workplace are found in the U.S. Constitution and state constitutions, statutes enacted by legislatures, executive orders issued by presidents and governors, regulations created by administrative agencies, and judicially authored common law. All of these pieces of law are regularly interpreted and expanded on by the courts as they are presented with specific legal disputes (cases) to decide. Distinguishing between these basic sources of law is useful because some forms of law are more authoritative than others, apply to particular groups of employees, or provide for different enforcement mechanisms and remedies.

Constitutions

Constitutions are the most basic source of law. **Constitutions** address the relationships between different levels of government (e.g., states and the federal government) and between governments and their citizens. A legal claim based on a constitution must generally assert a violation of someone's constitutional rights by the government (in legal parlance, the element of "state action" must be present). In practical terms, this means that usually only employees of government agencies—and not employees of private corporations—can look to the U.S. Constitution or state constitutions for protection in the workplace. Constitutional protections available to government employees include speech rights, freedom of religion, protection from unreasonable search and seizure, equal protection under the law, and due process rights.

Statutes

In our system of government, voters elect representatives to legislative bodies such as the U.S. Congress. These bodies enact laws, or **statutes**, many of which affect the workplace. Among the many important statutes with implications for human resource practice are

Title VII of the Civil Rights Act, the National Labor Relations Act, the Equal Pay Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act.

Executive Orders

The executive branch of government has the power to issue executive orders that affect the employment practices of government agencies and companies that have contracts to provide goods and services to the government. **Executive orders** function much like statutes, although they reach fewer workplaces and can be overridden by the legislative branch. One important example of an executive order affecting employment is Executive Order (E.O.) 11246, which establishes affirmative action requirements for companies that do business with the federal government.

Regulations, Guidelines, and Administrative Decisions

When Congress enacts a statute, it often creates an agency, or authorizes an existing one, to administer and enforce that law. Legislators do not have the expertise (and sometimes do not have the political will) to fill in all the details necessary to put statutes into practice. For example, Congress mandated in the Occupational Safety and Health Act that employers provide safe workplaces but largely left it to the Occupational Safety and Health Administration (OSHA) to give content to that broad principle by promulgating safety standards governing particular workplace hazards. Formal **regulations** are put in place only after an elaborate set of requirements for public comment and review has been followed. Regulations are entitled to considerable deference from the courts (generally, they will be upheld when challenged), provided that the regulations are viewed as reasonable interpretations of the statutes on which they are based.[1] Agencies also contribute to the law through their decisions in individual cases that are brought before them and the guidance that they provide in complying with laws.

Common Law

Many disputes are resolved through courts interpreting and enforcing the types of law discussed earlier. However, sometimes courts are asked to resolve disputes over matters that have not been objects of legislation or regulation. Over time, courts have recognized certain **common law** claims to remedy harm to people caused by other people or companies. Common law is defined by state courts, but broad similarities exist across states. One branch of common law is the traditional role of the courts in interpreting and enforcing contracts. The other branch is recognition of various **tort** claims for civil wrongs that harm people. Tort claims relevant to employment law include negligence, defamation, invasion of privacy, infliction of emotional distress, and wrongful discharge in violation of public policy.

Substantive Rights Under Employment Laws

Employment laws confer rights on employees and impose corresponding responsibilities on employers. Paradoxically, the starting point for understanding employee rights is a legal doctrine holding that employees do not have any right to be employed or to retain their employment. This doctrine, known as **employment at will**, holds that in the absence of a

[1] *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

contract promising employment for a specified duration, the employment relationship can be severed at any time and for any reason not specifically prohibited by law. Statutory and other rights conferred on employees have significantly blunted the force of employment at will. But in the absence of any clear right that employees can assert not to be terminated, employment at will is the default rule that permits employers to terminate employment without needing to have "good" reasons for doing so.

Broadly speaking, employees have the following rights under employment laws.

Nondiscrimination and Equal Employment Opportunity

A central part of employment law is the set of protections for employees against discrimination based on their race, sex, age, and other grounds. The equal protection provisions of the U.S. Constitution (Fourteenth Amendment), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act are examples of federal laws that prohibit discrimination in employment and express the societal value of equal employment opportunity.

Freedom to Engage in Concerted Activity and Collective Bargaining

Another approach to protecting workers is to provide them with greater leverage in dealing with their employers and negotiating contractual standards of fair treatment. Labor laws exist to protect the rights of employees to join together to form labor unions and attempt to improve their terms and conditions of employment through collective bargaining with their employers. Important federal labor laws include the National Labor Relations Act, the Railway Labor Act, and the Civil Service Reform Act (covering collective bargaining by federal government employees).

Terms and Conditions of Employment That Meet Minimum Standards

Some employment laws protect workers in a more direct fashion by specifying minimum standards of pay, safety, and other aspects of employment. Federal laws exemplifying this approach include the Fair Labor Standards Act (minimum wage and overtime pay requirements), the Occupational Safety and Health Act (workplace safety standards), and the Family and Medical Leave Act (leave policy requirements).

Protection of Fundamental Rights

Some legal challenges to employer practices are based on broader civil liberties and rights. For example, a variety of privacy protections exist, including privacy torts, the Electronic Communications Privacy Act, the Employee Polygraph Protection Act, and the Fair Credit Reporting Act.

Compensation for Certain Types of Harm

Employees can take legal action to recover damages when, for example, they are the victims of employer negligence, are defamed, or have emotional distress inflicted upon them; their employment contract is breached; or they are wrongfully discharged.

In the *Casias v. Wal-Mart Stores* case that follows, a terminated employee sues his former employer. Although one might sympathize with the employee under the facts of this case, it is apparent from this decision that *employment at will* still presents a large hurdle for terminated employees.

Casias v. Wal-Mart Stores
695 F. 3d 428 (6th Cir. 2012)

OPINION BY CIRCUIT JUDGE CLAY:

In this wrongful discharge action, Plaintiff Joseph Casias, a former Wal-Mart employee, appeals the district court's . . . dismissal [of his lawsuit] for failure to state a claim following his termination for failing a drug test in violation of Defendants' drug testing policy. . . . [W]e AFFIRM the judgment of the district court.

* * * Plaintiff was an employee of Wal-Mart's Battle Creek, Michigan store from November 1, 2004 until November 24, 2009, when Plaintiff was terminated from Wal-Mart after he tested positive for marijuana, in violation of the company's drug use policy.

Plaintiff was diagnosed with sinus cancer and an inoperable brain tumor at the age of 17. During his employment at Wal-Mart, Plaintiff endured ongoing pain in his head and neck. Although his oncologist prescribed pain relief medication, Plaintiff continued to experience constant pain as well as other side effects of his medication. After Michigan passed the MMMA [Michigan Medical Marihuana Act] in 2008, Plaintiff's oncologist recommended that he try marijuana to treat his medical condition. The Michigan Department of Community Health issued Plaintiff a registry card on June 15, 2009, and, in accordance with state law, he began using marijuana for pain management purposes. Plaintiff stated that the drug reduced his level of pain and also relieved some of the side effects from his other pain medication. Plaintiff maintains that he complied with the state laws and never used marijuana while at work; nor did he come to work under the influence. Instead, Plaintiff used his other prescription medication during the workday and only used the marijuana once he returned home from work.

In November 2009, Plaintiff injured himself at work by twisting his knee the wrong way while pushing a cart. Plaintiff contends that he was not under the influence of marijuana at the time of his accident. Although Plaintiff came to work the next day, he had trouble walking and was driven to the emergency room by a Wal-Mart manager to receive treatment. Since Plaintiff was injured on the job, he was administered a standard drug test at the hospital in accordance with Wal-Mart's drug use policy for employees. Prior to his drug test, Plaintiff showed his registry card to the testing staff to indicate that he was a qualifying patient for medical marijuana under Michigan law. Plaintiff then underwent his drug test, wherein his urine was tested for drugs.

One week later, Defendant notified Plaintiff that he tested positive for marijuana. Plaintiff immediately met with his shift manager to explain the positive drug test. Plaintiff showed the manager his registry card and also stated that he never smoked marijuana while at work or came to work under the influence of the drug. Plaintiff explained that the positive drug test resulted from his previous ingestion of marijuana within days of his injury in order to treat his medical condition. The shift manager made a photocopy of Plaintiff's registry card.

The following week, Wal-Mart's corporate office directed the store manager . . . to fire Plaintiff due to the failed drug test, which was in violation of the company's drug use policy. Wal-Mart did not honor Plaintiff's medical marijuana card. Plaintiff sued Wal-Mart . . . for wrongful discharge and violation of the MMMA, arguing that the statute prevents a business from engaging in disciplinary action against a card holder who is a qualifying patient. * * * [T]he district court held that the MMMA does not protect Plaintiff's right to bring a wrongful termination action because the MMMA does not regulate private employment. Plaintiff now appeals.

* * * According to the MMMA,

> *A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act. . . .*

The parties' dispute focuses on the use of the word "business" and whether the word simply modifies the words "licensing board or bureau," or in the alternative, whether "business" should be read independently from "licensing board or bureau." * * * The district court concluded that "the MMMA does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse action by the state." Specifically, the court concluded that the "MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or

that it otherwise limits the range of allowable private decisions by Michigan businesses." * * *

We agree with the district court and find that the MMMA does not impose restrictions on private employers, such as Wal-Mart. * * * Based on a plain reading of the statute, the term "business" is not a stand-alone term as Plaintiff alleges, but rather the word "business" describes or qualifies the type of "licensing board or bureau." Read in context, and taking into consideration the natural placement of words and phrases in relation to one another, and the proximity of the words used to describe the kind of licensing board or bureau referred to by the statute, it is clear that the statute uses the word "business" to refer to a "business" licensing board or bureau, just as it refers to an "occupational" or "professional" licensing board or bureau. The statute is simply asserting that a "qualifying patient" is not to be penalized or disciplined by a "business or occupational or professional licensing board or bureau" for his medical use of marijuana.

Plaintiff also argues that the plain language of the statute somehow regulates private employment relationships, restricting the ability of a private employer to discipline an employee for drug use where the employee's use of marijuana is authorized by the state. We find, however, that the statute never expressly refers to employment, nor does it require or imply the inclusion of private employment in its discussion of occupational or professional licensing boards. The statutory language of the MMMA does not support Plaintiff's interpretation that the statute provides protection against disciplinary actions by a business, inasmuch as the statute fails to regulate private employment actions.

We also note that other courts have found that their similar state medical marijuana laws do not regulate private employment actions. Thus, in addition to being unpersuasive on its face, Plaintiff's interpretation of the MMMA, which would proscribe employer terminations of qualified medical marijuana users, is in direct conflict with other states which have passed similar legislation.

For similar reasons, we dismiss Plaintiff's argument that Plaintiff's discharge was contrary to public policy. The district court held that * * * accepting Plaintiff's argument would create a new category of protected employees, which would "mark a radical departure from the general rule of at-will employment in Michigan." We agree with the district court that accepting Plaintiff's public policy interpretation could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marijuana in accordance with the Act. Such a broad extension of Michigan law would be at odds with the reasonable expectation that such a far-reaching revision of Michigan law would be expressly enacted. * * * The MMMA does not include any such language nor does it confer this responsibility upon private employers. We therefore reject Plaintiff's policy argument.

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. Why do you suppose that the employer ordered a drug test following the workplace injury and decided to terminate the employee despite being aware of his lawful medical use of marijuana?
3. What does employment at will mean? How does it figure into the decision in this case?
4. Do you agree with the decision in this case? Why or why not?

The foregoing excerpt from *Casias v. Wal-Mart Stores* is the first of a number of employment law cases that you will have the opportunity to read in this text. The words are those of the judge who wrote the decision. You would find the same words if you looked up the case—which you can easily do by using an online legal database and searching for either the names of the parties or the citation that appears below the names of the parties. The only difference is that we have shortened the case by selecting only the most essential details and by removing internal citations and footnotes. By seeing the law applied to particular factual circumstances and reading the judges' rationales for their decisions, you will gain a fuller understanding of the law.

When reading cases, it is important to pay attention to how the legal issues are framed. One might be tempted to say that the legal issue in the *Casias* case was whether the store had the right to terminate this employee for his lawful use of marijuana to manage pain resulting from cancer and a brain tumor, or more generally, whether the termination was fair. But these statements do not get to the heart of the *legal* issue in this case. Under

employment at will, a termination is lawful unless the terminated employee proves that he or she had some specific right not to be terminated under the circumstances. Not finding express protection for employees of private businesses from termination for medical marijuana use under the state's medical marijuana law, nor more generally, a clear public policy that would be jeopardized by allowing such terminations, the court fell back on the principle of employment at will. Whether the termination was necessary, wise, or fair was irrelevant to the legal issue of whether it was lawful under employment at will.

Determining Which Employment Laws Apply

Because U.S. employment law is a patchwork of legal protections that apply to some groups of employees but not others, it is necessary to briefly elaborate on some of the key contextual factors that determine which, if any, employment laws apply in a given situation. You will need to consider these factors when presented with situations posing potential legal problems.

Public or Private Sector Employment

The legal environment differs substantially depending on whether **public sector** (i.e., government) employees or **private sector** employees are being considered. Public and private sector does not refer to whether a company trades its stock on the stock market (i.e., publicly traded versus privately held companies), but rather whether the employer is a government agency or a corporation (including private, nonprofit agencies). Public employees make up roughly 15 percent of the workforce. One reason that public employees are a different case has already been mentioned. In general, constitutional protections pertain only to public employees and not to private-sector employees. Beyond this, public employees are often covered by state or municipal civil service laws and tenure provisions.

Not all comparisons favor public employees. Public employees are subject to restrictions on their political activities, excluded from coverage under the National Labor Relations Act and the Occupational Safety and Health Act, and limited in their ability to sue for violations of federal law. This last point should be underscored. A series of U.S. Supreme Court decisions has held, based on the Eleventh Amendment and the broad concept of state sovereignty, that state governments cannot be sued by their public employees, whether in state or federal court, for violations of such federal employment laws as the Fair Labor Standards Act and the Americans with Disabilities Act (however, the Court reached the opposite decision regarding certain suits brought under the Family and Medical Leave Act).[2] Thus, even though these federal laws still apply to state government employees, options for enforcement are limited.

Unionized or Nonunion Workplace

When employees opt for union representation and negotiate a collective bargaining agreement with their employer, the employer is contractually committed to live up to the terms of the agreement. In contrast to the vast majority of employees who lack employment contracts, unionized employees have many of their terms and conditions of employment spelled out in enforceable labor agreements. These contractual terms typically go well beyond the minimum requirements of the law (e.g., by providing for daily overtime rather than the weekly overtime required by federal law). Employers in unionized workplaces are

[2]*Alden v. Maine*, 527 U.S. 706 (1999); *University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Coleman v. Ct. of App. of Md.*, 132 S. Ct. 1327 (2012).