

Employment Law for Business

Ninth Edition

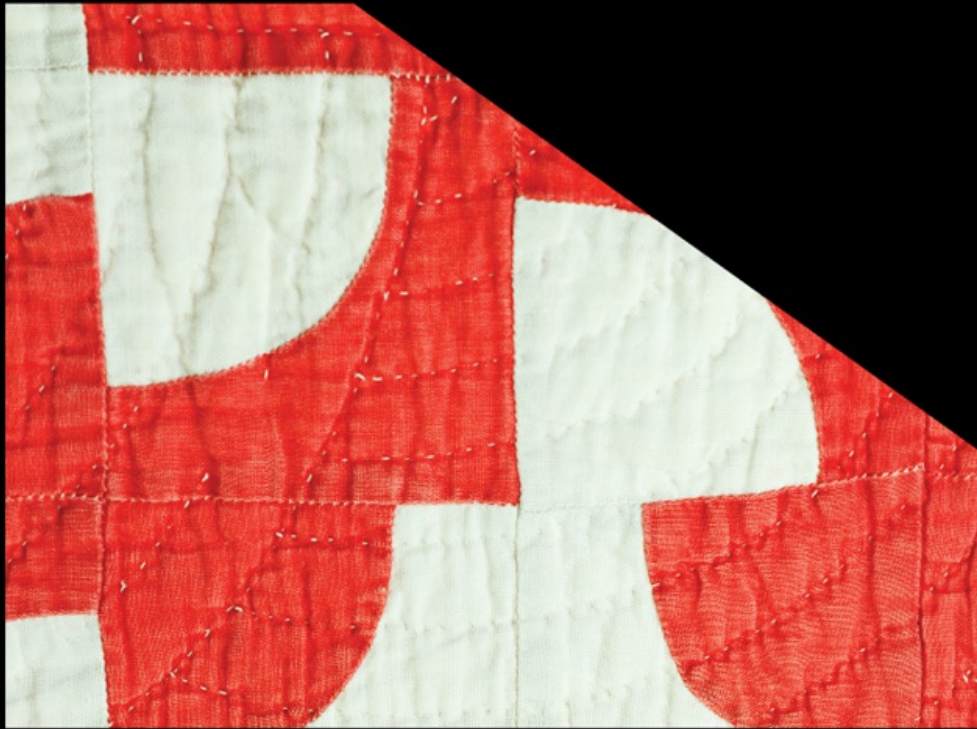


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Dawn D. Bennett-Alexander
Laura P. Hartman

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**Dawn D.
Bennett-
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University of Georgia

Laura P. Hartman

DePaul University



EMPLOYMENT LAW FOR BUSINESS, NINTH EDITION

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Dedication

To my Ancestors who endured the Middle Passage, slavery, and its aftermath, so that I could exist; and my parents, Rev. William H., and Anne P. Liles Bennett, who, by their lives of steadfast hard work, faith, and civic engagement made me and my contributions not only possible, but inevitable.

—My progeny:

Jennifer Dawn Bennett Alexander Jones

Ann Alexis Bennett Alexander

Tess Alexandra Bennett Harrison

—and my Grands:

Makayla Anne Jones

Edward Christian Alexander Jones

You are such a big part of why I work so hard to make the world a better place.

— The indomitable Lizzie Lou Jackson Thomas (1918–2015) who was one of my first introductions into coming to understand the reality of the dehumanizing invisible lives of difference that we lead and that I needed to work to change it. Lizzie Thomas was a long-time member of the church my father pastored. After the birth of my first daughter, Ms. Thomas insisted on giving me the gift of spotlessly cleaning my heretofore unseen house from top to bottom without asking a single question about what went where. When I asked how in

the world she knew what to do, her simple answer opened my eyes to an entirely new reality: she was a maid in the homes of the wealthy in Washington, DC. I was stunned. I had known her all my life and had no idea. I only ever knew her as a tiny, hardworking, generous, dependable church member with a big, kind heart, indefatigable energy, and ready, tinkling laugh. I quickly learned

that those she worked for had no idea of who she was outside of being their maid. I, on the other hand, only knew her as a wonderful human being and didn't even know she was a maid. They had no idea of the lively, lovely Lizzie Thomas I had known and enjoyed all my life. They had no real idea of who she was other than the woman who cooked for them, cleaned for them, and served their needs. That simple exchange spurred me on to a life of fighting for the equality of humanity and a quest to have people viewed as human beings deserving of respect rather than nameless, faceless group members judged on the basis of their socially constructed "place" in society based on race, gender, and other immutable characteristics. RIP, Lizzie Thomas. And thank you. Your exemplary life and simple words had a profound impact far greater than you ever knew.

—My sister, Brenda Lynn Bennett Watkins, without whose love, support and devotion my life would be such a different place. Thank you, my sister. What would I do without you?

—And last but certainly not least, to Jere W. Morehead, 22nd president of the University of Georgia and my 30-year colleague. Keep up the good and courageous work and I'll keep sending the love. Simply put: You. Rock.

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D D B-A

For those whose voices continue to be silenced by others, ours is now and always a responsibility to speak. *Kenbe la*: stand firm, stay true.

L P H

About the Authors

Dawn D. Bennett-Alexander *University of Georgia*



Courtesy Mike Horn

With over forty awards to her credit, Dawn D. Bennett-Alexander, Esq., is a tenured associate professor of Employment Law and Legal Studies at the University of Georgia's Terry College of Business. An attorney admitted to practice in the District of Columbia and six federal jurisdictions, she is a *cum laude* graduate of the Howard University School of Law and a *magna cum laude* graduate of the Federal City College, now the University of the District of Columbia. With her coauthor, she was cofounder and cochair, of the Employment and Labor Law Section of the Academy of Legal Studies in Business and coeditor of the section's *Employment and Labor Law Quarterly*; past coeditor of the section's newsletter; and past president of the Southeastern Academy of Legal Studies in Business. Among other texts, she coauthored, with Linda F. Harrison, McGraw-Hill's groundbreaking *The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society*, in 2011. Bennett-Alexander taught Employment Law in the University of North Florida's MBA program from 1982 to 1987 and has been conducting Employment Law seminars for managers and supervisors since 1985. Prior to teaching, Bennett-Alexander worked in Washington, DC, at the Federal Labor

Relations Authority, the White House Domestic Council, the Federal Trade Commission, the Department of Justice Appellate Division, Antioch School of Law, and and as law clerk to the Honorable Julia Cooper Mack as she became the first black female judge to be appointed to a court of last resort in the country, the D.C. Court of Appeals. Bennett-Alexander publishes widely in the Employment Law area; is a noted expert on Employment Law and Diversity and Inclusion issues; was asked to write the first-ever sexual harassment entry for *Grolier Encyclopedia*; edited the National Employee Rights Institute's definitive book on federal employment rights; has chapters in several other books including five Employment Law entries in Sage Publications' first and second editions of the *Encyclopedia of Business Ethics and Society*; has been widely quoted on TV and radio, and in the print press, including *USA Today*, *The Wall Street Journal*, and *Fortune* magazine; and is founder of Practical Diversity, consultants on Diversity and Inclusion as well as Employment Law issues. Among other accomplishments, Bennett-Alexander was one of only ten winners of the prestigious national award for teaching excellence, the 2015 Elizabeth Hurlock Beckman award, presented an invited diversity paper for the Oxford Roundtable at Oxford University, Oxford, England in 2014, and was a 2000–2001 recipient of the Fulbright Senior Scholar Fellowship under which she taught at the Ghana School of Law in Ghana, West Africa, and conducted research on race and gender in employment. She has also taught in Budapest, Krakow, Austria, Prague, Australia, New Zealand, Italy, and Costa Rica. She is the recipient of the 2011 University of Georgia President's Martin Luther King, Jr., Fulfilling the Dream Award, her University's highest diversity award, for her outstanding work in building bridges to understanding and unity; the 2010 recipient of the page vii University of Georgia's Terry College of Business inaugural Diversity Award; and the 2009 recipient of the Ernst & Young Inclusive Excellence Award for Accounting and Business School faculty. She dedicates all her research and writing to her Ancestors, three daughters, and two grandchildren.

Laura P. Hartman *DePaul University (Chicago) & The School of Choice/l'Ecole de Choix (Haiti)*



Courtesy Marketing & Communications Department, Questrom School of Business

Laura Pincus Hartman is on extended leave from DePaul University to serve as Executive Director of the School of Choice Education Organization, a U.S.–based nonprofit that she co-founded, which oversees the School of Choice/l'Ecole de Choix, a unique trilingual elementary school in Haiti that provides high-quality leadership development education to children living in extreme conditions of poverty.

From 2015–2017, Prof. Hartman also served as the inaugural Director of the Susilo Institute for Ethics in the Global Economy and Clinical Professor of Business Ethics in the Department of Organizational Behavior. She also was an Associated Professor at the Kedge Business School (Marseille, France).

At DePaul, Prof. Hartman is Vincent de Paul Professor of Business Ethics at DePaul University's Driehaus College of Business and has held numerous other positions, such as Associate Vice President for Academic Affairs and Director of its Institute for Business and Professional Ethics. Hartman also has taught at INSEAD (France), HEC (France), the Université Paul Cezanne Aix Marseille III, the University of Toulouse, and at the Grenoble Graduate School of Business. Hartman is past president of the Society for Business Ethics, presently co-chairs its Committee on International Collaborations, and directs its Professional Mentorship Program.

In the private sector, concurrent to her academic work, Hartman

was Director of External Partnerships for Zynga.Org (2009–2012), through which Zynga players of *FarmVille*, *Words with Friends*, and other online games have contributed over \$20 million toward both domestic and international social causes. From 2009–2011, she represented DePaul University on the Worldwide Vincentian Family’s Vincentian Board for Haiti, and was instrumental in the hands-on design and implementation of a micro-development, finance, and education system for people living in poverty in Haiti. A thought leader in leadership and ethical decision making, Hartman’s work has resulted in the publication of more than 80 articles, cases, and books, and demonstrates the potential for innovative and profitable partnerships to alleviate poverty while providing measurable value to all stakeholders involved.

A winner of the Microsoft CreateGOOD award at Cannes Lions (2015), named one of *Ethisphere’s* 100 Most Influential People in Business Ethics, and one of *Fast Company’s* Most Creative People in Business (2014), Hartman serves as an advisor to a number of start-ups and has consulted with multinational for-profits, non-profits, and educational institutions. She was invited to BAInnovate’s inaugural UnGrounded lab and has been named to *Fast Company’s* “League of Extraordinary Woman.”

Hartman graduated *magna cum laude* from Tufts University and received her law degree from the University of Chicago Law School. She divides her time between Haiti, Chicago, and Sint Maarten, and has been a mother to two daughters.

Cover photo: The cover photo is of a classic and well-known American quilt block called Drunkard's Path. I am an avid quilter not just because I enjoy it, but because in so many ways for me, quilting is a metaphor for life and so much in this text. Nothing illustrates that more than this quilt block. The quilt block is composed of only two curved pieces, one concave quarter square and one convex quarter circle. While the curves fit together perfectly and look neat and tidy when you look at the finished, quilt, when they are being sewn together, right sides facing, the two pieces look like they will never fit. After all, one is concave and one is convex. Putting them together is not an easy task and looks messy in the process. But, in fact, they do fit together and the result is a lovely quilt block with graceful, beautifully fitting curves. The reason I love Drunkard's Path so much and enjoy working with it is that it always reminds me of what so much of this text is about. It is one of the reasons I admire it so. People who seem quite different in terms of race, gender, ethnicity, religion, sexual orientation, disabilities, etc., much like the Drunkard's Path pieces, and may not seem like they will fit together. But, in the end, they actually do end up fitting together quite well when the law is used and applied as intended. In addition, just by using different ways of putting these same two pieces together and using contrasting colors, the quilt can look entirely different including circles, concentric diamonds, and ocean waves. Like people, change a thing here or there like hair, eye color, skin color, etc., and we may look different, but, like the two quilt pieces, we are all actually the same basic thing: a human being. I hope you enjoy this beautiful cover as much as we do.

On this day, as I write this, the country has just experienced the election and inauguration of a new president of the United States (see Addendum, below). It is unusual for us to mention politics in our pages. After all, we, as a society, like to think that "the law is the law"

so politics does not come into it. Since this is a legal textbook we generally honor that. We do so even though we realize that law does not occur in a vacuum. It is not created in one. It is not interpreted in one, and it is not enforced and executed in one. Other factors greatly impact both what becomes law as well as how laws are imposed, executed, and interpreted.

However, like the new president, this presidency and administration is not business as usual. The reason we mention it is not political. Everyone is entitled to their own political beliefs and we absolutely respect and honor that. The reason the recent election must be mentioned is because a great deal of the election cycle focused on issues that are greatly impacted by this text. These issues were portrayed in a very negative light for nearly a year and a half. In the end, the candidate who did so won the election. The impact of the negative portrayal by such a high-profile figure was immediately clear when individual acts of harassment and violence against groups protected by the laws in this text broke out across the country. The perpetrators cited the position advocated by the winner as the basis for their feeling validated in carrying out the violence. *Time* magazine reported that the Southern Poverty Law Center noted a significant rise in hate crimes in the weeks after the election, with over 200 incidents in just over one month, as white supremacists celebrated the winner's victory.¹

As such, and because the workplace is a microcosm of the greater society, there are bound to be repercussions in the workplace. Since, by the nature of the negativity, many of the groups protected by the laws herein and traditionally the objects of discrimination will form most of those claims, it is worthy of note here. So, politics

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or no, this we cannot ignore. We choose not to take the head-in-the-sand approach in providing you information on this subject matter. It will also help you to be prepared and have context for what will inevitably find its way into the workplace.

This textbook is primarily about workplace discrimination under the American laws providing protection from discrimination against groups traditionally treated less well because of some immutable

characteristic having nothing to do with their qualifications for a job. Women, the disabled, racial and ethnic minorities, and religious minorities have all been, at some point or another, marginalized, demeaned, castigated, even mocked by the person now leading the country. Supporters took this as permission to do the same, or as validation of their own previously held positions regarding those groups. For instance, former Ku Klux Klan leader, David Duke, today tweeted out his congratulations on the inauguration, saying “We did it!”² Tomorrow, the day after the inauguration, Washington, DC, is scheduled to have what has been said to be the largest demonstration in the history of National Mall demonstrations. The Women’s March is bringing together from all over the country, thousands of women as well as men, who are concerned about the way women and others have been treated by the new officeholder and what that portends for the future. Over 600 demonstrations are being held across the rest of the country and world that day for the same reason.³

But, aside from the people themselves, who may be the object of the claims, there is also the issue of the legal changes to come. We are not seers and we have no crystal ball. However, given the promises made by the new officeholder over the past 18 months, and the consistency of those promises regarding issues impacting these same groups, we have every reason to believe that changes will come and that they may greatly impact the groups protected by these laws, including women, immigrants, minorities, the LGBT community, and issues such as equal pay, family leave, and labor unions, among others.

In the 24+ years since we first began authoring this text, we have seen presidents come and go. We have watched as presidents either engaged in some version of “benign neglect,” or as the outgoing president (Obama), vigorous enforcement of the laws covered by this text. We rarely mention them outside of the context of saying they signed something into law. We have never given an opinion of them. This time around, given the statements made over the past 18 months of the election cycle by the winner of the election, we must. We must say that we stand steadfastly behind the laws this textbook addresses.

We must say that we believe in the worth and dignity of all employees and applicants—all human beings—and believe they are due respect as human beings. Any policies that fly in the face of that are not okay with us. We hope for the best, but given the rhetoric of the past 18 months, we nervously await the fate of these laws. This is in stark contrast to this author's elation on September 24, 2016, as she stood before the 1964 Civil Rights Act exhibit at the historic dedication and opening ceremony of the Smithsonian's newest addition, the National Museum of African American History and Culture on the National Mall in Washington, DC.

Meanwhile, we will continue to do our part to enlighten, to teach, and to stand in the truth of the U.S. Constitution that all are created equal and endowed with certain inalienable rights. Rights carried out by both the U.S. Constitution as well as the laws reflecting them such as those in this text. As an addenda to that, I invite you to check out my TED Talk on these issues on YouTube. Just put my name and/or Practical Diversity into your search engine or YouTube search and it will show up.

Enjoy! As always, we are delighted to receive your page x feedback and we very much appreciate it!

Dawn D. Bennett-Alexander
Athens, GA
January 20, 2017

Addendum: Nearly six months have passed since I wrote the prelude immediately above. It is so interesting to see the changes between then and now. As you are well aware, the Women's March was, in fact held, and it became an on-going, embarrassing sore spot that the attendance was much larger than that of the inauguration the day before. Despite the fact that EEOC commissioner, Chai Feldblum, said on March 14, 2017, that the agency's priorities would remain the same under the new administration,⁴ in the nearly six-month time period since the above, some of our worst fears are being realized.⁵

There has been a rolling back of several gains made in the law over decades. Among them, there has been an order across the board to

federal agencies to scale back civil rights activities, including a proposal to fold the four-decades-old Office of Federal Contract Compliance Programs (OFCCP) into the Equal Employment Opportunity Commission (EEOC).⁶ Both are extremely important agencies with very different roles in stamping out workplace discrimination. The executive order put in place by President Obama to make federal contractors who supply goods and services to the federal government more accountable for discriminatory employment practices and deter them has been revoked.⁷ A religious liberty executive order has been instituted that could allow employers to discriminate on the basis of their religious beliefs,⁸ to name a few things. Just today, again huge demonstrations were held across the country, in part in response to the rise in racist and violent acts toward minorities, most recently the stabbing death of two (and injury of a third) Portland, Oregon, commuter train passengers who tried to intervene when allegedly white supremacists were shouting “hate speech toward a variety of ethnicities and religions” at a young woman wearing a hijab and her friend.⁹ Things are moving very quickly. All we can say is that the text is as up to date as it could be at the time of publication, but do keep an eye out for changes that may impact what has been the established law you will read within these pages. DDB-A 6/3/2017.

With such gratitude to so many, some of our students today page xi come from home environments of political peace and stability. Others come from countries that currently or historically are or were in conflict. Who could have anticipated that ecosystems that were traditionally considered stable would be the source or location of today’s instability? Whether one supports their local systems or opposes them, likely all have been somewhat surprised by the upheaval the world has experienced in recent years.

Often, we and our students fall into a sense of complacency surrounding the issues that fill the front pages of newspapers today and do not share the passion represented so poignantly in Dawn’s message, above. That is unfortunate because, without passion, there is inaction and apathy.

To the contrary, no matter what issues are important to you, we encourage you to use your voices, inspired by education, to impact your lives and the lives of others in a way that raises the quality of life for all.

Dawn might agree that I have not been able to keep quiet in the face of injustice. The responsibility that we now have as educators—or even as mere information sources—is how to transfer not merely the information but also the empathy, the deeply held disquiet in the face of injustice, the grueling sense of indignity even when the affront is not against ourselves. Through this text and our work, we seek to equip others with a strength of voice so that those without a voice can be heard more clearly.

Many years may have passed since our first edition was published, and that first edition came out a quarter of a century after Title VII had been passed. It may seem like a great deal of time, and perhaps much has changed, but *not enough*. Whether one agrees with his politics or not, it seems fitting to begin each edition with past President Obama's words, "Change will not come if we wait for some other person, or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek."

Be that change.

Laura Pincus Hartman

Port-au-Prince, Haiti & Chicago, USA June 2017

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²Source: http://www.huffingtonpost.com/entry/donald-trump-david-duke_us_58824741e4b0e3a735689f21.

³Wang, Hansi Lo, "Protesters Prepare for Women's March after Trump's Inauguration," *NPR* (January 20, 2017), <http://www.npr.org/sections/thetwo-way/2017/01/20/510706246/protesters-prepare-for-womens-march-after-trumps-inauguration>.

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- ⁵Beirich, Heidi, "Hatred Is on the Rise in America, But What Caused It?" Southern Poverty Law Center for *HuffPost* (June 3, 2017), http://www.huffingtonpost.com/entry/what-caused-increase-hate-crimes_us_593071f5e4b010df62cc7671?ixp
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- ⁷Presidential Executive Order on the Revocation of Federal Contracting Executive Orders, 4/29/17, <https://www.whitehouse.gov/the-press-office/2017/03/27/presidential-executive-order-revocation-federal-contracting-executive>.
- ⁸Presidential Executive Order Promoting Free Speech and Religious Liberty, 5/4/2017. <https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty>
- ⁹Marco, Tony, Jason Hanna, and Steve Almasy, "Portland train stabbings: FBI looking into possible hate crime charges," CNN (May 28, 2017), <http://www.cnn.com/2017/05/26/us/portland-train-stabbing/>

Must an employer provide breaks for a nursing mother to express milk, and a private place in which to do it?

Must an employer allow time off to care for a sick child if the employee is gay and is raising a child not his own, with his partner of several years?

If a disabled employee could perform the job requirements when hired, but the job has progressed and the employee is no longer able to perform, must the employer keep her on?

Is an employer liable when a supervisor sexually harasses an employee, but the employer knew nothing of it?

Is an employer liable for racial discrimination because she terminates a black male who refuses to abide by the “no-beard” policy?

Can an employer be successfully sued for “reverse discrimination” by an employee who feels harmed by the employer’s affirmative action plan?

Can an employer institute a policy prohibiting Muslim women from wearing their hijabs (head scarves)?

If an employer has two equally qualified applicants from which to choose and prefers the white one to the black one, is it illegal discrimination for the employer to hire the white applicant, or must the employer hire the black one?

Must an employer send to training the employee who is in line to attend, if that employee will retire shortly?

Can an employer terminate a female employee because male employees find her pleasing shape too distracting?

Is it a violation of wage and hour laws for an employer to hire his 13-

year-old daughter to pick strawberries during the summer?

Is an ex-employer liable for defamation if he gives a negative recommendation about an ex-employee to a potential employer who inquires?

Must an employer disclose to employees that chemicals with which they work are potentially harmful?

Can an employer stop employees from forming a union?

These types of questions, which are routinely decided in workplaces every day, can have devastating financial and productivity consequences if mishandled by the employer. Yet, few employers or their managers and supervisors are equipped to handle them well. That is why this textbook was created.

Between fiscal years 1970, when newly enacted job discrimination legislation cases started to rise, and 2016, the number of federal discrimination suits grew from fewer than 350 per year to its all-time high of just shy of 100,000. A major factor in this statistic is that the groups protected by Title VII of the Civil Rights Act of 1964 and similar legislation, including minorities, women, and employees over 40, now constitute over 70 percent of the total workforce. Add to page xiii that number those protected by laws addressing disability, genetic and family medical history, wages and hours, and unions; workplace environmental right-to-know laws; tort laws; and occupational safety and health laws, and the percentage increases even more. The U.S. Department of Labor alone administers more than 180 federal laws covering about 10 million employers and 125 million workers.¹

It is good that employers and employees alike are now getting the benefits derived from having a safer, fairer workplace and one more reflective of the population. However, this is not without its attendant challenges. One of those challenges is reflected in the statistics given above. With the advent of workplace regulation by the government, particularly the Civil Rights Act of 1964, there is more of an expectation by employees of certain basic rights in the workplace. When these expectations are not met, and the affected population

constitutes more than 70 percent of the workforce, problems and their attendant litigation will not only arise, but are likely to be numerous.

Plaintiffs generally win nearly 50 percent of lawsuits brought for workplace discrimination. The median monetary damage award is \$155,000.² As you will soon see, the good news is that the vast majority of the litigation and liability arising in the area covered by these statistics is completely avoidable. Many times the only difference between an employer being sued or not is a manager or supervisor who recognizes that the decision being made may lead to unnecessary litigation and thus avoids it.

When we first began this venture more than 20 years ago, we did not know if we would be able to sell enough copies of the textbook to justify even having a second edition. Luckily, we had a publisher who understood the situation and made a commitment to hang in there with us. The problem was that there was no established market for the text. There were so few classes in this area that they did not even show up as a blip on the radar screen. Actually, we only knew of two. But having worked in this area for years, we knew the need was there, even if the students, faculty, and even employers were not yet aware of it.

We convinced the publishers that “if you publish it, they will come.”

And come they did. From the minute the book was first released, it was embraced. And just as we thought, classes were developed, students flooded in, and by the time the smoke cleared, the first edition had exceeded all the publisher’s forecasts and expectations. The need that we knew was there really was there, and an entire discipline was created. The textbook spawned other such texts, but remains the leading textbook of its kind in the country.

We cannot thank the publishers enough for being so committed to this textbook. Without their commitment, none of this would have happened. And we cannot thank professors and students enough for being there for us, supporting us, believing in the textbook and our voices, and trusting that we will honor the law and our commitment to bring the best to faculty and students.

We have seen what types of employment law

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problems are most prevalent in the workplace from our extensive experience in the classroom and in our research and writing, as well as in conducting over the years many employment seminars for managers, supervisors, business owners, equal employment opportunity officers, human resources personnel, general counsels, and others. We have seen how management most often strays from appropriate considerations and gets into avoidable legal trouble, exposing it to potential increased liability. We came to realize that many of the mistakes were based on ignorance rather than malice. Often employers simply did not know that a situation was being handled incorrectly.

Becoming more aware of potential liability does not mean the employer is not free to make legitimate workplace decisions it deems best. It simply means that those decisions are handled appropriately in ways that lessen or avoid liability. The problem does not lie in not being able to terminate the female who is chronically late for work because the employer thinks she will sue for gender discrimination. Rather, the challenge lies in doing it in a way that precludes her from being able to file a successful gender discrimination claim. It does not mean the employer must retain her, despite her failure to adequately meet workplace requirements. Rather, it means that the employer must make certain the termination is beyond reproach. If the employee has performed in a way that results in termination, this should be documentable and, therefore, defensible. Termination of the employee under such circumstances should present no problem, assuming similarly situated employees consistently have been treated the same way. The employer is free to make the management decisions necessary to run the business, but it simply does so correctly.

Knowing how to do so correctly does not just happen. It must be learned. We set out to create a textbook aimed at anyone who would, or presently does, manage people. Knowing what is in this book is a necessity. For those already in the workplace, your day is filled with one awkward situation after another—for which you wish you had the answers. For those in school, you will soon be in the workplace, and in the not-too-distant future you will likely be in a position managing

others. We cannot promise answers to every one of your questions, but we can promise that we will provide the information and basic considerations in most areas that will help you arrive at an informed, reasonable, and defensible decision about which you can feel more comfortable. You will not walk away feeling as if you rolled the dice when you made a workplace decision, and then wait with anxiety to see if the decision will backfire in some way.

In an effort to best inform employers of the reasoning behind legal requirements and to provide a basis for making decisions in “gray areas,” we often provide background in relevant social or political movements, or both, as well as in legislative history and other relevant considerations. Law is not created in a vacuum, and this information gives the law context so the purpose is more easily understood. Often understanding why a law exists can help a manager make the correct choices in interpreting the law when making workplace decisions with no clear-cut answers. We have found over the years that so few people really understand what any of this is really about. page xv
They know they are not supposed to discriminate on the basis of, say, gender, but they don’t always realize (1) when they are doing it, and (2) why the law prohibits it. Understanding the background behind the law can give extremely important insight into areas that help with both of these issues and allow the manager to make better decisions, particularly where no clear-cut answer may be apparent.

Legal cases are used to illustrate important concepts; however, we realize that it is the managerial aspects of the concepts with which you must deal. Therefore, we took great pains to try to rid the cases of unnecessary “legalese” and procedural matters that would be more relevant to a lawyer or law student. We also follow each case with questions designed to aid in thinking critically about the issues involved from an employer’s standpoint, rather than from a purely legal standpoint. We understand that *how* employers make their decisions has a great impact on the decisions made. Therefore, our case-end questions are designed as critical-thinking questions to get the student to go beyond the legal concepts and think critically about management issues. This process of learning to analyze and think

critically about issues from different points of view will greatly enhance students' decision-making abilities as future managers or business owners. Addressing the issues in the way they are likely to arise in life greatly enhances that ability. You may wonder why we ask questions such as whether you agree with the court's decision or what you would do in the situation. This is important in getting you to think about facts from your perspective as a potential manager or supervisor. Your thoughts matter just as much as anyone else's and you should begin to think like a manager if you are going to be one. Nothing magic happens once you step into the workplace. You bring an awful lot of your own thoughts, preconceived notions, and prejudgments with you. Sometimes these are at odds with the law, which can lead to liability for the employer. The questions are a way to ferret out your own thoughts, to explore what is in your own head that can serve as the basis of decisions you make in the workplace. You can then make any needed adjustments to avoid liability.

It is one thing to know that the law prohibits gender discrimination in employment. It is quite another to recognize such discrimination when it occurs and govern oneself accordingly. For instance, a female employee says she cannot use a "filthy" toilet, which is the only one at the work site. The employer can dismiss the complaint and tell the employee she must use the toilet, and perhaps later be held liable for gender discrimination. Or the employer can think of what implications this may have, given that this is a female employee essentially being denied a right that male employees have in access to a usable toilet. The employer then realizes there may be a problem and is more likely to make the better decision.

This seemingly unlikely scenario is based on an actual case, which you will later read. It is a great example of how simple but unexpected decisions can create liability in surprising ways. Knowing the background and intent of a law often can help in situations where the answer to the problem may not be readily apparent. Including the law in your thinking can help the thought process for making well-founded decisions.

You may notice that, while many of our cases are extremely timely and have a "ripped from the headlines"

feel to them, others are somewhat older. There are two reasons why we include those older cases. First, some of them are called “seminal” cases that created the foundation for all of the legal decisions that came afterwards, so you need to be aware of them. The other reason is much more practical. Because our goal is to teach you to avoid liability in the workplace, part of our means of reaching the goal is to use fact patterns that we think do the best job of illustrating certain points. Most legal texts try to bring you *only* the latest cases. Of course, we also do that; but our primary goal is to use those cases that we think best illustrate our point. The clearest, most illustrative fact pattern might be an older case rather than a newer one. We will not include newer cases just because they are new. We provide cases that best illustrate our points for you and, if they happen to be older cases that are still good law, we will use them. We are interested in facts that will help you learn what you need to know, rather than case dates. We look at the cases that have come out between editions and, if none do the job of illustrating our point better, we go with what is best geared to show you how to think through an issue.

We have made the decision to limit the number of cases in each chapter to between three and five. Most chapters have three or four. Even though the subject matter from chapter to chapter may lend itself to different numbers of cases, we decided to try for consistency. Hopefully, the carefully chosen cases will still accomplish our purpose.

We also have included endnotes and boxed items from easily accessible media sources that you come across every day, such as *People* magazine, *The New York Times*, *The Wall Street Journal*, and *USA Today*. The intent is to demonstrate how the matters discussed are interesting and integrated into everyday life, yet they can have serious repercussions for employers. In earlier editions, we opted for reading continuity and thus did not include a lot of our research material as endnotes. We have made the conscious decision to include more sources as endnotes. Hopefully, what is lost in seeing the endnote callout as you read will be balanced out with the fact that you now have the resources to do further investigation on your own since you now have the resources to do so.

Much of today’s litigation results from workplace decisions arising

from unfortunate ideas about various groups and from lack of awareness about what may result in litigation. We do not want to take away anyone's right to think whatever he or she wants about whomever he or she wants, but we do want to teach that those thoughts may result in legal trouble when they are acted on.

Something new and innovative must be done if we are to break the cycle of insensitivity and myopia that results in spiraling numbers of unnecessary workplace lawsuits. Part of breaking this cycle is using language and terminology that more accurately reflects those considerations. We therefore, in writing the text, made a rather unorthodox move and took the offensive, creating a path, rather than following one.

For instance, the term *sex* is generally used in this text to mean sex only in a purely sexual sense—which means we do not use it very much. The term *gender* is used to distinguish males

 page xvii from females. With the increasing use of sexual harassment as a cause of action, it became confusing to continue to speak of sex as meaning gender, particularly when it adds to the confusion to understand that sex need *not* be present in a sexual harassment claim but gender differences *are* required. For instance, to say that a claim must be based on “a difference in treatment based on sex” leaves it unclear as to whether it means gender or sexual activity. Since it actually means gender, we have made such clarifications. Also, use of the term *sex* in connection with gender discrimination cases, the majority of which are brought by women, continues to inject sexuality into the equation of women and work. This, in turn, contributes to keeping women and sexuality connected in an inappropriate setting (employment). Further, it does so at a time when there is an attempt to decrease such connections and, instead, concentrate on the applicant's qualifications for the job. The term is also confusing when a growing number of workplace discrimination claims have been brought by transgenders, for whom gender, sex, and sexuality intersect, and can cause confusion if language is not intentional, accurate, conscious, and thoughtful.

We are utterly delighted that for the first time in the 20-year history of the text, we are comfortably using the terms “homosexual” and

“sexual orientation.” We are ecstatic that society has come to a place where the negative connotations these terms once had are not as prevalent as they once were. In our last edition, we wrote the following:

So, too, with the term homosexuality. In this text, the term affinity orientation is used instead. The traditional term emphasizes, for one group and not others, the highly personal yet generally irrelevant issue of the employee’s sexuality. The use of the term sets up those within that group for consideration as different (usually interpreted to be “less than”), when they may well be qualified for the job and otherwise acceptable. With sexuality being highlighted in referring to them, it becomes difficult to think of them in any other light. The term also continues to pander to the historically more sensational or titillating aspects of the applicant’s personal life and uses it to color her or his entire life when all that should be of interest is ability to do the job. Using more appropriate terminology will hopefully keep the focus on that ability.

Being able to see society move so far in 20 years and pass laws of protection in this area that make it easier to deal with the LGBT community as full human beings is heartening.

The term *disabled* is used rather than *handicapped* to conform to the more enlightened view taken by the Americans with Disabilities Act of 1990. It gets away from the old notion noted by some that those who were differently abled went “cap in hand” looking for handouts. Rather, it recognizes the importance of including in employment these 43 million Americans who can contribute to the workplace despite their physical or mental condition.

There is also a diligent effort to use gender-inclusive or neutral terminology—for example, police officers, rather than policemen; firefighters, rather than firemen; servers, rather than waiters or waitresses; and flight attendants, rather than stewards

page xviii or stewardesses. We urge you to add to the list and use such language in your conversations. To use different terminology for males and females performing the same job reflects a gender difference when there is no need to do so. If, as the law requires, it is

irrelevant because it is the job itself on which we wish to focus, then our language should reflect this.

It is not simply a matter of terminology. Words are powerful. They convey ideas to us about the matter spoken of. To the extent we change our language to be more neutral when referring to employees, it will be easier to change our ingrained notions of the “appropriateness” of traditional employment roles based on gender, sexuality, or other largely irrelevant criteria and make employment discrimination laws more effective.

This conscious choice of language also is not a reflection of temporal “political correctness” considerations. It goes far beyond what terming something *politically correct* tends to do. These changes in terminology are substantive and nontrivial ones that attempt to have language reflect reality, rather than have our reality shaped and limited by the language we use. Being sensitive to the matter of language can help make us more sensitive to what stands behind the words. That is an important aid in avoiding liability and obeying the law.

The best way to determine what an employer must do to avoid liability for employment decisions is to look at cases to see what courts have used to determine previous liability. This is why we have provided many and varied cases for you to consider. Much care has been taken to make the cases not only relevant, informative, and illustrative but also interesting, and easy to read. There is a good mix of new cases, along with the old standards that still define an area. We have assiduously tried to avoid legalese and intricate legal consideration. Instead, we emphasize the legal managerial aspects of cases—that is, what does the case mean that management should or should not do to be best protected from violating the law?

We wanted the textbook to be informative and readable—a resource to encourage critical and creative thinking about workplace issues and to sensitize you to the need for effective workplace management of these issues. We think we have accomplished our goal. We hope the text is as interesting and informative for you to read and use as it was exciting and challenging for us to write.

¹<https://www.dol.gov/general/aboutdol/majorlaws>

²“Valuing your case,” Workplace Fairness (2017),
https://www.workplacefairness.org/valuing_your_case (accessed June 5, 2017).