

TABLE OF CONTENTS

PREFACE.....	v
PART 1. THE NATURE OF LABOR MARKETS	
Chapter 1. The Regulation of Labor Markets	1
A. The Model of Competitive Labor Markets	1
B. Reasons for Regulation of Labor Markets	6
1. Redistribution.....	6
2. Evolving Social Norms or Preference Transformation...	7
3. Correcting “Market Failure”	7
C. Objections to Regulation	10
D. Modes of Regulation	12
1. Taxing and Spending Measures	12
2. “Minimum Terms” Laws or Mandates	12
3. Regulation of the Process of Bargaining.....	13
Chapter 2. The Employment Relationship	14
A. What is at Stake?	14
B. The Nature of the Employment Relationship	15
C. Tests for Employee Status.....	17
1. Common Law or “Right of Control” Test.....	17
2. The “Economic Realities” or “Economic Dependency” Test.....	21
3. Areas of Difficulty under the Common Law or “Right of Control” Test.....	23
D. Laws Distinguishing Among Employees	26
E. Joint Employment.....	30
PART 2. THE COMMON LAW OF THE EMPLOYMENT RELATIONSHIP	
Chapter 3. Contractual Exceptions to Employment At-Will	33
A. Presumption of At-Will Employment.....	33
B. Agreements for a Definite Term or for an Indefinite Term Limiting Termination of Employment.....	35
1. General Principles of Contract	35
2. Agreements for a Definite Term	36
3. Agreements for an Indefinite Term Limiting Termi- nation of Employment.....	37
4. Constructive Discharge and “Wrongful Demotion”	40
5. Statute of Frauds	41

TABLE OF CONTENTS

C. Standard of Cause	42
1. Substantive Dimension	42
2. Procedural Dimension	45
D. Employer Promises Enforceable as a Matter of Promissory Estoppel	45
E. Binding Employer Statements	46
1. Are Statements in Employment Manuals and Handbooks Binding on the Employer?	46
2. Can Employers Modify or Rescind Commitments Made in Previous Unilateral Statements?	51
F. Implied Duty of Good Faith and Fair Dealing	54
Chapter 4. Employment Torts	56
A. “Bad Faith Breach”	56
B. Discharge or Other Discipline in Violation of Clearly Established Public Policy	58
1. Common Law	58
a. Source of Established Public Policy	60
b. Conflicting Duties	61
c. Clear Adverse Impact on Public Policy	62
d. No Interference with an Alternative Scheme	63
2. Legislation	63
C. Other Tort Theories for Challenging Termination Decisions	64
1. Fraud or Deceit	64
2. Wrongful Interference with Contractual Relations	65
3. Intentional Infliction of Emotional Distress	66
D. Defamation	67
1. Publication	67
2. Privilege	68
a. Absolute Privilege	68
b. Qualified Privilege	69
Chapter 5. Workplace Privacy	70
A. Constitutional Law	70
1. Physical Privacy	70
2. Self-Incrimination	76
3. Associational Privacy	77
4. State Constitutional Law	77
B. Legislation	78
1. Investigative Techniques	78
a. Polygraphs	78
b. Telephone Monitoring	78
c. Electronic Communication Monitoring	79
d. Investigation of Consumer Credit Reports	80

TABLE OF CONTENTS

2. Areas of Special Concern	80
a. Records Privacy	80
b. Identity Privacy	80
c. “Legal Activity” Laws	81
C. Decisional Law	81
Chapter 6. Information, Mobility and Competition	82
A. Introduction	82
B. Common Law Duty of Loyalty	84
C. Trade Secret Law	86
1. Definition of a Trade Secret	88
2. Improper Acquisition, Use or Disclosure	91
3. Inevitable Misappropriation	93
4. Remedies	95
D. Non-Compete and Other Restrictive Covenants	97
1. Legitimate Interests	100
2. Reasonable Duration and Scope	102
3. Reason for Termination of Employment	105
4. Remedies	106
a. Judicial Modification	106
b. Injunction and Damages	108
E. Choice of Law Clauses	108
F. Employee Inventions	110
PART 3. STATUTORY INTERVENTIONS	
Chapter 7. Workers’ Compensation Law	117
A. Origins of Workers’ Compensation Legislation	117
B. Rationale for Regulation	120
C. Covered Employers and Employees	123
D. Covered Injuries	124
1. Express Exclusions	124
2. “Arising out of and in the Course of Employment”	125
E. Potential Escape Routes from the “Exclusive” Remedy of Workers’ Compensation	126
1. “Dual Capacity” Employer	126
2. Absence of a Remedy under Workers’ Compensation	126
3. Injuries Outside the “Compensation Bargain”	127
F. Challenges	128
Chapter 8. Unemployment Insurance	130
A. Overview	130
B. Basic Mechanics of UI Programs	133
1. Finance	133
2. Experience Rating	134
3. Procedure	136
4. Coverage	138

TABLE OF CONTENTS

C. Eligibility	140
1. Monetary Eligibility	142
2. Nonmonetary Eligibility	144
a. Voluntary Quits and “Good Cause”	144
b. Misconduct	145
c. “Able and Available”	150
d. Refusal of Employment Opportunities	151
Chapter 9. Collective Organization and Collective Bargaining Law	
A. Rationale for Regulation	154
B. Basic Premises	156
C. Administrative Procedures	158
D. Protected Concerted Activity	159
E. Selection of Exclusive Bargaining Representative	161
F. The Process of Collective Bargaining	162
G. Administering the Labor Agreement	165
H. Individual Rights and the Collective Agreement	167
I. Union Democracy	168
J. Labor Law and Business Change	169
Chapter 10. Wage and Hour Regulation	
A. History	171
B. Basic Requirements of the Statute	171
1. Minimum Wage	171
2. Overtime Premium	173
3. Child Labor Restrictions	173
4. Anti-Retaliation	175
C. Rationale for Regulation	175
D. What Counts as Compensation?	177
E. What Counts as Work or Hours Worked?	178
F. Covered Employers and Employees	181
1. Enterprise Coverage	181
2. Employee Coverage	182
a. Employee vs. Independent Contractor	182
b. Employees Personally Engaged in Interstate Commerce	183
3. Exemptions	184
4. Other Exclusions from Coverage	186
a. Administrative Enforcement	187
b. Private Enforcement	188
G. State Wage Payment Laws	188
Chapter 11. Employment Discrimination Law	
A. Rationale for Regulation	191
1. Supply-Side Explanations	191
2. Demand-Side Explanations	191
3. Role of Anti-Discrimination Law	192

TABLE OF CONTENTS

B. Title VII	193
C. Gender Discrimination.....	195
D. Religious Discrimination	197
E. Age Discrimination.....	197
F. Disability Discrimination	199
G. Retaliation	201
H. Administrative Process and Remedies	202
Chapter 12. Occupational Safety and Health	204
A. Coverage and Regulatory Scheme	204
1. Covered “Workplace” and “Working Conditions”	205
2. Limited Preemption of State Law	205
3. Exclusive Agency Enforcement	209
B. Rationale for Regulation	210
C. Standards	212
1. Setting the Standard	212
2. Securing Compliance with OSHA Standards.....	219
D. General Duty Clause	220
E. Inspections.....	222
F. Protection Against Discrimination.....	223
G. Conclusion	225
Chapter 13. Employee Benefits Law	226
A. Overview	226
B. Rationale for Regulation	228
1. Why Do Employers Provide Pensions?	228
2. Why Regulate?	230
3. Implications of the Shift to DC Plans	232
C. Coverage Issues	234
1. Covered “Plans”	234
2. Eligible “Participants”	237
D. Preventing Forfeiture of Pension Benefits	240
1. Vesting Rules.....	240
2. Minimum Funding Requirements	241
3. Prohibition of Discharge for Attaining or Exercising Pension Rights	241
4. Regulating the Rate of Accrual of Pension Benefits	242
5. No Cut-back of Accrued Benefits	242
6. PBGC Termination Insurance	243
E. Reporting and Disclosure Obligations	248
F. Fiduciary Obligations	251
1. Determining Fiduciary Status	252
2. “Dual Hat” Issues	253
a. Giving Advice to Employee Participants	253
b. Making Benefit Determinations	255

TABLE OF CONTENTS

c. Amending the Plan	256
d. Promoting Employer Stock.....	259
3. Fiduciary Investing: Prudence	261
4. Fiduciary Investing: Duty of Loyalty and “Exclusive Benefit” Rule.....	264
G. Non-“Interference” Obligations	265
1. Application to Welfare Benefit Plans	265
2. Application to “Basic Organizational Decisions”	266
3. “Specific Intent” Requirement	267
4. Targeted Benefit Plan Changes	268
H. ERISA Preemption of State Law	270
1. State Mandates Not Requiring Ongoing Administration of a Plan	271
2. State Mandates Regulating “Payroll Practices”	271
3. State Regulation of Insurance	272
4. State Regulation of Practices Violative of Federal Dis- crimination Law	273
5. Arguable Shift Towards Narrower Scope of ERISA Preemption	273
Chapter 14. Personal Leave Law	278
A. Introduction	278
B. Basic Requirements.....	279
C. Notice and Designation of Leaves	280
D. Interaction of FMLA with the Americans with Disabilities Act.....	282
E. Paid Leave and Other Policy Issues	283
TABLE OF CASES	287
INDEX	303