

- I. At Will Employees –
  - a. Employees who can be fired for good cause, bad cause or no cause at all.
  - b. Employment at will agreement is terminable at will by either party.
  - c. Exceptions
    - i. Handbook – created to get consistency in performance by employer and put employee on notice. (Wooley v. Hoffman La Roche)
      - 1. Manual represents a unilateral contract. It is an offer from employer to employee for work. The employee works, knowing that he can quit anytime without violating the policy but knowing that he will be allowed to work without threat of termination unless he breaks the listed policies.
        - a. If the employee chooses to stop working, nothing is owed to them.
        - b. It is not binding only to those who were aware, court said that would be a problem.
      - 2. To prevent something in the manual from being binding, there must be a disclaimer.
        - a. Must be set off to draw attention and clear so that the at will authority is retained.
        - b. Something such as “nothing in this manual creates for cause termination”
        - c. May require a disclaimer to be signed
          - i. Need a disclaimer to allow changes to the manual at any time
      - 3. If there are disagreements, may go through grievance procedures if one believes an employers behavior is in violation of the manual.
        - a. Arbitrators often used
    - ii. Contract
      - 1. Binding on the employer
      - 2. Can be unilateral (like handbook)
      - 3. Language that creates a binding commitment
        - a. Expectation that employee work efficiently and effectively
        - b. Listings of terminations or disciplinary actions
        - c. Language which provides some sort of disciplinary procedures
          - i. Probationary periods imply that something will change at the end of the period, in a way that will be beneficial to you. Can turn employees at will into employees for cause.
    - iii. Implied limitations (Bechtel)
      - 1. A handbook disclaimer can be overcome by implied limitations, however an express written agreement signed by employee cannot be overcome by proof of an implied contrary understanding.
      - 2. Long term employment with promotions is not enough to create a “contractual guarantee of future employment security”

3. Procedures (such as “holding pattern” for laid off employees) binding on the employer do not destroy an employment at will situation
- iv. Public Policy
1. Oldest and broadest exception
    - a. What is right and just and concerns the citizens of the state collectively.
  2. One area is applying for benefits (such as workers comp).
  3. Also anti-retaliation laws
  4. Jury Duty (Ness v. Hocks)
    - a. The good of the jury system requires that employers cannot discharge their employees for trying to fulfill this duty, or pressure them not to serve
    - b. Not many other situations that have the same public duty
      - i. Subpoenas
      - ii. Testifying in a grievance hearing for another employee
      - iii. Reporting abuse of children by fellow workers
    - c. Some states take the position that the duty must be protected by statute, others add judicial decision.
      - i. IL says anything that is a “good thing”
  5. Reporting illegal behavior (Tameny v. Atlantic Richfield, Palmateer)
    - a. Most courts hold that the behavior must be criminal for there to be an exception
    - b. Court usually hold that the complaint must be made to an outside governing agency.
    - c. If it is a criminal offense to follow an order, than it is contrary to public policy and employee cannot be fired for refusing to follow through.
      - i. If he is fired, there is a cause of action.
    - d. There is no cause of action if the employee does the act, the employer gets in trouble, fires the employee as a scapegoat and employee sues. Nothing was accomplished b/c the law was already broken.
    - e. When there is a dismissal that violates public policy, the courts will allow the employee to receive redress for the wrong without any regard to express or implied contract or employee at will status. This is an overriding policy.
    - f. Courts have held that in an appropriate situation an employee can be protected for refusing to follow an order b/c it would violate the canons of his profession (Pierce v. Ortho Pharmacy)
      - i. Has to be something within the canon, not just a personally held belief

- ii. Need to show the threat to the health and safety of the public
  - g. Concern is not so much the importance of the crime reported, but the concern is with encouraging people to report suspicions of crimes because the gov't needs to rely on having private citizens come to them
    - i. Not just reporting a crime, but it has to be a statute that has a public interest aspect to it.
      - 1. Can be a statute and not a public policy exception
- 6. Whistleblowing (Geary v. US Steel Corp)
  - a. Court has fine line between nuisance and whistleblower.
  - b. Wants the policies to be followed – such as chain of command
  - c. False Claims Act – whistleblower is protected against discharge and can collect money for turning in anyone for submitting any kind of false or fraudulent claim to government.
- 7. Political Activity
  - a. Protection for employee's involvement in political activity or the decision to not involve themselves in such.
- 8. Complaining of employee does not have to be right in fact, only have a good faith belief that what was done was a violation of the law.
- 9. Statutes and case law protect
  - a. Going to law enforcement with complaints
  - b. Going to supervisor's in the business with complaint
  - c. Not many about going to the press, seems to be unprotected
- 10. If there is an internal remedy the cases show that courts will enforce that and that if they go to the law enforcement without exhausting internal procedure, there is no protection
- d. Non Compete Agreements (Foley v. Interactive Data Corp)
  - i. May be evidence of for cause employee. Simply the absence of a contract does not mean they are at will employees. Any suggestions of other agreements will be examined to determine if there is evidence to refute the at will assumption.

## II. Termination

- a. Bad Faith (Fortune)
  - i. Implied covenant of good faith dealing.
    - 1. Firing one to cheat him out of something he is owed is not an acceptable action. (such as pension, commission, etc)
    - 2. Little authority for implied good faith with an employee at will
      - a. There is some case law for fraud
  - ii. Reviewing dismissals (Contran v. Rollins Hudig Hall)

1. Jury is looking only to determine if the employer acted with fair or honest cause or reason and that their reasons were not trivial, capricious, unrelated to business, etc.
  - a. Must be an investigation
  - b. Must have given the employee notice and allow them to respond to any claims of misconduct
2. After acquired evidence (available at trial but not at time of termination) cannot be used to validate the termination.
  - a. Can impact the measure of damages
    - i. Reinstating one to their prior position
    - ii. Back pay

### III. Contractual Actions

- a. Oral Contracts (Ohanian v. Avis Rent a Car)
  - i. Statute of Frauds – if it can be finished in ANY way in a year (not breach, but death, bankruptcy, etc).
    1. Not a very successful argument
  - ii. Courts are generally suspicious of oral contracts allegedly made to one employee.
- b. Damages
  - i. Only ones available are those which are foreseeable when the contract is entered into.
  - ii. Rarely punitive damages available – why it may be better to file tort actions.
    1. Tort (Pfalsgraf) – proximate cause – pain and suffering, emotional distress, etc. More generous damages.
- c. Tortious Actions
  - i. Breach of Implied Covenant of Good Faith and Fair Dealing (Foley)
    1. Aimed at making effective the promises of the agreement which is imposed on parties in every agreement
      - a. Usually used in insurance b/c of the inequity of the relationship
    2. Four requirements
      - a. One party has superior bargaining power
      - b. Weaker party is not seeking to profit but secure an essential service
        - i. Policy for insurance claims is that it is a public good and insurance company has a duty to provide their services fairly and in good faith. Employee is a personal matter and there may not be the same policy reasons for it.
      - c. Weaker party places trust in the other.
      - d. The conduct on the part of the defendant indicates an intent to frustrate the weaker party.
  3. The policy arguments and requirements are not found in the employment arena and therefore the court has held that there is no

- right to tortious cause of action for breach of the implied covenant of good faith in employment contracts
- ii. Fraud and deceit predicated on a misrepresentation made to effect termination of employment (Hunter v. Up Right)
    - 1. Tort recovery is available separate from contract recovery only if plaintiff can establish all the elements of fraud with respect to misrepresentation that is separate from the termination of employment contract.
      - a. Cannot result from the termination itself
    - 2. There must be damage for a cause to be present.
  - iii. Intentional interference with contractual obligations (Cappiello v. Ragen)
    - 1. There must be a third party who upsets the employee's agreement with the employer, otherwise the employee is interfering with his own agreement.
      - a. Such as a supervisor acting with his own selfish interests in mind
      - b. The third party is actually doing the wrong doing, but the employer is held vicariously liable even if there is no evidence that any one beyond the individual committed the wrongful act.
  - iv. Intentional infliction of emotional distress
    - 1. Must act intentionally, must be outrageous behavior that causes extreme distress
      - a. The theory that if an employee is hard working, loyal, etc and is fired that there is emotional distress has not been given credence b/c it is inconsistent with the theory of being an employee at will.
      - b. If the manner of firing is outrageous or abusive, there can be damages – such as sexual harassment.
        - i. Courts are leery of this b/c it is not a quantitative thing and must be taken at face value.
          - 1. Often require some sort of medical diagnosis
  - v. Defamation (Lewis v. Equitable Life)
    - 1. Is the employer privileged to make the communication that was involved in the disclosure? General rule is that if it's a legitimate response to an inquiry from a potential new employer, there is a qualified privilege and unless there is malice involved, it is ok to say if it was true or false.
      - a. Can only sue if a third party hears the alleged defamation
    - 2. MO Service Letter Law
      - a. If one believes that they were unfairly discharged, the service letter requires that the former employer send a letter stating what the true cause of discharging was.
        - i. If they do not respond there are penalties.

- ii. Can use to sue for defamation if the future employer required to see the letter and the letter included the “defamation”
      - 3. Internal communication about an employee is privileged.
        - a. If an employer shares with other employees why another employer was fired, this may cause problems.
          - i. Ok to share with supervisors and close co-workers, but a general announcement about cause of dismissal is not ok.
- IV. Constitutional Protections for employees
  - a. Public employees have more protection b/c of the constitution with relative consistent construction on how it applies. Private sector decisions are based on the public employee standards.
  - b. Searches (O’Connor v. Ortega)
    - i. Employees have a reasonable expectation of privacy – no property rights.
      - 1. The protection is the extent that the employee believes things are private and that expectation is reasonable
    - ii. There is no warrant requirement
      - 1. B/c there would be a delay in acquiring the warrant and the employers are not experts in when a warrant would be needed.
    - iii. There are circumstances when the state interests would outweigh the privacy interests of the employee
      - 1. Employer can enter one’s office when
        - a. There is a normal need to do so for the efficient and proper operation of the workplace
        - b. There is a suspicion of improper activity or work related misconduct
          - i. There are not separate standards between the two, just reasonableness under the standards
    - iv. Employer policies can change the reasonable expectation of privacy
      - 1. If using cameras, must be notified
    - v. Working in a sensitive area can have a less expectation of privacy
  - c. Drug Test
    - i. No clear rule.
      - 1. Skinner case – court ok with blood testing for alcohol testing
        - a. Mandatory after accidents, permissive in certain situations.
          - i. Court said that it is ok for employees involved in safety industry to be tested after accidents that could have a drug related causes
        - b. Urine test considered more intrusive
        - c. Question of whether there can be random drug testing
          - i. Unions fight for cause before testing.
      - 2. Van Raub case – customs agents
        - a. Employees involved in drug prevention or carrying a gun can have mandatory drug testing, even if there is no evidence of a noticeable level of drug use

- ii. Limits
  - 1. safety related industry
  - 2. security related
    - a. Without either of these two there must be probable cause or individualized suspicion
  - 3. Drug testing requires prior bargaining with the union
- d. Polygraph
  - i. 1988 Employee Polygraph Protection Act
    - 1. Prohibits the use of polygraph outside of limited circumstances with strict procedural protections
      - a. National security reasons
      - b. Ongoing investigations
        - i. Must involve economic loss or injury to business
        - ii. Employee must have access to property in question
        - iii. Must have a reasonable suspicion
        - iv. Must provide employee with a statement that sets forth the accusations and the basis for the suspicion
      - c. Those interviewing for guard or security positions
      - d. Any employee who will handle a controlled substance
    - 2. Cannot be the basis for discipline without other supporting evidence
    - 3. This applies only to machines – not pen and pencil tests
- e. 1970 Fair Credit Reporting Act
  - i. Employer who declines to hire an applicant b/c of the results of a credit check must tell the applicant the name and address of the reporting agency
  - ii. Must be informed in writing that a check may be done
- f. 1968 Omnibus Crime Control and Safe Streets Act
  - i. Prohibits intercepting of phone calls and other communications w/o a court order, unless
    - 1. There is prior express consent
    - 2. The equipment is used in the ordinary course of business
      - a. An office phone can be tapped especially if there is an extension on the phone where someone could listen with no restraint
- g. 1986 Electronic Communications Privacy Act
  - i. Protects electronic communication, including email from interception, disclosure, use and unauthorized access of stored messages
    - 1. Service provider can access stored messages
    - 2. Limits the circumstances that these things can be done.
    - 3. Does not regulate the use of surveillance camera that picks up camera only
- h. Personal privacy (Cort v. Bristol Meyers)
  - i. If firing an employee for refusing to answer certain personal questions is against public policy, the questions must be against public policy themselves

1. The questions must be unreasonable and extremely intrusive. (In Cort case, they were no more intrusive than a bank loan app.)
  2. Dayton-Hudson case – if the questions are not adequately related to job performance, then they are unreasonable
- i. Office relationships
    - i. Needs to be a clear stated policy about such to be able to discharge an employee for such
      1. Courts have not held that it offends public policy b/c there is a valid reason for the prohibition
    - ii. Very little caselaw
- V. Covenants Not to Compete
- a. Two Kinds
    - i. Employment – once the tricks of the trade are learned, an employee cannot leave the business and use such to compete with original employer
      1. Careful when enforcing b/c of the fact that it can greatly affect the ability of an individual to make a living
    - ii. Sale of Business – can buy the good will of the company and have a covenant not to take this good will away
      1. Courts generally treat this favorably and enforce it without much concern
    - iii. Courts do not favor covenants not to compete b/c they are a form of restraint on trade and will uphold them only under limited circumstances. There must be some showing that there is something unique to be protected and that the employee was able to acquire access to this unique thing during their employment
      1. Key to NCA is that it is limited in time and geography – they must be reasonable restraints
        - a. Can only protect as far as the business has a legitimate interest
        - b. In this case the interest was protecting the good will of their clients
  - b. BDO Seidman v. Hirschberg
    - i. Firm has interest in protecting business but the employee has a greater interest in making a living
    - ii. Court enforced it only for those clients who the firm had, not those who the employee had developed on his own.
    - iii. The Court partially enforces the agreement
      1. Full enforcement
      2. Full rejection
      3. Blue pencil – cross out what it doesn't like and enforce what it wants to
    - iv. Court always aware of a third interest to be balanced – the interest of the public to be able to access the services
    - v. Professionals may have broader non-compete agreements than non-professionals.
  - c. Trade secrets

- i. can be protected so long as it is still really a secret. Must be
  - 1. Derives to make economic value (real or projected) and that would allow competitors to benefit from it
  - 2. Subject to efforts that are reasonable to protect its confidentiality
- ii. It is still a secret if your employees know it
- iii. Must be so highly technical that the knowledge from the employer is necessary to duplicate the efforts. If it is easily duplicated, it cannot be protected. (AMP v. Flieshacker)
  - 1. In cases where the employee has no other training then in this area, the court will be reluctant to enforce a NCA. Does not want to be unfair to employee, or the employer who provided the training.
  - 2. In cases where there was no documentation or other material taken by the employee, and only memory is to be relied on, it is not always specific or detailed enough to enforce a NCA
- iv. Pepsico v. Redmond
  - 1. Use of knowledge acquired under previous employment
  - 2. Wanted an injunction to prevent the employer from taking a new job in the same industry b/c of the information he had been privy to
  - 3. In this case the court did not see a way to avoid the use of secrets and also thought there was some bad faith on the part of the new employer.
    - a. This is *inevitable disclosure* – the leading case on the matter
    - b. There can liquidated damages in a case where real damages are hard to figure out

## VI. Fair Labor Standards Act

- a. Created as part of the New Deal to bring the country out of the Depression
- b. Two goals
  - i. To get rid of employers who were paying low wages to employees. Wanted to set a floor and limit all others
  - ii. Trying to spread the amount of work out by discouraging employers to hire people for more than 40 hours a week
- c. Cannot be waived – if the person is working, in anyway, they MUST be paid
  - i. Room and board can be considered part of payment
    - 1. Only the reasonable cost of it, not the market value
    - 2. Clothing, tools, etc are not part of wages
- d. §206 – requires minimum wage to be paid
  - i. If a business does at least \$300,000/year in interstate commerce, they fall under the federal standards
  - ii. \$5.15/hr for every hour they work, based on a 7 day work week
- e. §207 – Cannot work than 40 hours/week and if they exceed this, must be paid 1/5x
  - i. 1/5x their salary, not the minimum wage
  - ii. Not for hours over 8 hours/day, but total of 40 hours/week.

- iii. Gifts, vacation pay, illness time, bonuses, etc if NOT part of collective bargaining agreement are counted as part of regular payment
  - iv. Can have compensatory time in private sector (50 hours one week, 30 another)
- f. §211 – employer must keep records
- g. §216 – enforcement
  - i. Sec’y of Labor
- h. Independent Contractors (Lauritzen case)
  - i. IC usually work for short term projects who provide their own tools, and are only concerned with finishing the specific job
  - ii. Who has control over the employers is important
    - 1. If the employer has the right of control (setting hours, place of work, etc) then often not IC
  - iii. Compensation – by project or hour
  - iv. Degree of skill involved – less skill more likely to be employees
    - 1. If “dedication, honesty and good health” are more of the qualifications of the job, more likely to be employees
  - v. Time spent at job – the longer with one employer, the less likely to be an IC
  - vi. Amount of dependency of the employee on the employer
  - vii. Easterbrook questions the IC test, and suggests looking to whether the employees in question fit the intent of Congress in enacting the FLSA
- i. Other difficult to classify employees
  - i. Trainees are not employees if
    - 1. The training is similar to vocational school
    - 2. Training is for the benefit of the employee, not employer
      - a. American Airlines case held that stewardess training was more important to the trainees than the employer
    - 3. They do not replace regular employees
      - a. Most important. Can’t call one a trainee but then have them do the work of a regular employee
    - 4. It is not an immediate benefit to the employer
    - 5. They are not necessarily entitled to a job when they finish training
  - ii. Partners
    - 1. If true partners have a voice in their overall operation, they are not employees. If they are partners in name only, they are employees.
  - iii. Volunteers
    - 1. If one goes to work with no expectation of “employment”, they are not covered by the act.
- j. On call (Bright v. Houston NW Medical Center)
  - i. Critical issue is whether the time on call affects whether the employee can use such time for his own purpose or is restricted
    - 1. If the time on call can still be used for personal purposes, it is not subject to compensation
  - ii. If employee has to remain on site while on call, it is considered restrictive enough that they must be compensated for their time on duty

1. Even in cases where the employee had to stay had his own home while on call, the employee almost always loses
- iii. Look at the on call time week by week – not how long it lasted
- iv. The amount of interruption is a factor – if it happens all the time, the court may find compensation
  1. This does not count the time spent at work after being called – that is always compensable
- k. Other compensable activities
  - i. If the employer knows that the employee is bringing home work, its compensable
  - ii. Training is generally not compensable, even when it is geared towards their work unless
    1. Training takes place on the premises
    2. It is done at the employer's discretion
  - iii. Travel time
    1. Between work and home not compensable
    2. All travel time after checking into work is compensable
    3. Traveling out of state is compensable during normal working hours
      - a. 8 hours a day
  - iv. Breaks – compensable
  - v. Lunch
    1. 30 minutes duty free is not compensable
  - vi. Sleeping
    1. 24 hour shift – so long as there is an 8 hour period to sleep and they are able to get 5 hours uninterrupted, not compensable
    2. Less than 24 hours shift, even if allowed to sleep while its quiet, the whole shift is compensable
- l. Salary
  - i. Compensation as a salaried employee is assumed for 40 hours/week
    1. Overtime – the salary is divided by 40 hours, and person gets 1.5x the hourly wage
  - ii. Belo agreement – if an employee is working extremely irregular hours, can get a weekly salary, no matter how many hours they work, whether it is 30 or 60 hours/week. There just must be weeks where they work less than 40.
  - iii. Executive exception
    1. created for people who are generally well paid and work more than 40 hours/week. If they qualify as non-exempt, they are required to be paid 1.5x for overtime.
    2. Two types of tests
      - a. Long – for those who make more than \$155/week or \$175 for executives
      - b. Short – more than \$255/week
    3. Pay docks
      - a. If one's pay is docked, they are non-exempt

- i. Can be docked for major safety regulation infractions without losing exempt status
- b. If there is a deduction policy in the manual, it has never been used but it was used as a threatening communication, employees are non-exempt. (Auer)
  - i. If it is on the books but never used or talked about, a mere theoretical possibility that it could happen is not enough
  - ii. If it has been used once, but the employer is willing to pay back the deduction, there can still be exempt status.
- c. There is a professional exemption to the docking regulation. Lawyers, doctors, teachers of medicine or law are exempted from the salary test and can be docked.

#### 4. Primary Duty

- a. Short test for
  - i. Executive – management of the enterprise and work includes the regular direction of work of 2 or more employees
    - 1. Long test requires the ability to hire and fire people. Also looks to time spent in this type of work.
  - ii. Administrative – office or non-manual work that related to management policies or general business operations, including work that requires discretion and independent judgment
  - iii. Creative Professionals – original and creative in character recognized field of artistic endeavor which results in something which depends primarily on the invention, imagination or talent of the employee. Also must involve superior type of knowledge that requires some sort of schooling
  - iv. Combination exception – one who does a combination of the above duties.
    - 1. Not much successful litigation

#### m. Child Labor

- i. Child 14 or older can work in non-hazardous agricultural work outside of school hours
- ii. Children 12 or 13 can work on any farm where their parents are employed or they have parental consent
- iii. Under 12 can be employed by their parents on their parents farm
- iv. Non-agricultural age is 16.
  - 1. Hazardous industries require 18 (coal mining, etc)
  - 2. 14 and 15 can work in office, sales, retail, food service or gas station under limited circumstances

- 3. Exemptions are child actors, newspaper delivery and Christmas wreath making
    - v. No private right of action – only enforcement by the gov't.
      - 1. §212 – can be enjoined or fined.
      - 2. §212(a) says that you can ship products in ICC that were produced in a business where illegal child labor has been used in the last 30 days
  - n. Penalties and Damages
    - i. §215 – prohibits retaliation b/c an employee has filed a complaint or testified about violation of FLSA
      - 1. there is a private right to action here
    - ii. §216 – penalties
      - 1. §216(b) penalties can be any appropriate relief for the problem
        - a. Legal or equitable relief (employment, reinstatement)
        - b. Courts split on whether provision provides for pain and suffering
      - 2. The willfulness of the violation makes a difference in the sanctions
        - a. Willful – three years back wages, liquidated damages
          - i. To be willful, must be able to show that the employee knew or that he was guilty of gross negligence
        - b. Non-willful – two years back wages, liquidated damages
        - c. Good faith – back pay, no liquidated damages
    - iii. Settlements
      - 1. Cannot waive their right to minimum wage or overtime, but they are permitted to accept less if
        - a. It is done in pursuant to an action brought by the sec'y of labor
        - b. The employee files a lawsuit against the employer and is represented by counsel and enters into a settlement which is approved by a trial judge
  - o. FLSA does not preempt the state regulation – just sets the bottom floor.
- VII. Occupational Health and Safety Administration
  - a. OSHA can only order things that make a workplace safer or healthier – cannot regulate wage or similar matters
  - b. Important sections
    - i. §652(8) standard – must be reasonable, necessary or appropriate for safe and healthful employment
    - ii. §653 applies across the board
      - 1. (b)(1) except if other federal or state agencies have specific requirements
      - 2. (4) nothing supercedes workers comp
    - iii. §654(a) puts a dual duty on the employer
      - 1. (1) must provide a place of employment free of hazards

- a. not a guarantee that there won't be accidents or chances to be injured, but there cannot be recognized hazards likely to cause death or serious injury
      - b. This is the *general duty clause*
        - i. Once there is a specific standard in place the employer only has to comply with that standard
    - 2. (2) obligates employees to comply with OSHA standards
  - iv. §665 – 3 kinds of standards
    - 1. (a) can accept national consensus standards (must take as is)
      - a. Could adopt without any kind of notice or hearing if they had been previously in place as a result of gov't action or they were put out by the private testing labs or industry itself.
      - b. *Usery v. Kennecot Copper* – changed “shall” to “should” which caused the rule to change from mandatory to advisory. Enough of a change to require rulemaking procedure.
        - i. To be adopted w/o procedures, there must be no change
        - ii. Rulemaking
          - 1. §553 – any person can request a hearing on the proposed rule. The secretary has no discretion over this
          - 2. §655(f) standard can be immediately challenged once in place, even if it has not been used yet
    - 2. (b) sets out the procedures for secretary to promulgate new standards
    - 3. (c) emergency temporary standards
      - a. to correct the exposure of employees to grave dangers
  - v. §667 – individual states can take over responsibility for enforcing the statute within their jurisdiction. Needs to be okayed by OSHA
- c. Potential Threats
  - i. To require it to be fixed, the threat must be reasonable and not so far removed through a complex set of events
  - ii. The potential threat must be actually known and has to be a reasonable possibility – not just theoretical.
  - iii. It is a subjective and objective test. If the employer was aware OR if the industry is aware of the hazard and had changed its ways,
    - 1. Burden is on the secretary to show that it is a recognized hard. Must show that the company had actual knowledge that this was a problem or that it was considered dangerous within the industry (*Pratt and Whitney*)
    - 2. Hazard must be likely to cause death or serious injury and can be alleviated through feasible means
- d. Cost Benefit Analysis (*American Textile Manufacturers v. Donovan*)

- i. Court says that the regulation only has to be feasible and there does not need to be CBA.
  - 1. The only qualification is that it is to the extent feasible on the basis of best available evidence
  - 2. The feasibility standard is the only one written into s6(b)(5) and Congress did not intend for there to be CBA
  - 3. Economic feasibility is based upon whether the industry as a whole can afford to make that kind of expenditure – not individual companies.
    - a. Even if some companies will be unable to come into compliance and remain in business, it is ok.
- ii. Feasibility applies to health (prevention of long term diseases)
  - 1. Safety (preventing possible causes of injury) involves a sort of CBA
    - a. Looks to whether the standard adopted is the most efficient way to deal with the problem
- e. Employer's responsibility
  - i. Employee's obligation is to train their employees in safety regulations, as well as supervising them closely and deal with violations in a consistent and strict manner. (Atlantic and Gulf Stevedores)
    - 1. If an employer can show that they did these things but things were out of their control, it can be a defense
    - 2. Employer must do what is necessary to get employees to follow regulations or provide safe alternatives.
      - a. In this case there were alternatives available to make the stevedores wear hard hats
  - ii. Subcontractors (Dun-Par)
    - 1. Employer, even when they are a subcontractor, they have an obligation to provide their employees with a safe workplace.
      - a. Even if the subcontractor is not in control of the workplace, there are still things that they can do, such as talking to general contractor or preventing their employees from working in unsafe conditions
        - i. Claiming that someone else has the responsibility is not a defense
    - 2. The first part of the general duty clause applies only to their own employees, but the second part of the clause is not limited and requires general compliance with the OSHA standards.
      - a. General contractor would be responsible too
    - 3. Only real defense is lack of notice of the hazard
- f. Warrant requirement (Marshall v. Barlow's)
  - i. If the employer consents to the search, there does not need to be a warrant. If the employer requires, OSHA would have to get a warrant, but can get an ex parte warrant at any time
    - 1. Required showing for a warrant is only that it is in furtherance of the act and that there is an objective basis for the inspection

2. B/c of the procedural hassle of getting a warrant, if an employer refuses, often no one gets the warrant
- g. Inspections
- i. Four kinds
    1. Imminent danger (§662) – when there is a belief that there is a danger which could reasonably be supposed to cause serious physical harm or death, immediately
      - a. If the secretary is convinced of such, he is compelled to make the inspection
    2. Fatality or Catastrophe – made after there has been an accident on the premises that causes the death of one or more people or the hospitalization of five or more people.
      - a. If there is significant publicity of a smaller accident, would investigate
    3. Complaint (§657(f)) – any employee has the right to request an inspection. If made in writing, the secretary has the responsibility to check it out unless the secretary has reasonable grounds for believing its not a violation.
      - a. Reasonable grounds include a recent inspection or a complaint that is not OSHA's interest
    4. Program inspections – regular inspections as part of the regulatory program
  - ii. Inspections must take place during a reasonable time and at a reasonable place
  - iii. If there is a citation issued, employer has 15 days to object.
    1. Employer can only object to the period of abatement.
    2. If no objection, the review commission begins a formal procedure.
      - a. Secretary is the prosecuting party. Hearing before an ALJ.
      - b. Final determination can be appealed to the commission by any party or any one of the commissioners.
- h. Employee's rights
- i. OSHA is designed to protect them but they have a limited role and limited rights under the statute (Oil Chemical and Atomic Workers)
    1. Can participate in the adoption of standards and appeal ones they do not like
    2. Right to file complaint to get an inspection
    3. Can participate in the conference and the walk arounds (inspection)
  - ii. When the employer contests a citation, the employee can become involved
  - iii. Refusal to work (Whirlpool)
    1. There are many others things that an employee can do before refusal to work.
      - a. Employee must sincerely that the work assignment is dangerous
      - b. Their belief must be reasonable
      - c. There must be no alternative b/c of time circumstances



- b. Exclusive remedy – by accepting workers comp, there is no ability to sue for other damages
- c. General two prong test
  - i. Must occur in the course of employment
  - ii. Must arise out of the employment
- d. Very few limitations on amount or duration
  - i. Obligation is on the employer, once he is aware of the injury
  - ii. Earnings replacement can cause legal problems.
    - 1. Nothing for pain and suffering or punitive damages
- e. Eligibility
  - i. Other Employee's Behavior
    - 1. Negligence (Farwell v. Boston and Worcester RR)
      - a. If another employee is negligent, there is no workers compensation.
        - i. If the employee had previously been negligent and the employer knew and did nothing about it, there could be compensation
          - 1. Employee was properly trained, and the employer was not negligent in hiring the employee.
        - ii. Other defenses available were
          - 1. Fellow servant – can't sue employer for such
          - 2. Assumption of risk – the nature of the job is hazardous and was known to you at the time you took the job
          - 3. Contributory negligence – at common law, if the employee contributed to the negligence, can't sue
      - b. Transferred intent (Rivera v. Safford)
        - i. The exclusivity provision applies to other employees and people acting on behalf of the employee
        - ii. If the employee is acting within the scope of his employment – if yes then there is coverage.
        - iii. If it is an intentional act, there is no coverage
  - ii. Location of injury
    - 1. General rule is that there is no compensation for “coming and going”
    - 2. Premise rule – coverage begins where the employment begins
      - a. Line is the location of the employment
      - b. Driving between workplaces is an exception
      - c. Exceptions
        - i. If the only way to reach premise is through hazardous neighborhood, there is coverage b/c there is no other reason to be there but for employment

- ii. Employer requires the car to be at work
  - iii. Driving an employers vehicle is covered
  - iv. Being paid a travel expense allowance
  - v. Employee on call and on the way to work
  - vi. Doing an errand on the way home
  - vii. Need to show some sort of special connection between employment and travel
    - 1. Employee required to work extra hours and fell asleep driving home is covered b/c of the special circumstances connected to work (Snowbarger)
- 3. Home as a second work place (Santa Rosa Jr College)
  - a. If there are doing work at home, then they are covered there
    - i. Corollary is that as a workplace, they have to follow OSHA regulation
  - b. If they work at home for no reason but convenience, they are not covered.
- 4. Remote Job Site (Anderson)
  - a. If there is no reason to be somewhere but for the job, covered for almost everything
    - i. Including stupidity
      - 1. Hard to find a case where anything is not covered
      - 2. Same basic rule for people who travel for a living
      - 3. Living on the premise
        - a. Covered for any incidents on premise, but if they leave for a non-job related purpose, not covered
- 5. Recreation
  - a. Generally speaking any sort of recreation that takes place on an employee's premise is covered
  - b. Horseplay (Lubrano v. Malinet)
    - i. Not ignoring work for it, but using down time to do activity
      - 1. Under these circumstances, it is compensatable
    - ii. An employee who is injured b/c of another employee's horseplay is always compensated. Only when one's own horseplay causes injury is there a question
- 6. Suicide (Martin v. Ketchum)
  - a. Must be requisite intent of suicide
    - i. Dying by their own hand without intent is disqualified
  - b. Need a connection to work for it to be covered

- c. When dealing with mental illness, there is a higher standard than with physical injury, even if the cause may be the same.
- d. Easiest cases are when there is a sort of sudden, unusual event that took place and was followed shortly by the medical distress.
  - i. Would the stress have caused problems for a reasonable person

7. Acts of God (Nippert v. Shinn Farm)

- a. Two tests
  - i. Increased risk test – did the employee face a greater risk than the average person b/c of their employment
  - ii. Conditional risk test – was employee in a position that he would not have been if he was not working, then he should be compensated

8. Borrowed Employees (Brown v. Union Oil)

- a. Test
  - i. Who has control over the employee
    - 1. Main focus
  - ii. Whose work was being performed
  - iii. Was there an agreement between the two employers
  - iv. Did the employee agree to the work situation
  - v. Did the original employer terminate his relationship with the employee
  - vi. Who gave the tools and place of work
  - vii. Was the new employment over a considerable amount of time
  - viii. Who could fire the employee
  - ix. Who had the obligation to pay

9. Willful injury (Van Waters and Rogers v. Workman)

- a. Mere fact that what caused injury was willful does not reduce payment
- b. There must be a willful refusal to follow safety procedures of the employer
  - i. If the employer is trying to minimize accidents and the employees disregard that, they don't get the full workers comp benefits (minority rule)

iii. Payment

- 1. Preinjury is guiding standard
  - a. Goal is to replace whatever the employee has lost from their preinjury earnings
    - i. Usually 2/3s of the preinjury wages. 1/3 reserved b/c there is no tax on the replacement wages
- 2. Temporary disability

- a. Continues until employee reaches Maximum Medical Improvement (MMI)
    - i. Doctors determine that rehabilitation has come as far as it can
    - ii. If they are not fully recovered to be able to return to the level of work as they were before, they enter the permanent phase
- 3. Change in condition
  - a. If one has been determined to be disabled at a certain level but then able to find employment making more, they do not lose their nominal disability. (*Stevadores v. Rambo*)
  - b. To determine what compensation is correct, have to look how the injury effected the economic earnings. There is a distinction between physical injury and disability (economic injury)
    - i. A schedule will set you at a certain level, no matter what economics are
    - ii. Have to make determination at start and don't want to make wrong, since can't change it
      - 1. Can reduce payment as conditions change
        - a. In such a rehearing, cannot challenge the initial determination only the change in condition
- 4. Responsibility for payment
  - a. On set of disability (*Liberty Mutual Insurance v. Commercial Union Insurance*)
    - i. The insurance company that is current at the date of disability is responsible
      - 1. Even if employee is aware of the illness but does not reach disability until later
      - 2. No sharing of disability payments by insurance companies
  - b. Retirement
    - i. If already retired when disability results, they will often be eligible for allowance even though there is not a diminution in an actual wage earning
  - c. Last injurious exposure
    - i. For example, if one was exposed to asbestosis for 20 years and then changed to a non-exposure job where they became disabled b/c of the exposure, the last exposure employer is liable
- 5. Odd Lot (*Guyton v. Irving Jensen*)
  - a. Odd lot doctrine looks to many factors to determine if one is disabled. Court ruled that unless there is a reasonable prospect that one can find steady employment, then under the odd lot doctrine, he is considered to be totally disabled.

- i. Can still do “odd jobs” without losing total disability rating
  - ii. Often involves employees with borderline intelligence, minimum education, no skills and has been able to work doing some sort of heavy manual labor. After being injured they cannot do manual labor and are for all practical purposes, unemployable.
- 6. Additional Injury (Freeman United Coal Mining)
  - a. If one is awarded full disability through schedule awards, there can be additional granted
    - i. The intent of Congress through scheduled disability awards was not necessarily to award wage replacement, but the idea that some injuries need compensation for the pain and inconvenience of the grave injury.
      - 1. This is different from wage replacement disability. Can be granted wage replacement disability after receiving scheduled disability.
  - b. In this case the disabled employee continued working for the same employer, so he received disability for both injuries from the same employer
    - i. If he had worked for a second employer, the second employer would be responsible for full (second) disability, although the first injury did not occur at his place of employment, even if that is full disability. You take the employee as you find them.
    - ii. Because this may cause some employers not to hire disabled workers, there is a second injury fund. The employer pays for what the injury normally would have cost and the second injury fund pays the difference between that and the total disability amount.
- 7. Retraining requirement (Taylor v. State Accident Ins. Fund)
  - a. If an employee is fully disabled, but could find insurance if he went through rehab or retraining, he can be denied disability if he refuses to go through the training
    - i. Meant to encourage employees to return to the workforce and not live on disability
    - ii. The employer pays for the rehabilitation, but the rehab may create a need for a reduction in the compensation. This creates a problem since employer pays for the rehab but it allows for a reduction in its disability payment.

iv. Diseases

1. Causation

- a. Must be caused by the employment situation to be compensatable. (Jenkins v. Halstead Industries)
  - i. There must be a special link between the job.
    - 1. Must show exceedingly high risk at job or that there was one event that may have caused the disease.
    - 2. If it can be shown that the disease was partially caused or excited by the job, the compensation can match the proportion of causation. (minority position)
      - a. General rule is that if there is causation, the benefits are appropriate
- b. Employer takes the employee as they find them
  - i. If one is allergic to peanuts and has a reaction at work, there is compensation

v. Social Security

- 1. If there is a severe, medically diagnosable impairment that is expected to last more than 12 mos, goes through steps
  - a. Does employee have gainful employment? If yes, no coverage.
  - b. Is there a medically determinable, severe impairment? If no, no coverage
  - c. Is this an impairment that is per se disabled?
    - i. If yes, eligible
    - ii. If no, does the impairment prevent them from engaging in any work that they have engaged in for the last 15 years?
      - 1. If yes, then they go to the grid to determine level of impairment
        - a. Sedentary
        - b. Light
        - c. Medium
        - d. Heavy
      - i. If the applicant can do light or heavy work, often not qualified for benefits

vi. Federal Employer Liability Act

- 1. Applies only to railroad employees.
  - a. Differs from workers comp b/c
    - i. Keyed to negligence
      - 1. unless the plaintiff can establish negligence there is no recovery
    - ii. There is no administrative mechanism to enforce
      - 1. Must file lawsuit

iii. Damages are not limited

1. Whatever the jury wants to award, they can

2. Norfolk RR v. Ayers

- a. Employees filing for damages claiming that they are afraid of getting cancer, even though they are symptom free
- b. Mere fact of exposure is not enough for pain and suffering (Metro North)
- c. Court held here that you can receive pain and suffering b/c there is a significant connection between diagnosed w/ asbestosis (as these employees were) and getting cancer. Therefore there is a bonafide fear of getting cancer.
- d. If the exposure came from more than one employer, the last employer is sued and the employer can then sue the others to recover damages.

IX. Unemployment

- a. Implemented in 1933 as a response to the Depression that was occurring at the time. Started with a federal tax of 3% on the gross pay of all employees and if the state had an adequate program, 90% of this tax was returned.
- b. To qualify for benefits
  - i. Must establish that during the base period he/she was gainfully employed
    1. Base period is usually 5 quarters prior to unemployment. Must have to have worked for two of those quarters and have earned a significant amount of money in that period.
      - a. Unemployment is only for people who have recently been employed
    2. Employee must establish that they are involuntarily unemployed
    3. Must be able and available for work
- c. Benefits must be available for 26 weeks
  - i. During high periods of unemployment can be extended by the gov't for another 13 weeks.
- d. Seasonal employees are disqualified.
- e. Waiting period usually no more than one week for benefits to begin
- f. Connection to Workers Comp (Appeal of Peterson)
  - i. Unless the statute specifically states it, the general rule is that workers comp does not disqualify employee from receiving unemployment, even if partially disabled.
    1. Have to be able and available for work
    2. If he was so disabled that he was not available for work, not eligible for unemployment.
    3. Odd lot doctrine allows for disability recipients to receive unemployment
- g. Reason for Termination
  - i. Misconduct
    1. Under all unemployment statutes, people disqualified for misconduct are disqualified.

2. It must be more than doing a bad job, need a substantial reason, “willful behavior”
    - a. Insubordination is a willful behavior and reason to be found ineligible. (Fondel)
  3. Misconduct must be related to work to refuse unemployment (London)
    - a. Going into a competitive business is not willful misconduct (Merlino)
- ii. Quitting
1. Generally if there is a showing that they quit for good cause or good cause connected to the job (two different standards) then they are eligible for unemployment
    - a. Quitting b/c an offered replacement position is below their qualifications. Test is not whether there is a job for you, but if there is a suitable replacement. (Holbrook)
    - b. Court uses a prudent person standard to see if an employee should have taken a replacement position. (Murphy)
- h. Labor Disputes
- i. When can state refuse to give benefits b/c the cause of the unemployment is a union strike?
    1. The state has wide leeway in determining who is eligible for benefits. There needs to be a rationale basis for deciding that someone is ineligible. (Hodory)
      - a. The court held that finding anyone unemployed b/c of a strike, even if they were not in the strike, is ok b/c there was a reason to prevent the benefits
        - i. Didn’t want to be involved in the labor dispute
        - ii. Wanted to protect the fiscal integrity of the fund.  
Wanted to limit the amount of distribution
      - b. The main limitations by the federal gov’t on who can receive benefits are
        - i. Person has the right to remain eligible if her refuses to work in a position that was vacated by a labor dispute
        - ii. Has refused to work at wages or conditions that are less than those prevailing at similar work or location
        - iii. If required to not join a labor union to keep a job
  - ii. Does the National Labor Relations Board prevent unemployment compensation to strikers? (NY Telephone)
    1. It does not, the state can decide. It is ok for the state to do this b/c they see it as unequally effecting the strike
      - a. NLRA does not preempt the state from making this choice
        - i. Machinists case – states do not have the right to regulate something the federal gov’t has decided to leave unregulated.

1. Distinguished b/c the purpose of the statutes at stake in each case was different. In Machinists case the statute regarding collective bargaining expressly but in NY it was a general unemployment statute.
  - iii. Is restricting b/c of union emergency dues unfair? (Baker v. GM)
    1. NLRA says can't punish one for being a part of the union – by paying regular dues
    2. In this case court says it is ok b/c there is a meaningful connection between the dues and the strike.
  - iv. Other jobs on strike
    1. If employee takes another job while on strike there is compensation if they lose the job and it was meant to be permanent
      - a. Not if it is a temporary job while on strike
  - i. Pregnancy
    - i. Cannot deny unemployment b/c of pregnancy, but if you do not quit for good cause (pregnancy is not) still subject to the same unemployment requirements. (Blind law, would work even if you broke your leg) (Wimberly)
- X. Employment Retirement Income Security Act (ERISA)
- a. ERISA created to take care of employees reaching retirement age and having no benefits, as well as losing benefits if one didn't stay at the same job until retirement age.
  - b. Pension plan is a plan, fund or program that provides retirement benefits or defers retirement payment for employees (SEE SUPP 404)
    - i. Putting money in a fund to pay employees or allowing employees to defer a portion of their income until they retire
    - ii. Main advantage to pension plan is that the employer can deduct all of the contributions it makes to a pension plan from its gross income b/c the recipient does not pay tax on it until payment.
    - iii. Two kinds of pensions
      1. Defined benefit – classic pension. When you retire at age 65, we will pay you X amount/week. The commitment to the employee is a specific amount of dollars.
        - a. Can be a formula (2% of the average salary over last five years times the number of years you worked here)
        - b. Two kinds of this plan
          - i. Individual company defined benefits – plan exists for a certain business
          - ii. Multiemployer plan – group plan
            1. Main problem is that you have lots of employers who are involved in the plan and contributing and the amount of the contributions becomes excessive, so they drop out. However their employee's are still

eligible and the other employers must pay more.

- a. Now ERISA can hit them with a fine for such.
2. Defined contribution plan – Promise that employer makes to the employee that every month you work here, I will contribute X amount to your pension. Can take it as lump sum or annuities when you retire
  - a. The risk of annuities is on the employee and the value of the lump sum can be reduced.
- c. Welfare plan (§1002.1) medical, hospital benefits, disability, death, child care, prepaid legal services, etc (§302©)
- d. Characteristics of an ERISA plan
  - i. ERISA does not require anyone to have a pension plan or a welfare plan. That is left up to the employer and the only thing that ERISA says is that if you do have such a plan, it must meet these criteria
    1. Written documents – annual report filed with Dept. of Labor and Summary Plan Description
    2. Reporting – annually to Dept. of Labor
    3. Disclosure – One of the major reasons for ERISA was b/c those who ran the pension plans would not tell anyone.
    4. Remedies – Federal Court.
    5. Pre-emption of state laws that relate to one of these plans.
      - a. §1144 – except for the insurance, banking and security laws.
    6. Fiduciary Standards
    7. Civil and criminal penalties
      - a. Cannot sue for pain, suffering or punitive damages.
    8. Written notice of denial and opportunity to review
  - ii. Pensions have additional criteria
    1. Participation – age and service
      - a. Pension plans were often there only for the highly paid employees
      - b. Now everyone who is at least 21 y/o and has one year of service must be eligible
    2. Vesting
      - a. Usually didn't get pension until you worked there and reached retirement age. Now the benefits must vest within a specific amount of time, typically five years
    3. Funding
      - a. If the company agrees to defined benefit plan, it must start funding it from day one
    4. Non-alienation
      - a. Participants cannot assign or alienate their rights to receive benefits under a qualified pension. B/c they cannot be alienated, they cannot be attached by creditors

5. Minimum options
    - a. Lump sum or annuities
  6. Protection of spouses
    - a. A married participant cannot elect benefits that exclude their spouse without the consent of their spouse
  7. Termination insurance
    - a. Title IV. If a situation arises where a company is unable to pay pension benefits, the PBGC will pay benefits up to a specific maximum amount.
- e. Williams v. Wright
- i. When there is a question as to whether there was a plan or not court looks to
    1. Source of the funding – does not need to be in trust, can be out of general assets and still be a plan
    2. Procedure – the letter issued to beneficiary included procedures
    3. Class – can be only one person
  - ii. If a reasonable person can identify these factors, it is a plan, even if the employer has ignored ERISA, it is still an ERISA plan.
    1. Only things not considered to be ERISA plan
      - a. If they can demonstrate it is not for employees
      - b. Variety of arrangements such as where the employer offers health insurance but the employees must pay the premiums.
- f. Vizcaino v. Microsoft
- i. Even when employees (determined through traditional employment laws) they are not immediately beneficiaries. They must be eligible for the benefits.
    1. In this case they were not paid on the US payroll so it disqualified them.
    2. The company has the right to define beneficiary as they want to.
- g. Dranchak v. Akzo
- i. Have to determine if it was a plan to determine if ERISA applies
- h. Firestone v. Bruch
- i. To be a participant, you must show that there is a colorable claim that you are a participant to bring a claim. If there is some sort of decent argument that they should be participants, then they are entitled to the rights of participant under ERISA, including the right to sue or disclosure.
  - ii. Participants are entitled to
  - iii. Summary Plan Description within 120 days of being an eligible participant.
    1. §104(b)(4)
    2. Other documents relating to the annual report
- i. Hughes case
- i. The phrase of §104(b)(4) for required disclosures must be related to congressional intent of what they thought participants should be entitled to
- j. Titles

- i. Plan Administrator – party who is designated in the plan itself as having responsibility for the operation of the plan or if no one is designated as administrator in the plan itself, then the plan sponsor is the administrator
  - ii. Fiduciary – not really a term that entitles you to anything, but puts obligations on you.
    - 1. Can be a fiduciary at times and not at others
- k. §402 requires every plan to be established in written instrument and must provide for a fiduciary
- l. §1103 requires all of the assets of the plan to be held in trust
- m. §1104 duties of the fiduciary
  - i. discharge duties with respect to a plan solely in the interest of participants and the beneficiaries
    - 1. When acting as fiduciary have to make decisions in the interests of the participants with the exclusive purpose of providing benefits and defraying costs
    - 2. Must do so with care as judged by the reasonable man standard
    - 3. Diversify investments to minimize large losses
- n. §1106 When passing ERISA Congress was concerned with instances of pension plans with the employer in ways that result in benefits for employer but hurt the plan
  - i. Can't buy or sell property from party in interest
  - ii. Borrow money from . . .
  - iii. Furnish goods or services . . .
  - iv. Transfer to, use, any assets of the plan
  - v. Acquisition anything on behalf of the plan
  - vi. Can't do anything for his personal interest
- o. Firestone v. Bruch (II)
  - i. Arbitrary and capricious standard applies only to decisions of the administrator that use discretionary authority given to them. If there is nothing that gives discretion to the administrator, then it is reviewed de novo and the presumption of correctness does not apply.
- p. Lockheed v. Spink
  - i. When acting as a fiduciary can only act in the interest of the participants and beneficiaries and can't participate in the prohibited action.
    - 1. Amending a plan is not a fiduciary duty and so can do so without ensuring the best for the participants.
- q. §510 holds that it is unlawful for any person to discharge, fine, suspend, etc against a participant or beneficiary for exercising any entitled rights or for the purpose of interfering with the attainment of any rights under the act.
- r. Intermodel case
  - i. §510 applies to welfare benefits provided that the action is taken with the purpose to interfere in any right that the petitioner may be entitled to.
  - ii. USSC implies that you cannot, even though the welfare benefits are not vested, get rid of them at anytime without amending the welfare plan.
    - 1. Unresolved if it is acceptable to make a change to save money, not to cheat people out of money.