Employment Law Outline

I. Introduction

A. English Employment Law History:

1. Statute of Laborers (pg. 75)
   - Required labor at wages of pre-plague levels in response to the labor shortage. The purpose was to eliminate wage competition between ERs.

2. Statute of Artificers (pg. 76)
   - Prompted by another labor shortage, this statute specified that the term of labor was one year. There was increasing mobility of the laborer.

3. Blackstone (pg. 77)
   - Set forth the general rule that hiring is for one year in order to prevent opportunism by both ERs and EEs. Contracts, however, could be created for longer or shorter terms.

B. Modern American Employment Law:

1. Generally
   - Modern American employment law views employment as a private contract between employers and employees.
   - If there were no employment laws at all there might be problems.
   - For example, X arrives at Y Corp. and is offered a job at $10/day. X shows up and works 9-5. Y Corp. says wait, the $10/day means you must work 9am to 9pm. What do you do? Look to the oral contract. Look to industry practice. Messy.
   - Employment law helps to fill in the gaps. (i.e. the work day is 8 hours, not 12)
   - So if Y Corp. wants to have a 12 hour day, it is forced by the law to surface that issue and negotiate with the EE.
   - If you were to create a law saying the daily wage is presumed to be for 8 hour days, and the maximum number of hours you can work is 8, this would prevent the worker from working more than 8 hours. So the worker would be protected in this way, but it would also prevent those who prefer to work 12 hours from working and earning more money.

2. American Employment Law History:
   - In the Lochner case of 1905 the SC ruled that a NY law limiting the hours of a baker was unconstitutional. The Court has since backed away from this constitutional language.
   - In 1935 the National Labor Relations Act (NLRA) was passed implementing procedures to allow workers to get together and bargain collectively. There were no substantive terms, however.
   - Since then there has been an increase in the amount of government regulation of employment. The Fair Labor Standards Act (FLSA) passed in 1960, and other acts, have picked up where unions leave off. There has been a shift from reliance on collective bargaining to direct regulation of substantive workers’ rights.
   - Title VII of the Civil Rights Act imposed no substantive terms on the employment relationship, but did say that you can’t hire/fire on the basis of race, religion, sex, etc.
   - Under Title VII courts have developed a body of law to figure out what the ERs motivations were.
   - There is no one central source of employment law. There are federal and state statutes, the constitution, and state and federal court decisions.
   - States have greatly increased their influence on the employment relationship. They now closely examine employment decisions, especially terminations.

3. Default Rules
   - Default rules are gap fillers. The parties are free to agree to something else. The main issue is where to set the default. Where you set it will change who has to raise the issue in employment negotiations.
   - Traditionally, default rules strive to reflect that arrangement that most bargainers would prefer.

4. Immutable Rules:
   - Rules that set the terms of the contract and override party preferences.
   - These rules may infringe on what the EEs and ERs would choose given free choice.

5. Different Views:
   - One view is that the ER and the EE are each independent, competent actors capable of bargaining and reaching an agreement based on their own self interests. Under this view, immutable rules are suspect. They prevent the free
exchange of labor in the employment market. Labor is like any other commodity that can be exchanged on the open market.

- Another view is that labor is not like a widget on the market. It’s different from other commodities. The employment relationship is often a long term relationship, not a simple exchange of goods.

6. Implicit Life Cycle Model
- Worker enters the workforce and early on, the worker could earn more elsewhere, but he stays put because he is getting training that he thinks will help him in the long run. The ER is also paying more than he is receiving in productivity because he thinks he will get more in the long run over long-term employment. Eventually, the EEs output and wage are about equal, but eventually, the wages exceed the productivity as the term of employment drags on.
- As a result of this, the ER has the ability to opportunistically take advantage of the EE by firing him when the wages go above the output. The EE would be screwed because he would have a lot of firm specific investment, would be kind of old, might be hard to find a new job.
- The EE also has some incentive to quit early on when he is getting paid more than he is putting out.

II. Employment At Will
A. Historically:
1. Wood’s Rule (pg. 79)
   - Wood Rule: Hiring is at will when it is of a general or indefinite period.
   - The British presume hiring is for one year.
   - At will: Either party can terminate the contract at any time, for any reason (or for no reason).
   - Wood’s rule is a default rule that parties are free to contract around. Why pick “at will” to fill in the gap?
     - Why choose it? Simplicity – it is easily understood. Maybe this is what the parties would have intended.
     - The “at will” relationship has a more immediate feeling – to the extent we need you, we’ll keep you. It feels more temporary to the EE, but this might also provide some incentive for the EE to avoid discharge.
   - Many have criticized Wood’s Rule:
     - Jacoby argued that this rigid presumption forced courts to ignore the parties’ intentions.
     - Feinman argued that employment at will was an adjunct to the development of advanced capitalism. If the EEs could be dismissed on whim, they could not claim a voice in the determination of the conditions of work or the use of the product of their labor.

B. At Will Employment
1. Defining At Will Employment:
   - In the absence of a contract for employment for a definite term or a contrary statutory provision, an ER may discharge an EE at any time, without cause or reason, or for any reason and in such case, no action may be maintained for wrongful discharge.
   - At will employment is presumed in all states but MT.

2. Identifying At Will Contracts
a. Extra Consideration
   - Some courts will allow you to show permanent employment by showing that the EE paid extra consideration outside of the service that he renders from day to day. (Skagerberg).
     - Something more than just labor for wages is needed to show permanent employment. The court often wants concrete evidence that the parties meant to contract around the default rule.

b. Indefinite Contracts
   - Some courts, including MO, will find an indefinite employment contract to be at will absent a contract for a definite term. (Skaggs)
   - In these states, if you want to overcome the at will presumption, you will need to get a contract for a fixed period of time. MO has a strong preference for limiting attempts to contract around the at will rule.
Most states now are more flexible and more willing to allow the presumption of at will to be overcome.

3. Cases:

- Skagerberg (MN): Skagerberg was an engineer and received an offer to work for Blandin. He accepted and rescinded an offer from Purdue. He moved to MI and bought the home of Bladin’s superintendent as agreed in the contract. He was laid off after a few months. EE claimed breach of contract of permanent employment. Court said no, this was at will employment. There was just labor for wages, nothing more was exchanged. You need something more to get more permanent employment. Rejection of the Purdue offer, buying the house, giving up his business is all normal stuff.

- Skaggs (MO): Carriger worked for a hospital and was terminated without notice. Her contract had stated that either party could terminate the agreement “with just cause” by giving 60 days notice. She argues this was wrongful discharge because she had a just cause contract, not at will. The court said no, this is at will employment. The written contract was at will, the court looks only to the law, not to the facts. They don’t care about party intent. Indefinite term contracts are contracts at will.

C. Overcoming the At Will Presumption: Express and Implied Contracts

1. Express Definite Term Contracts (and Just Cause):

a. Generally
- Under these contracts, employment continues indefinitely but the ER can only terminated the EE for “just cause.”
- If you have a definite term contract, the courts will imply a just cause provision. (Chiodo).
  - By implying a just cause provision you are preventing a potential moral hazard. Without such a provision there would be no incentive to work because you are completely protected from firing.
  - Now, if no just cause term were implied, and the ER would be stuck with the EE, then that would encourage the ER to contract around this default rule. But this isn’t the rule. If it was, you might be stuck with a bad default rule if the parties don’t know about it. There are barriers to negotiating over it.
- What is just cause? EE not performing well, misconduct, incompetence, changed business conditions.
  - What about the EE stealing? Yes. ER believes EE is stealing? Some courts say you need a good reason and a reasonable basis for believing he was stealing, and the company must act in good faith. Other courts use a more objective standard. Good cause: more subjective. Just cause: more objective.
  - EE filed for embezzlement? Yes, just cause.
  - EE hired under a 2 year contract and then fired for embezzlement? Yes, just cause.
  - EE hired under a 2 year contract, business conditions change and he is fired? Maybe this would be just cause. But maybe the fact that he was hired under a 2 year contract means the ER should have been anticipating what his needs were. There is not necessarily a right answer here. The context in which the contract was made may shape the court’s analysis.

b. Case
- Chiodo (UT): Chiodo sued for breach of contract. He had an employment contract for a definite term of 10 years. The court implies a just cause term into the contract and finds that in a definite term contract, the ER must be able to discharge for just cause to prevent a moral hazard. Here there was not just cause for the termination. He was a good manager, worked hard. The ER seems to have tried to dredge up accusations against him. But EE was able to sufficiently and reasonably explain them.

2. Oral Contracts

a. Generally
- If an ER makes statements indicating that if the EE does a good job she will not be fired, such statements can create indefinite employment with termination only for just cause. (Hetes)
- Some courts will look to the context of the alleged agreement to overcome the presumption of at will employment.
  - For example, if the alleged agreement came up during negotiations about job security, that weighs in favor of finding a just cause term.
- Also if the promises are more specific, rather than general, there is a better chance you will be held to have created a just cause situation.
  - In MI, the SC found that a salesperson who had been told that “generally as long as they generated sales and were honest the salesperson had a job” was not a just cause contract. The court emphasized that the words were couched in general terms.
- ERs would be wise to be careful of what they say, to try to put everything in writing, especially if they aim to have at will employment.
Casual words of encourage may or may not be viewed as sufficient to overcome the presumption of at will employment. Some courts will imply a good faith obligation on the ER when he promises to provide employment “as long as I am satisfied with your work.” In such jurisdictions, the EE might be able to show breach of contract by showing that the ER was not “in good faith” dissatisfied with the EE’s job performance. The difference between good faith and just cause is that between a subjective and objective standard.

b. Case
- Hetes (MI): Hetes was a receptionist at a law office. She had no written contract but had had conversations during the hiring process with law firm representatives that assured her as long as she did a good job, she would have a job. She was terminated. Was this at will or just cause? The court held this was termination only for cause. Here she was given specific oral assurances of job security that were enforceable given the context of a negotiation about job security.

3. Statute of Frauds?
a. Generally
- Under the statute of frauds, an oral contract is void if it cannot be completed within one year.
- Thus, an indefinite term contract with just cause termination will not be in violation of the statute of frauds because just cause includes termination because of a downturn in business, which may occur within one year. (Ohanian)
  - Therefore it is useless to argue that an oral just cause contract is void because it will only terminate within one year if the EE fails to perform, which is breach – not performance of the contract.
- So some courts imply a term into the just cause provision, specifically the downturn in business, which actually limits the EE’s rights, but in some cases will allow him to win a breach of contract case.
- Other courts hold that you need express termination terms to take an oral contract out of the statute of frauds, implied is not enough.
- With the statute of frauds, you don’t have to worry about people forgetting the terms of the oral contract when the employment relationship is indefinite. If you don’t enforce the statute of frauds that forces the ERs to put their promises and expectations in writing.
- But if you do enforce it, that may mean the EE will extract promises from the ER that aren’t valid under the statute of frauds.
- How the statute of frauds is applied varies from state to state. VA, for example, applies it very strictly. NY (aside from the Ohanian case) also applies it very strictly. Some, on the other hand, will say the EE could have died within one year so that satisfies the statute of frauds.

b. Case
- Ohanian (2nd Cir): Ohanian worked for Avis for many years. They wanted to transfer him to the Northeast. They told him his future was secure in the company as long as he didn’t screw up badly. And that he would never get hurt in the company. So he took the job and moved. He was fired shortly after moving. The court implied a just cause termination term into the agreement on the basis of the oral assurances. These statements were made in the context of discussions about a job transfer, not during the hiring process. Avis tried to argue the statute of fraud prevented this just cause oral contract, but the court said no. Just cause includes termination for poor business conditions, which would mean that contract technically could be completed within one year. Dissent felt this should have been in violation of the statute of frauds since the oral assurances mentioned only him screwing up and not downturns in business.

4. Implied Contracts – Promissory Estoppel
a. Promissory Estoppel:
  i. Promise by the defendant;
  ii. Defendant should expect plaintiff would rely;
  iii. Plaintiff relied;
  iv. Injustice resulted by not keeping the promise.
- The reliance must be real. If you work for a company for 5, 10 years and reject other offers and then are fired, you probably won’t be successful arguing promissory estoppel because this won’t be seen as real reliance or it won’t be seen as reasonable reliance.
- Courts have used promissory estoppel to imply a contract for employment for a reasonable period of time. The period of time may depend on the extent of the reliance on the promise. (Grouse)
- Some courts, however, refuse to use promissory estoppel because it undoes employment at will (i.e. MO).
- Damages in a promissory estoppel claim are reliance damages. You do not get what you would have earned from the employment in question. This includes:
  - Damages for what was lost in quitting the prior job
  - Damages for what was lost in declining other offers.
- Some states will strictly enforce the statute of frauds and not allow oral contracts, but then will allow promissory estoppel arguments.
- Some courts have held that it is not reasonable to incur moving expenses or quit a job in reliance on an offer of at will employment. Other courts have asked whether an EE who has suffered moving expenses would have done so without some assurances of more than an at will contract.
- This is a hard theory to win on. Only about 4.23% of cases succeed.

Case:
- Grouse (MN): Grouse worked as a pharmacist. He was offered at job with GHP and told to give his 2 weeks. He did that and declined another job with Veteran’s Hospital. GHP was unable to get two references, so they fired him before he started. Grouse argued breach of contract via promissory estoppel. The court agreed saying he had reasonably relied on GHP’s promises and this included creating a reasonable period of time during which EE could work. The court gave reliance damages.

b. Extra Consideration – Just Cause
- Some courts will overcome the at will presumption by implying a term that there can be no termination without just cause for a reasonable time if:
  - EE affords his ER a substantial benefit other than the services which the EE is hired to perform, or when the EE undergoes a substantial hardship other than the services which he is hired to perform.
In such a case, the length of the reasonable time just cause term will depend on the hardship endured by the EE or the benefit he has bestowed. (Veno)
- Some states hold that when sufficient additional consideration is present, courts infer that the parties intended that the contract would not be terminable at will. (Darlington)

Case:
- Veno (PA): Veno was managing editor of the Free Press and was fired for publishing a story criticizing a local judge. He sued for illegal termination of his employment contract. The court held this was at will employment. There was no express contract or implied contract indicating this was not at will. In addition, EE could not show additional consideration which would create a suspicion that may this was not at will, but rather, just cause. Court found general comments made by Free Press managers, such as “we’re going to retire together” to be merely of an aspirational character. They do not create a legally binding definite term contract. In addition, his refusal to take other jobs was a preference to remain with Free Press, not a reliance on the promises. Finally, the court did not find additional consideration. But if there was, the EE would not be subject to discharge without cause for a reasonable period of time. That period being dependent upon the hardship endured by EE or benefits bestowed.

c. ER/EE Actions – Good Cause
- Some courts will imply an implied in fact contract for some sort of job security by looking to the longevity of the EE, his promotions and other successes, assurances made the ER, etc. (Pugh)
  - Some courts finding this type of implied contract suggest that the ER may terminate if he has “good cause,” which is more of a subjective standard.
- This type of implied in fact contract can be used to protect the EE when he gets older and the ER has the incentive to opportunistically fire him and find someone cheaper.
- Other courts have found that the mere passage of time in the ERs service, even marked by good reviews, is not enough to create an implied in fact contract.
- In the public sector, courts have been willing to find that teaching 4 years in a public college was enough to create a legitimate claim to job tenure.

Case:
- Pugh (CA): Pugh was employed with See’s Candies for 32 years. He was promoted several times. He was fired one day. He had been told by the president that if he was loyal and did a good job his future was secure. Moreover, See had a policy of not terminating administrative personnel except for good cause. There were no formal complaints against Pugh. The court here found facts from which a jury could find an implied promise of termination only for just cause. He worked for a long time, received lots of commendations and promotions, no criticisms, he was given assurances, and the ER’s policies worked in his favor. So now the ER must demonstrate good cause.

D. Overcoming At Will Presumption: Employment Manuals
1. Generally
- States have gone in two ways concerning employment manuals:
  a. NJ and Others: A contract may exist based on an employment manual. (Wooley)
     - The more liberal states will presume reliance. Many courts require that the EE have relied on the manual before the promises can bind.
     - These courts hold that the manual creates a unilateral contract, the ER is offering certain terms, the EE who is aware of the manual accepts those terms by continuing to work when he has no obligation to continue.
  b. NY and Others: An employment manual can give rise to actual employment promises, but they will look and make sure the language makes a promise and isn't just broad statements.
  c. MO and Others: Say employment manuals cannot create a binding contract. (Johnson v MDD)
     - These courts say that the handbook is an information tool, couched in general terms and open to broad discretion. It does not constitute an offer. Rather, they are unilateral expressions of self-imposed policies.
- A majority of states will allow employment manuals to create implied contracts, but states differ on the evidence they will allow. Often if you determine a contract exists, the next argument is over what the terms are.
- Some states use employment manuals to avoid unionization. Many ERs will issue disclaimers providing the risks/benefits of unionizing vs. nonunionizing.

Cases:
- Woolley (NJ): Woolley was hired by Hoffman with no written employment contract. He received a personnel manual which stated that EEs could be terminated for layoffs, performance, disciplinary reasons, retirement, and resignation. There was no category of discharge without cause. He argues he was fired without cause. He says the manual made express and implied promises of just cause termination. The court held that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an EE will be fired only for cause may be enforceable, even when employment is for an indefinite term and would otherwise be at will. Here the ER made an offer of just cause termination via the manual. It was given to all EEs and seemed to carry legal obligations. There was consideration because the EEs continued to work. The manual was a unilateral contract. The offer is binding as the EEs continue to work.
- Johnson v MDD (MO): Johnson was fired from MDD after she came in late a lot. She argues the handbook she received created an implied unilateral contract whereby she was granted indefinite employment with discharge only for cause. The court held the manual did not create a binding contract, as there was no offer or acceptance. It was an informational statement of self-imposed policies. You need to have the essential contract elements of offer, acceptance and consideration to make this binding. None of those elements were present. The handbook was in general terms and open to broad discretion. The ER reserved the power to alter the handbook, and no reasonable EE would see this as an offer to modify the employment contract.

2. Disclaimers in Employment Manuals
- Some courts hold that disclaimers are effective to invalidate any potential contracts created in the employment manual as long as the ER gives reasonable notice. (So the views above would invalidate the existence of a contract if there was a valid disclaimer).
  - What is reasonable notice? Look to typeface, visibility, length of time the disclaimer was in the manual, etc. Would the EE notice?
- Some courts hold that once an employment manual has operated to create an implied in fact contract term, the ER cannot unilaterally modify the contract (say by adding a disclaimer). To modify you need an offer, acceptance and consideration. (Demasse)
  - Some courts have held that continuing employment after modification does not constitute acceptance. The EE must be informed of the new terms, aware of the impact, and affirmatively consent to the modification. (Demasse)
  - The approach of the Demasse court might limit the flexibility of ERs, discouraging ERs from experimenting with greater job protection or other benefits in the first place. A competing policy concern, however, if to protect EEs who reasonably rely on company handbooks.

Case:
- Demasse (AZ): Demasse was terminated. He had received a handbook when he stared that stated terminations would start with less senior EEs. Later amendments changed that policy and stated hourly EEs would not be laid off based on seniority, but on performance and ability. After he was fired, he brought suit for breach of implied contract requiring EEs be laid off according to seniority. The court held that the seniority provision had become part of the employment contract, so the ER could not unilaterally change that policy. Implied in fact terms cannot be unilaterally modified. When the ER puts statements in the handbook, that ER should reasonably expect the EE to consider that as a commitment by the ER. That term becomes an offer to form an implied contract and is accepted by the EE’s acceptance of employment. Once the contract is formed, to modify the contract, there must be an offer, acceptance and
consideration. So the new handbook provision was an offer to modify. Employment after the change is not an acceptance. The EE would first need legally adequate notice of the modification, and then affirmatively consent to the modification.

III. Termination Claims - Tort
A. Exception to At Will Rule: Wrongful Discharge/Public Policy (Retaliatory Discharge)
1. Four Different Public Policies Recognized for a Wrongful Discharge Claim:
   a. Refusal to Commit an Illegal Act
   b. Refusal to Shirk a Public Duty (Jury Duty)
   c. Refusal to Withhold a Workers’ Compensation Claim (Exercising a Statutory Right)
   d. Whistleblowing (in some states)

2. Sources of Public Policies
   a. Constitution (state and federal)
   b. Statutes: Criminal Codes, Civil Statutes
   c. Regulations
   d. Judicial Opinions (considered a less firm foundation for public policy)
   e. Codes of Ethics

   - Most states hold that if you find the public policy in a statute, regulation, etc., the statute need not specifically forbid the discharge. You need to ask how specific must the statute be? Is it enough to look at the general principle behind the statute?

3. Third Party Effects
   - In order to have a public policy wrongful discharge claim, there must be a third party interest at stake. Query (Paredes?) whether the third party must be the public generally or if a single person is okay.
   - If the EE is demoted or harassed, rather than fired, in retaliation, she may also be able to bring a public policy claim.
   - Foley Test: Would we allow the parties to contract around the policy at issue? If the ER and EE created a contract, and that contract would not be enforceable for public policy reasons, then the ER can’t terminate for that reason either.

4. Remedies
   - What if there is a statute that specifically forbids discharge on the ground you are interested in? Does the statute have a built in remedy?
     - TN: If the statute creates a new right, it’s your only remedy. If it’s an old right, your remedies are cumulative, unless the statute specifically provides that you only get the statutory remedy. This approach presupposes the legislature knew the old common law claim existed when it created the new statutory right. So unless it excludes specifically the old common law remedy, you can have both the common law and the statutory remedy. (Hodges)
     - MO: If there is a statutory remedy, that is your exclusive remedy, no common law claims. If there is no remedy under the statute, you can bring common law claims.

5. State Approaches:
   - 44 states recognize a public policy exception; 5 do not; 1 has not addressed it.
   - NY and Other States: The decision lies with the legislature whether to recognize a wrongful discharge in violation of public policy tort. The legislature is an elected body, elected by the people, and should be responsible for determining what’s best for public policy. (Murphy)
     - But wouldn’t this work in favor of ERs who will have the money and the incentive to get it together and lobby the legislature? While the workers are scattered and unorganized.
   - Other States: Do recognize the public policy torts listed above in 1. Once the court decides to recognize the public policy exception, it will have to decide what violations are bad enough to trigger that tort.
     - States that do recognize the claim look to the sources listed in 2 to find the public policy.
     - Some states will only look to the criminal codes of the state to find public policy, others will use all of the sources listed in 2.
     - CA: In Gant held that the public policy exception requires the plaintiff to find a statute or CA constitutional provision as the basis for the claim. However, in Foley the court put aside the issue of whether there must be a statute and asked whether you could contract for it.
     - IL: Defines a public policy concern as what is right and just and what affects the citizens of the State collectively. This is a very broad definition. (Palmateer)
     - MO: Courts will look to statutes (criminal and civil), the constitution, and regulations to find a public policy. Process in MO: (1) look for a clear mandate of public policy; (2) hope there’s no remedy to preempt your tort claim. (Kirk)
- **TX**: Public policy exception covers only two cases: (1) Refusal to perform an illegal act (Sabine) – This covers instances where the EE in **good faith reasonably believes** that her ER has requested her to perform an act that may carry criminal penalties; and (2) when the EE is terminated because the ER does not want to pay benefits into the EE’s pension fund.

6. **Examples:**
   - Foley: EE claims he was fired for informing the VP of his company about another executive’s criminal investigation. He says under the law of agency, he had a duty to tell the ER about the relevant information so firing him for it was against public policy. The court rejected this idea, saying there was no third party affected by this. The interest was a purely private one. What if it was a publicly held company?
   - Nees: EE was at will and argues that she was fired for carrying out her civic duty to serve jury duty. The court looked to the Oregon Constitution, Oregon criminal and civil statutes, and cases to find a general public policy of promoting jury duty. If Nees had been demoted or harassed in some way in retaliation for serving jury duty, she could probably still bring a claim for violation of public policy.
   - Palmateer: IL SC upheld a cause of action for discharge after an EE was fired for reporting a possible crime to law enforcement.
   - Kirk: EE was fired for some unclear reason regarding her actions in looking after a patient at a hospital. She claimed the source of her actions was the Nursing Practice Act. The court accepted this and saw a general public policy that nurses should be acting on behalf of patients.
   - Del Mar: EE refused to ship fire arms under a label of “fishing gear” because she thought it was a criminal act. She was fired after she called the ATF to see if it was illegal. Court held that there is a public policy exception to the at will rule in TX for discharge for refusal to commit an illegal act. This includes refusing to do an act under a good faith belief that the requested act might be illegal.
   - See Nees case notes for more examples.

7. **Tort Damages**
   - A claim for wrongful discharge in violation of public policy is a tort claim. You are punishing for a wrong done to the person and to society. Because it’s a tort claim, you get punitive damages.
   - In a contract claim you are enforcing a private agreement. In those claims you get restitution and expectancy damages.

8. **Whistleblowing**
   - Questions to ask:
     a. Does the state protect both internal and external whistleblowers?
     b. Must there be an actual violation?
     c. Is good faith enough?
     d. Does the EE actually have to commit the illegal act, or can he see others do it?
     e. Must there be a public health/safety threat?
     f. Is violation of a regulation okay or must it be a criminal law?
   - Under NY law: (1) Activity, policy, or practice of the ER must be in violation of a law, rule or regulation (you need an actual violation); (2) Violation of the rule or regulation must create and present a substantial and specific danger to public health or safety; (3) EE must bring the activity, policy or practice in violation of law, rule or regulation to the attention of someone internally first; (4) Internal person must have a reasonable opportunity to correct the activity, policy, or practice.
     - Under the NY statute, institution of a claim under the statute waives the right to seek remedy under contract, collective bargaining agreements, other laws, rules or regulations, or under the common law.
   - Under TX law: Generally, whistleblowing is not protected (that is, observing someone else perform an illegal act). Only when the EE himself is asked to perform the illegal act is he protected. Also as seen above, if the EE in **good faith** refuses to perform an act the ER requests because he **reasonably believes** it might be illegal, he will be protected. However you might need to be making an inquiry into whether the act is illegal, not just refusing to do it.
     - Sarbanes Oxley: Protects EEs of publicly held companies who tell on their ER that they have a reasonable believe the ER is violating securities laws, committing mail fraud, etc. Reporting can be internal or external, the law covers both.

B. **Wrongful Discharge: Attorneys**

1. **Generally:**
   - Can an attorney claim wrongful discharge in violation of public policy?

2. **Approaches:**
a. IL and Others: No (Balla)
- Because the EE is an attorney, he does not have a claim. Under the Rules of Professional Conduct for IL, the attorney would have to report any violations by the company because it could result in injuries to public health and safety. That is, because the attorney had a duty to report the violation anyway, he has no public policy claim because the public policy interest is already protected.
  - This view encourages the client to freely communicate with his attorney and will not chill the flow of information.
  - The attorney has a fiduciary duty of loyalty to the ER that other EEs do not have. This view assumes the attorney will do what he is supposed to do, and follow the Rules of Professional Conduct.
  - In such a state, you might try to argue that the EE was not acting as a lawyer, but in some other capacity.

b. CA and Others: Yes (Gen. Dynamics)
- The public interest is protected by attorneys, and attorneys need the protection of the courts. Because attorneys are so regulated, they need more protection from public policy torts. The Court in CA too this approach:
  i. Mandatory Ethical Rule requiring disclosure of a violation: Attorney can bring a wrongful discharge claim.
  ii. Permissible Rule: Ask (i) Was the ER’s conduct of the kind to give rise to a retaliatory discharge action by a non-attorney EE? (ii) Is there a statute or ethical rule that specifically permits the attorney to depart from the usual requirement of confidentiality.
- The ethical requirement must be clearly established by the ethics code or a statutory provision. The ethics norm must be one intended for the **protection of the public at large**.
  - When there is a permissive rule, you can argue that this undercuts the presumption that the public welfare is protected. To the extent the rule is permissive, the duty of confidentiality seems even stronger.

c. MO:
- In MO, an attorney may reveal confidential information to keep their ER from causing public injury or death. Can you bring a wrongful discharge public policy claim? Not sure.
d. NY
- In NY, attorneys but not general EEs are protected from wrongful discharge in violation of public policy.

3. Litigation of these Cases
- It’s hard to litigate these claims given the attorney-client privilege. If you can’t litigate without revealing secrets, perhaps the suit ought to be dismissed.
- Some states allow secrets to be exposed to the extent necessary to prove a claim between an attorney and the client. Some states allow for use of sealed documents, protective orders, in camera proceedings, etc.

4. Policy
- In house lawyers are economically dependent on a single client/ER who controls their entire compensation, so maybe their discharge should be for cause. This might limit flexibility in replacing top corporate officers like in house counsel.
- The attorney has a fiduciary duty of loyalty to the ER that other EEs don’t have. It assumes that they will follow the RPC they are obliged to. However, in house counsel is particularly vulnerable to the client because he is not financially independent. This might weigh in favor of allowing a public policy exception.
- Sarbanes Oxley: attorneys appearing before the SEC have a duty to the corporate entity, not to any one person in the corporation. The Attorney first goes up the internal chain, if there is no response, he can go to the corporation’s board, and then to the SEC.
  - The Model Rules were modified to reflect Sarbanes Oxley.
  - SEC rules are intended to conform with state rules regarding the fiduciary duties of loyalty, care and confidentiality.

5. Cases:
- Balla (IL): Balla was an in house attorney at Gambro and he informed the FDA that Gambro was going to try to sell kidney dialyzers that did not meet FDA standards. He was fired for that. He argues wrongful discharge in violation of public policy. The court says no. Service as corporate in house counsel should not be allowed a claim for retaliatory discharge because the public policy implicated is protected by the lawyer’s ethical obligation to reveal information about a client as necessary to prevent acts that would result in death or serious bodily harm.
- General Dynamics (CA): Rose, the in house lawyer thinks he was fired for spearheading an investigation in EE drug abuse, protesting the company’s failure to investigate the bugging of the office of the chief of security, and advising general dynamics officials that their wage policy might violate the FLSA. He sues for public policy tort. The court says this is a case of the attorney engaged in ethically permissible conduct, but it is not required by statute or ethical code. The court asks whether EE conduct was of the kind to give rise to a retaliatory discharge action by a non-attorney EE, and whether there was a statute or ethical rule permitting the attorney to depart from the usual requirement of confidentiality with respect to attorney-client privilege. The court said the attorney may meet these requirements here. The ethical norm at issue must be one that is intended for the protection of the public at large.
C. Intentional Infliction of Emotional Distress (IIED)

1. Generally
   - Elements of an IIED Claim:
     a. Actor intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct;
     b. Conduct was “extreme and outrageous”, “beyond all possible bounds of decency” and “utterly intolerable in a civilized community;”
     c. Actions of the defendant were the cause of plaintiff’s emotional distress; and
     d. Emotion distress was “severe” and of a nature that “no reasonable man could be expected to endure it.”

   - 2 Types of Outrageous Conduct (Bodewig)
     a. Intentional conduct designed to inflict psychological and emotional distress;
     b. There is a special relationship and one party behaved recklessly.

   - Some things are just so beyond the bounds that there can be no legitimate business purpose. In those cases, the ER must answer for its actions. But must show the act was extreme and outrageous.

   - Courts might look to the social context in which the case arose to determine severity. (Bodewig)

   - Even though there is no third policy concern implicated here, some courts do recognized IIED claims. Why? Because if the conduct was really so outrageous you want to do something about that. Also this helps to equalize bargaining power. Most discharges, however, won’t give rise to IIED claims.

2. 4 Views:
   a. Traditional View: Freedom of contract. The implied relationship is a contracted one, so the contract contains all the terms and conditions concerning the relationship. The court will look only to the contract.
   b. Modern View: We honor private agreements, but if they affect a third party, the court will intervene.
   c. Broader View: Even though the parties are free to establish the terms of their relationship, they do so against a backdrop of norms and duties prescribed by law. The terms of the contract must fit within those basic notions of civility and decency.
   d. Strongest View: Some duties/interests are so fundamental that it is not merely a duty of implying them, but because they are so central to what our perceptions are of what people should do, we won’t contract around them.

3. Remedy
   - Plaintiff can get compensatory damages for IIED in a wrongful discharge in violation of public policy claim as well, if you can’t get IIED alone.
   - Punitives, compensatory damages.

4. Examples:
   - Agis: MA court found that the firing of a waitress because her last name was first alphabetically, for money that disappeared but she didn’t take was extreme and outrageous conduct. That action was without privilege and caused severe emotional distress, even though there was no physical harm.
   - Bodewig: Customer accused the Kmart clerk of stealing $20 from her. Eventually resulted in EE being strip searched. Court noted the EE was young and shy. They looked at the social context in which the case arose. She consented to the search, but nevertheless, the court found that this might rise to the level of IIED via the special relationship conduct. This case is unique in that the circumstances weren’t really that bad.
   - Monarch: 60 year old VP demoted to an entry level warehouse supervisor job that eventually resulted in his involuntary hospitalization. 5th Cir. upheld a claim for IIED.

IV. Termination Claims: Contract or Tort

A. Good Faith and Fair Dealing

1. Generally:
   - The implied covenant of good faith claim is intended to insure that neither party to a contract can deprive the other of the benefit of the contract.
   - Courts seem more likely to accept a good faith claim when the EE is seeking the benefit of the contract that he has been deprived of – you want the benefit of what you have earned. (Fortune) When the EE tries to use the claim to limit the at will rule and challenged the ERs right to terminate, that type of argument is less successful. (Foley).
   - The implied covenant is usually implied in commercial contracts. This covenant seems at odds with the at will rule. Taken literally, it seems to undue the rule. So these implied covenant cases will only be successful mostly in cases like Fortune (see below), where the ER has acted opportunistically by depriving the EE of the benefit of the bargain.
2. Remedy: Tort of Contract:
- Under a tort claim you get compensatory and punitive damages, but not under a contract claim. Tort damages are awarded to deter and fulfill people’s expectations.
- Does the implied covenant of good faith go to “overcoming the at will presumption” – a contract aspect – or is it an “exception to the at will rule” – a tort aspect?
  - The Foley court says it goes on the contract side.
  - The implied covenant of good faith is about protecting the bargain, not a separate socially imposed duty. In this respect, it’s a contract claim.
  - Foley also said there was no special relationship similar to the insurance context to warrant tort damages. An EE can always find a new job, but if your house burns down, you can’t find new insurance.
- The problem with only offered contract remedies is that the average EE will not be able to bring such a claim because it would not be worth it for a lawyer to take on such a case. Without tort damages, the contract damages are much lower, making it unlikely the lower paid EE would be able to find an attorney to take her case.

3. Examples:
- Fortune (MA): EE had an at will contract. He was paid his commission according to the written contract, but he was transferred before he could receive the rest of the commission he would have been entitled to had he not been transferred. After his transfer he was terminated. EE did not contest the discharge, only that the ER did not act in good faith. The MA court analogized: “where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuring transaction between the principal and the buyer should be regarded as having been accomplished by the agent. Also cites Monge, quoted directly below:
- Monge (NH): NH court held that a termination by the ER of a contract of employment at will which is motivated by bad faith or malice constitutes a breach of the employment contract.
- Murphy (NY): Murphy was fired because he disclosed that top management was committing accounting improprieties. He argues that his duties were to report any problems and in doing so, he was fired. He argues this is bad faith. However, the court held he had not good faith and fair dealing claim. If the relationship is at will, you can’t imply a covenant of good faith in order to undermine the at will rule. No obligation of good faith can be implied if it would be inconsistent with the other terms of the contractual relationship (i.e. the at will part). Dissent would read in a good faith obligation when there is an express contract to do certain things (i.e. report accounting problems).
- Foley (CA): EE was terminated after over 6 years of employment with good review and repeated oral assurances his job would be there if he did a good job. He also received termination guidelines that he believed indicated he would not be fired except for good cause. He was fired when he reported to a supervisor that a recently hired EE was being investigated by the FBI. The court held the had a contract claim for breach of the implied covenant of good faith. The court could find no special relationship between the ER and EE allowing tort damages (as there is in an insurance context).

B. At Will Rule Policy Discussion
1. Epstein Article (pg. 217)
- Epstein presents a classic defense to the at will rule. Epstein argues that there should be freedom of contract, and that it’s reasonable to expect that most of the time ERs and EEs will want to enter into an at will relationship.
  - Principle concerns in regulating the employment relationship on either side?
    - ERs primary interest is to deter wrongdoing an encourage maximum effort. ER doesn’t want to have to worry about justifying its actions.
    - EEs primary concern is to control ER abuses, and Epstein says that at will works because the EE can quit at any time. The EEs threat to quit is a real one. The ER must be concerned with reputation, having to rehire and train new EEs, etc.
- Quitting, however, can be very costly. And adverse reputation effects can be good, but we don’t always have perfect information about the ER. Moreover, the threat of a low skilled worker quitting really isn’t that critical to an ER.
- Epstein says the vast majority of employment contracts are at will – isn’t this some evidence that it makes sense?
  - But collective bargaining agreements generally do provide for some type of job security. Doesn’t that indicate that the average at will EE would want contracted job security if he could have it?

2. Schwab Article (Life Cycle Analysis)
- Schwab argues we have the best of both worlds – at will that can be overcome in certain exceptions.
- Does the life cycle model really apply to all EEs? Even unsophisticated clerks, etc? He says most mid-career workers can shirk because they’re being paid less than they’re working. In such a case, the at will presumption favors the ER.

3. Alternatives:
- What would an alternative legal regime for wrongful discharge look like? One possibility is to make the presumption just cause (statutory or judicial common law)
  - This might limit flexibility if ERs can’t hire and fire to meet their needs.
  - Just cause could lead to a lot of litigation as to what is/is not just cause.
  - Litigation is costly for ERs and EEs. Do the courts need to be the ones to resolve these disputes? In other countries that don’t have an at will rule, it’s much harder to lay people off when economic times are bad.

V. Public Employment Constitutional Claims
- Public employment adds another layer of concern and different law applies, especially the Constitution. So in a discharge case, the first step is to decide the EE is public or private.

A. Due Process Claims

1. Due process applies when:
   a. There is a legitimate claim of entitlement of the job (via existing rules, understandings, law); and
   b. When there is a liberty or property interest at stake.

- Essentially, if you don’t have the substantive right, the court will not impose a procedural right. The whole point of due process is to protect substantive rights, if you don’t have a substantive right, it’s a waste to allow the process. That’s why you must show a legitimate claim of entitlement.

- The 14th Amendment Due Process clause protects liberty and property interests.
  - Liberty includes the right to the individual to contract, to engage in any of the common occupations of life and generally enjoy those privileges recognized as the pursuit of happiness.
  - To have a property interest in a benefit, you must have more than an abstract need or desire for it. There must be a legitimate claim of entitlement stemming from existing rules or understandings that stem from an independent source, such as state law.

2. Remedy
   - Once due process is found to apply, you are entitled to the minimum procedural protections provided by federal law (the Constitution).
   - What is due process? **Notice and opportunity** to be heard. A full evidentiary hearing is not necessary. (Loudermill) There is no hard and fast rule as to what is appropriate. Use a balancing test – balance the interests at stake.
     - For example, if there is a factual dispute, the EE may deserve more process. But if the ER’s interest in immediate termination is strong (i.e. if someone brings a weapon to work) then less process might be appropriate.
     - In addition, the availability of post-termination procedures, and the speed in which the procedures will come about can weigh in favor of one side or the other.
       - The Court in Loudermill found that affording the EE the opportunity to respond prior to termination would impose neither significant administrative burden, nor intolerable delays.
     - If you can prove there is a liberty interest to which you have a legitimate claim of entitlement, the court will **grant a hearing**, it will not give you reinstatement, etc. (Sindermann)

3. Policy
   - Why grant due process? It’s a way of forcing the government to give reasons for its actions and decision. It holds the government accountable.
     - It’s a means of preventing error, weeding out bad motives, etc.
   - Why not grant due process to private sector employees as well? You want to prevent political patronage in the government sector. In addition, private ERs are disciplined by the market, the government has no market discipline. It takes a lot of time and resources to hold a hearing every time the government wants to fine someone.
   - Justice Marshall concurring opinion in one of these cases said his concern is that if ERs don’t have to give a reason, we won’t know if they had bad reasons. If they have good reasons, it’s not a problem. So they should have to reveal their reasons. Requiring the government to give notice and opportunity to be heard makes it harder for the government to act with bad motives.

4. Examples:
   - Roth (Sup Ct): Roth was hired as a professor at a state university for one year. It was decided he would not be rehired and reason was given to him for this decision. He alleged that failure to give notice of any reason for the nonretention and an opportunity for rehearing violated due process. The Court found no liberty or property interest implicated and he had no claim of entitlement to his job.
- Sindermann (Sup Ct): Sindermann worked at a junior college for four years, and his contract was not renewed. The college made no statement why it was not renewing his employment and gave him no hearing. There were no formal contractual tenure provisions, but there were understandings fostered by the college, particularly those in the employee handbook. He argues these guidelines promulgated by the TX College and University Board created a legitimate claim of entitlement. The Court held he had a legitimate claim of entitlement to job tenure and this was proof of a property interest that would get him hearing.

- Loudermill (Sup Ct): Loudermill was fired from his security guard job for the state because he was deemed to have lied on his employment application when he stated he had never been convicted of a felony. Loudermill maintains he thought it was a misdemeanor. Under OH law civil servants can be terminated only for cause and may obtain administrative review if discharged. Loudermill received his hearing and his dismissal was upheld. He alleges though that his due process was violated because he did not have a chance to respond to the charges against him prior to removal. OH state law was the source of his property interest. The Court found that a pretermination opportunity to respond, coupled with post-termination procedures is good. Once due process is found to apply, you must give the minimum procedural requirements provided by federal law (constitution). Court determined that Loudermill was entitled to oral/written notice of the charges, an explanation of the evidence against him, and the opportunity to present his side.

B. First Amendment Claims

1. Process Generally
   a. 1st Amendment Free Speech
      - A public employee will have a 1st Amendment free speech Claim when:
         a. The statement was of a public concern (when the public has an interest in the statement, when it will raise public debate: look to context, form and content).
      - If there is a 1st Amendment speech claim:
         a. Balance the ER interests in effective and efficient fulfillment of its responsibilities to the public with the EEs interest in commenting on public concerns.
            - Factors to consider in ERs interest in effective operation: Did the speech have an impact on the job? Did it show a lack of loyalty via direct criticism of supervisors, etc.? Did the statements impair discipline by superiors or harmony among co-workers? Was there a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise? Does the speech impair the EE’s ability to carry out his responsibilities?
   b. First Amendment Freedom of Association Claim:
      - The government interest in insuring loyal implementation of its policies does not outweigh the EEs interest in freedom of association. You cannot hire/fire on the basis of political association/affiliation. (Rutan)
         - There are other ways to insure the policies are carried out – i.e. firing for failure to carry out duties, etc.
      - Freedom of association allows people to associate with political parties and preserves their ability to participate in the democratic process. (Rutan)

2. Other Views
   - Brennan in dissent in Connick (Free Speech) said:
      a. Take only the content of the speech into account in determining if there is a public interest.
   - Scalia in Rutan (Freedom of Association) said
      - It should be a matter of political choice to allow government ERs to hire and fire based on political affiliation. He thinks the majority was imposing a civil service system. He points to federal judges who are all hired on the basis of political patronage. If it’s a good enough policy for judges, why not for other kinds of government jobs as well?

3. Policy
   - 1st Amendment claims encourage political discourse. It allows voters to make reasoned and informed judgments.
   - Public EEs will fear discharge which would chill discourse.
   - Freedom of association claims preserve the public EE’s right to have political affiliations without consequence to his job. It promotes the democratic process and allows people to participate.

4. Examples:
   - Pickering (Sup Ct): Pickering was a teacher in a school district. He was dismissed after writing a letter to a local newspaper criticizing the way the board of education handled proposals to raise new revenue, etc. The Board said the letter was false and statements were damaging to the reputation of other school officials. The Court found that Pickering’s comments were on an issue of public importance and concern, and that the interest of the school did not
outweigh Pickering’s interest in contributing to public debate. The court looked to whether the statements were carelessly made and false, how closely related to the operations of the schools the statements were, whether they would have a harmful impact on the school system, etc.

- Connick (Sup Ct): EE worked as an assistant DA in New Orleans. She was unhappy with her transfer to a different team in the office. She circulated a survey asking other EEs of their opinions on the office, the supervisors, etc. and whether they felt obligated to support certain political parties. The court held that other than the political party question, the survey was not of a public concern. That question went through a balancing test and found that the government’s interest outweighed. The DA felt that the survey caused a mini-insurrection and injured working relationships. The court did not see the necessity for an ER to allow event to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest.

- Rakin (Sup Ct): McPherson worked in the office of the Constable in TX. She made some comments about hoping Reagan is killed in the context of a conversation with a coworker about reduced foodstamp funding, etc. The supervisor overheard and she was fired. The Court found this to be a matter of public concern because her statements were made in the context of a discussion on the President’s policy. In doing a balancing test, the Court ruled that there as no evidence her remark interfered with the functionings of the office. She served no confidential, policymaking or public contact role, so the danger to the agency’s functioning from her private speech was minimal. You could argue in this case that her speech really didn’t have much significance from a public policy standpoint.

- Rutan (Sup Ct): The governor of IL issued an executive order proclaiming a hiring freeze for every agency. No vacancies would be filled or any new positions created unless allowed by the Governor. He appeared to be using his office to operate a political patronage system for republicans. Rutan made a first amendment freedom of association claim. Court found this to be a 1st Amendment violation. The government’s interest in efficiency can be satisfied by hiring and firing based on the EE’s effectiveness in doing his job, not on the basis of his political affiliation. The Court does allow the government to choose or dismiss certain high level EEs based on their political views in order to insure loyal implementation of its policies.

VI. Private Employment Constitutional Claims

A. Constitutional Free Speech and Association Claims

1. Generally:
   - Private EEs cannot rely directly on the 1st Amendment, as it applies only to government actors.
   - Some states will allow you to look to the federal constitution to find a public policy promoting freedom of association.

2. Process:
   a. Does the court recognize a public policy drawn from the constitution?
      - A freedom of speech/association claim does not fall into any of the 4 pigeonholes noted in the retaliatory discharge discussion. In addition, there doesn’t seem to be any third party interest at stake, unless you look to the interest in allowing third parties to receive the speech that is being suppressed.
   b. Balance the interests of the ER in efficiently carrying out its responsibilities and fostering close working relationships vs. the EE’s interest in speaking out on an issue of public concern. (the Connick test)

3. NLRA
   - To show a violation of §7, you must show:
      a. Concerted Activity: NLRA protects only group activities;
      b. Activity was Protected: It was for the mutual aid or protection of others, and was work related (related to wages, hours, and other conditions of employment);
      c. ER knows the activity is concerted;
      d. ER is motivated by the concerted activity.

   - In order to not be protected, the act must be truly insubordinate and disruptive of the workplace. Usually you get protection unless the activity is so violent or of such serious character as to render the EE unfit for further service.
   - Point of the NLRA is that if you’re going to protect collective bargaining, you need to protect the efforts leading to protective bargaining as well.
- The NLRA thus protects private EEs who speak out about matters that are work related in a concerted manner. This protection is not afforded to public EEs. But there are some analogous types of rights for public EEs.

4. Policy:
- Does it make sense to have two separate systems for public vs. private employees?
- Some states have passed statutes saying private ERs can’t discriminate against the EEs on the basis on political affiliation, etc. Many states have looked to statutes and the constitution for expressions of public policy even if the constitution doesn’t expressly apply to the situation.
- Public policy wants to protect public values – you want to prevent the distorting of the democratic process.

5. Examples:
- Novosel (COA): Novosel was employed by Nationwide Insurance and was discharged solely for refusing to participate in an effort to lobby the PA house on tort reform. The court held that there was a public policy exception: Public policies are ones that strike at the heart of a citizen’s social right, duties and responsibilities. Freedom of political expression is a compelling societal interest, like that of serving jury duty. The court looked to state court opinions to find the public policy against limiting the rights of political expression and association. The court then ruled that you would have to balance the ER and EE interests as in Connick to determine if there was a violation.
- Brunner (TX): Brunner claims she was fired for volunteering to help AIDS victims. The court refused to create a public policy exception since TX law only allows a public policy tort claim in 2 narrow situations: refusal to perform an illegal act; ER fires to avoid having to pay into a pension fund. Since this does not fall into either exception, no tort claim.
- Timekeeping (NLRB): EE argues he was wrongfully terminated under NLRA §7 and 8 for engaging in a protected, concerted activity. He wrote an email criticizing the proposed vacation policy plan and sent it to fellow EEs and the manager. The email also was worded in flippant and grating language. The manager saw it as a slap in the face of EEs with good attitudes and a personal attack upon himself. The court held that this was a concerted activity, about a work related topic, that was for the work-related mutual aid of his fellow employees. In addition, the ER knew the activity was concerted because it was a group email, and he even stated he was motivated to fire him because of the concerted activity. If this had been a public EE, this would not be a matter of public concern, so the public EE would have no constitutional claim.

RECAP: PROTECTION FOR SPEECH RIGHTS:
- When to EEs have some sort of protection for speech rights? First ask if the EE is public or private?

**Public Remedies**
- §7 Analogous type rights for public EEs. (If such rights existed for Connick/Myers should’ve brought those claims)
- **Just Cause**: Might find these in civil service statutes or collective bargaining agreements. To extent EE may be retaliated against for speaking out, may be able to argue just cause.
- **1st Amendment**:
  a. Was speech on a matter of public concern?
  b. If yes, court will balance the EE’s interest in speaking out vs. ER’s interest in having an efficient workplace.

**Private Remedies**
- §7 NLRA protects EE speech to the Extent its concerted activity, for mutual aid, about working conditions.
- **Just Cause**: Far fewer private EEs are covered by just cause.
- **1st Amendment**: Wrongful discharge In violation of public policy. Some courts allow this, others do not. This cause of action could be overridden by state legislature.

VII. Privacy Claims

A. Public Employees: 4th Amendment Claims
1. Searches and Seizures
   a. Generally:
      - 4th Amendment protection against unreasonable searches and seizures applies to states if the EE has a reasonable expectation of privacy.
      - Question: Is there a reasonable expectation of privacy such that the government ought to have a reason to intrude? Usually under the 4th Amendment, the government ought to have a warrant and probable cause. But this isn’t law enforcement, it’s an employment situation.
   b. Process for Determining if there was a Privacy Violation in the cases of: (i) securing state property or (ii) investigating work related conduct:
a. Was there a reasonable expectation of privacy?
- Factors: Intent of framers? What has the EE used the space for? What is the societal understanding? What is the regular practice in the workplace?
b. If yes, apply a balancing test. (B and C might go together, balance to see if search was reasonable in inception and scope, I’m not sure)
- Balance the ER’s interest in having an efficient workplace (need for supervision, control, and efficient management, etc) vs. EE’s interest in privacy.
c. Search must be reasonable at its inception and in its scope.
- To argue the search was not reasonable try to show the ER claimed it was trying to secure state property but it only seized personal property.
- Search will be reasonable at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the EE is guilty of work related misconduct, or that the search is necessary for non-investigatory work-related purposes, such as to retrieve a file.

2. Disclosure of Private Information
a. Privacy Interest Covered Generally:
   - Privacy claims based on the Constitution, but not rooted in any particular amendment, extend to **two types of interests**:
     i. Individual interests in avoiding disclosure of personal matters;
     ii. Interest in independence in making certain kinds of important decisions (like marriage, procreation, etc.)
   - You can’t waive your right to privacy. If there’s a privacy interest, it is protected. You can’t condition public employment on someone waiving a constitutional right.
   - Types of protected privacy interests: Medical records, certain financial information that may be embarrassing, etc.
     - If the records are open, there is no privacy interest. If the activity is something you do in public (gambling, drinking) no privacy interest. The essence of private information is its general unavailability and the individual’s treatment of it as confidential.

b. Process for Determining if there’s Been a Disclosure Violation:
   i. Is the interest in protecting the disclosure valid? Is this private information? (See above: personal matters, important decisions)
   ii. If yes, balance the interest of the ER vs. the EE.
   iii. If the ER’s interest outweighs, there must be a system in place to protect the information from further disclosure.

3. Examples:
- Ortega (Sup Ct.): Ortega was a doctor at a state hospital. Hospital officials were concerned about possible improprieties in his acquisition of a computers, as he said it was donated, but it appeared residents were possible coerced into donating. The hospital suspended him and decided to search his office. The hospital claimed it wanted to secure state property. There was no policy of searching offices. The court found a reasonable expectation of privacy.
- FOP (COA): Police department decided to create a new unit. In order to get into the unit, the officers had to complete a questionnaire which asked questions pertaining to the officers’ financial situation, propensity for gambling and drinking, family history of arrest, medical histories, and associations with other organizations. The court found that the officers had constitutional privacy interest in those questions that were not related to characteristics necessary for the job, and no already part of a public record. The court weighed the strength of the government’s interest vs. the EE’s interest in each matter deemed to be private. In addition, the court noted that the department needed to have a system in place to protect the information from disclosure.

B. Private Employees
- **Four types of invasion of privacy claims**: (i) intrusion upon seclusion; (ii) public disclosure of embarrassing private facts; (iii) publicity which places the plaintiff in a false light; (iv) appropriation, for the defendant’s pecuniary advantage, of the plaintiff’s name or likeness. (we didn’t discuss iii and iv).
- There may be **privacy interests in**: communication, information, bodily integrity, spaces, objects, to act autonomously (especially off duty), etc. There are dozens of rules that protect privacy.

1. Invasion of Privacy: Public Disclosure of Private Facts (Miller)
   a. Public disclosure of private facts;
   b. Facts were private;
   c. Matter made public is highly offensive to a reasonable person.
   - An invasion of an EEs right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the person were a public
figure, or a particular public such as fellow EEs, club members, family or neighbors if the person were not a public figure.
- The public disclosure need not be written or widespread. It means any sort of communication.

2. Invasion of Privacy: Intrusion Upon Seclusion (Trotti)
   a. Intentional intrusion on the solitude or seclusion;
   b. That is highly offensive to a reasonable person.
- Look at the facts of the case, the practices of the parties, etc.

3. IIED (Rulon-Miller)
   a. Actor intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct;
   b. Conduct was “extreme and outrageous”, “beyond all possible bounds of decency” and “utterly intolerable in a civilized community;”
   c. Actions of the defendant were the cause of plaintiff’s emotional distress; and
   d. Emotion distress was “severe” and of a nature that “no reasonable man could be expected to endure it.”

4. Breach of Contract (Rulon-Miller)
   a. Was a contractual right to privacy created?
- Look for repeated statements by the ER; company policies; written policies in employment manuals. Through these means, the ER can create a contractual expectation of privacy.
- There aren’t many times you can use this affirmative contract claim, but it does help to establish reasonableness for other claims.

5. Cases:
- Miller (IL): EE worked for Motorola. Her medical information was maintained at the place of business. It was disclosed to at least one fellow EE. She alleged such severe physical and mental distress that she had to retire early. Her claim was invasion of privacy, public disclosure of private facts. Here her medical condition was disclosed to fellow EEs which sufficiently satisfies the requirement that publicity be given to a private fact. Disclosure of a mastectomy would be highly offensive to a reasonable person.
- Trotti (TX): EE worked for Kmart and kept her belonging in a locker provided by Kmart. She provided her own lock and did not supply the key to Kmart. Kmart set out a policy that it could go through the lockers and sometimes did. She realized one day that her locker had been opened and her personal effects gone through. The court found this could be an intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person. The offense must be highly intrusive upon the facts. Because the EE brought in her own lock and because the ER created an expectation that the locker would be free from intrusion and interference given the private lock, there was a legitimate expectation of a right to privacy that was intentionally intruded upon. Question for the jury.
- Rulon-Miller (CA COA): EE worked for IBM as a manager and dated a person who worked for a competitor. She was demoted for her relationship with the other guy. IBM had sent out notes to managers saying company policy insured the right of the EE to privacy and the right to hold a job even though off the job behavior might not be approved by the manager. The policy established was one of no company interest in the outside activities of an EE as long as the activities did not interfere with the work of the EE. Here there was no effect. So she had a contract claim. In addition, a jury would be entitled to decide if this was extreme and outrageous conduct in light of the manager’s conduct and statements, and the company’s express policy. The court here found that the statements and conduct would tend to humiliate and degrade the respondent. He denied Rulon-Miller a right granted to all other EEs for conduct unrelated to her work and degraded her as a person. So it is possible a jury would find IIED.

6. Invasion of Privacy: Public Policy: Drug Testing
   a. Generally
- Some states are willing to look to state and federal Constitutions to find a public policy in favor of protecting an EE’s right to withhold certain information from his ER.
   - **Drug Testing Approach 1** (Luedtke):
     i. Balance ER’s interest in safe and secure workplace vs. EE’s interest in off duty activities;
     ii. If ER’s interest outweighs, drug testing must at a time contemporaneous with the EE’s work time.
     iii. EE must receive notice of the drug testing program.
   - **Drug Testing Approach 2** (Luck)
     i. Foley: You could create a valid agreement where ER and EE would agree that EE would not take the drug test. This would not be void for public policy concerns.
ii. The constitutional right to privacy is a private right, no third party interests are at stake.

- **Drug Testing Approach 3 (Jennings)**
  i. No common law right of privacy as a basis for wrongful discharge claim;
  ii. You can continue to work under the modified terms of the contract (drug testing) or you can quit;
  iii. No privacy interest is invaded here because you must consent to the drug testing.

b. Cases:
- Luedtke (AK): EE worked for an oil rig and refused to take a drug test. He was fired for it. Court held that the EE has a privacy right in what he does at home. The ER cannot intrude upon the seclusion of what the EE does in his own home. Court said that what you do in your home is private, provided it is for noncommercial use and does not interfere in a serious manner with health, safety, rights, and privileges of others or with the public welfare. Where a public policy supporting the EE’s privacy in off-duty activities conflicts with the public policy supporting the protection of health and safety of other workers and the EE himself, health and safety concerns are paramount. The drug testing must be conducted at a time reasonably contemporaneous with the EE’s work time. The EE must receive notice of the drug testing program.
- Luck (COA CA): Luck worked for Southern Pacific for 6 years when a drug testing program was implemented. She didn’t consent to the testing and was discharged. She tried to bring a public policy claim but the court said no, this is a private right. Under Foley, if ER and EE agreed that EE would not have to take the drug test, no public policy would render the agreement void. Even if you said this was a public interest, there must be a consensus that reasonable people would not differ on whether this involved public policy interest, there is no consensus here. Moreover, the public policy must be firmly in place at the time of the firing, and it was not here.
- Jennings (TX): EE sued for relief from drug testing because she said it was a violation of her common law right of privacy. She contends that the ER changed the terms of employment, but she did not assent to the change. Court held that when the ER notifies the EE of changes in employment terms, the EE must accept the new terms or quit. The court says there is no common law right of privacy claim as a basis for wrongful discharge. Sabine Pilot provided the only very narrow exception to employment at will. Moreover, no privacy interest is invaded here because the privacy right is protect – if you consent to the drug testing, there is no invasion. So the testing is consensual.

7. Invasion of Privacy: New Technologies
a. 2 distinct privacy interest:
   i. Interest in privacy of communications;
   ii. Interest in the nature of the information itself.

b. Case
- Smyth (US district ct): EE worked for Pillsbury and sent out an email from his house, but over the company’s email system, that contained some foul language and trash talked the company. He claimed wrongful discharge in violation of public policy, the public policy being invasion of privacy. Court said the EE did not have a reasonable expectation of privacy in his email, as this was a company email system. He could have tried for a contract or estoppel claim because the company had a policy that company emails would not be read, but court says an ER may not be estopped from firing an EE based upon a promise, even when reliance is demonstrated.

VIII. **Defamation**

A. Defamation Generally

1. Restatement Definition:
   - To create liability for defamation there must be:
     i. A false and defamatory statement concerning another;
     ii. An unprivileged publication to a 3rd party;
     iii. Fault amounting at least to negligence on the part of the publisher; and
     iv. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

   - Defamation per se: does not require proof of damages. Includes charging another with commission of a crime.
   - Regular Defamation: requires proof of damages.

2. Qualified and Absolute Privilege:
   a. Generally:
- The defense of privilege has developed under the public policy that certain conduct which would otherwise be actionable may escape liability because the defendant is acting in furtherance of some interest of societal importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff. (Zinda)
- Absolute privilege gives you complete protection without any inquiry into the defendant’s motives.
- Conditional/Qualified privilege is recognized in certain conditions, including when the statement made is on a subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest, and they are entitled to know. (Zinda)
  - The common interest privilege is based on the policy that one is entitled to learn from his associates what is being done in a matter in which he has a common interest.
- 2 situations in which a common privilege is recognized:
  (i) Former ER communicates to prospective ER.
  (ii) ER communicates to current EEs reasons for one EE’s discharge.

b. When to Apply a Qualified Privilege:
- Determining when a qualified privilege should protect a communication is a question of law, courts will:
  i. Balance the interests protected by a privilege and the interest served by allowing a defamation action.
  - For example, the interests of the EEs in knowing their reasons for their discharged, to ensure they aren’t fired on mistaken beliefs, may outweigh any harm which the knowledge of the negative reason may cause the EE.

3. Restatement Definition of Abuse of Privilege (Zinda):
- Privilege may be abused:
  i. Because of the defendant’s knowledge or reckless disregard as to the falsity of the defamatory matter;
  ii. Because the defamatory matter is published for some purpose other than that for which the particular privilege is given;
  iii. Because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege;
  iv. Because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged; or
  v. The publication includes unprivileged matter as well as privileged matter.
  (vi.) Also malice.
- It’s okay if the ER uses a method of publication that involves incidental communication to people not within the scope of the qualified privilege, provided the original publication attempted to target only the relevant people. (Zinda)

4. Publication
- Restatement Types of Publication (Chuchey):
  i. Intentional: There is an intent to publicize defamatory matter when the actor does an act for the purpose of communicating it to a third person, or with knowledge that it is substantially certain to be communicated.
  ii. Negligent: If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication.
  iii. Self Publication (see below)
  - Some states do not recognize information exchanged between EEs of the same company as publication (Messina, Starr). They require publication to a third party.

5. Self-Publication (Chuchey)
- Self-publication occurs when the EE is forced to later repeat the defamatory statements to others. Two types:
  i. The originator of the statement has reason to believe the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person.
  ii. Liability is imposed if the defendant knew or could have foreseen that the plaintiff was likely to repeat the statement.
  - Some courts will find publication in the first approach. Under the second approach, less courts follow that. Basically you don’t want to punish the defendant for things the plaintiff could reasonably have avoided disclosing.
  - Some courts do not allow a claim for compelled self-publication (like OK in Starr).

6. Recommendations
- Rule:
  i. If the recommendation amounts to an affirmative misrepresentation;
  ii. Presenting a foreseeable and substantial risk of physical harm;
  iii. To a third person;
The recommender may be liable for torts of fraud or negligent misrepresentation.

7. Cases:
- Elbeshbeshy (ED PA): Plaintiff worked as a nuclear structural mechanic. She was terminated for “lack of cooperation.” This reason was also told to her supervisors. The court ruled that this could be defamatory. Such a statement might lead members of the community and third persons to reasonably believe that the plaintiff’s nature was irremediably insubordinate, obnoxious and antagonistic, when really there was just a personality conflict. Telling this to the supervisors constituted publication. In order to overcome the qualified privilege, EE presented evidence that she was fired out of malice and abuse of privilege.
- Zinda (WI): Zinda sued his ER for product liability. He had filled out in his job application that he suffered from no injuries, but then he sued for alleged lingering injuries. The ER fired him for lying on the application and published the reason in the company newsletter, which made it out into the community. The court held that this communication in the newsletter was privileged as all the EEs had a common interest in knowing why fellow EEs were discharged. The ER had an interest in quieting rumors and sustaining moral. There was no abuse of privilege. It’s okay if the method of publication involves incidental communication to people not within the scope of the privilege.
- Messina: EE was fired when he intentionally postdated a vehicle inspection report that he filed with the company. This was a violation of federal safety regulations for which the ER could have been sanctioned. None of the EEs who heard the conversation though less of Messina, therefore no slander could have occurred. You need to prove damage to succeed on a defamation claim. In addition, OK law does not find communications between EEs of the same company as publication.
- Starr (10th Cir): Starr worked for Pearle Vision and was fired after she refused to cooperate with an investigation into whether she was responsible for credit card fraud. Several EEs of the Pearle Vision told third parties not affiliated with the company why Starr had been fired. She argued this was defamation. She also argued this was defamation via self-publication because she would have to tell future employers why she was fired. The court says no, OK does not recognize self-publication. However, they do agree that there may be a claim for defamation as a result of publication to the 3rd parties. Moreover this could be slander per se because it charges commission of a crime, which does not require proof of actual damages.
- Churchey (CO): Churchey was fired by Coors for failing to report her medical clearances given by the company doctors. Her doctors had told her different things. She claims defamation via self-publication because she now has to report this to future employees as the reason for her discharge. The court accepts the notion of self-publication provided the originator of the defamatory statements had reason to believe the defamed person would be under a strong compulsion to disclose the contents of the statement to others.
- Randi (CA): This is an extremely unusual case. A school district gave a glowing recommendation about a former EE to a prospective ER without telling them of the prior charges and complaints of sexual misconduct and impropriety. The former EE then later sexually assualted the plaintiff who was a student. The court held that liability can be imposed if the recommendation amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a 3rd person. There could be tort liability for fraud or negligent misrepresentation.

IX. Misappropriation: Duty of Loyalty and Trade Secrets

A. Duty of Loyalty (Jet Courier)
1. Generally
   - Restatement: “An agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency… unless otherwise agreed.” (Agency law) (Jet Courier)
   - EEs can prepare to leave the ER, he can do things to prepare for his next job, but he can’t actively be in competition.
   - Duty of loyalty claims arise from actions taken by an EE when he was still employed by the ER.

a. Solicitation of EEs:
   - Generally, an EE breaches his duty of loyalty if prior to the termination of his employment he solicits his co-EEs to join him in his new competing enterprise.
   - An EE is subject to liability under the Restatement if before or after leaving employment he causes fellow EEs to breach their contracts with the EE.
   - Factors:
     i. The nature of the employment relationship
     ii. The impact or potential impact of the EE’s actions on the ER’s operations; and
     iii. The extent of any benefit promised or inducements made to co-workers to obtain their services for the new competing enterprise.

b. Solicitation of Customers
   - The key inquiry is whether the EE’s actions toward the customers amounted to solicitation.
- You can advise customers that you will leaving your current employment, but you cannot solicit them for your new competing business.

c. Policy
- The EE needs the ability to move on. Society benefits from competition.
- The substantive rules give the EE more wiggle room. However they are also vague enough that the ER can bring suit, which can be a big burden on new companies, especially if they are startups.

2. Case
- Jet Courier (CO): Mulei was hired to run Jet Courier’s Denver office. He signed a contract for bonus payments but never really received them. While working for Jet he began to form his own venture. While still employed he told Jet customers he was starting his own business and would give them the same service. He also talked to Jet EEs trying to get them to work for him. The court found Mulei would be liable for breach of loyalty if he had solicited customers and EEs while still employed.

B. Inevitable Misappropriation (Pepsico/Earthweb)

1. Generally
   a. Trade Secrets Act:
      i. Trade Secret;
         - A trade secret is something that has economic value because it’s not known to the public and the company has treated it as a secret.
      ii. Actual or threatened misappropriation.
         - Misappropriation is acquisition of a trade secret by improper means. This can include disclosure by someone with a duty of confidentiality.
         - Some states allow you to obtain an injunction and maybe damages if disclosure of the trade secret is inevitable at the new job.
            - For example, in IL, threatened misappropriation can be enjoined where there is a high degree of probability of inevitable and immediate use of the trade secrets. (Pepsico)
            - Just because the new position is similar to the one held prior, without more, that does not make it inevitable that the EE will use or disclose the trade secrets.
         - The Trade Secrets Act is adopted in over 40 states. The common law claim is similar.

   b. Limitations on Inevitable Misappropriation (Earthweb)
      - Some courts are less willing to enjoin an EE based on inevitable misappropriation.
      - NY courts consider three factors in determining whether to apply the inevitable disclosure doctrine:
         i. Are the 2 ERs in direct competition, providing the same or very similar products or services;
         ii. Is the EE’s new position nearly identical to his old one, such that he could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of his former ER; and
         iii. Are the trade secrets at issue highly valuable to both ERs.
      - NY would also recommend looking at the nature of the industry and the nature of the trade secrets.
      - So NY courts will use inevitable disclosure only when those three factors are present, otherwise you need a contract.

   c. Trade Secrets Defined
      - NY provides the following factors to determine if something is a trade secret:
         i. The extent to which the information is known outside the business;
         ii. The extent to which it is known by EEs and others involved in the business;
         iii. The extent of measures taken by the business to guard the secrecy of the information;
         iv. The value of the information to the business and its competitors;
         v. The amount of effort or money expended by the business in developing the information; and
         vi. The ease or difficulty with which the information could be properly acquired or duplicated by others.

   d. Policy
      - You want to protect innovative work, trade secrets, so that companies and people have an incentive to be innovative and think new ideas.
      - On the other hand, you don’t want to suppress competition or make it too difficult for the EE to work elsewhere.
      - The misappropriation claim is something of a fairness claim.
      - Some courts are hesitant to apply the inevitable disclosure doctrine because they are worried about overreaching by the ER. They feel the inevitable disclosure doctrine is too subjective, and prefer to rely on the written contracts instead.
- These courts find that when there is fraud, stealing of secrets, etc., then the inevitable disclosure doctrine is good. But in other cases, you don’t want to imply a contract term that isn’t there. It is better to have a written contract so there can be bargaining and the EE knows what the restrictions are.

e. Remedy
- You can get an injunction. Courts are usually reluctant to grant injunctions. However in these cases, the damages are hard to measure, and once the trade secrets are closed, the damage is done.
- The injunction might have two parts:
  i. Enjoined from revealing the trade secrets;
  ii. Enjoined from working for the new competitor for a certain period of time.
- Even if the former EE is contractually bound not to disclose the trade secrets, you can still get an injunction. (PepsiCo)

2. Cases
- PepsiCo (7th Cir): Redmond worked in the Powerade division of Pepsi when he was lured away to work at Quaker, which makes Gatorade. The two companies were fierce competitors. Redmond had knowledge of Pepsi’s marketing plan for Powerade and they wanted to enjoin him from using that information at Quaker to give Gatorade an edge. The court held that it was inevitable that Redmond would rely on the Pepsi trade secrets at Quaker, unless he had an uncanny ability to compartmentalize information. The court granted an injunction to prevent Redmond from using the trade secrets and from working at Quaker for 6 months.
- Earthweb (NY): Schlack worked as VP of Content at Earthweb, an internet site providing online products and services to business professionals in IT. He took a job with another company and Earthweb sued for injunction arguing he was likely to disclose trade secrets. The court refused to apply inevitable misappropriation because the two ERs were not direct competitors, the new position was not identical to the old, and the trade secrets were not highly valuable to the new company.

C. Convenants Not to Compete

1. Approaches
- Generally, most courts will distinguish between general skills and training, vs. skills appertaining specifically to the ER that were acquired or developed through training there. Non-competes will often not be enforced to prevent an EE from using general skills elsewhere. (Rem Metals)

a. NY Approach (Earthweb):
- NY will only enforce a restrict covenant not to compete if the covenant reaches the prospective employment and the restraint if reasonable and necessary to protect the ER’s interests.
- So, Non-Competes will be enforced if:
  i. Terms of the covenant reach the new employment; AND
  ii. Reasonably limited in scope; AND
  iii. Reasonably limited in duration; AND EITHER
  iv. Necessary to prevent an EE’s solicitation or disclosure of trade secrets; OR
  v. Necessary to prevent an EE’s release of confidential information regarding the ER’s customers; OR
  vi. The EE’s services to the ER are deemed special or unique.

b. IL Approach (Outsource):
- IL will enforce a non-compete when:
  i. The terms of the agreement are reasonable (geography, duration, activity restriction must be reasonable); and
  ii. The terms of the agreement are necessary to protect a legitimate business interest of the ER.
- IL recognizes a legitimate business interest in two situations:
  i. Where the customer relationships are near-permanent and but for the EE’s association with the ER, the EE would not have had contact with the customers (generally lawyer/client, doctor/patient, etc.); and
  ii. Where the former EE acquired trade secrets and other confidential information through his employment and subsequently tried to use it for his own benefit.

c. OR Approach (Rem Metals):
- OR will enforce a covenant not to compete when it is reasonable in time, duration, etc., and the ER can establish the existence of:
  i. Trade secrets;
  ii. Information or relationship which pertain peculiarly to the ER; or
  iii. Other special circumstances sufficient to justify the enforcement of a restrictive covenant.
- So OR will protect more than just trade secrets, its net is a bit broader.
- OR is careful to make the distinction between the EE using a general skill in a new ER, vs. using a skill appertaining specifically to the ER that was acquired or developed through training.

d. Other Approaches
- Some courts will only enforce non-competes if it will protect trade secrets. Other states are much more willing.
- CA does not enforce non-competes at all. In CA, ERs also tend not to sue EE’s for misappropriation of trade secrets very often, even though under common law they could.
- MA is much more amenable to enforcement.

2. Remedy:
- The non-compete can be enforced.
- Courts have developed three responses to overly broad non-competes:
  i. Rewrite the offensive clause;
  ii. Adopt a “blue pencil rule” enforcing the reasonable parts of the clause only if they are grammatically separable from the invalid parts; or
  iii. Refuse to sever objectionable portions or rewrite the covenant as this would encourage ERs to write truly ominous covenants knowing the courts would pare them down if overbroad.

3. Policy
- Courts are often reluctant to enforce non-competes given hardship to the EE. We’re concerned about individual EEs and anti-competitive effects.
- Need to balance protecting what the ER has created vs. what the EE has brought with him.
  - You want to incent the ER to create new things, to create value. A non-compete is an easy, low cost way to do this. You also want to protect the ER’s interest in training, in developing human capital.
- Why not protect ER’s interest in generally training? The EE has invested in learning the general skills, maybe the ER invested in providing the training, but that’s different.
- Why not let the parties make a contract so that the ER will have an incentive to provide training? How will we know the ER is paying for the training?
  - Sometime you talk about firm specific skills that are only valuable in that firm. In that case, you don’t have to worry about encouraging the ER to invest in training, because the EE can make more money using those skills at that ER. They aren’t transferable to other ERs.
  - But with firm specific skills, you worry about opportunism later on by the ER. If the ER fires the EE after many years, the EE will have a hard time getting another job because he has only firm specific skills.
- Is forever too long? Courts have said no.

3. Cases
- Earthweb (NY): Same facts as above. The court found that the new employment was not covered by the literal terms of the non-compete. Even if it was, the court said the terms were not reasonable and the agreement not necessary to protect legitimate interests. The court found the duration of the non-compete – 1 year – was way too long in the internet industry. Moreover, the court did not see any trade secrets at stake.
- Outsource (7th Cir IL): Barton worked for OSI as a salesman. When he was employed he signed a non-compete and a confidential information contract. The agreements were to remain in effect for one year after termination of employment. He quit and opened his own company and employed former OSI employees and recruited formed OSI customers. The court found that OSI enjoyed a brand that gave it strong customer loyalty amounting to near permanence. In addition, but for Barton’s association with OSI, he would not have had contact with those customers. Moreover, Barton had access to confidential information such as cost and price figures, and also data on the EEs. The covenant was narrowly tailored in geography, activity restriction and time. So the court enforced the noncompete. Posner dissenting saying in theory, this is the right outcome, but IL courts will enforce non-competes in circumstances that much more strictly conform to the rule given above.
- Rem Metals (OR): Rem wanted to enjoin Logan from working for a competitor doing welding for 6 months. Logan had signed a non-compete agreeing not to engage in business in competition with Rem for one year. There was a clear violation of the non-compete, but the court held that the EE had only general skills he was taking with him to the new ER. You cannot shift the risk of future competition to the EE because he has acquired general skills on the job. That fact that Logan gained considerable experience is not grounds for injunctive relief.
- Karpinski (NY): Karpinski opened an oral surgery shop in Ithaca and hired Ingrasci to work there. Ingrasci signed a non-compete saying he would never practice dentistry and/or oral surgery in 5 counties where Karpinski drew his clients from. Ingrasci later stopped working for Karpinski and opened his own oral surgery shop in Ithaca. Karpinski sought to enjoin him via the non-compete. The court examined the non-compete and found that the 5 county geographic scope was fine, as this was where Karpinski drew his clients. The also found the time, of forever to be fair,
saying an agreement would not be stricken merely because it lasted forever. The activity restriction, of dental and oral surgery, however, was too broad. It was everything that Ingrasci was trained to do. Moreover, Karpinski was an oral surgeon, not a dentist. So the court only enforced the part that was reasonable, the prohibition on oral surgery.

D. Employee Inventions

1. Shop Right (Francklyn)
   a. Generally
      - A shop right is a default rule that gives the ER a right to use his EE’s invention. Shop rights can arise via:
        i. Acquiescence; or
        - EE induces and assists in the ER’s use of the invention without demand for compensation or other notice of restriction of the right to continue. This results in an irrevocable, equitable license to use the invention.
        ii. Creating the invention on the ER’s time, on ER’s premises, and with ER’s tools.
        - The inventor gets the patent, the ER gets the right to use the invention without charge.
      - Third Parties: The owner of the shop right cannot license the right to use the invention to 3rd parties. The shop right is personal to the ER.
      - EE vs. Contractor: Generally a shop right arises out of an ER-EE relationship. But it is not necessarily limited to such a relationship. The full nature of the parties’ relationship must be examined to determine whether a shop right exists, not merely whether the relationship was employment vs. independent contractor.
   b. Policy:
      - The default rule of a shop right protects the ER from an EE suing his workplace, tools and time to create something, and then leaves with it.
      - It’s an equitable remedy. Something of value is created between the collaboration of the ER and the EE and both get to share in it.
   c. Case
      - Francklyn (9th Cir): Francklyn worked for Guilford as an independent contractor. While he was working, he used his free time to create a new harvester for the clams, using the ER’s premises and tools, at least at the beginning. It had been agreed between the EE and ER that Francklyn would work on improving the harvester. Francklyn gave Guilford the right to use the harvester without paying royalties. In addition, he used the ER’s time and tools. The court found that Francklyn granted Guilford a shop right via both his acquiescence and his use of Guilford’s tools and premises. The court didn’t care that he was an independent contractor, he was sufficiently analogous to an EE. The court also held that Guilford could not license the right to use the invention to 3rd parties. A shop right is personal to the ER and it can’t be assigned or transferred.

2. Holdover Clauses (Ingersoll-Rand)
   a. Generally (this is a fact specific test)
      - A holdover clause usually states something to effect of, if you come up with an invention within X years of employment, the former ER has a right to ownership.
      - Most courts will enforce a holdover clause if it is reasonable. A clause is reasonable if:
        i. It protects the legitimate interests of the ER (see below for definition of legitimate interest);
        ii. It imposes no undue hardship on the EE; and
        iii. It is not injurious to the public (public policy). (this is the Solari-Whitmyer test from Ingersoll-Rand)
   - The first two requirements are essentially a balancing of the ERs legitimate interests vs. the extent of the hardship on the EE. Where an ER’s interests do not arise to the level of a proprietary interest deserving judicial protection, a court will conclude the agreement stifles competition and is unenforceable.

   - **ER Legitimate Interest**: The legitimate interest protect can include trade secrets and confidential information, but also it can be broader.
      - The ER may have legitimate interests in protecting into that is not a trade secret, but is highly specialized, current information not generally known to the industry, but to which the EE has been exposed and enriched solely due to his employment.

   - **Public Interest**: The public has an interest in safeguarding fair commercial practices and protecting the ER from piracy and theft. But also has a strong interest in fostering creativity and invention. But balance.
   b. Case
- Ingersoll-Rand (NJ): Ciavatta worked for Ingersoll-Rand for a while as a technical engineer. After he quit, he created a new machine to prevent roof collapses in mines, that was better than the one at his former ER. EE was not involved in working on the Ingersoll-Rand version of the machine and did not do research for it. ER argues it has a right to the invention by virtue of the 1 year holdover clause. The court says no. Here it would not be reasonable to enforce to holdover. EE appears to have conceived of the invention himself. He was not hired to invent, and moreover the info needed to invent his machine was available throughout the industry, and published in magazines. ER had deliberately kept an open, public posture in the mining industry. EE developed the product based on his own general skill, expertise and knowledge. He undoubtedly employed some skills and knowledge gained at the ER, but the invention was not the result of any research currently done by the ER or research that he was personally involved in.

**PART II OF COURSE**

**X. Fair Labor Standards Act**

**A. Background and Basic Provisions**

1. History (Lochner Case)
   a. History Generally
      - The 14th Amendment talks about liberty, which includes the liberty to contract for one’s employment.
      - This freedom of liberty to contract can only be impinged upon by states in certain special circumstances.
      - Those circumstances include when the state strives to use its police powers:
         - To protect the safety, health, morals and the general welfare of the public.
      - In the Lochner era, the Supreme Court was unwilling to allow states to infringe upon the constitutional right to freedom of contract except in a few very narrow exceptions.
      - The exceptions included if the job is really seriously dangerous and there might be a true effect on the public if there is no regulation; and maybe if the EE’s are unable to assert their own rights during the contracting process.
      - Policy: Why not let the market regulate when you have 2 equal parties bargaining for an employment contract?
      - Problems of information; maybe the parties aren’t equal; problems of discounting the future risk; workers may not have sufficient information about later costs (i.e. health care) – thus the workers will externalize the costs.
   b. Case
      - Lochner (SC): NY law said bakers have a 60 per week, 10 hour per day maximum. It was an immutable maximum rule, but the parties could agree to something less. The SC was suspicious of the motives behind this act. They were suspicious of forcing parties of a contract into certain terms. Baking isn’t the healthiest line of work, but there are worse. The Court seemed to think that allowing the legislature to regulate in this instance would open the door to more regulation. Maybe if the bakers couldn’t assert their rights during the contracting process if would be okay for the legislature to intervene. But here it was a 14th Amendment violation.

2. FLSA
   a. Presently
      - Now if the statute is reasonably related to a legislative purpose and is not unreasonably restrictive or discriminatory, the Supreme Court says fine.
   b. Basic Provisions:
      - FLSA:
         i. Sets a minimum wage;
         ii. Requires overtime pay for work in excess of 40 hours at one and one half times the regular rate of pay;
         iii. Limits child labor.
      - FLSA aims to provide a minimum standard of living necessary for health, efficiency and general well being of the workers.
      - FLSA is an immutable rule. You can contract for better terms, but not worse.
   c. Minimum Wage
      - Should we raise the minimum wage? Congress would have to act. The minimum wage now of $5.15/hour gives you a yearly salary of $10,300. For a family of three, the poverty level is $14,630, so $5.15/hour is really low.
      - Many minimum wage workers, however, aren’t the sole workers in the household.
      - To decide whether the raise the minimum wage, you have to consider the economy as a whole. As wages rise, more people are willing to work, but less ERs are willing to hire.
         - So raising the minimum wage may reduce employment levels ultimately.
         - It could also be the result that prices will rise and the worker will not be better off.
         - changes in minimum wage also affect those above the minimum wage, but still at the bottom generally.
d. Overtime
- The requirement of more pay for hours worked over 40 hours is an attempt to spread the work – to reduce unemployment by encouraging ERs to hire more workers, rather than to add hours, when they need additional labor.
- Secondly, OT provisions are intended to protect EEs from ERs who might require them to work unreasonably long hours, or at least to compensate those who might have to work long hours.

e. Child Labor
- Child labor restrictions are intended to protect the interests of kids by promoting education.
- They are also designed to protect adult interests. By limiting the number of workers, the FLSA should increase the pay of adults and may increase the # of jobs available.

B. Implementing Substantive FLSA Obligations
1. On Call Time as Working Hours
- Relevant Question: Can the EE use the on call time effectively for his own purposes?
  - If yes, then the on call time is not compensable time on the job. If no, then the EE should be paid.
  - EEs who receive compensation for idle time generally have almost no freedom at all. It is not necessary that the EE have substantially the same flexibility or freedom as he would if not on call, or else all or almost all on-call time would be working time.
- Two Approaches for ERs to Respond to the On-Call Problem:
  i. Attempt to structure on call time so that it is not working time compensable under the Act.
  - Look to Bright: Give a longer response time, limit the number of calls to work, etc.
  ii. Adjust wages so that treating the on-call time as compensable is not too burdensome.
  - Reduce the regular hourly rate, so the ER may be able to offset most of the cost of treating the on call time as compensable.
- Case: Bright (5th Cir COA): EE was on call whenever he was not at work at the hospital. He had to be (1) wearing a beeper; (2) within 20 minutes; and (3) not drunk. He was compensated if he had to go into work for 4 hours, otherwise he got no pay while on call. The court found that FLSA is not about oppressive working conditions generally, only about working more than 40 hours. It didn’t matter to them that EE was on call for almost 1 year without respite. He had the flexibility to effectively use on call time for his own purposes, so this was not compensable overtime.

2. Determining Rate of Pay
a. Generally
- When EE’s get more than just weekly wages (i.e. bonuses and commission) it can be hard to figure out what their rate of pay is for both minimum wage purposes and OT purposes.
- Some courts have said that you have to look to each workweek – you can’t average over a month or a year. Calculate the amount owed weekly, not aggregated over more than one week.
  - Aggregating and averaging such that the EE is not actually receiving the minimum wage every week may be detrimental to maintaining a minimum standard of living necessary for the health, efficiency, and general well-being of the workers.
- FLSA Support:
  - §206 talks about the minimum wage and requires payment of the minimum wage “in any workweek.”
  - §207 talks about OT obligations and takes a single workweek as its standard and does not permit averaging hours over two or more weeks.
- Arguably, if the ER pays bi-weekly, you need to ensure that on a biweekly basis the EE is receiving the minimum wage for every hour worked. Annual payments, however, would probably create difficulties.

b. Regular Rate of Pay Calculation (207(e)):
- Regular rate of pay includes:
  - Regular pay and any bonuses received that are dependent on the work performed.
  - If bonuses are issued monthly, calculate a monthly rate of pay. If weekly, use the week rate of pay.
  - I have examples of calculations that we did in class.
- In kind payments are included in FLSA wages only if they are primarily for the benefit of convenience of the EE, accepted voluntarily by the EE and of a kind customarily furnished by the ER or by other ERs engaged in similar activities. 203(m)
- Regular rate of pay does not include:
  - Bonuses in the form of gifts (not tied to performance), other gifts as rewards for service;
  - Vacation pay, sick pay, travel expenses, etc.
  - Bonus payments made at discretion of ER at the end of a period that is not pursuant to any contract; payments made pursuant to profit sharing plans; payments that are talent fees;
- Irrevocable contribution by ER to a trustee or 3rd party for retirement, health insurance, etc.;
- OT pay;
- Premium pay for weekend work, holidays or regular days of rest when the premium rate is not less than 1.5 times the rate established for non OT hours;
- Extra payment for work outside the hours established where the premium rate is not less than 1.5 times the regular salary;
- Any value from stock option grants, etc.

c. Damages
- When FLSA violations are willful, damages are: 2xs liquidated damages.

d. Alternatives for ER:
- ER could increase the base rate of pay and decrease commission and bonuses to comply with the minimum wage provisions.
  - This however, might reduce the ER’s arsenal of tools to incentivize the EEs to do the work (sell the cars, etc.)

e. Case
- Sam Dell’s Dodge (US Dis Ct NY): The EEs worked at the car dealership for $56/week. They were eligible for weekly, monthly, and annual bonuses depending on how many cars were sold. They also got commission. The staff worked on average 55 hours per week, but the EEs were required to state on their time sheets that they only worked 36. So the EEs were paid less than the minimum wage if you take into account only their base pay. The court found that FLSA minimum wage provisions apply to the workweek, and moreover, the ER paid weekly. So the bonuses could be considered in connection with the minimum wages for the week in which they were paid, but nothing else went into the regular rate of pay calculation. The demonstration cars did not get added as part of the rate of pay because they were a benefit to the ER. Moreover, the violations here were willful (as evidenced by ER’s insistence on only reporting 36 hours per week) so damages were 2xs liquidated damages.

3. What Counts as OT Pay?

a. 203(h)
- 203(h) holds that only (5), (6), and (7) of 203(e) can be credited toward OT compensation due.
  - (5): Premium rates paid for hours worked in excess of 8 a day or in excess of the maximum workweek, or in excess of the EE’s normal working hours;
  - (6): Extra compensation provided by a premium rate paid for work by the EE on weekends, holidays or regular days of rest, or on the 6th or 7th day of the workweek where such premium rate is not less than 1.5 times the normal rate for non-OT hours.
  - (7): Extra compensation provided by a premium rate paid to the EE, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday or workweek, where the premium rate is not less than 1.5 times the normal rate.
- (5), (6), and (7) are dealing with sorts of OT pay anyway that is in cash. So that is why these are allowed as OT compensation but (1), (2), (3), (4) and (8) are not. Congress explicitly excluded stock options from inclusion in the regular rate of pay for OT purposes.
  - You cannot contract around the OT provisions.

b. Policy:
- Some things like vacation pay, holiday pay, etc. aren’t included in the OT or regular rate of pay because we don’t want to discourage ER’s from providing these extras.
- Also, it would make the calculations much harder.
- Why not allow the parties to contract for what will constitute OT pay? You don’t want to allow the ER to be able to circumvent requirements that exist for the EE.
  - Want to protect EEs against ER overreaching. Also, want to promote job spreading, so the law says you can’t contract around it.

c. Case:
- Gray-Goto: EE and ER had contracted that the EE would not be paid OT, but the ER would pay for certain fringe benefits: paid vacations and holidays, and biannual bonuses and insurance. The value of these equaled or exceeded the amounts of OT otherwise due. The court said that these fringe benefits cannot take the place of OT pay because they do not fall into (5), (6), or (7) of 203(e). Vacation and holiday pay falls under (2); bonuses fall under (1); insurance falls under (4).

4. Who is Exempt from OT Pay Requirement?
a. Current Rules:
- If you earn less than $155/week, you are not exempt from the OT rules.
- If you earn more than $155/week but less than $250/week use the long test to determine if you are exempt;
- If you earn over $250/week ($12,500), use the short test to determine if you are exempt.
- 213(a)(1) exempts from the OT provision “bona fide executive, administrative or professional positions.”

b. Process:
   i. What was the EE’s primary duty?
      - The question is what is the EE’s principle value to the ER?
      - A primary duty can’t be ascertained by simply looking to see what the EE spends most of the day working on.
   ii. Does the primary duty fall within the administrative, executive or professional category?
      - The current analysis is very fact specific. So it would be unusual to see such a case resolved on summary judgment.

c. Tests:
   i. Executive Exemption (Short Test)
      - An EE’s primary duty must consist of:
         i. Management of the enterprise in which she is employed, or a customarily recognized subdivision;
         ii. Work also must include the customary and regular direction of the work of 2 or more EEs.
   ii. Administrative Exemption (Short Test)
      - An EE’s primary duty must consist of:
         i. Office or other nonmanual work directly related to management policies or general business operations, that
            includes;
         ii. Work requiring the exercise of discretion and independent judgment.
   iii. Creative Professional Exemption – There are also learned professionals (like lawyers) (Short Test)
      - An EE’s primary duty must consist of:
        i. Work that is original and creative in character in a recognized field of artistic endeavor;
        ii. The result of which depends primarily on the invention, imagination, or talent of the EE.

d. Policy:
   - Why have an exception for EEs where the minimum overtime wages do not apply? These types of EEs have more
     control over their jobs. They can set their hours, have better bargaining positions, etc.
   - OT is supposed to encourage work spreading. Executives make a lot to begin with and when they take the higher
     salary, they do so with the understanding that they will work more than 40 hours per week.
     - These positions are salary, not hourly, there is no clock punching.
     - Salaried EEs may be paid to serve a function rather than for the exact amount of hours they work, or both. They
       might wanted because of their skills and also their hard work.
   - Kim also adds that it’s hard to figure out when executives, administrators and creative professionals are working and
     when they’re not. It’s administratively hard (ie if a creative person thinks of a great idea when he’s in the shower).

e. Proposed Changes:
   - Department of Labor proposed amendments to salary cut-offs as to whether there’s no exception, the short test or the
     long test:
     - Less than $425/week – Not exempt, get OT.
     - More than $65k/year – Exempt, no OT.
     - Instead of a short or long test there would be one test.
   - A second proposal was to make a learned professional anyone who has an education beyond high school (even EMTs,
     etc) would potentially be exempt.
   - These proposed changes could increase or decrease the amount of litigation.
   - A controversial study said that 8 million workers who received OT payment now would not longer get it (but 8M may
     be a bit high).

f. Case:
   - Dalheim (5th Cir COA): General assignment reporters, news producers, directors and assignment editors argued FLSA
     was violated because they were not paid OT. ER argues they are exempt as executive, administrative or professional
     EE sunders 213(a)(1). The court held that these EEs did not have primary duties of executives, professionals and
     administrative personnel so they were entitled to OT pay.

C. Employment Relationship/Coverage
1. Independent Contractor v. EE
   a. Generally:
      - If you’re an independent contractor, you do not fall under FLSA.
      - Under FLSA an EE is any individual employed by an ER.
      - To determine if the individual is a contractor or an EE, courts want to determine the economic reality of the situation.

   b. Common Law Independent Contractor Test:
      - The question is: Does the principal have the right to control the manner in which the work is done?
        - If so, then it’s an employment relationship.
        - If principal just sets goals and the worker determines how it gets done, then it’s an independent contractor.
      - If the individual is a contractor, then the ER is not responsible/liable for the actions for the EE.
      - Problems with Common Law Test:
        - In the case of harvesters who get ½ the sale price of what they pick, they are sharing in the risk and might not get minimum wages every week. There’s no guarantee. It’s forcing workers to share the market risk. If the bottom falls out of the harvest price, their wages may be lower than the minimum wage.
        - Child labor: If responsibility for who is working and how long is taken off the ER, then parents can make kids work as long as they want.

   c. Lauritzen 6 Factor Test:
      - None of the 6 factors is necessary or decisive in any way. Courts will look to all six, how they cut and then determine economic dependence.
      - So, under Lauritzen, to determine if someone is an independent contractor, look to:
        i. the nature and degree of the alleged ER’s control as to the manner in which the work is performed;
        ii. the alleged EE’s opportunity for profit or loss depending on his managerial skill;
        iii. the alleged EE’s investment in equipment or materials required for his task, or his employment of workers;
        iv. whether the service rendered requires a special skill;
        v. the degree of permanency and duration of the working relationship;
        vi. the extent to which the service rendered is an integral part of the alleged ER’s business.
      - Judge Easterbrook found this test to be not helpful, especially if none of the factors is decisive. He would prefer to throw out the factors and create a bright line rule.
        - He prefers to look at the statute, the statute is interpreted broadly.
        - A Bright Line Rule would work for Migrant Farm Workers, but it would still lead to a lot of gray areas on the whole.

   d. Policy
      - Some migrant workers, for example, might not want to be seen as EE’s. Then the ER will have to take out medicare, taxes, etc. Also they want their kids to work. In addition they might be undocumented immigrants.
      - You could say regulation is interfering with the principal and the workers’ relationship, but on the other hand, the legislation is to protect EE’s and public policies.
      - If it’s regulated, that would incentivize ERs/EEs to restructure their current relationship into an independent contractor relationship to get out from under FLSA.
        - The converse is true when the ER wants to get a worker covered under Worker’s Comp Laws (if independent contractor is hurt on the job, he could sue in court, covered EE under Worker’s Comp laws can’t).
      - Courts are always willing to look behind the label and see what the real relationship is, although this is often hard to do.

   e. Case:
      - Lauritzen (7th COA): Lauritzen owned some acres on which he planted pickles. He hired migrants to come and pick them. Children would come pick as well. He gave them ½ of the proceeds from the sale of the pickles they picked. The EE had only to bring their gloves. Here the ER had the right to control the entire pickle operation, not just the details of the harvesting. He exercises pervasive control over the whole operation. The profit may depend on how good a pickle picker is, but there is no corresponding possibility for the migrant. The gloves are not a capital investment, the skill required is negligible. There is a permanency in the sense that the same migrants come back year after year. And harvesting the pickles is obviously integral or else there would be no sense in growing pickles.

2. What is an Enterprise?
   a. Enterprise Generally:
      - An EE is entitled to the benefits of FLSA if he is “employed in an enterprise engaged in commerce or in the production of goods for commerce.”
      - An “Enterprise” is:
i. The related activities performed by any person(s);
   - Activities are related when they are the same or similar.
ii. Unified operation or common control; and
iii. Common business purpose.
- “Engaged in commerce” means:
  - Businesses with more than $500,000 in gross annual sales.
  - FLSA does not cover small EE’s, those businesses are exempt.

b. Policy:
- If the individual owner is too small to be covered on its own, why draw them in just because they do business with a larger management company?
- Why does FLSA exempt smaller businesses?
  - Affect smaller #’s of the labor force;
  - Maybe we want to help small business grow;
  - Maybe it’s administratively hard to patrol all business.
- Why exempt small business if we then cover them because of their affiliations? Maybe the small businesses are trying to capture the benefits of economies of scale by contracting with bigger companies to provide services.
  - Maybe the small owners can stop using the management company or revamp their pay if they want to get around this.

c. Case
- Arnheim and Neely (SC): AN was a management company that acted as an agent for several independent building owners. AN hired all the EEs for the buildings, supervised their employment, negotiated with tenants in the building, etc. The question was whether the EEs of the buildings, that were hired and controlled by the management company, could demand coverage under FLSA even though they were technically EEs of the building owners. The court said yes. Here there was an enterprise engaged in commerce – AN – that had a bunch of related activities in the form of the different buildings it managed, it had unified operations and control, and a common business purpose. Therefore, EEs were employed by an enterprise engaged in commerce, so they fell under FLSA. As a practical matter, it meant the building owners would be ante-ing up the extra minimum wage and OT.

3. Joint Employers (Moving up the Chain of Production)
a. Generally
- Most courts are willing to recognize the concept of joint ERs. That is, the EE is directly employed by a contractor, but is doing work through that contractor primarily for a specific company. Especially prevalent with garment workers.
- Dispute as to what test to apply.
  - The Lauritzen test wouldn’t really apply here because it is intended to test whether the individual is an EE or an independent contractor – not who is the ER.

b. Carter Test:
- Some court will use the four factor Carter test. The Court in Zheng found Carter factors to be sufficient, but not necessary, and therefore not really that helpful:
  - Carter Factors look to
    i. Who had the power to hire/fire EEs;
    ii. Who supervised and controlled the work of the EE, also scheduled or oversaw conditions of employment;
    iii. Who determines payment
    iv. Who keeps employment records;
- Some courts find the Carter test to be too restrictive, too narrow. They argue is only focuses on physical control, and really we need to be looking more broadly than that. These courts would find the Carter test sufficient, but not necessary. You can move on to other factors that might suggest and ER-EE relationship.
  - The SC Rutherford case is used (by Zheng) to look for factors outside the Carter test. In that case, no Carter factors were found, but in the end they looked to other factors and found an ER/EE relationship.

c. Zheng Test:
- 2nd Cir COA in Zheng says to look to the totality of the circumstances to see if contracting made sense, or if it was just a way to avoid FLSA.
- Zheng articulates 6 factors to look at, but the determination should be made on the basis of the whole activity:
  i. Whether the potential ER’s premises and equipment were used for plaintiff’s work;
  ii. Whether the contractors (direct ERs of the plaintiffs) had a business that could or did shift as a unit from one putative joint ER to another;
iii. The extent to which plaintiffs performed a discrete line-job that was integral to the putative ER’s process of production;
iv. Whether responsibility under the contracts could pass from one subcontractor to another without material changes;
v. The degree to which the alleged ER or its agents supervised plaintiffs’ work; and
vi. Whether plaintiffs worked exclusively or predominantly for the alleged ER.
- So the Zhen test uses a mix of prior texts and adds on some new things.
- A very fact specific test – hard to apply.

d. Hot Goods Provision:
- Requires the Secretary of Labor to actively pursue these breaches.
- Hot goods provision makes unlawful the transportation or sale of goods produced in violation of FLSA.
- The provision moves liability up the chain of production – giving them incentive to monitor.

e. Policy:
- Why try to find an employment relationship in the garment worker, etc. context anyway? What justification is there for going after the manufacturer?
  - There’s concern that the use of subcontractors is just a way to get around FLSA. Even if you don’t intend to violate FLSA, you’re still getting the benefits of it.
  - The difficulty with this system is the lack of enforcement. You need workers to raise complaints, but they often don’t. So the tendency is to try to hold Liberty (Zheng) type entities responsible so they have incentive to ensure that the contractors are complying with FLSA.
  - Is there a risk of pushing too far? Contracting out work is economically good in appropriate cases. It can be very efficient. Sometimes monitoring will go too far. Like the example of GM monitoring Pittsburgh plate glass for the windshields they use in their cars. That is too far.

f. Case
- Zheng (2nd COA): Chinese garment workers tried to impose liability for breach of FLSA on the clothing manufacturer, even though they were directly employed by a contractor. Liberty, the manufacturer, supposedly accounted for 70-75% of the workers’ work and supposedly Liberty people were usually monitoring the assembling of the garments. There is dispute over these facts though. The Lauritzen factors applied here would find the workers to be EE’s. However this test is more for independent contractors. There’s no question here that the workers were employed by a contractor. The question is were they also employed by Liberty. The Carter test the court found to be too narrow. Under that test the EE’s here would not be EE’s of Liberty. The court then uses Rutherford for authority to look for new factors. It examines the totality of the circumstances and found that they really were EE’s of Liberty.

D. Enforcement Problems:
1. ER Requirements to Ensure Eligibility to Work
   a. Generally:
      - Under IRCA (Immigration Reform and Control Act), ERs have an increased responsibility to check the immigration status of workers when they are hired.
      - The INS enforces this statute through notices and fines.
      - IRCA represents a broader policy of who should be allowed to enter and work, and under what circumstances. These policies are being implemented through the employment relationship.
        - Maybe aliens won’t try to come over illegally if no one will hire them.

   b. IRCA Requirements:
      i. If ER knows an EE is unauthorized to work, he can no longer employ him;
      ii. ER must fill out an I-9 and receive correct work authorization documents from the applicant (paperwork obligation).
      iii. ER cannot knowingly hire a worker not authorized to work (substantive obligation).

        - Knowingly means both actual and constructive notice that the applicant is not authorized to work.

   c. Case:
      - Mester (9th Cir): Mester owned a furniture manufacturing business in CA and hired about 70 people. The INS did an inspection and found that some of the EEs were not authorized to work in the US because they did not have valid documents. In addition, he knowingly hired a worker who did not have the correct paperwork. The INS fined him. The Court agreed that there was substantial evidence to show that once given notice, he knew the people who were not authorized to work, yet he allowed them to continue to work, and that is a violation of IRCA.

2. Undocumented Aliens as EE’s under FLSA
a. Generally:
- FLSA defined EE very broadly, as “any individual employed by an ER.”
  - That broad definition is followed by several specific exceptions, none of which involves aliens.
  - In addition, the legislative history seems to indicate that the definition of EE should be read broadly.
  - The SC also has never refused to give alien’s EE status under FLSA.
  - The department of Labor also interprets FLSA to cover aliens.
  - Interpreting FLSA to cover undocumented aliens does not conflict with IRCA. IRCA never mentions wanted to
    repeal FLSA for undocumented aliens, and its legislative history does not indicate such an intent.
  - Similarly, if FLSA did not cover undocumented aliens, ERs would have an incentive to hire them.

b. Damages Available:
- **Sure-Tan**: EE had been deported and wanted back pay for his retaliatory discharge. SC said no, as EE wasn’t even
  available to work then because he had been deported.
- **Hoffman Plastics (2002)**: ER fired the EE after a union organizing campaign. The EE was never actually authorized
  to work in the US. The SC looked at IRCA and its policies. Because IRCA forecloses the NLRB from awarding
  backpay to an undocumented worker, the EE got no damages.
  - NLRB’s ability to order remedies can’t include those outside of their authority (or they will be in conflict with the
    federal immigration laws).
- **Patel (1988)**: 11th Cir said the EE here was trying to recover for work actually performed, so yes, he should get that
  back pay. If Patel had occurred after Hoffman, and he had gone to the NLRB to try to get paid and was then fired, he
  would not get reinstatement or back pay because he’s an illegal alien. He might still get wages for when he was
  employed but not paid what he deserved, but no backpay for when he was unemployed.

c. Policy:
- Should it make a difference if he ER knows at the time of hire that the EE is undocumented?
- The Walmart cases highlight the subcontractor dilemma – is this contracting for a valid economic purpose, or is it a
  subterfuge to avoid FLSA.
- IRCA tries to prevent undocumented workers – are subcontractors being used to also avoid IRCA?
- Guest Worker Proposal: ERs would need to show they can’t get valid US workers. The question is, how can you
  certify that there are no valid US workers? What effect would this program have on enforcement of employment and
  labor laws?

d. Case:
- **Patel (11th COA)**: Patel was an undocumented alien from India who worked at the Quality Inn. He was not paid in
  compliance with the minimum wage and OT provisions of FLSA. The district court said he was an illegal alien so he
  should not be covered by FLSA or else people like him would be encouraged to come over and get jobs. The COA
  says no. FLSA’s definition of EE is very broad, aliens aren’t exempt, so he is an EE and entitled to remedy.

XI. Unemployment Insurance (UI):
A. Generally:
1. Background
   - All states have UI systems, they were created in response to the federal tax program.
   - UI is designed to be:
     - A temporary partial wage replacement for experience workers who have lost their job through no fault of their
       own.
     - The amount a company will have to pay to UI taxes is based on an “experience rating.” If the ER lays off lots of people,
       his experience rating will be higher and he’ll have to pay more.
2. UI Requirements:
   i. Temporary: Usually about 26 weeks of insurance you will get, sometimes longer if unemployment is high.
   ii. Partial Wage Replacement: Usually you get ½ of your wages up to a statutory maximum. Most workers will get
       about 1/3 of their wages.
   iii. Experienced Workers: Workers pay into it as they work. Not need based, it is based on past attachment to the
       workforce. Looks at prior time working. Those reentering or finishing school would not be eligible.
   iv. Lost Job Through no Fault of Your Own: Cannot quit without good cause. If you do, you’re not entitled. If
       you’re fired, you also can’t collect.
3. Types of Unemployment:
   i. Cyclical: Supply and demand pretty much dictates that sometimes people will be laid off and phased out. The UI
      system helps these people by providing a small cushion while they search for new work.
ii. Frictional: It just takes time to find new jobs. UI will give you some support here, but you need to be searching for a new job. Some think searches might be extended because of UI. This could be good or bad. Might permit a better match.

iii. Structural: Mismatch between skills the workers have and the jobs available. The jobs just aren’t there. The UI program really doesn’t help in this situation. What you need here is new training or move to an area where there are jobs that match your skill.

iv. Wait: Laid off, waiting for recall. Could be seasonal, business cycles, etc. The EE hasn’t completely severed his ties to the ER.
   - If you have a definite recall date, you can collect UI without having to look for a job.
   - If you have a recall date, allowing UI may allow a worker to return to his ER at the previous level. But the ER is shifting the cost of slow periods to the UI system. Tax rates are affected by the # of times you lay people off. But there is a maximum and other workers will have to subsidize.
   - If you have no definite recall, you’ll have to look.

4. UI Appeals Process:
   - When a former EE applies for UI and gets it, the ER’s tax rate is affected.
   - Once the board rules yes or no in favor of giving UI, the EE and the ER can appeal.
   - Appeals Process:
     i. First Level of Appeal: Hearing before an ALJ (very informal, no lawyers);
     ii. Second Level of Appeal: UI Compensation Board;
     iii. Third Level of Appeal: State courts.
   - A large number of claims are processed efficiently in this system, for the most part, without lawyers.

5. Three Hurdles to Collect UI:
   i. Earnings Test: Based on the level of wages earned by EE over the past year;
   ii. Eligibility: Is the worker able and available to work? Is he actively engaged in searching for a new job?
   iii. Disqualification: What are the reasons for the worker leaving his last job? Disqualified if you left because of serious misconduct, or without good cause.

6. Examples:
   a. EE fired for reporting wrongdoing on the part of the ER that may be injurious to public welfare.
      - Common Law Claim: Yes (Public Policy)
      - UI: Yes.
   b. EE fired for stealing.
      - Common Law Claim: No.
      - UI: No, misconduct disqualifies.
   c. EE laid off because business is slow.
      - Common Law Claim: No.
      - UI: Yes.
   d. EE fired for personality conflict.
      - Common Law Claim: No.
      - UI: Yes.
   e. EE hired, but turns out there was a mismatch of skills, so he is laid off.
      - Common Law Claim: No.
      - UI: Yes.
      - So the common law claims exist when the ER does something so egregious that you can get a public policy tort to overcome the at will presumption.
      - UI kicks in unless the EE has done something really bad.

B. Eligibility
1. Generally:
   - In order to be eligible for compensation, you must make yourself available to work.
   - If you are expecting a recall – but have no recall date, some states will not let you sabotage another offer by saying you will go back to that ER if you are called back (like PA in Knox).
   - You must take each offer seriously.
2. Policy:
- Seems like a silly policy to make an EE take a job when he is expecting a recall and will quit to go back to that firm. It could result in a meaningless job search, and the ER would be upset about hiring an EE that leaves shortly thereafter.
- On the other hand, if you are laid off, thinking you will be recalled and never are, you’ll sure wish you had been looking for a job then.
- However, even if you are on a temporary layoff with a set recall date, you still must search for a job? I don’t know if this is right.

3. Knox
- Knox was laid off and hoping he might be recalled. He went in for an interview and didn’t get the job after saying he planned to return to his former ER if recalled. The board denied him UI and the Court affirmed saying he failed to make himself eligible for suitable work without good cause by talking about his recall. An EE can’t attach such conditions to his acceptance of work so as to render himself unavailable for work. He must always be reading and willing.

C. Disqualification – Misconduct
1. Generally:
a. MO defines misconduct as follows (Continental Research):
   “... an act of wanton or willful disregard of an ER’s interest, a deliberate violation of the ER’s rules, a disregard of standards of behavior which the ER has the right to expect of his EE, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the ER’s interest or of the EE’s duties and obligations to the ER… The term should be construed in a manner least favorable to working a forfeiture so as to minimize the penal character of the provision by excluding cases not clearly intended to be within the exception.”
- In sum: wanton or willful disregard of an ER’s interests, or negligence to the point of evil design.

b. MN defines misconduct as follow (McCourtney):
   “Conduct evincing such willful or wanton disregard of an ER’s interests as it found in deliberate violations or disregard of standards of behavior which the ER has the right to expect of his EE, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the ER’s interests or of the EE’s duties and obligations to the ER. Mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies, or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not misconduct.”
- In sum, willful, wanton, or with evil design constitutes misconduct. Did EE make a good faith effort to resolve the problem she was fired for?

2. Policy:
- You want to help people when they lose their job, even if they have no legal common law claim for their discharge. So UI gives benefits provided you didn’t lose your job through your own misconduct.

3. Cases
- Continental Research (MO COA): EE forked for Continental and was asked to go and clear snow from the roof. He ended up climbing onto the overhang to shovel the snow off. He was not told to do that, but whatever. The ER ended up firing him over this, saying he had no permission to go on the roof and that he had created an unsafe working environment. The COA found that this was not direct disobedience of the ER, he just went beyond the suggested procedure. IN addition, his actions were not adverse or in disregard o the ER’s interest. This was not wanton or willful misbehavior, he just had poor judgment. Not misconduct, entitled to UI.
- McCourtney (MN COA): EE worked for ER for 10 years and was a good EE. However, she had a baby and the baby was sick. She was had excessive absenteeism for about 5 months and then, after two warnings, she was fired. She had genuinely tried to find a caregiver to care for the sick child, but her work hours were such that it was impossible. The court said she was entitled to UI because he conduct was not misconduct. She had not evil intent and her absence was not wanton or willful. She made a good faith effort to resolve the issues, was a good EE for 10 years prior, etc. The court looked to her work history, not sure how it would turn out if she worked for only 1 year.
- Dissent said the outcome was unfair, it imposed a catch 22 on the ER: Either put up with the excessive absenteeism, or fire her and have to pay the consequences with the experience rating system.

D. Disqualification – Good Cause
1. Generally:
- Desire to preserve a marital relationship, or a similar familial relationship can constituted good cause in cases that allow good cause outside the employment context.
a. 3 Views:

i. Some states provide that the good cause for quitting must be linked to the employment (like MO).
   - MO: Good cause is cause connected with the work or the employer. Not for personal reasons. (Wimberly)
   - The MO statute is not discriminatory, it doesn’t single out any particular non-work related reason to deny UI benefits.
   - In the context of pregnancy, that is not considered good cause for leaving because it is not considered to be connected with the employment. The Fed Statute, however, does not allow state statutes that are discriminatory, but this is not discriminatory.

ii. Other states find that any good cause will be okay, even if it’s not connected with the work, provided the reasons are compelling (CA).
   - CA (MacGregor): Good cause is “such cause as justifies an EE’s voluntarily leaving the ranks of the employed… such a cause as would in a similar situation reasonably motivate the average able-bodied and qualified workers to give up his employment with its certain wage rewards in order to enter the ranks of the unemployed.”
   - CA, and many states, use this reasonable person test.
   - In CA, good cause can be for keeping a familial relationship in tact, whether or not there is a marriage.

iii. Material Changes in Contract (IN):
   - If an EE quits because there was a material change in the agreed upon working conditions this might constitute good cause.
   - If you explicitly negotiate for certain contract terms, and then the ER unilaterally changes those terms, you might be able to quit and still get UI.
   - The problem is whether these conditions the EE attaches to her availability to work make her really available to work under the UI system. If you can’t work OT are you available to work? Might depend on whether the industry you work in commonly requires overtime work.
   - So watch for a Know type situation, where if you attach too many conditions on your ability to work, you aren’t making yourself available to work and aren’t eligible for UI.

2. Policy:
   - The dissent in MacGregor wanted a brightline rule that only the marital relationship can be used to show good cause for keeping the family in tact. The ALJ agreed.
   - It might be beneficial to have such a brightline rule because it would be administratively convenient.
   - In addition, there’s a public policy to promote marriage.
   - On the flip side, there can be more intimate non-marital cases than some people who are married.
   - What about gay partners? Having a child may be evidence of a familial relationship. A fact specific question, not sure how the courts would come out.
   - Do we really even want the UI system involved in these sorts of policy arguments? Maybe we can’t avoid that question.
   - Advantages to limiting good cause to the employment situation? It doesn’t hurt ER’s when the EE’s must leave for reasons not associated with the job – the ER will not be burdened. But maybe we shouldn’t be denying UI if there is a really good, non-employment related job.

3. Cases:
   - MacGregor (CA): EE worked for a restaurant and quit to go to NY where her child’s father moved to care for his ailing dad. The two were not married, they had the child together and they had a familial relationship. EE moved to ensure the relationship would remain. Desire to preserve a martial relationship can constitute good cause. Here there was a family unit that should be preserved. The court held that even though they were not married there was still good cause and she look could collect UI.
   - Wimberly (MO/SC): Wimberly worked for Penny’s and left to have a baby. When she wanted to return she was told they did not have an opening. MO denied her UI because she left to have a baby, and that is not good cause under the MO statute. Wimberly argued that 3304(a)(12), a federal statute, prohibited discrimination against women who leave because of pregnancy. The court held that the MO statute was neutral – it applied equally to everyone who left for reasons not associated with the employment. Therefore, Wimberly was entitled to no UI. Under the FMLA she would now be protected, but that wasn’t around when her case was up.
   - Jones (IN): EE worked a restaurant from 9am to 3pm because she wanted to take care of her kids. Her ER changed her hours from 9am to 6pm, and she initially accepted, then decided she could not work the new hours and quit. The court held that leaving employment for family responsibilities does not constitute good cause. The court held that if the EE is discharged for refusal to accept a unilateral change in working conditions, the EE would be entitled to
benefits as the discharge would not be for good cause. However, if the EE chooses to remain in the employment under the changed conditions, the prior agreed upon condition will be deemed to have been abandoned and will not longer be considered part of the working conditions.

XII. Family and Medical Leave Act (FMLA)

A. Process:
   (i) Is the ER covered under FMLA?
      - Must have at least 50 EEs.
   (ii) Is the EE covered under FMLA?
      - Must have worked more than 1250 hours in the last 12 months.
   (iii) Is the EE entitled to leave?
      - 102(a)(1)(A) Birth of son or daughter (entitlement to leave ends 12 months after birth)
      - 102(a)(1)(B) Adoption or taking a foster child (entitlement to leave ends 12 months after placement)
      - 102(a)(1)(C) Care for spouse, son, daughter, or parent with a “serious health condition”
      - 102(a)(1)(D) EE herself has a “serious health condition” making EE unable to perform the job functions.
   (iv) What is “serious health condition”?
      - An illness, injury, impairment, or physical or mental condition that involves:
         (a) inpatient care in a hospital, hospice, or residential medical care facility; OR
         (b) continuing treatment by a health care provider.
   (v) Can leave be intermittent?
      - Birth of child: Only if ER agrees.
      - Adoption or taking of a foster child: Only if ER agrees.
      - Serious illness of spouse, son, daughter, parent or EE: When medically necessary.
      - However, ER may require that the EE transfer temporarily to an available alternative positions for which EE is qualified and that has equivalent pay and benefits; and better accommodates recurring periods of leave than the regular position.
   (vi) Can leave be unpaid?
      - Yes. If an ER provides paid leave for less than 12 workweeks, the additional weeks of leave to attain the 12 can be unpaid.
      - An EE can elect, or the ER can require the EE to substitute accrued paid vacation, personal, or family leave for some of the equivalent amount of the 12 weeks taken for reason of birth, adoption or foster care, or illness of spouse, child, or parent.
      - An EE can elect, or the ER can require the EE to substitute accrued paid vacation, personal, medical or sick leave for any of the 12 weeks when EE is leaving to take care of spouse, child, or parent, or is himself sick.
   (vii) Notice Required?
      - Notice of leave for birth or adoption of child or taking a foster child, when foreseeable, should be given not less than 30 days before the date of leave is to start. If birth or placement requires leave to begin in less than 30 days, must give notice as is practicable.
      - If taking leave for serious illness of EE, or EE’s spouse, child or parent, the EE should try to schedule treatment so as not to unduly disrupt the ER’s operations, and shall give not less than 30 days notice of leave or notice as practicable (practical).
   (viii) Documentation Required?
      - ER can require that a request for leave for serious illness of spouse, child or parent or for yourself is documented by a health care provider. The EE must provide the medical certification in a timely manner.
      - ER can also require the EE get a second opinion.
   (ix) Damages:
      - EE can get damages of the amount of any wages, employment benefits, or other compensation lost. If no wages or employment benefits have been lost, you can get a sum for losses sustained, i.e. cost of providing care, for up to 12 weeks. You get interest on all of this.

B. FMLA Policy:
1. Why was FMLA passed?
   - FMLA allows people to take care of family problems and their own health problems. Allows people to balance work and family with a sense of job security. It also promotes equal opportunity employment and promotes gender equality. Women often have to care for their family and it allows them greater flexibility to work, but also extends the same rights to men.
2. How successful has FMLA been?
   - Some say not very successful. It only applies to larger firms and they often already had similar programs.
   - Because the leave is unpaid, the EE’s who can least afford it often are unable to take advantage of it. People who are taking leave now were doing it before FMLA.
Concern that ERs will now only do the bare minimum to comply with FMLA and not be more generous.
FMLA looks at big family changes. Not routine problems that create work-family conflict.

C. Examples:
1. EE works at Penney’s. She’s been there three years. She requested a leave of absence on account of her pregnancy in August. Penney’s granted leave without guarantee of restatement. The child was born in Nov. In Dec., petitioner tried to go back and was told there were no open positions.
   - The ER is covered because Penney’s employs more than 50 EEs. The EE is covered b/c she’s worked more than 1250 hours in the pervious year. EE is entitled to leave under 102(a)(1)(A) because she had a baby. It’s possible the period before the birth was covered under 102(a)(1)(D) as a serious health condition. Look to the definition, a serious health condition requires inpatient care or ongoing treatment by a healthcare provider. She’d had to show that her serious health condition made her unable to perform her job functions. Did she give notice? If leave was foreseeable, as for the pregnancy, she should have given 30 days notice. It not, she needed to give whatever notice is practicable. ER could then come back and request medical certification. Ambiguity about timing – did she take more than 12 weeks?
2. Same as above, but Penney’s gives it EEs 2 weeks paid sick leave per year and 2 weeks paid vacation. They don’t accrue from year to year and EE has not used any of her before requesting leave.
   - Under FMLA, ER can require the EE to use up all unpaid sick and vacation days. EE or ER can elect this. So here, she would get 4 weeks paid, and 8 weeks of FMLA unpaid.
3. EE was employed by ER as a full time accounts payable clerk for more than 10.5 years. EE was a good EE with no attendance problems, but due to her child’s illness she was frequently gone from work. She has missed 450 hours of work so far this year and it’s now May 1.
   - In the past 12 months, she has missed 450 hours of work, but she still has worked 1550 hours, so that is enough to make her eligible. Assume ER is also eligible. She is taking intermittent leave. Intermittent leave for the birth of a child can be taken only when the ER agrees. However, leave taken to care for a seriously ill child can be taken when medically necessary. Here’s she’s under 102(a)(1)(C) – caring for her sick child. Fact question as to whether the kid has a serious health condition. Need inpatient care or ongoing treatment by a healthcare provider. A birth defect requiring repeated surgeries would qualify. Would an ear infection? Maybe…
4. EE was informed when hired that she could work from 9am to 3pm because she had family responsibilities. ER later told EE that her hours would be extended and she refuses to work.
   - She quit for a family related reason, but it is not a reason under 102(a)(1). No birth or adoption, no serious illness.

XIII. ERISA

A. Background:
1. Employment Benefits: Forms of compensation other than cash.
   - Deferred Compensation: Essentially Pensions – Two Types:
     (i) Defined Benefit Plans: ER creates a plan giving SX when EE retires, leaves, etc. Amount is based on wages, year of seniority, etc.
     (ii) Defined Contribution Plans: ER will contribute a certain amount to EE’s individual account – they guarantee no certain amount in the future.
   - In Kind Benefits: Welfare Plans
     (i) Most common is health insurance.
2. Policy:
   - Wages are set by the market, should benefits also be set by the market?
     - People might not save for retirement, want to promote certain social policies.
     - ERs can provide some benefits more cheaply.
     - Risk of opportunism because EE is receiving the benefits after a time lag.
   - These plans are complicated, EE may not have enough information to adequately bargain for these things.
   - Particularly with pension plans, there’s a risk of underfunding. Must have adequate funds to ensure the promise can be kept.
   - Risk of mismanagement.
   - Why provide pensions?
     - Gives an EE incentive to stay longer; could attract new EEs; ER’s cost is reduced because it is promising something now, but giving it later; ER’s might also pay less in wages.
3. Risks of Providing Benefits Over Cash:
   (i) Lack of Info: Fix – Disclose benefits to EE’s, provide information and standardized forms.
   (ii) Risk of Oppertunism: Fix – ER required to keep promise of benefits.
- These fixes are what ERISA tries to respond to and do. ERISA was passed in 1974 in response to these concerns.
- Risks (iii) and (iv) are unique to pensions.
- Risks (i) through (iv) apply to other benefits as well.
- ERISA does not mandate the ER to provide benefits at all. If an ER chooses to provide benefits, ERISA will require the benefits must meet certain minimum requirements.

4. Pre-ERISA (McNevin Case)
- EE was fired and he wanted his pension. He went to work for a competitor, however, and under the pension plan’s rules, that disqualified him from pension benefits. EE had a passbook saying he had worked over 5 years and had earned a certain amount in pension. The rules of the plan said that the trustees will disburse the $ and can use their discretion to determine if there was any cause for dissatisfaction.
- The majority found that the pension was a gift, and was inchoate until someone gave it to him. They did hold, however, that the only way the EE could be deprived of his $ is by a breach of K. They can’t deprive him of his ability to go to court to get it sorted out.
- Dissent said it was a contract. The ER made a promise, $ for valuable consideration of loyal service, so EE is entitled to the $ and it can’t be forfeited.

B. Vesting Requirements:
1. Generally:
   a. ERISA imposes the following vesting requirements as well:
      - Once you hit retirement age, your pension is nonforfeitable.
      - Your own contributions are not forfeitable.
      - Pension plans must vest within 5 or 7 years, depending on the vesting schedule the ER chooses.
      - The ER can have more generous vesting plans, but cannot vest later than 5 or 7 years, depending.
   b. 2 ERISA Vesting Schedules:
      (i) 5 Year Plan: Leave/Retire/Fired after 5 years: 100% vested. Leave/Retire/Fired before 5 years, 0% vested.
      (ii) 7 Year Plan: Leave/Retire/Fired after 7 years: 100% vested. Leave/Retire/Fired after 0-3 years, 0% vested.
      Leave/Retire/Fired after 3 years: 20% vested; 4 years, 40% vested; 5 years, 60% vested; 6 years, 80% vested.
   - You cannot have a plan incorporating both. You must have a plan that completely complies with one or the other. ER can be more generous, but must satisfy one or the other at all points in time.
   c. Policy:
      - These vesting requirements protect EE’s from ER opportunism.
      - It’s not fair to the ER to create an elaborate, immediately vesting pension plan for the EE, if the EE will leave 2 months later. Want to encourage the EE to stick around.

2. Cases:
   - Lauren Young Tire (9th COA): EE was laid off and went to work for a competitor. Under the pension plan, if you went to work for a competitor without having worked for 10 years (he worked 9 year, 8 months), you forfeited your benefits. OR law said you can’t have this kind of forfeiture. The court held that ERISA preempts state law so the OR law does not apply here. Under ERISA, you can have this forfeiture provision provided it doesn’t operate after 10 years (now 5 or 7). After 10 years, the benefits are vested. ER’s motivation for firing Clark was a downturn in business. Clark doesn’t dispute this, but he could have argued the motive for his firing was to prevent vesting of his pension.
   - Hummel (9th COA): The ER pension plan is such that the longer you work there, the less you forfeit. The forfeiture provision is different depending on whether you go to work for a competition or not, this is a ‘bad boy’ provision. The court says the ER plan for non-competing EEs gives full vesting after 5 years, so that satisfies the 5 years plan, and that 5 years plan then must be used for all EEs. (ER’s 5 year plan was a bit more generous than ERISA’s 5 year plan, that’s fine.) Kim says the court was wrong. ERISA 7 year plan was also satisfied with ER’s plan for competing EEs and non-competing EE’s (although it is more generous).

C. Coverage:
1. Generally:
   - ERISA covers only EE’s, not independent contractors.
   a. Who can bring suit?
      - Under 29 USC 1132(a), a “participant” of a benefit plan can enforce the substantive provisions of ERISA.
- A “participant” is “any EE or former EE of an ER who is or may become eligible to receive a benefit of any type from an EE benefit plan…”
- An EE is “any individual employed by an ER.”

b. Test to distinguish who is an EE and who is an independent contractor:
- Use the common law test: traditional agency, master-servant law.
- Assess and weigh the following factors, none is decisive:
  - The ER’s right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the ER has the right to assign additional projects; the extend of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of EE benefits; and the tax treatment of hired party.

c. How much control does the ER have to define the workforce?
- Use of labels alone is not dispositive.
- The reality we are looking for is control (in FLSA is was economic dependence). How much control does the ER have to differentiate its workforce and give different benefits – core vs. contingent workforce.
- If you make your contingent workers look a little too much like core workers, you will probably be called out on it.

d. Policy:
- ERISA protects EE’s, while FLSA has other purposes in addition to protecting EE’s.
- Because ERISA and FLSA use different definitions of EE, you end up with a scheme in which a person may be an EE for one purpose, but not another.

2. Cases:
- Darden (SC): Darden sells policies for competitor insurance companies after he quits working for Nationwide. This was in violation of his pension agreement. There were two pension plans, the question was whether he was an EE of Nationwide such that he can bring an ERISA claim. So who is an EE? SC notes that Congress in the past means common law EE when it uses the term EE without further description. FLSA doesn’t help because the definition of “EE” under FLSA was intended to be broader, as FLSA’s definition of employment was broader. Court ultimately adopts traditional agency law principles. Under these principles, Darden would probably be considered an independent contractor.
- Vizcaino (9th COA): Freelancers working for Microsoft sued to recover benefits. They were hired as independent contractors, and had signed agreements stating they would not get any benefits. The IRS came in a few years later and said no, these people are EEs. Microsoft agreed to withhold payroll taxes. Put some EEs on the payroll and others went to work for temp agencies. The EE’s later sued, saying if we were EE’s after all, we want pension benefits. The SPP plan was a 401(k) plan and covered by ERISA. SPP was available to “EE’s of Microsoft.” The Plan administrator said no benefits originally, but once it determined they were EE’s all along, the court said it was an arbitrary and capricious holding to deny benefits, and they should have gotten for the time they worked as freelancers. The ESPP was not an ERISA plan, so no federal law mandates that the benefits be provided or says how to provide them. The Court agreed that the ESPP should be viewed as an offer, and that by working, the EE’s accepted the offer, and had a right to participate. The majority says the language in the agreements, stating they weren’t eligible for benefits, was a mistake, it wasn’t a substantive term they agreed to. The dissent say no, ESPP was an offer to all EE’s that can be revoked, and it was revoked when the freelancers were hired under an agreement with no benefits. The freelancers wanted to buy stock in 1997 for 1988 prices, when they were hired on. They eventually settled.

D. Section 510

1. Generally:
- §510: Interference with Protected Rights: It is unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the plan, or with the purpose of interfering with the attainment of any right to which he is entitled to under the plan, or because he has given info or testified or is about to testify in any inquiry or proceeding relating to this chapter.
  - The term “plan” refers to pension and welfare plans.
  - §510 applies to vested and unvested rights. If a right is unvested, the ER may terminate the plan at any time.
    Early retirement plans, health insurance plans, etc. don’t vest. I think only pension plans vest.
- Motive Requirement: Not every time an EE with a pension is terminated there’s a violation. How do you know? Action must be taken “with the purpose” of interfering with, etc. You must show intent. Were pension considerations the determining factor?
- All that matters is that the discharge was motivated by the pension. So you can consider pension costs as long as they don’t matter. But if they’re going to matter, you can’t consider them.

- **Proving Motive:** EE’s need not prove that the desire to avoid pension liability was the sole reason for their termination. Rather, §510 requires no more than proof that the desire to defeat pension eligibility is a determinative factor in the challenged conduct.

- Once EE’s establish that the desire to avoid pension liability was a determining factor, the defendant, in order to avoid liability, must prove that it would have reached the same conclusion or engaged in the same conduct in any event. If the ER carries its burden of proving a non-discriminatory reason, the EE’s must then show that the justification is mere pretext.

2. §510 Process:
   (i) Was there a discharge, fine, suspension, etc.
   (ii) Was the EE a participant or beneficiary?
   (iii) Was there a plan?
   (iv) Was there motive? Was the discharge, etc. more likely than not motivated by a desire to avoid pension liability? Was pension liability a determining factor in the adverse EE action?

3. ERISA Covers:
   (i) Pension Benefit Plans: Vested and Pre-Vested;

   - Under §510, the following are covered/protected as ERs might try to tamper with the benefits:
     (i) Benefits not capable of vesting (Heath);
     (ii) Benefits about to vest, but not yet vested (Lauren Young Tire);
     (iii) Vested benefits that continue to accrue (Nemeth);

4. Policy:
   - Why distinguish between vested and unvested plans?
     - Encourages ERs to experiment with benefits. If they all vested, the ER couldn’t change it later on.

5. Cases:
   - Heath (7th Cir): EE was fired right before he was eligible for the early retirement incentive program. He did have fully vested, normal retirement benefits, but he wanted his early retirement benefits too. Early retirement plans to do not vest. The EE is free to terminate it at any time. But §510 does not distinguish between vested and unvested benefits. An ER can, however, modify or abolish the plan, but it must be done in accordance with the procedures set up for terminating/modifying the plan.
   - Nemeth (US District Court): EE’s allege §510 was violated because the company took the cost of the pension plan into consideration when deciding to close a company plant. The EE’s were all vested, but they argued they were being deprived of their future retirement benefits – they wanted the full benefits they would get from working until retirement age. The EE’s needed to show the ER had the intent of interfering with pension benefit. Had to show the pension considerations were a determining factor. The court here found no motive, so no §510 violation.

E. EE Welfare Plans (COBRA)

A. Generally:

1. Background
   - No ER is required to provide health benefits. But taxes encourage ER’s to provide it.
   - Problems arise when an EE loses his job. COBRA is sort of analogous to UI, in that it attempts to limit loss of insurance upon job loss. It was passed in 1986 as an ERISA amendment.
   - Under COBRA, ER’s who offer health plans must offer continuing benefits when the EE leaves.
   - EE welfare benefit plans **do not vest**. However, an ER could vest them if you can find a clear commitment on the part of the ER in the plan documents, stating in clear and express language that it is vesting them. Vesting is not lightly inferred.
   - ERISA **does not require minimum standards** for health benefit plans.

2. Terminology:
   - **Qualified Beneficiary:** EE, spouse or dependent child who was covered under an ERISA health plan.
   - **Qualified Events:** EE – Termination, reduction in hours, etc; Spouse/Child – Death of spouse, termination of EE, child reaching age of majority, divorce, etc.
   - **Election Period:** ER must notify the Plan that there was a qualifying event. The Plan will then notify the EE that he can elect COBRA. EE has 60 days to decide whether to take it.
- If EE accepts, he gets continuing coverage for 18 or 36 months, depending.
- If EE accepts, he will have to pay the premiums of up to 102%.
- **Termination Event:** ER ceases to offer the plan; EE becomes entitled to Medicare or other insurance; EE stops offering the plan.
- **HIPAA:** Restricts ability of ER health plans to limit coverage for pre-existing conditions for more than 12 months. Group health plans cannot have eligibility based on health related factors.

3. Termination of Coverage:
- Cobra coverage terminates on the date on which the EE “first becomes covered, after the date of election, by another group health plan. 602(2)(D).
- “First covered after the date of election” is important. If you had other coverage before you elected COBRA coverage, you don’t fall under 602(2)(D) (Geissal). Bright line Rule.

4. Other ERISA Requirements
- **Summary Plan Description:** ER must provide a summary of the plan. When the summary conflicts with what is in the actual plan, the summary is binding.
- If an ER does not reserve the right to amend or terminate in the summary, that does not mean it waives those rights. The summary is a summary and cannot contain everything.
- ERISA plans cannot be changed by oral agreements.

5. Americans with Disabilities Act (ADA)
- ADA forbids discrimination based on disability in health benefits.
- Under the ADA, however, you can exclude certain experimental drugs and can deny coverage for broad categories that would effect some with disabilities and some without, for example, eye care.
- What’s not okay is singling out particular conditions or disabilities. Singling out AIDS is likely to be seen as disability discrimination, provided it’s a disability.
- The ADA does not prohibit discrimination based on specific conditions, it:
  (i) It was part of a bona fide plan;
  (ii) The discrimination was not a subterfuge (i.e. not justified by actual risks and costs); and
  (iii) If the disability based distinction is necessary ensure the viability and fiscal soundness of the plan.
- Would what ER did to McGann (below) violate ADA? Maybe.

(i) Did the ER create vested rights for welfare plan?
(ii) Did ER create a bilateral contract for a vested welfare plan?
(iii) Estoppel
(iv) Fiduciary Duty

7. Cases:
- Geissal (SC): EE is fired on July 16th. He elects for COBRA continuing coverage within 60 days. Throughout the whole period, and even before he became unemployed, he was also covered under his wife’s TWA health plan. ER had cancer. There must have been some difference in coverage between his old plan and the TWA plan or else he would not have elected COBRA. The SC established a bright line rule relating to the timing of the new coverage. The possibility of a gap in coverage does not matter. Court doesn’t want to get in the business of evaluating plans to determine if the gap was big enough.
- McGann (5th COA): McGann gets AIDS and submits claims for benefits. The ER amended its plan and became self insured. It took its coverage it from a lifetime of $1M in benefits to all EE’s to only $5k for people with AIDS. McGann argues this is discrimination under §510. Under 510 ER can’t (1) discriminate against an EE for exercising any right under the plan, and the ER can’t (2) interfere with the attainment of any right. In response to (1), the court says the ER didn’t take the action with the specific intent to retaliate against McGann. Granted it changed the plan in response to McGann’s failing of claims, but there was no intent to discriminate against McGann. In response to (2), the court says McGann is arguing essentially that his health benefits are vested. But health benefits are never vested. ERISA allows ERs to modify. This opinion seems to undercut the purpose of ERISA, protecting EE expectations and preventing ER opportunism. But courts are reluctant to say what should or should not be covered.
- Sprague (6th COA): Retirees thought they were promised lifetime health coverage with no charge from GM, but then GM changed the plan and they had to pay about $700/year. GM gave them booklets saying that GM would provide health insurance for life, but some of the booklets also reserved the right to change the plans. The EE’s proceeded on
four legal theories: (1) did the plan create vested right? (2) did GM enter bilateral contracts with early retirees to create vested benefits? (3) does equitable estoppel apply? (4) Any breach of fiduciary duty?

(i) Court said the plan did not create vested rights. Many of the books had statements saying GM could amend the plan. Thus, the commitment to vesting was not clear. The summary is a summary, it can’t include everything. The fact that a summary is silent as to a right to amend does not mean the ER has created vested rights.

(ii) Court rejected the bilateral treaty idea. ERISA does not allow oral amendments to change a plan.

(iii) Five requirements for estoppel: (a) language amounting to a representation of a material fact; (b) party to be estopped must be aware of the true facts; (c) party to be estopped must intend the representation to be acted on; or the party asserting estoppel must reasonably believe the party to be estopped so intends; (d) party asserting estoppel must be unaware of the true facts; (e) party asserting estoppel must reasonably or justifiably rely on the representation to his detriment. Court says estoppel can only be invoked if the plan is ambiguous. Reliance on lifetime benefits statement was not reasonable given the ambiguity thrown in by GM’s amending clauses.

(iv) Fiduciary duty attaches once the ER creates the plan. Administrators of the plan have a duty owed to beneficiaries. EE’s say ER’s, as administrators, did not speak truthfully about the plan. Court says they didn’t misrepresent anything.

8. Examples:
(a) What if McGann was fired? ER says I’m firing you for filing claims for AIDS treatment. That would violate 510.
(b) What if ER had amended the plan to say McGann is excluded from receiving benefits? Yes, this is also a 510 retaliation claim.
(c) What if ER excludes coverage for AIDS, and McGann is the only one with AIDS? Court says this is not a 510 violation. Is the effect different from (b)? No, but the motive is.
   - There’s a difference between singling out an individual and singling out a disease.

F. ERISA Preemption §514(a),(b)

1. Generally:
   - §514(a) broadly preempts any and all state laws that “relate to any EE benefit plan…”
   - Relate to: A law relates to a benefit plan if it has a connection with or reference to such a plan.
   - Saving Clause: §514(b)(2)(A): Exceptions to 514(a). Nothing exempts any person from any law of any State which regulates insurance, banking or securities.
   - So laws regulating the terms of certain insurance contracts are saved from preemption.
   - Deemer Clause: §514(b)(2)(B): Self insured plans under the deemer clause are not saved, so these are also preempted. So if you self insure, you don’t have to comply with state law regulating the terms of insurance contracts.
   - Plan Requirement: A decision to extend benefits is not the establishment of a plan or program… It is the reality of a plan, fund, or program and not the decision to extend certain benefits that is determinative. In determining whether a plan, fund or program is a reality, a court must determine whether from the surrounding circumstances, a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits. (Fort Halifax Packing)
   - Distinguish between regulating ERs and regulating insurance companies.

2. Process to determine preemption (duh):
(i) Look to statutory language;
(ii) Look to case law (Met Life, McClendon, Morash)
(iii) Look to policy to bolster your conclusion.

3. Preempting Common Law
   - The cause of action will be preempted when recovery is possible only when the EE proves the principal reason for termination was the ER’s desire to avoid contributing to or paying benefits under the EE’s pension fund.
   - Because the court’s inquiry must be directed toward the plan, the cause of action relates to an ERISA plan.

4. Policy:
   - FLSA allows states to go above the statutory minimum. But ERISA takes a different and broader approach to state preemption. Why?
     - Easier for national companies to comply with the law.
     - ERISA doesn’t impose many substantive requirements, so maybe we should let states do that. Maybe we should let states experiment to see what works and what doesn’t.
   - Damages: ERISA damages are much less good than common law damages. ERISA doesn’t provide jury trials either, and can be easily removed to federal court. Under common law you get compensatory and maybe punitive damages, but not under ERISA.

5. Cases:
- Met Life (SC): MA statute 47B required that health policies in MA provide mental health benefits at a certain minimum level. The question was whether ERISA preempted this provision. Under §514 ERISA preempts any state laws that “relate to any EE benefit plan.” This MA law relates to benefit plans, as it requires plans provide mental health benefits. However, the law is saved as a law regulating insurance contracts. So no, the law is not preempted.

- McClendon (SC): EE was fired after a company wide reduction in force. He had worked for 9 years, 8 months. He sued in TX alleging that his pension would have vested in another 4 months and that was the reason for his discharge – to avoid pension payments. This was a common law claim. The SC held this claim was preempted by ERISA. The cause of action allows recovery when the EE proves the principal reason for termination was the ER’s desire to avoid contributing to or paying benefits under the EE’s pension fund. Because the court’s inquiry must be directed toward the plan, the cause of action relates to an ERISA plan. When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §510, state jurisdiction is preempted by §514.

- Morash (SC): EE was discharged and not paid his accrued vacation time. A MA law requires ERs to pay a discharged EE his full wages, including holiday or vacation payments. Is this law preempted? The SC said no. Vacation pay is usually fixed and due at known times. It does not depend on contingencies outside the EE’s control. Most benefits ERISA regulates accumulate over time and are payable only upon the occurrence of a contingency outside the control of the EE. It is unlikely Congress intended to subject to ERISA’s reporting and disclosure requirements those vacation benefits that are payable on a regular basis and are paid from the general assets of the ER. Vacation and holiday pay is a payroll practice, and wages are generally in a state’s sphere. The case would be different if there had been a fund created by a group of ERs to guarantee the payment of vacation benefits to those EE’s who regularly shift their jobs from one ER to another. These people face far greater and different risks and need ERISA protection.

6. Examples:
   a. EE fired after 15 years in retaliation for serving on a jury. The EE sues for wrongful discharge and seeks damages in an amount equal to lost wages and the value of pension benefits she would have accrued had she not been discharged.
      - This wrongful discharge claim is not preempted. The cause of action here has nothing to do with the existence of the pension plan (as opposed to in McClendon). §510 has nothing to do with this, and would provide her no remedy.
   b. EE is fired after 15 years in retaliation for serving on a jury. The EE sues for wrongful discharge and seeks lost wages and an order requiring that the ER’s pension plan pay her increased pension benefits on reaching retirement age (i.e. raise pension benefits to the level they would have been had she been allowed to work).
      - The plan here will be regulated by the court. The plan will be forced to pay increased benefits, not the company, so this suit would be preempted.
   c. State law requires that any pension benefits earned by an EE must vest immediately.
      - This law clearly relates to ERISA, as it deals with when pensions vest, so it preempted.
   d. ABC Pension Fund rents offices in Acme, but fails to pay rent. Acme sues ABC in state court for payment of back rent.
      - No preempted. This suit is not related to the pension plan. It’s a law of generally application that just happened to involve a pension fund in this case.
   e. ERISA requires that all ERs who establish benefit plans must file a copy of the Summary Plan Description with the federal DOL. Following passage of ERISA, a state passes a law requiring such ERs to also file a copy of the SPD with the states DOL.
      - Preempted. ERISA wants uniformity, simplicity, etc. ER’s must file with federal DOL, so it must be related to an EE benefit plan. The law relates to a benefit plan and is preempted.
   f. State law requires that all ERs give their EEs Memorial Day off, or else pay them a premium wage of twice their normal rate of pay for work on that day.
      - Morash distinguishes between traditional payment of wages and benefit plans. Is this a plan? Plans regulated by ERISA have a contingency outside the plan that triggers it. ERSIA is concerned about mismanagement of funds. In Morash they say the concerns aren’t present. Are they present here? Based on Morash, probably not preempted. No accumulation of funds, it’s a straightforward payment of wages.
   g. State law requires that insurance companies that offer group health insurance for dependent children must provide coverage for those dependent from birth.
      - Falls within the saving clause of 514(b)(2)(A) – regulates insurance.
   h. State law requires that any ER that provides medical benefits for its EEs must also provide identical coverage for its EEs’ dependents from birth.
      - Falls within the deemer clause if this is self-insurance. Another way to read this, the law relates to “ee benefit plans” and not, arguably, regulating insurers, because its regulating ERs. So it would be preempted.

IX. Workers Compensation (WC)
A. Generally:
1. Goals
   - Workers comp laws are designed to regulate workplace health and safety. There are two main goals:
(i) Compensating the EE for injury;
(ii) Preventing injuries in the first place.

- In thinking about ways to achieve these two goals ask:
  (i) Is this way of addressing workplace health and safety effective?
  (ii) Is it equitable? (Provide compensation fairly as between workers)
  (iii) Is it efficient? (Lowest possible cost)

2. Fellow Servant Rule (Farwell)
- The Fellow Servant Rule holds that He who engages in the employment of another, for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly.
  - The EE will likely know the risks and be able to effectively guard against them or tell the ER.
  - As such, an EE cannot bring a claim against his ER for the negligence of his fellow servant. (A non-EE could sue ER for negligence of EE though. That’s the master-servant, respondeat superior rule).
  - So the fellow-servant rule compensated the EE for injuries through higher wages. As for prevention, the EE had incentive to monitor what was going on with his fellow EE’s to ensure his safety. In addition, ER doesn’t want to have to pay the wage premium, so there an incentive to reduce risks.
  - But, EE’s don’t often have power to negotiate for a fully compensating wage increase.
  - There’s also an equity concern, everyone gets the wage differential, but only some will be hurt.
  - Information problems, rational behavior problems. Safety concerns – can EE’s really understand the safety issues?
  - Hard for ERs to clean up unsafe aspects of a workplace if the ER can’t cut wages once the danger is eliminated.

3. Unholy Trinity:
- Three things that made recovery impossible before WC laws:
  (i) Fellow Servant Rule;
  (ii) Doctrine of assumption of risk;
  (iii) Contributory negligence;
  - Even if these three barriers are removed, and the EE can sue, will tort recovery work to achieve prevention and compensation?
  - Tort system might over deter ER’s – push them to extraordinarily excessive lengths to prevent injury.
  - All EE’s won’t necessarily receive the same treatment, depending on court, judge, etc.

4. Cases:
- Farwell (MA): EE is injured by the negligence of fellow EE. He tries to sue the ER. Court says no, fellow servant rule. The relationship between the EE and the ER prevent compensation. There’s a presumed contract that the level of the wage rate presumably includes the allocation for risk of injury.

B. Today’s WC Laws:

1. Generally:
- If a worker is injured, the worker gets a certain, defined benefit, regardless of fault.
  - They generally get less than what they would get in the tort system.
  - The damages, however, are easily calculable.
  - You want enough of a cost that the ER feels it and will try to prevent future injuries.
- WC is a state law. There are NO federally mandated standards. The state laws generally provide:
  - Medical Benefits
  - Rehabilitation services;
  - Partial wage replacement, depending on the extent of the injury
  - Death benefits for dependents.
- WC is an insurance based system. ER’s costs of WC to some extent are experienced rated.
  - Some small ERs are excluded.

2. General Rules:
- **Rule:** Injury must “arise out of and in the course of” employment.
  - Course of employment means when the injury takes place within a period of employment, at a place where the EE reasonably may be, and while he’s engaged in duties or doing something incidental thereto.
  - “In the course of” is broader than “scope of employment.” Scope is used in agency law to determine responsibility of the master for his servant’s acts.
  - Much broader than a tort suit, no need to show negligence or fault.
  - Some states distinguish between “arising out of” and “in the course of.” For example, if a roofer is struck by lightening, this is in the course of employment, but not arising out of.
Extra Curricular Activity Rule: No recovery may be had where the injury arises from voluntary participation in athletic activities. Except: If injury arises from an athletic (social, recreational) activity that was a reasonable expectancy of, or expressly or impliedly required by the employment, it is compensable under WC.

- **Rule:** Was there a reasonable expectancy? (Ezzy)
  (i) EE must subjectively believe his participation is expected;
  (ii) Was that belief objectively reasonable?
  - To assess objectively reasonable, look to:
    (i) ER’s ongoing involvement;
    (ii) Does ER perceive itself as gaining some sort of benefit (i.e. collegiality);
    (iii) Job related pressure to participate.

Horseplay Rule: Ask was horseplay in the course of employment? If it’s a substantial deviation from the work, the horseplay would not be compensable.

- **Substantial Deviation/Larson Test:**
  (i) The extent and seriousness of the deviation;
  (ii) The completeness of the deviation (was it commingled with the performance of duty or involved an abandonment of duty)
  (iii) The extent to which the practice of horseplay had become an accepted part of the employment (makes no difference whether ER knew about it or not); and
  (iv) The extent to which the nature of the employment may be expected to include some horseplay.

3. Cases:
- NY RR (SC): NY passed a law that required ERs to pay compensation without regard to fault (unless EE was drunk or self-inflicted). ER makes a due process argument that it is being forced to compensate the EE under NY law without fault. EE’s interests are also diminished by this law to the extent they can’t prove big damages in court.
- Ezzy (CA): Ezzy was hurt playing in a company softball game. She stated that her participation was not required, but that there were strong urging to play, there was expressed concern over a lack of girls that were needed, the office made t-shirts for the team, and held an end of year banquet for them. She probably wouldn’t be able to show negligence for a tort suit anyway. Court held she subjectively thought she was expected to participate, and that her subjective belief was objectively reasonable. So, yes she could recover. Is this consistent with goals of WC? Is this the sort of thing ER’s can prevent?
- Prows (UT): Prows was injured during a rubber band fight while he was working. The court held this injury was compensable even though it occurred during horseplay. The court looks to whether the injury occurred in the course of employment. They use Larson’s horseplay test and find that this deviation was not so serious. That the EE was engaged in his job duties when the injury occurred. The fights had become a part of employment since they occurred so often. And with this type of work environment (delivery), horseplay was foreseeable. So this was not a substantial deviation and was compensable.

C. Exclusivity of Remedy:
1. Generally
   - In every jurisdiction, WC is the exclusive remedy for accidental injury or illness on the job. The courts traditionally have required an EE to prove a specific intent to injury in order to sue in tort.

2. CA Approach – Work Connection:
   - **Quantum Theory of work Connection:** If what you were doing had some connection to your work, you were injured in the course of employment, regardless of whether or not you were injured doing something that was what you were hired to do.
   - **Damages** under WC are much less than what you would get under tort, so people will try to get in with a tort suit.

3. NJ Approach – Substantial Certainty
   - An EE may bring suit based on tort theories when:
     (i) The ER’s actions were substantially certain to cause harm to the ER, and
     - Substantial Certainty is more then gross negligence. A very narrow exception.
     - Mere knowledge and appreciation of the risk does not meet the substantial certainty test.
     - The standard is set very high.
     (ii) The context in which the in act takes place is not one contemplated by the legislature in formulating WC statute (stated oppositely, the injury is not a fact of life in industrial employment).
   - The court made the exception a high standard because of slippery slope – they don’t want to undo the whole WC compromise.
   - Policy: If its an intentional wrong by the ER, you want to deter them from doing it again.
4. PA Approach: Course of Employment:
   - An EE may **not** bring suit in tort when:
     (i) EE was injured while actually engaged in the furtherance of the business of the ER, regardless of the physical location of the injury; or
     (ii) Ee’s injury occurred on the premises of the ER (i.e. not engaged in ER’s business, but one premises – like in a break room).
   - But, even if you are on ER’s premises, if you are acting like a member of the public, or didn’t have to be there, then it doesn’t matter that the injury occurred on premises of ER.
     - i.e., you work for a hospital and get sick, go to emergency room of that hospital. Yes, you’re still no the ER’s premises, but you are acting as a member of the public, and you did not have to go to that emergency room.

5. Dual Capacity Doctrine: Minority Approach
   - Permits EEs to recover from their ER if the ER possesses a second persona so completely independent from and unrelated to his status as ER that by established standards the law recognizes it as a separate legal person.
   - Most dual capacity claims are based on medical malpractice, sometime product liability too.
   - Example: ER and health care provider at the same time. Different roles, so if you are injured by a health care provider who you also work for, the minority would say dual employment, you can sue.
   - Example: You are driving the Firestone truck which has Firestone tires. The car crashes (not because of the tires) and EE is injured. EE would get WC.
   - Example: You are driving the Firestone truck which has Firestone tires. The tire blows and the EE is injured. Could argue dual capacity – ER and Producer of tires – to escape the WC bar. But if court didn’t recognize dual capacity, there’d be no way around the exclusivity bar.
   - EE and his buddies go on a fishing trip on a Saturday. The EE works for Firestone and has Firestone tires on his SUV. One bursts on the way to fishing and he is injured. Not in course of employment – no exclusivity problems.

6. Cases:
   - Eckis (CA): Eckis was injured riding Shamu. She worked for Sea World as a secretary and was asked if she wanted to ride the whale. She said yes. But Shamu was trained to ride a person with a bikini, and he had been in a bad mood recently. Her boss said it was fine, and she was injured. She claims she was hired as a secretary, not a whale rider, and since her injuries were unrelated to the secretarial duties she was originally hired to perform, she argues her employment had nothing to do with her injury and there she should be allowed to sue in tort. She sued for fraud, negligence, and liability for unreasonably dangerous animal. ER says this injured occurred in course of employment and she’s limited to WC. Court agrees, and she gets nothing really. ER had already paid her salary and medical benefits while she was out, and she had since returned back to work.
   - Millison (NJ): EEs have asbestos related injuries. They claim the ER failed to warn them about working in a dangerous field, and that ER doctors knew they suffered the disease, but the ER continued to have them work and didn’t say anything. EEs argue they can sue in tort because the ER committed an intentional wrong which is not covered by WC. EE’s argue for a broad interpretation. The narrowest way to interpret the exception is that the act must have been motivated by an intent to harm the EE. The court adopts the substantial certainty test. Count one of failure to warn is precluded because mere knowledge and appreciation of a risk, even the strong possibility of a risk, doesn’t meet substantial certainty. Count two can go in tort because the ER actively mislead the EE, knew the EEs were showing symptoms, but did not tell them. Suggests that if an ER knows the EE working with asbestos will have a 50 or even 75% chance of getting cancer, he still does not have to tell them.
   - Tatria (PA): EE is injured after being sent to hospital emergency room and the table she is one breaks. She works for the hospital and felt sick while at work. She wants to sue in tort. Court looked at the statute and determined that her injury was not sustained while engaged in furtherance of ERs business, and even though she was on the Er’s premises, it doesn’t apply here. EE wasn’t required to be in the emergency room by the nature of her work, she needed treatment and that was the closest place to go. So yes she can sue in court. She was like a member of the public.

7. Examples:
   - What if an EE worked at a hospital, fell ill, and was required to go to the EE health services where EE was injured? The connection between her employment and her connection in that treatment room would be closer and probably she would not get around WC.

D. Preemption and Relation to Other Laws:
1. IIED – CA Approach
   a. Elements of IIED:
      (i) Outrageous conduct;
      (ii) Intent to cause emotional distress or reckless disregard;
      (iii) Actually causes emotional distress;
The emotion distress is so severe that a person should not have to put up with it.

b. CA Law for IIED with Physical Injury:
   (i) Intent Problem
      - The elements of IIED allow a claim with just “reckless disregard.” However, under WC, the exception is for “intentional wrongs.” This exception is read very narrowly – even gross negligence is not enough or it will undo the whole WC compromise.
   (ii) Slippery Slope
      - ERs will always have to review, criticize, demote, terminate, etc. in the workplace. Such actions often cause emotional distress. If we allowed IIED, all EE’s would have to do to avoid WC exclusivity is allege the ER intended to cause ED with his bad review (termination, etc.) and that would be enough to cause IIED.
   (iii) Dissent:
      - The dissent argued that extreme and outrageous behavior is not part of normal ER actions.

c. CA Law for IIED without Physical Injury:
   - In 1992 the CA SC found that if an ER’s conduct produces emotional distress that creates physical or emotional injury, it’s compensable under WC and WC is the exclusive remedy.

d. Making an IIED Claim in CA:
   - Argue ER’s conduct has a “questionable” relationship to the employment.
   - CA cases that have permitted recovery in tort for intentional misconduct causing disability have involved conduct of an ER having a questionable relationship to the employment, an injury which did not occur while the EE was performing service incidental to the employment, and which would not be viewed as a risk of the employment or conduct where the ER or insurer stepped out of their proper roles.
   - Maybe you could also try to limit Cole to its facts – if an ER is not hiring or firing, etc. But a harder argument.

e. Case:
   - Cole (CA): EE suffered a stroke from high blood pressure caused from stress caused by ER harassment. He wants a tort suit for IIED, not WC. ER argues that WC is the exclusive remedy for physical injuries arising out of the course of employment. Court says that in order to avoid WC exclusivity, you need to show intent on the part of the ER. But IIED allows for intent or reckless disregard, so it would undo the WC compromise. In addition, it would open up a floodgate of claims based on emotional distress caused by bad reviews, terminations, etc. This case raised the issue of injury not arising out of health and safety concerns, but arising out of the employment relationship.

2. Employment Torts in CA and WA
   - Even if injuries occur upon termination of the EE, they are still in the normal courts of employment, as termination results from the normal course of employment, and are covered by WC.

a. Employment Statutes vs. WC:
   - Test
      (i) Look to purposes of the statutes vs. purposes of WC to determine which controls.
         - If you allow the statutory claim are you eviscerating the WC compromise? WC deals with industrial injuries and illness. Does the statute address something else?
         - Do policies overlap?
      (ii) Which was created first? If the statute was enacted after WC, most likely the legislature found it necessary to add the statute as WC doesn’t compensate for it.
      (iii) If one statute is narrow/specific and another is broad/general, the narrow/specific applies.

b. Wrongful Discharge in Violation of Public Policy vs. WC
   - Test: Is this something contemplated in the SC bargain? Public policy torts probably were not.
   - These are important claims and they are not barred.

c. Discrimination Statutes
   - Some states have WC statutes with non-discrimination clauses written in. It becomes a much harder question then if you can sue in tort for discrimination. If no, then people in different states would get different remedies depending on the structure of their state’s WC statute.
   - State WC can’t preempt federal ADA claims.

d. Cases:
   - Shoemaker (CA): Shoemaker was fired after his boss harassed him repeatedly and blamed him for things he did not do as a CA State Department of Health Services investigator. He wants to bring a claim under the CA whistleblower’s
statute and for wrongful discharge in violation of public policy tort. The question is whether WC preempts these tort claims. The court says no. You can bring the whistleblower’s claim because it provided additional protection to those already covered by WC. It was enacted after WC and if a suit was not allowed, it would be a non-event. By allowing the whistleblower claim, you are not eviscerating the WC compromise. WC deals with industrial injuries, whistleblowing was not contemplated. Moreover, the court notes that the whistleblowing statute is narrower than WC so its controls (but this argument is weak and court doesn’t put too much weight on this). Additionally, the court notes that a public policy tort is also allowed because public policy torts weren’t part of the WC bargain, etc.

- Reese (WA): Reese injured his foot on the job at Sears, which he acknowledges falls within the SC scheme. But he also argues that he was discriminated against for this disability when Sears refused to accommodate him with his injury. He wants to bring a suit for discrimination under the WA statute. Issue of whether such a claim would be preempted by WC. Court says no. WC and the anti-discrimination statute have two totally different policies. WC is intended to be the exclusive remedy for industrial injuries, including lost wages. But the remedy for discrimination claims is also lost wages. There is no conflict between the statutory schemes here. Under discrimination claim, the EE is seeking claims for actions taken by the ER after he was disabled. For the WC claim, he seeks recovery for out of pocket expenses attributed to his physical injury.

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X. Mandatory Arbitration:
A. Generally:
1. Generally
   - Arbitration results in a binding and final resolution of the parties’ claims. The arbitrator’s decision is like a judge’s decision.
   - Compare with mediation where the parties go to a 3rd party who helps them resolve the dispute. Facilitates negotiations. No power to force a certain result on the parties.

2. Federal Arbitration Act (FAA)
   - Mandatory arbitration is a significant trend in employment law.
   - Federal Arbitration Act states:
     §2: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
   - FAA Exception states:
     §1: Excluded from the Act’s coverage are “contracts of employment of seamen, railroad EEs, or any other class of workers engaged in foreign or interstate commerce.”

3. FAA and Statutory Claims:
   - Generally statutory claims are subject to mandatory arbitration if such an agreement has been signed. Arbitration provides you with generally the same rights as a court hearing, except you get an arbitrator and not a judge.
   - Process:
     (i) Does the text or legislative history of the statute indicate that Congress did not want these claims to be forced into mandatory arbitration?
     (ii) Can you argue that mandatory arbitration would be against the aims of the statute?
4. FAA, State Claims, and Employment Contracts:
- FAA exclusion §1 applies to employment contracts of seamen, railroad EE’s and any other class of workers engaged in foreign commerce. The SC read this exclusion very narrowly in Circuit City.
- The exclusion does not apply to employment contracts. Most workers will be covered.
- In addition, state law and common law tort claims will also be subject to the mandatory arbitration agreements. Thus, the whole range of employment rights we talked about in this class might be subject to potentially mandatory arbitration if the EE signed an agreement.

5. Policy Behind Arbitration:
- Is it a good thing?
  - States can no longer guarantee access to a judicial forum.
  - Bargaining power problem? An EE at the time of hiring might not adequately weigh the risks and benefits of such an agreement.
- How are arbitrators selected?
  - It’s determined by contract. It depends on how neutral the rules are for selecting the arbitrator.
  - The ER might have a better idea of who the arbitrators are and who will be the most sympathetic to them since they probably arbitrate more than the EEs.
  - With judges, you can see what else they’ve done, but not with arbitrators. A written decision is not necessarily required.
- Presently being litigated in courts is whether there’s a limit on what arbitration contracts can be enforced. Are there minimum necessary rules of procedure, etc?
  - Hooters: According to the arbitration agreement, the ER got to choose the arbitrator and the EE’s had to turn over all sorts of evidence to the ER. The ER did not have to give anything to the EE. Court struck down this agreement.
- There is some legislative movement to amend the FAA to exempt employment contracts. Other option is to amend judicial statutes to say arbitration is not mandatory. But this leave state laws still under mandatory arbitration.

6. Cases:
- Gilmer (SC): EE brought a claim for age discrimination under the ADEA. He had signed an agreement when he registered with the NYSE that any claims would be subject to mandatory arbitration. He wanted to bring the claim in court. The SC found that this statutory claim was subject to mandatory arbitration if such an agreement was signed. First the court found that you have the same rights in an arbitration proceeding as in a court. In addition, nothing in the ADEA statute or history indicated that Congress did not want arbitration to be used (although when the bill was passed, mandatory arbitration was not common so Congress might not have thought of this). Furthermore, using arbitration would not violate the policies and goals of the ADEA, and would not infringe on the role of the EEOC. The Court took a very favorable view of arbitration.
- Circuit City (SC): EE was fired and wanted to file a state law employment discrimination suit against Circuit City, but he had signed a mandatory arbitration agreement. Court held that the FAA exclusion should be read very narrowly, not to include EEs. In addition, state law and common law tort claims could be subject to mandatory arbitration under the FAA if such an agreement was signed.

XI. Exam Review:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Tort</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arises out of agreement between Parties.</td>
<td>Arises out of duties implied by law.</td>
<td>Legislature is speaking.</td>
</tr>
<tr>
<td>Remedy: Expectation damages, maybe reliance damages depending on the claim.</td>
<td>Remedy: Lost wages, compensatory damages, Maybe also punitive damages.</td>
<td>Remedy: Whatever the statute says you get.</td>
</tr>
<tr>
<td>At will, express contract, implied contract (i.e. employment manuals), promissory estoppel, good faith fair dealing, etc.</td>
<td>Wrongful discharge in violation of public policy, IIED, invasion of privacy, good faith and fair dealing, etc.</td>
<td>FLSA, WC, ERISA (COBRA), FMLA, etc.</td>
</tr>
</tbody>
</table>

Public EEs: Just use the public EE claims below that we have studied, don’t try to apply the private EE claims for tort and contract to public EEs.
Public EE’s Claims:
(i) Constitutional Claims;
(ii) Civil Service rules.

Random Things:
- Generally tort and contract claims will yield to statutory claims unless the statute permits it. (See Kirk and Hodges)
- ERISA express preemption clause of state laws relating to EE benefit plans. Exceptions under 514(b) and exceptions to the exceptions.
- Sprague gave us some federal common law claims you can bring under ERIA that aren’t preempted.
- WC exclusivity: Can’t sue on tort theories unless:
  (i) Didn’t occur in course of employment;
  (ii) Dual Capacity (minority);
  (iii) Intentional;
  (iv) Risk not one contemplated by WC bargain – this one is not so much a standalone as something to think about with all of the three above.
- Defamation:
  - Truth is an absolute defense.
  - Privilege can protect even a false and defamatory statement if it’s privileged. Privilege is conditional – you can lose it. You need an important common interest. 2 situations create a common interest:
    (i) Former ER communicates to prospective ER.
    (ii) ER communicates to current EEs reasons for one EE’s discharge.
- Difference between Churchey and Pearle Vision is self-publication.