Introduction and Historical Background

- **THE MEANING OF WORK**
  - Entry ticket to provisions; family status and security; shapes individual identity; affects other people’s evaluations of us (Article)
  - The Supreme Court in the modern era has NOT given constitutional recognition to a free-standing right to work

- **HISTORICAL ROOTS OF EMPLOYMENT AT WILL**
  - At common law employment viewed as a master-servant relation in which master’s authority to exercise control over work done and persons who perform it was ABSOLUTE
  - *Payne v. Western & Atlantic RR* (fired 4 shopping):
    - if employees R engaged for *fixed term* discharge may be actionable for breach of contract, BUT if service is terminable @ option of either party no cause of action
  - Employment at Will Rule: in the absence of a contract for a fixed term, employer may terminate an employee for good reason, bad reason, or no reason at all
  - Employment at will rule operates from a premise of an EQUAL relationship between employer and employee

- **THE RISE AND FALL OF FREEDOM OF CONTRACT**
  - *Adair v. U.S.:* employers have right to terminate employees for membership in unions
  - *Lochner v. N.Y. (bakery hours):* laws regulating working hours for bakers improperly interfere with the right of contract between the employer and employee
    - *Lochner* was an ABERRATION in its historical context and one of the few cases invalidating protective labor legislation
  - *Muller v. Oregon (hours for women):* regulating work hours for women is a health and safety interest that overrides freedom of contract
  - *Adkins v. Children’s Hospital: *revises *Lochner* b/c changes in years since *Muller* reduced inequality of the sexes that made *Muller* necessary
  - *West Coast Hotel v. Parrish (minimum wage law):* wage laws are ok b/c economic hardship of great depression and public interest in guaranteeing minimum wage override freedom of contract

- **NEW DEAL LABOR LEGISLATION**
  - Meant to spur economic recovery following Great Depression
  - National Labor Relations Act (NLRA)
    - employees have right to organize and bargain collectively (and to refrain from unionization)
    - employers are proscribed from unfair labor practices that interfere w/ employee rights to organize and collective bargain
  - *NLRB v. Jones & Laughlin Steel* (union forming employees intimidated): NLRA does NOT interfere w/ exercise of termination rights from employment at will BUT the employer may NOT under cover of that right intimidate or coerce employees w/ respect to self organization and representation

- **UNIONISM AND COLLECTIVE BARGAINING**
  - Mechanisms for Dealing w/ Social/Economic Problems
    - Exit-And-Entry: leave less desirable for more desirable jobs
      - penalizes bad employers and rewards good ones
    - Voice: use of direct communication to bring actual and desired conditions closer together (unions)
  - Unions lobby for legislation protecting rights of all workers not union ones AND finance and pursue impact litigation
  - Modern union membership has declined due to:
    - Employment shift from industrial production to white-collar service work
    - Substitution of technology for workers
    - Globalization of labor and outsourcing
    - Tendency towards bureaucracy and complacency in union leadership
• The Contemporary Era
  o Modern Employment Law is caught between 2 systems: Private Autonomy (collective bargaining) AND Public Intervention (legislation)
  o Characteristics of Modern Workplace
    ▪ Long-term attachment between employee and single employer is NO MORE
    ▪ Employment identity comes from occupation rather than a specific employer
    ▪ Decline in SENIORITY PRINCIPLES
  o Internal Labor Markets (OLD)
    ▪ Firms organized internally in hierarchy manner
    ▪ Hiring @ intro level
    ▪ Basic model is long term employment
    ▪ Promotion from within
    ▪ Employee dependence on employer
    ▪ Loyalty is VERY IMPORTANT
    ▪ Expectation of job security
    ▪ Wages/ benefits tied 2 SENIORITY
  o Modern Labor Market
    ▪ Short term employment
    ▪ Lateral Hiring
    ▪ Multiple employers over career
    ▪ Identity tied to occupation rather that firm
    ▪ NO job security
    ▪ Wages set by MARKET rather than seniority
    ▪ Benefits are more PORTABLE

• Contracting for Individual Job Security
  o The Presumption of At-Will Employment and Alternative Models
    ▪ HISTORICAL BACKGROUND
      • Blackstone’s Old English general rule of a year: employer must not terminate employee until end of a full year (master shouldn’t be able to discharge servant after benefit of his work during harvest season but not support him during unproductive winter)
      • Employment at will is a DEFAULT RULE for when the employment contract is silent to duration, parties are free to contract around it
      • Savage v. Spur Distributing (told employment permanent as long as performed satisfactorily):
        o Unless both parties are bound, NEITHER is bound
        o If employee doesn’t promise to stay, no promise by employer of permanent employment
        o Permanent = indefinite = terminable at will
        o Essentially made substantive rule that employees couldn’t bargain for job security
      • In 1st half of 20th century, courts required employees alleging permanent employment to prove the provided additional consideration beyond services performed to support such a promise
        o Courts found this consideration ONLY when employee agreed to release a claim for damages OR agreed to give up a competing business

    ▪ ALTERNATIVE MODELS
      • THE UNION SECTOR (Article)
        o Termination ONLY for just cause: failure to perform satisfactorily by lack of
          ▪ Regular attendance
          ▪ Obedience to work rules
          ▪ Reasonable quality and quantity of work
          ▪ Avoidance of conduct interfering w/ employer’s ability to carry on business effectively
        o Just Cause Discharge must further one of employers Legitimate Interests:
          ▪ Rehabilitation
          ▪ Deterrence of similar conduct
          ▪ Protection of ability to operate business successfully
Employees R Entitled to Industrial Due Process:

- Notice of standards
- Decision based on facts/ opportunity 2B heard
- Imposition of discipline in gradually increasing degrees EXCEPT in cases of extreme breach

**PUBLIC EMPLOYMENT**

- **Board of Regents v. Roth** (teacher w/ 1 year contracts w/o tenure till 4):
  Constitutional property interest in employment is created BY the employment contract w/ the state and is limited by the employment contract

- **Perry v. Sinderman** (taught for 10 years w/ implied tenure in handbook):
  - Person’s interest in a benefit is a property interest for due process purposes if there are rules or mutually explicit understandings that support the claim of entitlement
  - An IMPLIED AGREEMENT may provide evidence of such entitlement

- **Cleveland Board of Ed. v. Loudermill** (fired for dishonesty on employment application): individual must be given an opportunity to be heard BEFORE being deprived of a property interest for due process to be served

**Express Contracts**

- **WRITTEN CONTRACTS**
  - **Guiliano v. Cleo** (Contract but sent home given no work):
    - The contractual right to change work duties doesn’t include right to remove ALL DUTIES (this is constructive discharge)
    - Severance pay is NOT conditioned on a breach of contract OR a reasonable estimation of damages and is paid by employer when employment relationship is terminated through no fault of the employee
    - Liquidated Damages are a sum stipulated and agreed upon by parties @ time of contract to compensate should a BREACH ever occur
    - Liquidated damages are recoverable if reasonable @ time of contract and reflect their original intent REGARDLESS of whether employee was actually able to secure other employment

- When fixed term contracts don’t specify termination terms, courts presume they CANNOT be terminated without cause during term of the contract
  - Financial reasons ARE NOT sufficient to constitute just cause
  - Misconduct or poor job performance = just cause

- **ORAL CONTRACTS**
  - **Toussaint v. Blue Cross** (P told b/ company “as long as I did my job”)
    - Employer gives up right to terminate without cause when:
      - Prospective employee inquires about job security AND
      - Employer agrees employee shall be employed as long as he does the job
  - Different from **Savage** b/c by this time courts stopped requiring separate consideration for promises of job security
  - **Rowe v. Montgomery Ward** (P left 4 personal emergency w/o permission, told had job as long as achieved sales quota):
    - Despite “as long as” language assurance to job security isn’t agreement to terminate ONLY for cause where:
      - There’s no PRE-EMPLOYMENT NEGOTIATION on security
      - No INQUIRY into job security
      - P applies for one of many identical jobs (rather than a unique one) where its unlikely terms are negotiable
  - **Tuissaint** is a more liberal standard of when employers are bound by oral promises of job security
  - **Rowe** says ther must be objective evidence showing statements were intended to be binding under the circumstances
**Implied Agreements**

- **EMPLOYEE HANDBOOKS**
  - **Wooley v. Hoffmann-LA Roche:**
    - When employer of substantial # of employees circulates a manual that, when fairly read, provides certain benefits are an incident of the employment (i.e. job security), the judiciary should construe them in accordance w/ reasonable expectations of employees
    - Contract arising from the manual protects employee ONLY from arbitrary discrimination…it is NOT a contract for “lifetime” employment
    - The manual is an offer to form a unilateral contract reliance on the contract in the manual by choosing to remain at work is PRESUMED
  - **Anderson v. Douglas & Lomason** (fired 4 pencils, progressive discharge in handbook):
    - Handbook Creates Unilateral Contract Where:
      - Handbook is definite enough to be an OFFER
        - Handbook is directive not just guidelines
        - Language of procedure is detailed and definite
        - Procedures are invariable (employer can’t alter)
      - Handbooks communicated to and accepted by employee ACCEPTANCE
        - Receipt is sufficient EVEN IF employee doesn’t read it
      - Employee provides CONSIDERATION
    - DISCLAIMERS need not be conspicuous to be enforceable
      - But disclaimer must be clear and unambiguous to the reasonable employee
  - **Asmus v. Pacific Bell** (employer changed job security policy in manual):
    - an employer can terminate/modify contract w/ no fixed duration after a reasonable time period IF it provides employees w/ reasonable notice AND modification doesn’t interfere w/ vested employee benefits
    - the employer DOESN’T have to provide additional consideration 2 terminate
    - job security policy is NOT a vested benefit for private sector employees
  - **Asmus** is a MIDDLE GROUND between cases saying terms of contract implied from employee manual cant be modified AT ALL and saying they can be modified AT ANY TIME regardless of notice or vested benefits

- **PROMISSORY ESTOPPEL**
  - **Goff-Hamel v. Obstetrics & Gynecologists** (woman left old job fired day b4 start new)
    - A cause of action for promissory estoppel lies where employer has made promise of at-will employment he should reasonably expect to induce action or forbearance on part of the employee
    - Promissory estoppel provides for damages as justice requires NOT based on benefit of the bargain
    - Analysis for Promissory Estoppel Claim:
      - Did employer make definite offer of employment that knew or should have known would cause employee to act to his detriment?
      - Was employee actually induced to act?
      - Was action taken detrimental to employee?
      - Does justice require employee be reimbursed 4 damages as result of promis?
    - Many courts follow Goff-Hamel dissent and say promissory estoppel MAY NOT be used to remedy an unfulfilled promise of at will employment

- **IMPLIED-IN-FACT CONTRACTS**
  - Courts look @ entire course of dealing between parties to determine whether some sort of job security was implicitly intended
  - **Pugh v. See’s Candies** (32 year employee fired, told if loyal and good work future secure):
    - Factors 2 Determine Implied-in-Fact Promise for Job Security:
      - Personnel policies or practices
      - Employee longevity of service
- Actions/communications of employer reflecting assurances of continued employment
- Practices in industry in which employee is engaged
  - Longevity is NOT ENOUGH to imply contract 4 job security

- DETERMINING WHETHER GOOD CAUSE EXISTS
  - 4 INDEFINITE term contracts not to discharge w/o cause, business reasons such as financial difficulties or reorganization constitute “cause” permitting termination
  - Cotran v. Rollins (fired after investigation of sex harassment claims against him):
    - In an indefinite term implied contract good cause for termination exists where employer’s factual determination of misconduct is objectively reasonable
    - Fair Termination includes:
      - Substantial evidence, adequate investigation, notice of claimed misconduct, and a chance for employee to respond
  - Cotran rule for good cause is a DEFAULT rule that can be modified by an EXPRESS CONTRACT

- Good Faith and Fair Dealing
  - Under restatement every contract imposes on parites duty of good faith and fair dealing in performance and enforcement
  - HOWEVER, MOST STATES have REJECTED claims based upon implied covenant of good faith and fair dealing
  - Fortune v. Natl. Cash Register (fired so wouldn’t have to pay sale commission): written employment contracts contain an implied covenant of good faith and fair dealing and a termination not made in good faith constitutes a BREACH of an employment contract
  - Murphy v. American Home Products (fired 4 revealing accounting improprieties): absent a constitutionally impermissible purpose, a statutory proscription, or express limit in contract, employer’s right to terminate employment @ any time remains unimpaired

- Public Policy Claims
  - The Public Policy Exception
    - WHAT CONSTITUTES PUBLIC POLICY?
      - Foley Test (“void if contracted for test”): if the public interest at stake is one that can be properly circumvented by agreement of the parties, then it is not sufficient for a public policy claim
      - Classes of cases often accepted under PPE: termination for perjury, workman’s comp. claim, jury duty
      - 3rd Party Effects Test (Schwab): where contract violated had substantial adverse third-party effects, it shouldn’t be enforced
      - Gantt v. Sentry Insurance (forced 2 resign b/c refused to lie in sex harassment investigation)
        - A public policy exception carefully tethered to fundamental policies delineated in constitutional or statutory provisions is VALID
        - DFEH statute prohibited tampering w/ investigations therefore coercing an employee to lie to an investigator contravenes public policy of the state
      - Mariani: professional ethics codes may constitute public policy for purposes of establishing wrongful discharge where ethics provision is designed to serve interests of the public rather than interests of the profession
      - However, courts are DIVIDED over whether ethics codes should provide basis for wrongful discharge
      - Kirk v. Mercy Hospital: public policy can be found in letter and purpose of a constitutional, statutory, OR regulatory provision or schem
        - You have to show a statute but not a LITERAL violation (GENERAL POLICY behind statute can provide requisite public policy)
        - IF statute provides for remedies, employee is NOT entitled to common law action for wrongful discharge in violation of public policy (PRECLUSION)
• **PRECLUSION**
  - *Amos v. Oakdale Knitting* (wage dropped below minimum told take it or be fired):
    - Existence of an alternative remedy precludes claim for wrongful discharge where:
      - Federal legislation preempts state law
      - State legislature says it wants statutory remedies to be exclusive:
        - First look @ words of statute 2 see if preclusion intended
        - Then look @ purpose and spirit of statute and what it sought to accomplish
    - Should nature of available remedy be relevant in determining whether common law wrongful discharge claim is precluded by state statute
      - *Makovi* (Maryland): NO
      - *Flenkner* (Kansas): YES- question of whether remedy is adequate is CRUCIAL
  - **Constructive Discharge; Whistleblower Statutes**
    - *Strozinsky* (fired after yelled at, threatened, demoted, pressured)
      - to raise constructive discharge claim, employee must establish conditions so intolerable they felt compelled to resign
        - OBJECTIVE inquiry: would reasonable person in P situation feel forced to quit
        - Intolerable conditions can arise when employee asked to engage in illegal acts
      - Constructive discharge is ancillary to UNDERLYING CLAIM IN WHICH EXPRESS DISCHARGE OTHERWISE WOULD BE ACTIONABLE
    - Courts divided on whether employees who suffer retaliatory action that falls short of discharge and not egregious enough to constitute “so intolerable that a reasonable employee would resign” should be able to file claims for wrongful demotions or discipline in violation of public policy
    - Numerous state and federal statutes protect job security of employees who engage in certain types of whistleblowing
    - Statutes vary widely in terms of who is covered and what types of complaints are protected
      - Tend to emphasize threats to health and safety rather than financial wrongdoing
  - **The Special Case of Attorneys**
    - *Balla v. Gambro* (discharged for trying to stop bad kidney stuff sale): an attorney DOES NOT have a claim for retaliatory discharge against a company due to the presence of the attorney client relationship (in-house counsel doesn’t have a claim under tort of retaliatory discharge)
    - *Crews v. Buckman Labs Intl.* (fired b/c reported boss practiced law w/o license): attorney CAN pursue a claim of retaliatory discharge…counsel can reveal confidences and secrets of a client when lawyer reasonably believes its necessary to establish claim or defense on behalf of the lawyer in controversy w/ client
      - *Crews* looks @ attorney more like an EMPLOYEE *Balla* looks at it more like a LAWYER
  - **Collective Job Security**
    - COMMON LAW CONTRACT, PROPERTY AND TORT CLAIMS
      - *United Steel Workers v. US Steel* (plant wants 2 leave town but big blow to town)
        - NO community property claim- employee property right in plant arising from long-established relation between plant and town
        - The court has NO AUTHORITY to require employer to continue operations when officers and board decide to discontinue
      - *Ypsillanti v. General Motors*; there is an EQUITABLE BASIS for relief in the plant closing context where the closing would result in gross inequity and patent unfairness (BUT this case was overruled saying GM’s promise to continue operations in exchange for tax abetments was “hyperbole”)
        - Proposed Test: Employer breaches covenant of good faith and fair dealing where
          - Keeps plant closing secret till short time before closing
          - Employer knows or should know it will close and gives false assurances of job security
    - **WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)**
      - WARN requires employers w/ 100 or more full time employees to provide notification of plant closings and mass layoffs to workers, unions, and affected state agencies 60 days in advance.
      - *Childress v. Darby Lumber* (notice given 1 day before closure on paycheck):
        - Good faith defense to WARN violation requires showing by employer of subjective intent to comply w/ Act AND objective reasonableness in applying the act
• MERE IGNORANCE of WARN is not enough for good faith exception
• Important indicator of business circumstance that isn’t reasonably forseeable is circumstance caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control
  • WARN Issue of how to count employees: court looks @ nature of operations and relations of principles to determine whether 2 companies are effectively one company

  o COLLECTIVE JOB SECURITY UNDER THE NLRA
    • UNION ORGANIZING DRIVES
      • Textile Workers Union v. Darlington Manfg. (told employees rising cost from union would close plant): when an employer closes his entire business, even b/c of vindictiveness to the union, such action is NOT an unfair labor practice
        o HOWEVER a partial closing violates WARN if motivated by a purpose to chill unionism in remaining plants AND if employer reasonably would know that closing would have that affect
    • THREATS TO CLOSE IN RESPONSE TO UNION ORGANIZING ACTIVITY
      • NLRB v. Gissel Packing Co. (stated in past union strikes lead to closing of plants)
        o Employer can communicate views on unionism so long as the aren’t a threat of reprisal or force or promise of benefit
        o Employer can make prediction 4 effect of unionism but must be carefully phrased on basis of objective fact to demonstrate consequences beyond his control or convey a decision already arrived at to close in case of unionization

• Employee Mobility
  o COVENANTS NOT TO COMPETE
    • Hopper v. All Pet Animal Clinic (leaves and starts clinic in same area w/ small animals):
      • Initial burden is on employer to prove covenant is reasonable and has a fair relation to, and is necessary for, the business interests for which protection is sought
      • Covenant is INVALID IF:
        o Restraint is greater than needed to protect employer’s legitimate interest OR
        o Employer’s need is outweighed by hardship to employee and likely to injure the public
      • Legitimate Interests to be Protected:
        o Trade secrets
        o Confidential info transferred to employee
        o Special influence gained by employee over customers obtained during employment
      • Geographic limits are reasonable when limited to area in which employee actually worked or from which clients are drawn
      • Durational limits are reasonable when no longer than necessary for employer to put new person on job and new employee to have reasonable opportunity to demonstrate effectiveness to customers
        • Most courts follow the blue-pencil rule in Hopper and reqrite the contract to what it determines to be a reasonable length of time

  o TRADE SECRETS
    • PROTECTING TRADE SECRETS
      • Dicks v Jensen (leave to start own lodge bus tour business):
        • 2 part test to determine whether info deserves trade secret protection
          ▪ does info have independent economic value not readily ascertainable to others
          ▪ were reasonable efforts made to maintain info’s secrecy
            • written agreement not to compete?
            • Knowledge confined to restricted employee group?
            • Measures to guard info

    • INEVITABLE DISCLOSURE
      • PepsiCo v. Redmond (left to work for Quaker a fierce competitor):
        • The Inevitable Disclosure Doctrine: a former employee will inevitably rely on or disclose trade secretst in the course of his new employment
THE DUTY OF LOYALTY

- **Augat v. Aegis** (left and started own business taking other employees with him)
  - At will employee can plan to compete w/ employer and take active steps to do so while still employed but:
    - No trade secret appropriation
    - No soliciting employers customers while still working
    - No acting for future interests @ expense of employer by using employer’s funds or employees for personal gain or by course of conduct designed to hurt employer
  - DAMAGES are determined by losses incurred by employer that wouldn’t have occurred but for D’s breach of the duty of loyalty

- Duty of Loyalty (Augat) vs. Trade Secret
  - Loyalty places broader restrictions on employee: TS only protects specific info while loyalty places broader restrictions
  - Loyalty is NARROWER in other respects: applies only while employee is still employed

**Dignitary Interests**

- **Reputation**
  - Employees have strong interest in avoiding harm to their reputations
  - **Zinda v. Louisiana Pacific** (termination published in plant newspaper w/ reasons)
    - Communication is defamatory if it tends to harm the reputation of another so as to lower him in estimation of the community or deter 3rd persons from associating or dealing w/ him
    - There is a conditional privilege defense to defamation where circumstances lead any of several people w/ common interest in subject matter correctly or reasonably to believe that the info is such that another sharing the common interest is entitled to know
  - Abuse of Privilege:
    - Knowledge or reckless disregard as to falsity of info
    - Matter published for purpose other than that for which privilege given
    - Publication to a person not reasonably believed necessary for accomplishment of purpose of privilege
    - Publication includes unprivileged as well as privileged info
  - An employer is entitled to use a method of publication that involves incidental communication to persons not w/ in scope of privilege
  - Some courts presume existence of harm where defamatory statement imputes “unfitness” for one’s business or profession
  - Some courts hold that statements made by one employee to another in same co. don’t meet element of publication for purposes of defamation law
  - **Chambers v. American Trans Air** (old employer giving bad references):
    - an employee reference from a former employer to a prospective employer is clothed with the mantle of a qualified privilege
    - lack of grounds for belief is equated to reckless disregard for the truth that overrides privilege
    - an employer can be held liable for providing unjustifiably positive references BUT the doctrine is NOT WIDELY EXCEPTED and imposes liability ONLY where there is an affirmative representation that raises a substantial risk of physical harm to others
    - in most states TRUTH is an AFFIRMATIVE DEFENSE to a defamation claim

- **Avoiding Emotional Harm**
  - Most states recognize tort of intentional infliction of emotional distress that allows P to recover damages when D’s extreme conduct causes mental anguish even in absence of proof D breached independent legal duty
  - **Wornic v. Casas**: To prevail on claim of intentional infliction of emotional distress, P must prove:
    - D acted intentionally or recklessly
    - Conduct was extreme and outrageous: Goes beyond all possible bounds of decency and regarded as utterly intolerable in civilized society
    - Actions of D caused emotional distress
    - Resulting distress was severe
  - **Bodewig v. K-mart** (stolen money search): employer/employee relationship is a special relationship based on which liability may be imposed if employer’s conduct was such that a jury might find it beyond the limits of social toleration and reckless of the conduct’s predictable effects on plaintiff
    - For employer showing of intent OR recklessness, for others show intent: employees are more vulnerable to the unreasonable demands of the employer
  - **Hollomon v. Keadle** (physician who cursed out women):
- Abusive profanity alone not enough for intentional infliction of emotional harm
- Absent showing employer had knowledge employee was peculiarly susceptible, this position stands
- Fact of the employment relationship had NO RELEVANCE to court’s analysis; case almost cuts the OPPOSITE WAY of Bodewig

**Privacy**

**CONSTITUTIONAL PROTECTION FOR PUBLIC EMPLOYEES**

- **O’Connor v. Ortega** (Dr’s office searched for sex harassment investigation)
  - 4th amendment protects right to be secure against unreasonable searches and seizures
  - workplace includes those areas and items related to work and generally within employer’s control (still part of workplace w/ personal items in them)
  - public employee’s expectation of privacy in offices, desks, and file cabinets may be reduced by virtue of actual office procedures and procedures OR by legitimate regulation
  - Inquiry for Reasonableness of search
    - Was action justifiable @ inception?
    - Was search as actually conducted reasonably related in scope to circumstances justifying interference?

**COMMON LAW PROTECTIONS FOR PRIVATE EMPLOYEES**

- Relevant forms of invasion of privacy: unreasonable intrusion upon seclusion of another AND unreasonable publicity given to another’s life

- **K-Mart v. Trotti** (unassigned locker w/ own lock searched)
  - Intentional intrusion upon seclusion of another that is highly offensive to a reasonable person is an invasion of privacy
  - Intrusion MUST BE highly offensive for cause of action to stand
  - Intrusion upon privacy itself is actionable and P can receive at least NOMINAL damages w/o demonstrating physical detriment

- **Borquez v. Robert Ozer, P.C.** (told everyone employee was gay and partner had AIDS):
  - Publication of private life is invasion of privacy if matter is of a kind that would be highly offensive to reasonable person AND IS not of legitimate concern to the public
  - Publicity occurs when a matter is communicated to the public @ large OR to so many persons that the matter must be regarded as substantially certain to become public knowledge
  - Publication necessitates ONLY communication to a 3rd party
  - Right of privacy can be waived for one purpose and still asserted for another

- **Smyth v. Pillsbury Co.** (fired for sending inappropriate e-mail): there is no reasonable expectation of privacy in e-mail sent over company e-mail system notwithstanding assurances such communications wont be intercepted by management (such interception is also NOT substantial and highly offensive invasion of privacy)

**TENSION BETWEEN PRIVACY RIGHTS AND AT-WILL EMPLOYMENT**

- **Luck v. So. Pac. RR** (fired for not taking drug test): termination for refusal to take a drug test as an exercise of the constitutional right to privacy is NOT a violation of public policy for purposes of wrongful termination

- **Jennings v. Minco Labs** (started drug program after P worked there wanted it stopped)
  - Drug testing plans threaten no UNLAWFUL invasion of employee privacy interest and consent to new terms of employment DOES NOT become non-consensual b/c P needs the money and cant quit instead

**COLLECTIVE APPROACHES TO PROTECTING EMPLOYEE PRIVACY**

- NLRA prohibits employer surveillance that tends to discourage employees’ exercise of their right to organize and bargain
- Where there is a union in place, NLRB has concluded a wide variety of employer investigation tools used to detect misconduct are mandatory subjects of bargaining
- **Colgate-palmolive** (hidden cameras in bathrooms w/o bargaining): installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining
- When employer discharges/disciplines employees based on info from illegal surveillance, discipline wont be rescinded where employer can show cause even though proof is essentially fruit of unlawful surveillance
• OFF-DUTY CONDUCT AND ASSOCIATIONS
  • b/c of limited focus of common law privacy tort, it provides little protection against adverse employment action based on employee’s off-duty activities or associations
  • states have passed statutes protecting employees from retaliation based on off-duty activities but such statutes may be of limited effect
  • *McCavitt v. Swiss Reinsurance America* (fired for off duty romantic relationship): nothing in logic language, legislative history or state case law indicates romantic dating is a recreational activity under NY labor law

• Employee Voice
  o THE PUBLIC SECTOR EMPLOYEE
    ▪ 1st amendment expressly protects freedom of speech HOWEVER when govt. employer acts to supress or punish speech of employees it acts in 2 capacities: as SOVEREIGN AND as EMPLOYER
    ▪ *Pickering v. Board of Ed.* (teacher fired 4 letter about funds handling):
      • Factors to determine whether termination is violation of constitution:
        o Statements directed towards someone w/ whom employee would normally be in contact during course of his work
        o Relationship between employee and statement person such that personal loyalty and confidence are necessary for proper function
        o Statements aren’t related to a significant matter of public concern
      • Balancing Test: interest of employee in speaking on matters of public concern vs. interest of employer in maintaining order and control in workplace
    ▪ *Connick v. Myers* (DA fired for questionnaire to office on employment issues)
      • When public employee speaks NOT as a citizen on matters of public concern but as an employee on matters of personal interest court should not review personnel decision
      • Whether speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record
      • If the time, manner, and place of speech disrupts functioning of the workplace, greater employer justification
    ▪ The Pickering Test
      • Is the speech a matter of public concern?
      • Does the speech adversely affect govt. interest as an employer?
      • Public concern is a THRESHOLD TEST (if no public concern we don’t get to balancing test)

  o PRIVATE SECTOR EMPLOYEES
    ▪ Here we don’t have the 1st amendment safeguard for employee speech
    ▪ *Novosel v. Nationwide Insurance* (fired for refusing to participate in political lobbying efforts)
      • Clearly mandated public policy is one that strikes at the heart of a citizen’s social right, duties and responsibilities
      • Public policy is implicated whenever the power to hire and fire is utilized to dictate the terms of employee political activities
      • Test:
        o Does speech prevent employer from efficiently carrying out responsibilities
        o Does speech impair employee’s ability to carry out own responsibilities
        o Does speech interfere w/ essential and close working relationships
        o Does manner, time and place in which speech occurs interfere w/ business operations
      • Court here says we can derive a public policy from 1st amendment OR state law
    ▪ *Edmondson v. Shearer Lumber* (fired for involvement in opposition to project beneficial to employer)
      • State or federal constitutional free speech CANNOT, in the absence of state action be the basis of a public policy exception in wrongful discharge claims
      • As opposed to Novosel, court here says we CANNOT derive public policy from 1st amendment or state constitution
The law will protect collective voice when it’s about wages, hours, and working conditions. NLRA doesn’t condition §7 rights on presence of a union.

**Requirements for §7 Protection:**
- Activity must be “concerted”: 2 or more employees OR 1 employee acting on authority of others to enlist their support in common endeavor.
- Activity must relate to wages, hours or terms and conditions of employment.
- Activity must be “protected”: not disloyal, indefensible, violent, unlawful OR in breach of contract.

**NLRB v. Washington Aluminum** (workers fired for going home b/c shop too cold):
- §7 protects concerted activities by employees whether they take place before, after or at the same time a specific demand is made to the employer to remedy a condition.
- The reasonableness of workers’ decision to engage in concerted activity is IRRELEVANT to determination of whether a labor dispute exists or not.

**Timekeeping Systems, Inc.** (fired for e-mail about new vacation plan):
- §7 requires ONLY that employer discipline employee where employer knows conduct being disciplined is concerted, NO REQUIREMENT that discipline is BECAUSE the activity is concerted.
- Unpleasantries uttered in course of otherwise protected concerted activity DO NOT strip way the protection of the Act.

### Wages and Hours

**THE FLSA: MINIMUM WAGE AND OVERTIME PROVISIONS**

**THE BASICS**
- Establishes minimum wage employers must pay covered employees.
- Requires employers pay covered employees time and a half for hours worked in excess of 40 hours in a work week.

**WHO IS COVERED**
- 3 inquiries to determine FLSA coverage:
  - coverage as an individual OR employed by an employer subject to enterprise coverage.
    - Individual coverage test: employee covered if engaged in commerce or in the production of goods for commerce.
    - Enterprise coverage test: all employees of an enterprise engaged in commerce or in the production of goods for commerce are covered REGARDLESS of type of work performed by individual employee.
      - Enterprise must have annual gross volume of sales made or business done of @ least $500,000.
  - Must be an existing employment relationship:
    - Employees must be distinguished from independent contractors, volunteers, students, etc.
    - It is the economic reality of the relationship that determines whether a worker is an employee within the meaning of FLSA: does worker depend on someone else’s business for the opportunity to render service or are they in business for themselves?
  - Act exempts certain categories from minimum wage and/or overtime provisions:
    - White collar exceptions
    - Amusement and recreational businesses, etc.
    - Live in domestic workers are exempt from overtime but NOT the minimum wage provisions of FLSA.

**Heath v. Perdue Farms** (chicken catchers not paid overtime):
- Factors to Determine Employment Relationship:
  - Degree of control employer has over manner work is performed.
  - Opportunities for profit or loss dependent upon managerial skill of worker.
  - Employee’s investment in equipment or material.
  - Degree of skill required for the work.
  - Permanence of working relationship.
  - Whether service rendered is integral part of putative employer’s business.
Joint Employer Test
- Degree of direct and indirect work supervision
- Power to determine pay rates or methods of payment of workers
- Right to directly or indirectly hire, fire, or modify employment conditions
- Preparation of payroll and payment of wages

Holly Farms: agricultural activity includes farming activities performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.

WHAT IS COVERED WORK
- Davis v. Food Lion (worked off clock 2 meet schedule times didn’t get paid but told not to): proof of an employer’s actual or constructive knowledge of off the clock work is a necessary element of an employee’s case for unpaid overtime
- Employee must show pattern or practice of employer acquiescence so that it’s reasonable to infer the employer suffered or allowed employee to work off the clock hours
- Dinges v. Sacred Hart Hospitals (EMT’s want overtime pay for all on call time)
  - Where conditions placed on employee’s activities are so restrictive employee can’t use the time effectively for personal pursuits, time spent on call is compensable
  - In close cases courts let private arrangements endure rather than letting FLSA override
- Rest periods of 20 minutes or less are included in compensable work time but meal breaks of 30 minutes or longer are not compensable under FLSA
- Activities performed @ jobsite that are integral part of principal activities of the job are compensable
- Training time is compensable unless:
  - Occurs outside regular work hours
  - Attendance is voluntary
  - Not directly related to employee’s job AND employee performs no productive work during training

ENFORCEMENT OF THE FLSA
- Can be enforce through civil actions brought by Sec. of Labor or employees themselves or rarely by criminal prosecutions by DOJ
- Statute of limitations for FLSA claims: 2 years non willful, 3 years willful
- Individual states can enact wage/hour laws that are MORE protective of workers rights than federal law
- Alden v. Maine- state employees can’t bring action against state under FLSA unless the state waives immunity
- 2 types of collective action
  - Rule 23 under state labor laws
    - Binds ALL potential class members unless they affirmatively OPT OUT
    - Not permitted under FLSA
  - FLSA collective action
    - Employees have to opt in and only those who do are bound

THE OVERTIME BARGAIN: TIME, MONEY AND CLASS STATUS
- PUBLIC SECTOR EMPLOYMENT AND COMP TIME
  - Christensen v. Harris County- employers are free to decrease work hours and can cash out comp time by paying employee, it naturally follows that public employers can force their employees to use their comp time
  - Mortensen v. Sacramento County- en employer has no obligation to grant comp time to employees on specific dates
- HIGH END EXCEPTIONS
  - Executive employees primary duty is management of the enterprise and who customarily and regularly direct the work of 2 or more employees and have authority to hire or fire other employees OR whose suggestions/recommendations as to change of employees status are given particular weight
  - Scherer v. Compass- time is NOT the sole determinant of primary duty, rather it is the work the employee does that is of principal value to the employer
  - Administrative employees are those whose primary duty is performance of office or non-manual work directly related to management or general business operations of the employer or employers
customers AND whose primary duty includes exercise of discretion and independent judgment w/ respect to matters of significance

- *Robinson-Smity v. Gvt. Employees Insurance*—there is a distinction between use of skill and experience in applying written standards and independent judgment required under Act’s definition of administrative employee
- Professional employees include LEARNED PROFESSIONALS whose primary duty requires knowledge of advance type in a field customarily acquired by prolonged course of specialized instruction and CREATIVE PROFESSIONALS primary work requires invention, imagination, originality or talent in field of artistic or creative endeavor
- Journalists may satisfy requirement for creative professional exemption if primary duty is work requiring originality or talent rather than intelligence, diligence and accuracy
- Computer professionals primary duty consists of performance requiring theoretical and practical application of highly specialized knowledge in computers analysis, programming and software AND duty must include work requiring consistent exercise of discretion and judgment

- **Pension and Health Benefits**
  - ERISA regulates pension AND WELFARE BENEFIT PLANS
  - There’s virtually no substantive provisions that regulate health plans or other welfare benefit plans
  - ERISA regulates plans once an employer decides to provide them
  - **PENSION CASES**
    - Defined benefit plans offer fixed benefit during retirement based on formula based on employee salary and length of service (employer assumes risk of managing plan) defined contribution plans employee and employer make contribution into account for each employee and employee is responsible for managing the plan
    - *McNevin v. Solvay Process Co.* (employer said no vested interest in pass book benefits): persons or corporations proposing to give sum for benefit of employee has right to fix terms and provide when gift becomes vested and absolute
    - *Clark v. Lauren Yong Tire* (lost pension b/c worked for competitor): a non-competition forfeiture clause is valid so long as the plan provides that benefits accrued AFTER 10 years of service cannot be forfeited
    - ERISA requires vesting of benefits after 5 years OR gradual vesting of 70% after 3 years and 100% after 5
    - *Campbell v. Bankboston* (defined benefit plan changed to cash balance plan that benefits younger workers): wear away provisions don’t amount to a forfeiture of an accrued benefit in violation of ERISA rather it is a reduction in expected future accruals
    - Courts have SPLIT over whether cash balance plans are inherently discriminatory
    - *Heath v. Varity Corp.* (fired to prevent vesting early retirement): ERISA prohibits employer from firing employee to prevent attaining a right employee may become entitled to under the plan and DOES NOT distinguish between vested and unvested benefits
  - **HEALTH BENEFIT CASES**
    - *McGann v. H&H Music* (changed plan after employee got AIDS): P must show specific intent to retaliate for filing claims OR to interfere with attainment of right he would have become entitled to pursuant to an existing, enforceable obligation assumed by employer…employer has ABSOLUTE RIGHT to modify terms of welfare plans for employees
    - *Sprague v. GM*: welfare plans are specifically exempted from vesting requirements and an employers intent to vest must be found in the plan documents stated in clear and express language
      - ERISA broadly pre-empts state laws that relate to an employee-benefit plan but the pre-emption is substantially qualified by an “insurance saving clause” that states that nothing in ERISA exempts a person from state law regulating insurance, banking or securities
      - 3 Criteria to Determine Whether A Practice Regulates “business of insurance”
        - does the practice have the effect of transferring or spreading policyholder risk?
        - Is the practice an integral part of the policy relationship?
        - Is the practice limited to entities within the insurance industry?
      - Deemer clause— if employer self insures, it doesn’t come under the savings clause as an exempt insurance company
    - *Mass. v. Morash*— policy to pay employees for unused vacation time does NOT constitute employee welfare benefit plan
    - *Fort Halifax Packing*— Factors to determine whether there is a plan: 1) requires an administrative scheme to meet obligation 2) employer assumes responsibility to pay benefits or regular basis
    - ERISA preemption provision preempts ONLY state laws that relate to employee benefit plans
• **Ingersoll-Rand:** a law relates to an employee benefit plan if it has a connection with or reference to such a plan. If existence of plan is a critical factor in establishing liability under state law, the cause of action is preempted.

**Health and Safety**

- **Workers’ Compensation**

  - **ORIGINS OF WORKERS COMPENSATION LAWS**
    - Under **common law** only recourse for injured workers was lawsuit to recover damages BUT tort system availability of damages turned on fault and causation not need
    - **Farwell:** **Respondeat Superior** does NOT apply where a servant brings action against own employer to recover damages for injury arising out of course of employment when caused by another employee (Fellow Servant Rule)
    - Common law defenses to worker claim: fellow servant rule, assumption of risk doctrine, contributory negligence
    - **NY Central RR v. White:** it’s not unreasonable for the state, while relieving employer from responsibility for damages measured by common law standard to require him to contribute reasonable amount by way of compensation for loss of earning power incurred in common enterprise

  - **BASIC BENEFITS AND COVERAGE**
    - Benefits: medical costs, cash benefit (min and max), permanent disability, survivor benefits
    - to be covered by workmens comp, injury must be arising out of and in the course of employment
    - **Prows:** Test to Determine whether horseplay arises in course of employment: 1) Extent and Seriousness of deviation 2) Completeness of the Deviation 3) Extent to which horseplay has become part of the employment 4) extent to which nature of employment may be expected to include some such horseplay (Prows assumes “arising out of” and “in the course of” are the same test)
    - **Houser v. Bi-Lo** (ordered stock caused heart attack): an injury occurs in the course of employment when it takes place while employee was performing a duty they were employed to perform (time and space of work); injury arises out of employment where there is apparent to rational mind a causal connection between conditions under which work is performed and resulting injury

  - **EXCLUSIVITY OF REMEDIES**
    - **Eckis v. Sea World:**
      - Where reasonable doubt as to act is contemplated by employment or injury occurred in the course of employment act requires courts to resolve doubt AGAINST right to sue for civil damages and in favor of compensation act applicability
      - Compensation act applies where employee injured: on employer’s premises during regular working hours; during activity employer asked him to do; during activity of service to the employer and that benefits its business
    - Courts differ on whether exclusivity should bar a tort suit to recover for injuries if the worker will receive nothing under the compensation system

  - **EXCEPTION FOR INTENTIONAL ACTS**
    - Most states recognize an exception to exclusivity for intentional torts
      - **Whitaker v. Scotland Neck** (dumpster accident): exception to exclusivity exists ONLY where there is uncontroverted evidence of the employer’s intentional misconduct and where such misconduct is substantially certain to lead to employee’s serious injury or death
      - Some states require employer actually intend to cause injury to get around exclusivity bar
      - **Millson** (asbestos): mere knowledge and appreciation of a risk is NOT the “substantial certainty” needed to file suit for intentional wrong

  - **NON-PHYSICAL TORTS**
    - **Cole v. Fair Oaks Fire** (stroke from supervisor harassment): the exclusive remedy provision for intentional harm by employer does not apply when the harm intended is emotional distress
    - **Shoemaker v. Myers** (whistleblower vs. compensation): where another statute AND compensation act may be applicable to a case, the court must look to the purposes served by competing statutes to determine which controls (more narrow one applies)
OSHA

STRUCTURE OF THE STATUTE

- Unless the state has an approved plan, OSHA generally PREEMPTS state health and safety regulations
- OSHA mostly relies on temporary standards and general duty clause to enforce safety standards
- OSHA standards and general duty clause are enforced through inspections

GENERAL DUTY CLAUSE

- *Caterpillar Inc.* (flying studs): Elements of General Duty Clause Violation: Existence of hazard likely to cause death or serious bodily harm; employer awareness of hazard; availability of feasible means to abate hazard; employer failure to implement means
  - Good faith efforts to comply that aren’t entirely effective can negate finding of willfulness IF they were objectively reasonable under circumstances
- *Whirlpool* (mesh screen falls): OSHA regulations permitting employees to chose not to perform his assigned task b/c of reasonable fear of death or serious injury coupled w/ reasonable belief no less drastic alternative is available are OK