I. INTRODUCTION AND HISTORICAL BACKGROUND

A. Origins

B. The Meaning of Work

C. The Historical Roots of Employment At-Will
   i. Payne v. The Western Atlantic Railroad Co. (1884)
      1. Workers were fired because they were trading with a merchant who operated a store near the A’s railroad company. Workers, out of fear of being fired, stopped trading with π. While the cause might be unjust and censurable, it is not legally wrong.
      2. Classic statement of the at will rule: All employers may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilied of legal wrong.
         a. What kind of response might that invoke in employees? Unionize (working collectively together they might be able to change the law…); sign a contract with employer (fixed term contract); try to insulate yourself and do the best at your job; there might be a market response.
   ii. Employment at will is the default rule, justified on the basis that employers require flexibility in order to respond to business fluctuations.

D. The Rise and Fall of Freedom of Contract
   i. Lochner v. New York (1905)
      1. The Supreme Court ruled that a NY law limiting the hours of a baker was unconstitutional. It is unreasonable to interfere with the rights of parties to contract. The general right to make a contract in relation to one’s business is part of the liberty of the individual protected by the 14th Amendment of the Constitution.
      2. This case constitutionalized the concept of freedom of contract: limiting the government from setting time constraints on jobs.

E. The New Deal Labor Legislation
   i. The “New Deal,” a program of regulation designed to spur economic recovery following the Great Depression, set out to reduce wage competition so that American workers would enjoy higher wages and more secure employment and therefore would spend more money stimulating growth.
   ii. The Labor Laws
      1. Wagner Act – the National Labor Relations Act – the “labor laws”
         a. Declared it the policy of the United States to encourage worker self-organization and collective bargaining as a means to facilitate labor peace and the uninterrupted flow of commerce. Conferred rights to organize and to bargain collectively on employees and created the NLRB, which was charged with the authority to settle disputes arising out of unfair labor practices.
      2. National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937)
         a. Facts: This case is a dispute over an organizing drive to form unions by employees. The employer was not allowing the workers to unionize. The NRLB found that...
the company had committed unfair labor practices by coercing and intimidating employees who were seeking to organize a union and discharging employees in retaliation for union organizing. The company refused to comply with the Board’s order. The Court of Appeals found that the order exceeded the power of the Board.

b. **Holding & Rationale:** The Supreme Court found that the order of the board was within its competency and that the act (NRLA) is valid as applied here. After all, the theory behind the right of worker’s to organize is that it would be a way of channeling disputes into the bargaining context versus the more disruptive work stoppages.

**iii. The Philosophy of Unionism…**

1. Societies have 2 basic mechanisms for dealing with social or economic problems: (1) exit-and-entry – exit means quitting and is the market mechanism that aids those who are unhappy with their condition and entry consists of new hires by the firm, and (2) voice – refers to the use of direct communication to bring actual and desired conditions closer together/to raise concerns about conditions.

2. Today, there continues to be this drive of workers to want to have a voice in their work environments. What are the advantage and disadvantages of relying on exit as opposed to voice?
   a. Voice gives more information to the employers; employer has a reason to know what the problem is.
   b. Much turnover if relying on exit (especially if your industry relies on innovation and skills sets).
   c. If the market works well, then the market would weed out the companies that are not conducive to a worker’s needs.
   d. Fear of retaliation when using the voice.
   e. Takes time to raise the voice.
   f. If the problem is fixed, then everyone gets the benefit of the solution/ is it fair to spend the time and effort trying to get the change, however also those who do nothing receive the benefit.

3. Unions are a mechanism for dealing with voice. The union is the way of collecting people’s thoughts and then presenting it to the SUPERIORS.

**iv. The Decline of Unionism – Why?**

1. Unions themselves, become too bureaucratic, too complacent, not responsive to changes in workplace.

2. Changes in economy- increasing global competition, transition from manufacturing to service sector.

3. Law itself; limited remedies available to deal with unfair labor practices, complicated process to gain recognition in a union.

4. Employer hostility against the unions.

**F. The Individual Rights-Based Statutory and Judicial Doctrines that have supplanted Unionism and Collective Bargaining**

i. Statutory Protection

1. Antidiscrimination Laws

2. Minimum Standards Protection; statues that establish minimum workplace requirements

ii. Common Law Protections, judge made protections
EMPLOYMENT LAW
COURSE OUTLINE

1. Public policy tort
2. Contract claims
3. Covenant of good faith and fair dealing

iii. These rights basically involved substantive limits being placed on the employer. This is in contrast to the NLRA model as well as the market restraints placed on the employers. Some argue that employees lose the voice in the individual-rights model because the opportunity for governance is lost.

II. THE CONTEMPORARY ERA – shifts in the demographics and structure of work

A. The Workforce of the Future
   i. Demographic changes:
      1. More Women
      2. Aging Workforce
      3. Racially diverse
      4. More immigrant workers
      5. Changes in work time
      6. People have different interests in fulltime employment versus flexible time schedules.
   ii. The needs of the workplace are changing. Old model:
      1. Internal Labor Markets (ILMs) – This model had its predominance in the mid-20th Century. Firms are organized hierarchically, where they do their hiring at the entry level and promote from within, encouraging long-term employment. Basic relationship is viewed as one of employee dependence. Employee loyalty is important. Expectation of job security (the company will take care of you). Employees identify with the company. Wages and benefits are tied to seniority.

B. The Reconstitution of Work: “Precarious Employment”
   i. The New “New Deal” (new model argued by Katherine Stone)
      1. Short-term employment. Lateral hiring. Employees are expected to take more responsibility for managing their careers. Expect to see multiple employers over the course of a career. Identity is tied more to an occupation or a skill rather than a particular firm. No job security. Wages are set by the market. Benefits, if they are provided, are more portable.
      2. What implication does this change have on the laws that get passed? This provides more flexibility to the employer to shift their employment standards to accommodate a changing economy
   ii. Contingent Employment – another way of thinking about this shift.
      1. Increase in part-time employment, outsourcing, the use of temporary or leased employees, independent contractors.

III. CONTRACTING FOR INDIVIDUAL JOB SECURITY

A. Despite numerous laws that regulate the employment relationship, the underlying assumption remains that the terms and conditions of employment are primarily determined by private agreement between the parties. “Employers may dismiss their employees at will...for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.” (Payne). The employee’s
interests in insuring job security run up against the employer’s need or desire for discretion and flexibility to manage its workforce.

B. The Presumption of Employment At-Will

i. Historical Background

1. The English Law from Blackstone
   a. Picture of Employment: Hiring was for a year; servant would serve and master maintain servant.
   b. The presumption that an indefinite hiring was a hiring for a year extended at all classes of servants
   c. The presumption could be rebutted in specific cases when the parties contracted.

2. The American Law from Woods
   a. Wood’s Rule marked the point where American law departed from British law. The employment relationship became apart from the domestic master/servant relationship.
   b. The rule is inflexible – when there is general or indefinite hiring, it is prima facie a hiring at will.
   c. Either party can terminate the contract at any time, for any reason.
      i. Wood’s rule is a default rule that parties are free to contract around.
      ii. It is easily understood.
      iii. The “at-will” relationship has a more immediate feeling – to the extent that we need you, we will keep you.
      iv. It feels more temporary to the employee, but this could work as incentive to avoid being discharged by the employer.
   d. Wood’s Rule is the default rule meaning that even if the parties don’t talk about the terms, but there is a relationship, this is the term that fills any gaps.

   a. Facts: Plaintiff took new job based on belief that the new employment would be permanent. He moved his family to a new city for the job. Shortly after he began, he was discharged. Plaintiff sued for damages claiming breach of an alleged employment contract. Plaintiff claims he had an option contract in which he had a permanent job unless he performed unsatisfactorily.
   b. The Court stated that there was no contract for employment for any definite time which means the employment was indefinite which means at-will, unless there is something else specifically put forth, like additional consideration. For example, did the employee actually purchase the job? Did the employee give up something to make the job permanent? Plaintiff says that he incurred expenses when moving his family, but the court says that the expenses weren’t sufficient because the employer did not receive any benefit from the consideration (the detriment).
   c. Generally, courts found sufficient additional consideration only in two situations: when an employee agreed to release a claim for damages or agreed to give up a competing business.
   d. Not good law in most states today. Most states have gotten rid of the mutuality requirement.

ii. Alternative Models
1. **The Union Sector**
   a. “Just Cause” – most collective bargaining agreements place just cause restrictions on the employer’s right to discharge workers.
      i. Individuals in unionized workplaces receive legal protection against arbitrary discharge.
      ii. Perform satisfactory work, and the employee is entitled to industrial due process before being discharged. Satisfactory work has 4 components:
          1. Regular attendance.
          2. Obedience to reasonable work rules.
          3. A reasonable quality and quantity of work.
          4. Avoidance of conduct, either at or away from work, which would interfere with the employer’s ability to carry on the business effectively.

2. **Public Employment**
   a. **Board of Regents of State Colleges v. Roth** (1972)
      i. Civil service statutes at both the state and federal levels typically restrict the ability of public employers to discharge covered employees without cause.
      ii. **Facts**: Roth was hired as an assistant professor for a term of one year, and was not rehired for the following academic year. Tenure was only available after 4 years of year to year employment. A new teacher without tenure is under Wisconsin law entitled to nothing beyond his one-year appointment. Roth brought suit claiming that failure to give him notice of any reason for non-retention and the opportunity for a hearing violated his due process of law.
      iii. **Holding**: The Court found no liberty or property interest implicated and, therefore, he had no claim of entitlement.
      iv. **Rationale**:  
          1. No deprivation of liberty argument, b/c…
             a. The state, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community.
          2. No deprivation of property argument, b/c…
             a. He did not demonstrate that he had a property interest in the job beyond 1-year.
          3. No substantive right or property interest = no due process claim.
   b. **Sindermann** (1972)
      i. **Facts**: Companion to Roth. There was a Faculty Guide that stated that there was no tenure system, but a teacher has a permanent tenure so long as services are satisfactory and is cooperative and happy in work. Also there were guidelines from the TX College and University System that said that employed teachers of 7 or more years have a form of job tenure.
      ii. Court held that there was a legitimate claim of entitlement to job tenure.
  c. **Loudermill** (1985)
i. **Facts**: The plaintiff was employed by the Ohio Board of Ed as a security guard, a civil service position, who was fired for alleged dishonesty on his employment application. He sued alleging that the Ohio statute was unconstitutional because it failed to provide any kind of hearing prior to dismissal, thereby depriving him of property without due process.

ii. **Holding**: The Court decided that Loudermill was entitled to oral/written notice of the charges against him; an explanation of the evidence against him; and the opportunity to present his side.

iii. Why do we have a Due Process clause? Check on government power to prevent arbitrary revocation of rights/ arbitrary decision making. Also, want citizens to feel secure in their rights. Fairness. Lowers the possibility of mistake – helps ensure accurate, fair decision. What are the costs? Slows the process down, results in loss of managerial discretion and efficiency.

3. **The Contemporary Era**
   a. By the 1980s, many court rejected the previous doctrine, like where an employee had to prove that he had provided additional consideration to avoid discharge without cause, and opened the way for discharged employees to assert that an express promise not to discharge without cause was enforceable even if the employee was free to quit at any time and didn’t provide additional consideration apart from his labor.
   b. Even with the hurdles of mutuality and additional considerations removed, individual employees who wish to challenge their dismissals as a violation of their contractual rights must still come forward with some evidence to overcome the presumption that employment is at-will.

   c. **Express Agreements**
      i. **Written Contracts** – the at-will presumption can be overcome by evidence that the parties had contracted for the employment to continue for a definite period of time. A written contract for a fixed term remains the most straightforward way to overcome the at-will presumption. Even when the contract is silent on the issue of termination, courts presume that contracts for a fixed period cannot be terminated without cause during the term of the contract. When contracts for a definite term fail to specify the circumstances under which they can be terminated, the courts must fill the gap and determine what circumstances apply. Generally, a fixed-term contract can be terminated for “just cause, in the sense of poor job performance or misconduct. In addition, most courts today are willing to enforce indefinite-term contracts restricting the employer’s power to terminate where the parties’ intentions are clear.
      ii. **Guilliano v. Cleo, Inc.** (1999)
         1. **Facts**: Plaintiff employee entered into a written employment contract with defendant employer. Thereafter, plaintiff’s role and responsibility to defendant was severely diminished. Defendant instructed plaintiff to work out of his home and he would receive assignments, which he did not receive. After several months, plaintiff retained a position with another company. Plaintiff initiated an action against defendant for constructive termination, suing for the remainder of his salary because he claimed he was...
entitled to it through a date that had been written into the contract. Plaintiff’s contract stated that employment could be terminated for cause, listed as dishonesty, willful misconduct, gross negligence. The contract spelled out cause, so the employer couldn’t claim financial difficulties or unexpected market problems as “cause.”

2. The court reasoned that the plaintiff was constructively terminated from his position with defendant, and was entitled to liquidated damages because the sum was reasonable at the time the parties entered into the contract, and reflected their true intention to compensate for a breach. The employer could change his duties but couldn’t take them away altogether = breach.

3. Last issue over damages… Plaintiff claiming that the contract contains a severance clause (no contingency, automatically entitled to money), and the Defendant claiming that this is a liquidated damages clause (requires further inquiry into a possible breach). The court stated that paragraph 9 of the contract contains a liquidated damages clause.

iii. Oral Contracts
   a. Plaintiff believed that he would have his job “so long as he did his job” according to oral discussion at time of hire.
   b. The Court sets out a liberal standard in this case compared to the one from Savage.
   c. Court held that oral statements were sufficient for a jury to find the existence of contract for employment terminable only for cause.

   a. Plaintiff was fired when she had to leave the store (after 8 years of satisfactory work) for a personal emergency without permission from supervisor.
   b. The Court found the oral statements by the interviewer insufficient to rise to the level of an agreement providing termination only for just cause.
   c. Unlike Toussaint, Rowe didn’t engage in pre-employment negotiations regarding security, rather she had simply stumbled into the store one day and had the interview before being hired. Also, there is no evidence that Rowe asked about job security. Hence, there is no evidence of a meeting of the minds on this subject of continued employment.

3. Establishing Oral Contracts for Job Security
   a. In theory, contracts requiring just cause or good cause for termination can be created by oral agreement as well as written agreement. In practice, however, claims based on
purely oral promises faces substantial hurdles. Difficulties with enforcing oral contracts include:

i. Distinguishing between “puffery and promise,” especially in the context of the hiring process in which mutual wooing between the parties occurs.

ii. Determining exactly what was said after the fact (courts often look at the circumstances surrounding the hiring).

iii. Statute of frauds, which generally bars enforcement of oral contracts that are not capable of performance within a year.

d. Implied Agreements

i. Sometimes various employer communications, policies or practices impliedly create contractual right to job security. In these instances, courts are willing to recognize enforceable contractual rights despite the absence of specific negotiated contracts.

ii. Employee Handbooks


   a. Facts: Woolley was hired without written employment contract. He received a personnel manual stating that there could be termination for layoffs, performance, discipline, retirement, and resignation. There was no mention of discharge without cause. Woolley argues he was fired without cause. He claims the manual made express and implied promises of just cause termination.

   b. Holding: The Court held that the job security provisions contained in the personnel policy manual widely distributed among a large workforce are supported by consideration and may therefore be enforced as binding.

   c. Rationale: The Court noted the importance of honoring commitments made through employee manuals especially when they provide for job security. In determining the manual’s meaning and effect, must consider the probable context in which it was disseminated and the environment where it exists. Here the manual represented the most reliable statement of the terms of employment because except for medical staff, no one would have special contracts. It is inevitable that employees would regard the manual as binding commitment. Ultimately, the manual is an offer that seeks the formation of a unilateral contract, and the employees’ continued work makes the contract binding. Reliance was to be presumed under the circumstances.


   a. Facts: Anderson was fired for stealing a box of company pencils. He filed claim because he said that DLC didn’t
follow the discipline policies as outlined in the company handbook. Issue: whether the issuance of the handbook created an employment contract other than an at-will relationship.

b. The Court stated that the fact that Anderson didn’t read the employee manual doesn’t prevent his from relying on the promises contained in the manual in this breach of contract action. All that is necessary is the existence of an offer to be present from an objective standpoint; how would a normally constituted person understand the words when used in their actual setting? To decide whether manual if objectively definite, consider its language and context.

c. Holding: The final holding was that a reasonable person reading the manual couldn’t have believed that DLC assented to be bound to the provisions contained within.


a. Facts: PB had a Management Employment Security Policy that offered all management employees employment security even if present jobs are eliminated so long as they continue to meet changing business expectations. PB terminated the MESP so that it could achieve more flexibility in the conducting its business and compete more successfully in the marketplace. However, PB adopted a new layoff policy, and employees who chose to stay on working would receive enhanced pension benefits. Plaintiffs remained on, but after a couple of years they were laid off. The parties disagree on how employers may terminate or modify unilateral contracts that have been accepted by the employees’ performance.

b. Holding: The Court held that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of change, additional consideration is not required.

c. Rationale: The MESP can’t be deemed illusory because plaintiffs obtained the benefits of the policy while it was operable. The MESP didn’t give rise to or create any vested benefits in plaintiffs’ favor. The MESP was in place for a reasonable time and was effectively terminated after PB decided that it was no longer a sound policy for the company, PB provided more than reasonable notice to the affected employees that it was terminating the policy and it didn’t interfere with any employees’ vested benefits.

iii. Promissory Estoppel

1. Promissory Estoppel is an implied contract doctrine intended to enforce promises that induce reasonable detrimental reliance when
the factual circumstances fall short of establishing a formally bargained-for exchange. (A promise which the promisor should reasonably expect to induce action or forbearance ... on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise).

2. **Goff-Hamel v. Obstetricians & Gynecologists, PC (1999)**
   a. **Facts**: GH was offered a job, left her present job, but then the new employer changed their mind and never started her position. GH was offered employment without a definite period. So she had no grounds to bring a breach of contract claim because the employment was essentially at will. However, she brought a promissory estoppel claim.
   b. **Holding**: Court concluded that promissory estoppel can be asserted in connection with the offer of at-will employment. Promissory estoppel is appropriate here because GH acted to her detriment in order to avail herself of the promised employment.

3. **PE claims have only limited success in the employment context due to the judicial veneration of the employment-at-will rule.**

**iv. Implied-in-Fact Contracts**

a. A variety of factors, combined together, may imply that the parties intended something other than at-will employment. Theory has been criticized for vagueness.

1. **Pugh v. See's Candies, Inc. (1981)**
   a. **Facts**: Pugh had been told by president that if he was loyal and did a good job his future was secure. There were no formal complaints against Pugh but he was fired after 32 years of service.
   b. **Holding**: Pugh demonstrated a prima facie case of wrongful termination in violation of his contract and there was an implied contract that he could only be fired for good cause.
   c. **Rationale**: When determining whether there was an implied in fact promise for continued employment, consider a variety of factors: personnel policies or practices; longevity of service; actions or communications by employer reflecting assurances; industry practices. While oblique language won’t be sufficient to establish agreement, consider the totality of relationship.

2. More recently, the CA Supreme Court has stated that the purpose of the implied-in-fact contract theory was to enforce the actual understanding of the parties. The focus of the inquiry should be on the particular terms and conditions of employment impliedly agreed to by the parties. Some states use a “totality of circumstances” analysis.

v. **Determining Whether Good Cause Exists**
1. Proving the existence of a contract limiting the employer’s right to discharge at will is only the first step in establishing liability. Once such limits are shown, the next question is whether the defendant violated its contractual obligations by discharging the plaintiff. Usually financial difficulties or the need for reorganization suffice permitting termination, but difficult situations arise when employers assert lack of performance or employee misconduct.

   a. Facts: Cotran was accused of sexually harassing other employees and, after an investigation by his employer, fired.
   b. Holding: Court held that the interests of both parties must be balanced to ensure that good cause dismissals are scrutinized under an objective standard, without infringing more than necessary on the freedom to make efficient business decisions.
   c. Good Cause means: “fair and honest reasons, regulated by good faith, that are no trivial, arbitrary or capricious, unrelated to business needs or goals or pretextual. A reasoned conclusion supported by substantial evidence gathered through adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond”

3. In general, when a trier of fact must determine whether a good cause contract was breached, 3 distinct issues must be raised.
   a. Does the reason for discharge constitute good cause?
   b. Is the reason given by the employer the actual reason for the discharge, or merely a pretext for some other insufficient reason?
   c. Did the employee in fact act in the way alleged by the employer to give cause for the termination?

4. Burden of Proof –
   a. In the union context, employers bear the burden of proving that just cause exists for disciplining or discharging an employee.

   e. Good Faith and Fair Dealing
      i. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” Restatement
      ii. Although a majority of states that have considered the issue have rejected application of the implied covenant in the employment context (they are seen as encroaching too far on management prerogatives), a substantial minority of states do recognize good faith and fair dealing claims by employees under certain circumstances. These states, however, have not abrogated the presumption of at-will employment, thereby creating a tension between an employer’s implied duty to act in good faith and the unfettered right to terminate the employment relationship.
1. **Facts:** Plaintiff was employed by defendant under a written at-will contract. He was paid commission according to written contract, but he was transferred before he received the rest of the commission he would have been entitled to had he not been transferred. After the transfer, he was terminated. Issue: whether this “bad faith” termination constituted a breach of the employment at will contract.

2. **Holding:** Court held that the written contract contained an implied covenant of good faith and fair dealing and a termination not made in good faith constitutes a breach of the contract.


1. **Facts:** Murphy claimed he was fired when he complained to management of accounting improprieties. He did not have a written employment contract, but plaintiff claims that employer acted in bad faith when it fired him after he reported.

2. **Holding:** The court held that this was at will employment and plaintiff could be fired at any time. NY Court says that it doesn’t make sense to have a good faith and fair dealing claim for at will employment. There is no compelling policy reason to read the implied obligation of good faith out of contracts impliedly terminable at will.

v. **Foley v. Interactive Data Corp.** (1988)

1. Claims based on implied covenant of good faith and fair dealing gave rise to only contract, not tort, damages in the employment context. When a court enforces the implied covenant, it is in essence acting to protect “the interest in having promises performed” – the traditional realm of a contract action – rather than to protect some general duty to society which the law places on an employer without regard to the substance of its contractual obligations to its employee.

IV. **PUBLIC POLICY CLAIMS**

For many decades, the majority of courts held that even when the employer’s exercise of its power to discharge had effects beyond the operation of its business, they refused to intervene on the grounds that no contractual provision limited the employer’s actions. In the following decades, the common law courts developed a number of doctrines that mitigated the harshness of the at-will rule. Wrongful discharge in violation of public policy offers individual employees some protection for job security.

A. **The Public Policy Exemption**

i. **Sheets v. Teddy’s Frosted Foods, Inc.** (1980)

1. **Facts:** Plaintiff was an at-will employee who reported to his employer that their products did not comply with the applicable law relating to labeling and licensing. He was terminated for unsatisfactory performance but the actual reason for his termination was retaliation for his efforts to ensure compliance of his employer products. The court stated the issue as whether to recognize an exception to the traditional rules governing employment at will so as to permit a cause of action for wrongful discharge where the discharge contravenes a clear mandate of public policy.

2. **Holding:** An employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment.
ii. The public policy exception is present to protect employees who are in awkward positions.

iii. An overwhelming majority of jurisdictions have recognized a public policy exception to the at-will rule, although the scope of the exception varies significantly from state to state.

   1. Most courts that recognize the public policy tort will protect the employee so long as she has a good faith, or at least objectively reasonable, belief that the act was illegal, even if she turns out to be wrong. A few, however, require that the employee prove that the activity was in fact illegal.

iv. Different public policies recognized for a wrongful discharge claim:
   1. Refuse to commit an illegal act/ perjury.
   2. File a worker’s compensation claim (exercising a statutory right).
   3. Perform jury duty.
   4. Engage in union activity (usually not a common law claim).
   5. Whistleblowing (not all states).

v. The overwhelming majority of states that recognize a public policy exception in employment say that claim arises in tort not contract (which allows the employee to claim a broader range of damages).

vi. Seminal cases adopting a public policy exception:
   1. Petermann v. International Brotherhood of Teamsters (CA, 1959)
      a. Plaintiff was subpoenaed to testify before a legislative committee, and he alleged that a union official instructed him to testify falsely. When he failed to do so, he was discharged.
      b. The court stated that “to hold that one’s continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to public welfare.”
   2. Frampton v. Central Indiana Gas, Co. (Ind. 1973)
      a. Plaintiff was injured while at work and filed a claim for Workers’ Comp. She was soon discharged without explanation.
      b. The court stated that an employee must be able to exercise this statutory right without fear of reprisal. Retaliatory discharge in this case is unconscionable.
      a. Plaintiff was called to serve jury duty. She was soon discharged.
      b. The court stated that the system would be adversely affected by allowing an employer to discharge an employee for fulfilling her obligation of jury duty; the will of the community would be thwarted.

B. What Constitutes Public Policy?

i. According to the court in Palmateer, public policy “concerns what is right and just and what affect the citizens of the State collectively.” Some courts simply list the types of situations in which the exception will be recognized, usually the 3 categories outlined above – illegal acts, workers’ comp, and jury duty (some also recognize whistleblowing).

   1. Facts: Plaintiff alleged he was discharged because he reported and attempted to investigate the theft of property and embezzlement by his supervisor from his employer.
   2. Holding: The court rejected his public policy argument, because the act he complained of did not affect the public but rather a private interest. The reporting of a crime against
the interest of his employer can’t be said to have been seeking to vindicate his own legal rights, but only those of the employer he says wrongfully terminated him. The victim of the crime here can’t be said to be the general public, as where crimes or violations of health or safety laws are involved. Therefore, there was no public harm in this situation.

iii. Public versus Private interests – In recognizing a public policy claims, many courts have emphasized that it protects only public and not purely private interests.
   1. If there was a contract between parties to expressly avoid any obligation to inform employer of illegal behavior, would the contract be considered void? If not, then there is no public interest at stake. “Void if contracted for” test.

iv. Third Party Effects
   1. Professor Schwab suggests the court should step in when the private contract has substantial adverse third-party effects.
   2. In order to have a public policy claim, a public concern must be implicated not merely a private overreaching. An employee acting in the public interest gets only a small share of the social benefit created. The public-good activity, therefore, will be underproduced unless tort law intervenes…?

   1. Facts: Plaintiff claims constructive discharge in retaliation for his refusal to testify untruthfully or withhold testimony regarding the sexual harassment of fellow employee, which he believes is in violation of public policy.
   2. The court outlined sources of public policy:
      a. Constitution
      b. Legislation (statutes – criminal and civil codes)
      c. Administrative rules, regulations or decisions
      d. Judicial Opinions
      e. In certain instances, a professional codes of ethics may contain an expression of public policy.
   3. Question to ask: Whether the employer’s conduct contravenes the letter or purpose of a constitutional, statutory or regulatory provision or scheme.
   4. Holding: An employee bringing a wrongful discharge claim must identify a public policy delineated in a constitutional or statutory provision. The court stated that any attempt to induce or coerce an employee to lie to an investigator plainly contravenes the public policy of the state.

5. Multi-Part Tests
   a. In later cases, the CA courts have read into Gantt a 4-part test for determining whether a public policy exception applies. “…to support a wrongful discharge claim, the alleged policy must be:
      i. Delineated in either constitutional or statutory provisions;
      ii. Public in the sense that inures to the benefit of the public rather than serving merely the interests of the individual;
      iii. Well established at the time of the discharge; and
      iv. Substantial and fundamental.
   b. Other courts have developed their own tests.
vi. **Kirk v. Mercy Hospital Tri-County** (1993)
   1. **Facts**: Plaintiff made diagnosis of TSS and thought that doctor would provide treatment orders. Received no orders from doctor and patient died. Plaintiff made comments to patient’s family and later was terminated because hospital was mad that she was making such statements. Plaintiff brought an action for wrongful discharge under the public policy exception to the employment-at-will doctrine. She claims she was fired after trying to advocate on behalf of the patient. The public policy exception in MO requires a violation of some well-established public policy and no other remedy present to protect the interests of the employee or society. If there is another remedy the PPE is inapplicable.
   2. **Holding**: The court held that plaintiff was entitled to pursue her claim without reliance on any direct violation of “law or regulation” by defendant. The court stated that you need to point to something that speaks to a general policy. According to the court, the Nursing Practice Act and the regulations thereunder constituted a clear mandate of law on which a cause of action for wrongful discharge could be based. Under these rules of professional conduct, the plaintiff could have risked discipline by the state board of nurses if she ignored improper treatment of patient under her care.

vii. While the statute the Kirk court relied on as a source of public policy was quite general, other courts have looked for quite specific statutory prohibitions. In addition, some courts do not restrict public policy to violations of the “literal language” of a statutory or constitutional provision, but assert they should consider whether the discharge contravenes the “spirit as well as the letter” of the law. Others have been far more reluctant to find public policy violations without a specific showing of an actual violation.

viii. Once courts deal with the issue of the public policy exception (legal question), they also have to deal with the factual question of whether or not her discharge was in fact wrongful.

C. **Preclusion**
   i. Because of the number and variety of statutes regulating the employment relationship, court often confront situations in which there are potentially overlapping remedies.
   ii. **Amos v. Oakdale Knitting Co.** (1992)
      1. **Facts**: Plaintiffs were given pay cut which resulted in pay below minimum wage. They were told to accept the cut or be fired. They brought suit saying their termination violated state public policy
      2. **Holding**: Court stated that public policy has been violated because employees were fired in contravention of express policy declarations contained in the NC General Statutes. Absent federal preemption or the intent of our state legislature to supplant the common law with exclusive statutory remedies, the availability of alternative remedies doesn’t prevent a plaintiff from seeking tort remedies for wrongful discharge based on PPE

D. **Constructive Discharge** – purposefully creating working conditions so intolerable that the employee has no option but to resign.
      1. **Facts**: Plaintiff claimed that she was forced to resign because she disagreed about the tax withholdings from a bonus check. She claimed that she was trying to comply with a statute and federal tax laws when she disagreed with the others. Issue: Whether a cause arising from a resignation can be actionable as a wrongful discharge within the context of that narrow exception (public policy exception to the employment-at-will doctrine
requires a “discharge”). Whether the doctrine of constructive discharge can attach to a common-law claim based on the narrow public policy exception to the general rule of at will employment.

2. The Court held that the employee must establish conditions so intolerable that he or she felt compelled to resign would a reasonable person in the position of the plaintiff feel forced to quit? The situation must be unusually aggravating and surpass “single, trivial, or isolated incidents of misconduct.” Taken together (looking at the totality of circumstances: frequency of conduct, severity, remoteness of the illegal acts from the actual dates of resignation) the cumulative effect of these circumstances led the court to believe there was a factual question about the nature of her discharge. The plaintiff must prevail under an objective standard before showing constructive discharge. Plaintiffs can raise an ancillary constructive discharge defense in those causes of action under the public policy exception to the employment at will doctrine in which the employer alleges voluntary resignation.

ii. There are at least 3 issues that must be addressed when establishing the standards for determining when an employee has been constructively discharged:

1. What type of working conditions must the employee show?
2. By what standards should the alleged conditions be judged?
3. What level of employer intent is required? Courts have taken different approaches to this question.

E. Statutory Protections for Whistleblowers

i. Numerous statutes – both state and federal – also protect the job security of employees who engage in certain types of whistleblowing.

ii. Whistleblower protections have tended to treat health and safety violations as more serious than financial violations. After Enron, etc. there may be a shift of common law to find that financial wrongdoing could support a claim.

iii. Sarbanes-Oxley Act of 2002 – created important new protections for whistleblowers in context of publicly traded companies were fraud or violations of federal securities law is at issue.

F. The Special Case of Attorneys


1. Facts: Plaintiff was in-house counsel and manager of regulatory affairs for the defendant. Plaintiff informed the defendant, his employer, that he would do whatever was necessary to stop the sale of certain misbranded and/or adulterated dialyzers. The employer fired the attorney, and the attorney filed an action for retaliatory discharge. Question presented: whether in-house counsel should be allowed the remedy of an action for retaliatory discharge.

2. Holding & Rationale: The court stated that, generally, in house counsel don’t have a claim under the tort of retaliatory discharge. The public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel. The court reasoned that the retaliatory discharge exception to the at-will employment doctrine was intended to encourage employees to come forward and report acts that contravened public policy. The court found that attorneys had an ethical obligation pursuant to Model Rules of Prof’l Conduct to reveal information necessary to prevent a client from committing a crime. The court also found that extending the tort of retaliatory discharge might have a chilling effect on the communications between the employer and in-house counsel such
that employers might limit their communication with their in-house counsel. The court stated that attorneys know or should know that at certain times in their professional careers, they will have to forgo economic gains in order to protect the integrity of the legal profession.

   1. **Facts**: Plaintiff was hired by defendant as associate general counsel. While working in this capacity, she reported to the general counsel, who, she discovered, did not have a license to practice law in Tennessee. Plaintiff discussed her concerns with a member of the Board. General counsel, Davis, later fired the plaintiff. Plaintiff filed suit alleging a common law action for retaliatory discharge in violation of public policy. She alleged (1) the existence of an at-will employment relationship; (2) the existence of a clear public policy evidenced by the ethical duty not to aid in the unauthorized practice of law; (3) that she did not voluntarily leave her employment; and (4) the sole motivation for the constructive discharge was her adherence to her ethical duties to report the unauthorized practice of law; thus, her complaint stated a common-law retaliatory discharge claim and the lower courts improperly dismissed her claim.
   2. **Holding**: In a case of first impression, the Tennessee Supreme Court held that in-house counsel could bring a common-law action of retaliatory discharge resulting from counsel’s compliance with an ethical duty (Code of Professional Responsibility) that represented a clear and definitive statement of public policy.
   3. **Rationale**: The court reasoned that it seems anomalous to protect only non-lawyer employees under these circumstances. The fact that the employee is also an attorney doesn’t mean that the action for retaliatory discharge in violation of public policy is not available to them. In contradicting the rationale in *Balla*, the court stated that sole reliance on the mere presence of the ethical rules to protect important public policies gives too little weight to the actual presence of economic pressures designed to tempt in-house counsel into subordinating ethical standards to corporate misconduct. Unlike lawyers possessing multiple clients, in-house counsel are dependent upon only one client for their livelihood. Also, the employer should bear the burden, not the employee. The court agreed with the Model Rules, permitting in-house counsel to reveal the confidences and secrets of a client when the lawyer reasonably believes that such information is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. However, the court emphasized that the in-house counsel must make every effort to avoid unnecessary disclosure of client confidences and secrets.

iii. **Mandatory vs. Permissive Disclosures**. What is the lawyer’s duty/obligation if client is committing a financial wrongdoing?
   1. A majority of states follow the Model Rules which states that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.
   2. If lawyer is confronted with illegality but can’t reveal due to confidence privilege, option is to withdraw.
   3. A lawyer’s duty has changed (become more complex) after Sarbanes-Oxley.
      a. These regulations state that lawyers have a duty to represent the corporate entity and also report corporate wrongdoing up the corporate ladder to the CEO or Chief Legal Officer.
b. This reporting wouldn’t be a violation of attorney-client relationship, also could report confidential information to the SEC.

V. COLLECTIVE JOB SECURITY
There exist three possible bases for legal claims by workers: (1) common law contract, property, and tort claims; (2) the notice provisions of the Worker Adjustment Retraining and Notice Act of 1988; and (3) the NLRA prohibition on retaliatory partial closings in the context of a union organizing drive and (in the unionized workforce) its requirement that the employer bargain over decisions affecting working conditions, including job security.

A. The Common Law Contract, Property and Tort Claims
   a. Local 1330, United Steel Workers of America v. United States Steel Corp. (Youngstown Steel Case)
      i. Plaintiffs sought to either force US Steel to keep the plants open or enjoin the company to sell the plants to the employees
      ii. Plaintiffs claimed that proposals on part of management to keep the plant open if the workers increased productivity and it was profitable resulted in a contract between the labor and management (this was not supported by any written document and was not covered by the collective bargaining agreement between the parties).
         1. Promissory Estoppel claim
            a. US Steel arguably made a promise which the workers relied on to their detriment (they didn’t try to get other jobs, instead they put in time making the plants profitable for their last few months of operation).
            b. Oral statements were made over the hotline on the workroom floor and by local managers.
            c. However, statements could not be construed to constitute a definite promise, statements were made by PR officers and local managers, not company offices, and profitability was never fulfilled (there was a disagreement over how to define profitability over the long term).

         2. Community Property Claim
            a. Did a community claim exists here where the workers have given so much to the steel mill and the steel mill has gained so much from the workers…to allow mill to leave destroys the area of Youngstown?
               i. Some right in their jobs would give them some say in the dispensation of the property and possibly allow them to buy the steel mill.
               ii. Court can find no basis or precedent for this claim in any constitution, laws of US or any state or in any cases.

      b. Policy Concerns
         i. Shareholders get more protection for their investment (dollars) than workers (sweat).
         ii. Do we want to punish company by taking away decision-making power the longer they stay in a community?
         iii. Shouldn’t the community itself bargain up front for assurances the company won’t leave?
         iv. Asking who the owners are is the wrong question (Professor Singer, notes). The answer to this question automatically assumes only one owner who has been granted protected rights just by
being the owner. (Workers and community gave so much…aren’t they owners too?)

v. Workers choose to work here, they bear some risk (knew plant wasn’t doing well and stayed).

vi. Free market concern: employers should be allowed to make decisions about plant operations and employment.

vii. Should the company at least be required to provide severance pay, pay for other job training, give right to purchases the plant?

viii. Basically, two views: should just allow market economy to work or should we give protection and provide social safety to communities/large groups of unemployed workers?

c. Family Law/marriage analogy: joint investment, detrimental reliance, positions of vulnerability allow for community property claim in divorce proceedings and division of the family assets.

B. Worker Adjustment and Retraining (seen as response to Youngstown)

a. Worker Adjustment and Retraining Notification Act (WARN)

i. Requires employers with 100 or more full-time employees to provide notification of plant closings and mass layoffs involving 50 or more workers at a single worksite to workers, unions, and affected state agencies 60 days in advance.

ii. Definitions/Requirements:

1. “employer” means any business that employs 100 or more employees (excluding part-time employees or 100 or more employees who in the aggregate work at least 4,000 hours per week (excluding overtime);

2. “plant closing” means permanent or temp shutdown of single site of employment, or one or more facilities or operating units within single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

3. “mass layoff” means a reduction in force which is not a result of a plant closing and results in employment loss for (1) 33% of employees (excluding any part-time employees) and (2) at least 50 employees (excluding part-time employees) or (3) at least 500 employees (excluding part-time employees); and

4. “employment loss” means an employment termination (other than discharge for cause, voluntary departure, or retirement; or a lay off exceeding 6 months; or a reduction in hours of work more than 50% during each month of any 6-month period.

5. Note: When employment loss for 2 or more groups at single site, each of which is less than the minimum number of employees specified above, but which in the aggregate exceed that minimum, and which occur within any 90-day period shall be considered a plant closing or mass layoff unless employer shows they were the result of separate and distinct actions.

iii. Cause of action granted to civil actions by employees, their representatives, or rarely municipalities where employer’s operation is located.

iv. Exceptions:

1. notice period may be reduced or eliminated for…

   a. faltering companies that can show notification would have interfered with good faith efforts to gain capital or new business to avoid or postpone.

   b. unforeseeable adverse business circumstances (or natural disasters)
EMPLOYMENT LAW
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c. or, where good faith efforts to comply with the Act

v. Remedies
  1. backpay, benefits, civil fines for failure to notify the appropriate unit of local
government and attorneys fees

vi. Compliance problems: it is expensive, hard to know when at any point in time employer
is in violation (confusing for employer and employees), no punitive awards so may not be
worth pursuing

b. Issues of Statutory Interpretation

i. How have courts handled the “good faith,” “business circumstances,” and “faltering
company” exceptions?

ii. Childress v. Darby Lumber, Inc. (defendants Darby and Russel Construction each had
less than 100 employees and challenged the applicability of WARN to a layoff by Darby
of its employees only one day after they had received notice)
   a. Snap shot date: calculations to determine number of employees (ant thus
applicability of WARN) goes to date of the last date upon which notice
would be required to be given…sixty days before the layoffs
   b. Single employer challenge: while each employer had less than 100
employees the fact that the two employers shared common ownership,
direction, and had interdependent operations meant they operated as a
single employer for purposes of the Act
      i. Good faith: was the act or omission that violated the Act done in
good faith and did the employer have reasonable grounds for
believing that the act or omission was not a violation of the Act?
         1. employer must show subjective intent to comply with the
Act as well as evidence of objective reasonableness by the
employer in applying the Act
         2. must show “an honest intention to ascertain and follow
the dictates of the Act” and “have reasonable grounds for
believing that its conduct complied with the Act”
         3. ignorance of the Act is not a defense
      ii. Business circumstances: Act’s notice requirement does not apply if
“the closing or mass layoff is a caused by business circumstances
that were not reasonably foreseeable as of the time that notice
would have been required
         1. “not reasonably foreseeable”: circumstance which is
caused by some sudden, dramatic, and unexpected action
or condition outside the employers control”
            a. e.g. principal client’s sudden departure, unexpected
gov’t. order to shut down, strike at major supplier,
even unexpected and dramatic economic
downturn
         2. test focuses on employer’s business judgment: employer
must exercise such commercially reasonable business
judgment as would a similarly situated employer in
predicting the demands of the market (accurate prediction
not required)
      iii. Faltering company: Act’s notice requirement does not apply when:
(1) the employer was actively seeking capital at the time that sixty-
day notice would have been required; (2) there was a realistic
opportunity to obtain the financing sought; (3) the financing would have been sufficient, if obtained, to enable the employer to keep the facility open for a reasonable period of time; and (4) employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business

1. (4) must be shown to be objectively reasonable that a potential source of capital would have been unwilling to give it to a faltering company…basically must prove company would have said no had it known of the situation

2. **Note:** Faltering company exception applies to plant closings (not available to mass layoffs) and should be narrowly construed.

2. Litigation under WARN:
   a. some employers seek to exploit the difficulty in application of this Act by spreading layoffs over time and over work sites

3. Unforeseeable Business Conditions Defense:
   a. hotly contested issue, has been allowed in cases where governmental agencies or federal prosecutors have suddenly imposed heavy burdens or filed charges on an employer

4. Sale of Business as Mass Employment Loss:
   a. This does not trigger WARN notice requirement for the seller
   b. However, employment loss which occurs after the date of the sale (e.g. when the purchasing company refuses to rehire employees of the purchased entity) does trigger WARN notice requirements for the buyer

C. Collective Job Security Under the National Labor Relations Act: in addition to common law claims and WARN Act violations, plant closings resulting in collective job loss may also impinge upon the collective rights protected by NLRA.
   a. Section 7 of the NLRA protects employees rights to form, join, or assist labor organizations; to bargain collectively through reps of their choosing; and to engage in other concerted activity for purposes of collective bargaining or other mutual aid or protection
   b. Section 8(a)(1) makes in an unfair labor practice for an employer to “interfere with, restrain or coerce employees” who are exercising rights under § 7
   c. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”
   d. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the majority representatives of its employees
   e. Chargers may be filed under all Sections and equitable remedies are available
   f. Three common situations:
      i. Employer closes in response to union organizing campaign § 8(a)(1) and (3)
      ii. Employer threatens to close plant in effort to discourage union organizing activity or part of anti-union activity during organization campaign §§ 8(a)(1) and (3)
      iii. In already unionized workplace, employer shifts operations without first bargaining with the union in violation of § 8(a)(5), or if there is a labor contract, in violation of a provision barring such contracting out
   g. Union Organizing Drives: Plant closings in response to the election of a union
      i. *Textile Workers v. Darlington Manufacturing*
1. Issue: Was respondent guilty of an unfair labor practice by permanently closing its plant following petitioner union’s election as the bargaining representative of Darlington’s employees?

2. Facts: Board found that the Milliken family owned Deering Milliken (which operated 17 manufacturers) which owned and operated Darlington (one of 27 mills) and thus Darlington was part of an integrated employer group controlled by Deering Milliken. Roger Milliken who made threats to close plant should a union organize and did later close plant.

3. Court said this was ok because a businessman can choose to go out of business if he desires…a complete liquidation of a business provides no future benefit to the owner. “when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice” This was not a “runaway shop” (where employer reopens somewhere else) or a “shutdown” (where employer gives employees chance to renounce union which would violate § 8(a)(1))

4. Court later found that if this was a partial closing designed to chill unionism (that is the § 7 rights of remaining employees) at other plants it could be seen as a violation of § 8(a)(3) because it was an attempt to discourage membership in a union.

5. Upon remand, the NLRB found that Milliken had made speeches to business leaders that unionism would not be tolerated, vowed to oppose it at all costs and most importantly Milliken had urged plant managers at other plants to engage in smear campaign against unions lest those employees desire to end up like Darlington.

h. Threats to Close in Response to Union Organizing Activity

i. NLRB v. Gissel Packing Co.

1. Company president sough to discourage the election of a union and spoke of how an earlier attempt at organization had almost doomed the company. The company actively campaigned and the president made personal appeals to not vote for the union because it might lead to the closing of the company, even telling employees their age and skill level would prevent them from finding other employment should the plant close.

2. “An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as those communications do not contain a threat of reprisal or force or promise of benefit. Employer is only free to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control and not threats of economic reprisal to be taken solely of the employer’s own volition”

a. He may even make a prediction as to what the effect of unionism will be on the company.

i. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

i. Plant Closings Where the Workforce is Already Unionized

i. Fibreboard Paper v. NLRB: Court ruled that a unionized employer was obligated to bargain with the union representing its employees prior to making decisions to contract
out work being performed by employees in the bargaining unit in an effort to effect labor costs savings

1. Court did not intend that parties engage in marathon, fruitless discussion but merely wanted the union to have an opportunity to be heard
2. not every managerial decision which affects job security is to be bargained over…here though the employer was basically replacing maintenance employees with those of outside contractor who would do the exact same thing so the union should be allowed to show it could be cost effective

ii. First National v. NLRB: Court ruled employer was only obligated to bargain with the union over the effects of the decision to close its business, not the decision to close.

1. Congress did not intend to make unions (and union reps) equal partners in running of the business enterprise
   a. Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship
   b. Other managements decisions, such as order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively an aspect of the relationship between employer and employee
   c. Third type of decision: where there is a direct link between employer and employee but has as its focus only the economic profitability of the contract between employer and employee.
      i. Here, bargaining should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.
      ii. Employers should be free to decide things such as scope, direction, and profitability of its business


1. when a collective bargaining agreement exists containing provisions that limit the employer’s right to close or to subcontract out work, the agreement itself can furnish the basis for a damage award in breach of contract action by the union against the employer
   a. union was awarded $2M in damages where it had given company “give-backs” (relinquished benefits) in an attempt to keep plant open…although decision to close plant for economic reasons was still up to employer, the contract provided remedy where Singer had not invested those “give-backs”

VI. EMPLOYEE MOBILITY

A. Covenants Not to Compete
   i. Hopper v. All Pet Animal Clinic, Inc.

1. Two veterinary doctors had a non-compete agreement in place which prohibited plaintiff from practicing small animal medicine for a period of three years within a 5 mile radius of city
2. Since this is a restraint of trade, the 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
3. Employer can seek protection against improper and unfair competition, not ordinary competition
4. Rule of reason inquiry: a restraint is reasonable only if it (1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public

5. Valid and enforceable non-compete must:
   a. Be in writing
   b. Part of a contract of employment
      i. Covenant not to compete must be ancillary to the employment contract, not the reason for it (can’t hire and fire workers just to prevent competition)
   c. Based on reasonable consideration
   d. Reasonable in duration (related to the legitimate interest which employer is seeking to protect) and Reasonable in geographical limitations
   e. Not against public policy

6. Legitimate interests of employer which may be protected include
   a. Trade secrets which have been communicated to employee
   b. Confidential information, not involving trade secrets, such as information on business method
   c. Special influence by employee obtained during course of employment over employer’s customers

7. She received general (employee pays for this through lower wage) and specific training (employer pays for this because they get benefit, but might want to protect against employee using them for training and then leaving especially with highly skilled training)

8. This is typically a fact-specific inquiry

9. Often courts will parse the agreement, enforcing some portions and invalidating others...referred to as “blue-penciling”
   a. Still others will invalidate the whole agreement if any part is unreasonable
   b. Some employers will take advantage of “blue-penciling” and draft overbroad agreements hoping employees don’t challenge them or courts don’t strike all portions

10. Employers typically will seek a TRO which often has the desired affect of enforcing the agreement since the legal process is long. The employee is not allowed to compete while under the TRO. But, at the same time employee is out of work, so courts grant sparingly.

ii. Modern Approach to Covenants:
   1. much easier to enforce than prohibiting the utilization of trade secrets
   2. argument to protect employer’s investment in “human capital” or earning capacity which has been given employee through training

iii. Covenants and training costs:
   1. employers are trying to enforce as to lower level employees, but have been unsuccessful (Olsen Staffing)
   2. also have tried to recoup training costs through contractual arrangement seeking payment if employee does not work a certain length of time (Aust). Although some state wage payment laws prohibit such actions (Sand Appliances)

iv. Professionals:
   1. in cases such as doctors preventing their services could be injurious to public (Farber)
   2. although, entertainers are often held to their covenants, especially when the employer has cultivated personality or celebrity (Macy)
v. Mobile Labor Market
vi. Current labor market has led to the court upholding nation-wide covenants (Paribello…where a geographical restriction would render the agreement a nullity in the broker/client relationship), shorter durations where the geographic limitation is broad (Paribello), but where the industry changes very quickly even a short duration may be void (Schlack…computer industry)

vii. Discharge for refusal to sign covenant:
   1. wrongful discharge in violation of public policy allowed in CA, but not in NJ

B. Trade Secrets
viii. Protecting Trade Secrets
   1. Dicks v. Jensen
      a. Employees left on lodge and started their own. Contacted clients of former employer from client list they had developed and had access to at former employer
      b. Vermont Trade Secrets Act was adopted from the Uniform Trade Secrets Act (adopted in 41 states)
   c. Test for protection: Information, including a formula, pattern, compilation, program, device, method, technique, or process that:
      i. has independent economic value that is not readily ascertainable to others
         1. jurisdictions differ on what establishes “readily ascertainable” (customer list had been screened by plaintiff at considerable effort and expense vs. because customers were engaged in business, their names and locations were readily ascertainable)
      ii. where reasonable efforts were made to maintain the information’s secrecy
         1. burden is on the plaintiff to demonstrate that he pursued an active course of conduct designed to inform his employees that such secrets and information were to remain confidential
   2. Advising Employers: covenants not to compete are generally better at protecting employer interests as it is much more difficult to prove that trade secrets have been taken and utilized
   3. Uniform Trade Secrets Act: adopted in 42 states has granted protection to customer lists, pricing lists, business processes.
      a. Important inquiry is the steps which were taken to maintain secrecy. Passcodes of passwords protecting info was seen as enough (ConAgra), but where info can be discovered through reverse engineering it is not protected (Gipson)

ix. Inevitable Disclosure
   1. PepsiCo, Inc. v. Redmond
      a. Plaintiff sought injunction against former exec who had access to confidential information in highly competitive sport drink industry prohibiting from taking the job he was hired to do and from divulging any info while working at Quaker Oats. Plaintiff had signed a confidentiality agreement.
b. Plaintiff must show it has a trade secret then must show there is a treat of misappropriation
   i. To show misappropriation must show (a) acquisition of a trade secret by improper means or (b) disclosure of a trade secret without permission
   ii. No misappropriation has occurred yet, but PepsiCo is saying it’s not like he can perform his new job and just forget what he knew about price structure, manufacturing, distribution, and strategic planning

c. Policy balance: encouraging invention and innovation, fair competition vs. employees kept from moving between jobs and working in similar positions and public’s interest in competition

d. Court has in mind his dishonesty to supervisors at PepsiCo surrounding his new employment and prohibit him from working for 6 months and enjoin him from releasing confidential information forever

e. Court basically created Inevitable Disclosure doctrine in saying it would be impossible for defendant to “compartmentalize” the information he knew

x. Remedies:
   1. Injunctive Relief is typical remedy under Uniform Trade Secrets Act
   2. exemplary damages may be available for willful violations
   3. Injunctive Relief is also typical remedy for non-competes, as are traditional contract remedies, including restitutinary damages

xi. Actual Written Covenant Not to Compete vs. Inevitable Disclosure Doctrine
   1. In PepsiCo, employer had a confidentiality agreement (could be seen as efforts to protect the secret) and the court also found Inevitable Disclosure Doctrine
   2. Typically, employers should get the non-compete in writing at the start
      a. Employer should be forced to put employee on notice of restrictions, in this way employee could bargain for higher salary since they may be restricted from competing later

xii. Trade Secret Law can be seen as an amalgamation of property, tort, and contract law

b. The Duty of Loyalty
   i. Augat Inc. v. Aegis, Inc.
      1. Former employee began recruiting current employees of Augat. Having the 4 managers on board was very important to investors in new company.
      2. Augat brings duty of loyalty claim against Greenspan who, while working for Augat, talked others into joining him at Aegis.
      3. Because Greenspan was in a managerial position he could not solicit the departure of employees to work for a competitor as he had a duty to the corporation to maintain at least an adequate number of managers
      4. What can an employee do if when they want to leave a company?
         a. Allowed to plan to go into business in competition with current employer
         b. Allowed to not disclose that fact to current employer
         c. Can ask other employees to join him (provide he have no managerial duty to company…see above)
         d. Not allowed to solicit customers while still working
         e. Not allowed to take trade secrets or customer lists
f. Can’t operate at the expense of the current employer to use funds for own gain (e.g. can’t be planning new business on work time)

5. Remedies in breach of loyalty cases are typically defendant must turn over improperly earned profits from the breach of loyalty
   a. However, sometimes plaintiff has burden to prove lost profits due to the breach of duty

VII. DIGNITARY INTERESTS

A. Reputation:
   i. A defamatory statement is one that “tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him”
   ii. Restatement of Torts elements of defamation claim
      1. to create liability for defamation there must be:
         a. a false and defamatory statement concerning another;
         b. an unprivileged publication to a third party
         c. fault amounting to at least negligence on the part of the publisher; and
            i. since employee must show abuse of an employer’s conditional privilege (proving abuse of privilege or malice), the third element does not often come into play in employment litigation
         d. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication
            i. special harm or harm per se is generally presumed where a statement imputes “unfitness” for one’s business or profession, so this element does not often come into play in employment litigation

   2. Privilege
      a. Some defamations fall within a class of conduct which the law terms privileged granted when defendant is acting in furtherance of some interest of societal importance
      b. Privilege may be absolute (judicial offices, legislators) or conditional
      c. Conditional privilege can exist for common interest:
         i. Statements on subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest.
         ii. Based on policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest common

      d. Conditional privilege may be abused under 5 conditions:
         i. Defendant’s knowledge or reckless disregard as to falsity of defamatory statements
         ii. Is defamatory statement is published for some purpose other than which the privilege is given
         iii. If publication is made to someone not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege
         iv. If publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged
v. If the publication includes unprivileged matter as well as privileged matter

e. Once employer has established the existence of a conditional privilege then burden shifts to plaintiff to affirmatively prove abuse (standard is going to be higher than just mere negligence)

iii. Intracorporate Communications:

1. Some courts hold that statements made by one employee to another employed by the same company do not meet the element of “publication” for the purposes of defamation law (Starr)
    a. on agency theory: employees acting on behalf of the corporation are not third persons…the corporation is merely communicating with itself (Hayes)
    b. public policy rationale:
        i. corporations need to be able to communicate internally in a free and candid manner
        ii. if employees could be held liable it might have a chilling effect on communication that could lead to
        iii. However, this seems to be overinclusive and allows for false statement to be made

2. Other courts say corporations are subject to a qualified privilege if the defamatory statements are made in good faith
    a. Corporate officers are shielded when they act in good faith in furtherance of corporate goals, but not when they use corporate power to simply serve their own, personal ends.

iv. False and Defamatory:

1. truth is an affirmative defense to a defamation claim on which the defendant bears the burden of proof

2. Hard line to draw when comments are about performance, reasons for discharge
    a. “did not follow up on assignments” can be innocently construed and is not defamatory (Anderson)
    b. “lack of cooperation with others” as reason for discharge can be defamatory (Franklin Inst.)

3. Sometimes, courts apply a qualified privilege to performance reviews statements (Landers)

v. False Light Tort:

1. different from the defamation tort in that
   a. defamation require statement harmful to one’s reputation, while false light statement must be highly offensive to the reasonable person
   b. defamation requires publication to at least one other person, whereas false light requires matter be published to public generally (larger audience)
   c. defamation protects against harm to one’s reputation, while false light tort seeks compensation for “mental distress from having been exposed to public view”
   d. However, truth and privilege are common defenses

vi. Zinda v. Louisiana Pacific Corp.

1. facts: Corporation fired employee who had lied on employment form and then in the company newsletter which detailed “comings and goings” it stated that employee was let go for falsifying employment forms
2. Rationale: In remanding the case to determine if conditional privilege was abused, the court noted that the information shared was subject to a conditional privilege because other employees had a right to know why a fellow employee was discharged and employer had right to dispel rumors and keep morale up.

3. “An employer is entitled to use a method of publication that involves an incidental communication to persons not within the scope of the privilege”
   a. In a “common interest” privilege case the scope of dissemination/publication will be analyzed

B. Employer References
   1. Employer Reference Practices:
      a. Although most employers ask for references, considering them a valuable source of information about prospective hires, many are also unwilling to share information—particularly negative information—about former employees
      b. This seems to be an irrational behavior as privilege exists on this type of communication, size of awards have decreased, and litigation itself has decreased
      c. It is good public policy for employers to share information—good and bad—when it comes to former employee references

2. Immunity Statutes:
   a. A number of state legislatures have specifically granted immunity for employers giving references for their former employees
   b. Employers are presumed to be acting in good faith
      i. Presumption of good faith can be rebutted by showing statement was
         1. knowingly false
         2. deliberately misleading
         3. disclosed for malicious purposes
         4. disclosed in a reckless disregard for its falsity or defamatory nature; or
         5. violative of the current or former employee’s civil rights pursuant to current employment discrimination laws

3. Labor Market Affects of this unwillingness to share
   a. Mismatching: lack of accurate information leads employers to hire workers in jobs for which they are not suited, reducing productivity
   b. Churning: unproductive employee turnover when mismatched employees return to the labor market, but lack of accurate references makes it unlikely they will find a better match
   c. Scarring: employer, relying on imperfect labor market signals, or even false negative info, refuse to hire someone who would be a productive employee

4. Reference Pools:
   a. Idea that creating large reference pools in state-run databases where employees had a review and correction option

5. Liability for Positive References:
   a. Recommending employer should not be held accountable for failing to disclose all negative information, but liability can be imposed if the recommendation is an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a third person
i. CA case where teacher was recommended “without reservation” although he had history of sexual misconduct which repeated itself at new school (Randi W)

ii. Some courts apply for intentional misrepresentation but not for negligent misrepresentation (Indiana)

iii. Some impose liability even for negligent misrepresentation (New Mexico)

6. Self-publication:
   a. The idea that liability can be imposed where a plaintiff has been forced to repeat a defamatory statement to another
   b. A MN court where an employer could reasonably foresee that the plaintiff would be under a strong compulsion to repeat the defamatory statement, a strong causal link existed between defendant action and damage caused
      i. In Lewis a former employee was required to state they were fired for “gross misconduct” and thus was prevented from getting a new job
      ii. This is not sound policy because employers are not allowed to give true or real reasons for discharge under this doctrine

   a. Employee suspected that former employer’s references were the reason that she was not getting hired. She had family members call and pose as prospective employers.
   b. Court recognized qualified privilege as defense and defined as:
      i. Noted that privilege arises out of the necessity for full and unrestricted communication on matters in which parties have a common interest or duty…as a general rule employee reference given by a former employer to prospective employer is clothed with this qualified privilege
   c. Want to promote employers giving sincere responses in this critically important area
   d. Privilege may be lost if (1) communicator was motivated by ill will; (2) there was excessive publication; or (3) statement was made without belief or grounds for belief in its truth
      i. If plaintiff is alleging ill will, the ill will must be the underlying purpose for the statement, not just representative of their relationship

C. Avoiding Emotional Harm
   i. Most states recognize a tort of intentional infliction of emotional distress, or tort of outrage, when employers conduct causes mental anguish, even in absence of proof that he defendant breached an independent legal duty
   ii. The tort is not designed to redress “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities”
   iii. Liability is imposed when defendant’s conduct “has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” plaintiff must prove:
      1. defendant acted intentionally or recklessly
      2. the conduct was extreme and outrageous
      3. actions of defendant caused plaintiff emotional distress
      4. resulting emotional distress was severe
iv. **Discipline and Discharge:**
   1. When employees must be disciplined or discharged it will likely cause them to experience emotional distress...is IIED an end-run around the at-will employment doctrine?

v. **Wornick v. Casas**
   1. Worker was fired in a private meeting for “snapping” at others and failure to perform certain assigned tasks, she was then escorted from the building (a typical procedure for lower level workers but not for managerial level workers) by a security guard who was not rude.
   2. “Termination of an employee is never pleasant, especially for employee”
   3. Concurrence: liability is only imposed if a jury finds the conduct in the particular circumstance offensive...no standard has been set out for what is extreme and outrageous...out to evaluate a sea of factual circumstances

vi. **“A Sea of Factual Circumstances”**
   1. Concurrences fears have been realized as courts have failed at developing a clear standard for extreme and outrageous conduct

vii. **Bodewig v. K-Mart, Inc.**
   1. Plaintiff was forced to endure strip search in front of customer, had cashbox checked, and was “piggybacked” for some time after she had been accused of stealing money’. Plaintiff sued for tort of outrageous conduct
   2. Tort of outrage: where the wrongful purpose (i.e. not intentional intentional conduct to inflict mental distress) was lacking, but the tortuous element can be found in the breach of some obligation, statutory or otherwise, that attaches to defendant’s relationship to plaintiff
   3. Court uses landlord-tenant analogy to show that employer has special relationship to employee such that its conduct, though not deliberately aimed at causing distress, was such that it is beyond limits of social toleration and reckless of the conduct’s affect on plaintiff
   4. Employer argued that plaintiff did not prove she suffered severe emotional distress b/c no medical records or physical evidence of such distress which is required to prevent fraudulent claims
   5. Court says that for a girl of her age that it is reasonable that she would have suffered the affects she claimed (sleepless nights, nervousness, crying) and it could go to a jury

viii. **Hollomon v. Keadle**
   1. Crazy doctor subjected employee to repeated veiled death threats, cursed, and told her carried a gun, employee claimed tort of outrage and that she had suffered stomach problems, loss of sleep, loss of self-esteem, anxiety and embarrassment. She didn’t resign because she was afraid for her life and was in dire financial situation.
   2. Court found that plaintiff’s employer was not on notice that was not of ordinary temperament or that she was peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity
   3. Court takes a narrow view of this tort whether the employee was discharged, constructively discharged, or resigns.

ix. **Ordinary Abuse:**
   1. Hollomon court seems to be saying that ordinary abuse such as that by Keadle should be tolerated absent the employers knowledge of some special susceptibility
of employee to emotional distress and allows only for excessive, extraordinary and nearly bizarre behavior is grounds for relief

x. Bias and Harassment:
   1. since courts have struggled with ways to define what is outrageous various factual situations have led to claims such as when executive was demoted to performing janitorial work (Wilson); employer’s using racial epithet was actionable (Taylor); sexual harassment alone is not enough for IIED claim (Hoy)

xi. Other Hurdles/Alternatives to Tort law:
   1. some claims fail when courts require proof of and demand a high level of severity of emotional distress
   2. sometimes employers will not be held liable for acts of abusive supervisor
   3. As an alternative to tort law, in the unionized workplace collective bargaining agreements often allow for a grievance procedure where employees can bring up concerns about working conditions

D. Privacy
   i. Constitutional Protection for Public Employees
      1. O'Connor v. Ortega
         a. Public employee’s office was searched while he was on administrative leave (there was no policy in place allowing for this inventorying the office of one on leave, while there was for one who had been terminated). During the search his personal property as well as state property was seized pursuant to an investigation.
         b. Searches and seizures by government employers of the private property of employees are subject to 14th Amendment rights which are implicated only if the conduct of the employer infringed upon “an expectation of privacy that society is prepared to consider reasonable”
         c. Reasonable expectation of privacy in the workplace is delineated to the boundaries of the workplace which includes areas and items related to work and are generally within employer’s control…these areas remain part of the workplace even if employee places private items in them
         d. Public employees expectations of privacy may be less than those in the private sector by virtue of actual office practices and procedures, or by legitimate regulation
         e. Since Ortega did not share his file cabinet or desk with others for 17 years he did have a reasonable expectation of privacy; however the rest of his files were in the common areas of the workplace
         f. Court determined that appropriate standard of reasonableness of a search by public employers requires
            i. Balancing the invasion of the employees legitimate expectations of privacy against the governments need for supervision, control, and the efficient operation of the workplace”
            ii. Probable cause (in the criminal sense) and the delay it would cause is not necessary in the public employment context because public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetency, mismanagement, or other work-related malfeasance
         g. When the search is justified given the government interests of efficiency, the actual search must also be reasonable:
1. was the action justified in its inception
2. was the search reasonably related in scope to the circumstances which justified the interference in the first place

h. “Government offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home”

2. Separating Work Life and private life
   a. Dissent argues that this is hard to do in the modern workplace where the workplace has become a sort of second home for many employees

3. Constitutional Protection for Confidential Information and Personal Autonomy
   a. Two types of privacy interests
   b. Individual interest in avoiding the disclosure of personal matters
      i. Right to privacy in things such as medical and financial records is not absolute, but must be balanced against the govt's interest in disclosure
   c. Interest in the independence in making certain kinds of important decisions (autonomy)
      i. Often Comes up in the off-duty relationships context (see Off-Duty Conduct section below)
      1. discrimination based on past sexual history not allowed (Thorne)
      2. adultery does not deserve constructional protection (Van Buren)

4. Surveillance
   a. Vega-Rodriguez v. Puerto Rico Telephone Co
   b. Cameras in the public workplace workers felt they could not make any movement in privacy
   c. Court held that they had no reasonable expectation of privacy in open workplace
   d. Information revealed on camera was not personal or confidential like “medical records” or “private relationships” protected under autonomy prong

ii. Common Law Protections for Private Employees
   1. Restatement: four forms of invasion of privacy
      a. Unreasonable intrusion upon the seclusion of another; or
      b. Appropriation of the other’s name or likeness; or
      c. Unreasonable publicity given to the other’s private life; or
      d. Publicity that unreasonably places the other in a false light before he public
      e. First and third situations are most likely to be litigated
   2. K-Mart v. Trotti
      a. Employees of K-Mart had on-site lockers and employee provided her own lock for this locker. Locker and employee’s purse was searched by employer
      b. Invasion of privacy has been defined as:
         i. an intentional invasion upon solitude or seclusion of another that is highly offensive to a reasonable person; and
ii. as the right to be free from the wrongful intrusion into one’s private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities

c. In unlocked lockers on employee premises or even in lockers in which the employer had provided the lock, it can be reasonable to infer that those lockers are subject to search, However, because employee had locked the locker jury could find a reasonable expectation of privacy
   i. there was dispute as to whether prospective employees were told all lockers were subject to search

d. the intrusion upon privacy is actionable in itself and physical detriment need not be shown

3. Expectations of Privacy:
   a. How far can employers reduce objective expectations of privacy by establishing as policy expansive potential searches

4. Market Argument:
   a. Should we let employers and employees bargain over the expectation of privacy in the workplace
   b. Unions can be seen as a guard against intrusion, especially when individual employees lack the information and leverage to gain much in the bargaining process
      i. However, even unions have had to concede to drug testing procedures

   a. Plaintiff disclosed that he had AIDS to partner in firm, who in turn disclosed to numbers colleagues and his wife despite being asked to keep the information confidential. Plaintiff was then fired.
   b. Defendant had actually decided to terminate plaintiff two days before he learned of plaintiff’s disease
   c. Court recognizes invasion of privacy for unreasonable publicity given to the private life of another
      i. Liability is imposed if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public
   d. Highly offensive to a reasonable person/not of legit public concern:
      i. Here the disclosure of AIDS diagnoses would have been highly objectionable because of the private nature of sexual relations and the stigma attached to AIDS…thus it was not of legitimate concern to the public
   e. Publicity
      i. Publicity occurs when a matter is communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge
      ii. This is general rule is not applicable for special relationships exists between the plaintiff and “public” to whom the information is disclosed because disclosure to persons with whom plaintiff has special relationship may be just as devastating as disclosure to many
iii. Defendant claimed privilege because of health concerns, which court seemingly would allow, but found that the defendants had discussed it for other reasons than just health and professional concerns.

iv. On appeal, Supreme Court stated that publication (communicated by defendant to third person) was different from publicity (communicated to public at large) and since this tort required publicity verdict was overturned on this issue.

6. Information Gathering by Employers:
   a. As employers increasingly seek to gain access to private information about employees “intrusion on seclusion” tort has been used in response with some mixed success to challenge employer collection of info such as sexual information, health, credit information.
   b. Apart from common law, patchwork of federal and state laws limit an employer’s ability to collect certain specific types of information.

   a. Defendant repeatedly assured employees that email messages were “confidential and privileged” and email messages could not be intercepted and would not be used as grounds for termination.
   b. Employee sent email from home over employers email system and was later terminated on basis that emails were inappropriate and unprofessional.
   c. Employee claimed violation of privacy as matter of public policy in form of intrusion on seclusion.
   d. Court did not find a reasonable expectation of privacy in an e-mail communications voluntarily made over company email system notwithstanding assurances to the contrary.
   e. Even if defendant had reasonable expectation of privacy, the interception of them would be a substantial or highly offensive intrusion on seclusion because company is not forcing employee to disclose any private information, but rather is just monitoring its email system.
      i. Court analogized to a case where employee didn’t have to submit to urinalysis screening because of the private information disclosed.

8. Expectations of Privacy:
   a. General consensus is that email messages—at least in the workplace setting—are not protected communications.

9. Statutory Regulation of E-mail interception:
   a. Electronic Communications Privacy Act prohibits interception of electronic messages.
   b. However, courts have defined interception as an act done in transmission and the retrieval of messages stored on a system did not violate the ECPA.

iii. Tension Between Privacy Rights and At-Will Employment:
   1. Options for at-will employees when she fears an invasion of privacy:
      a. Submit to the invasive search or test procedure and sue later for invasion of privacy.
      i. Problem is that the invasion has occurred at this point.
b. go to court immediately to seek injunctive relief barring the alleged invasion of privacy
   i. problem is that this is not practical

c. object to the employer’s plans, be fired, and sue for wrongful discharge after the fact
   i. hinges on ability to gain redress in court and if that jurisdiction will extend wrongful discharge in violation of public policy

2. Private Rights as Public Policy
   a. Should courts extend the tort of wrongful discharge in violation of public policy to apply to cases in which employee is fired for asserting legitimate privacy rights?
   b. Luedtke v. Nabors Alaska Drilling:
      i. Court found basis for recognition of employee privacy as public policy in statutes which restrict information employers can gather, the constitution which has a clause guaranteeing privacy, and the common law right to privacy outside of the employment context
   c. What would widespread recognition of this right mean?
      i. Without such protection employers can unilaterally impose searches
      ii. With protection employees can bargain over giving up certain privacy rights in exchange for higher wages
      iii. With protection, the possibility of liability will make employers consider implications of proposed policy more in-depth
      iv. With protection, employer has better footing to raise concerns about privacy
      v. From Pauline Kim…Privacy Rights, Public Policy, and the Employment Relationship

3. Balancing Employer Interests:
   a. In Luedtke the Alaska court first characterized the interest at stake as that of “protecting employees legitimate privacy interest” which was established by the public policy of the state
   b. The analysis then turned to a balancing test of the employees right to privacy against other public policies, such as the health, safety, rights and privileges of others”
   c. That is, did the drug testing policy in place unreasonably threaten the employees privacy in light of the employers legitimate interest in health and safety
   d. Contrast this approach with the approach in Luck where the court characterized that the alleged public policy must be “one which reasonable persons can have little disagreement” and then looked for a public policy against the proposed drug testing instead of public policy for right to privacy.
      i. Since urinalysis was a hotly contested issue, there was disagreement and there was no firmly established public policy against this testing.

4. Luck v. Southern Pacific Railroad
   a. Plaintiff alleges wrongful termination in violation of public policy when she was discharged after she refused to consent to urine sample test imposed on all employees
b. Following *Foley*, at-will employment is subject to limits of public policy.
   i. Termination against public policy must affect a duty which inures to the benefit of the public at large rather than to a particular employer or employee
      1. If the parties could have agreed on some conduct with violating any public interest then it cannot violate public policy
      2. The right to privacy is by its name a private right, so public policy has not been implicated
   ii. Even if her termination involved interests she did not satisfy other *Foley* factors:
      iii. Public policy must be one about which reasonable persons can have little disagreement (not the case here…see above)
      iv. The public policy must be one that was firmly established at the time of termination (Supreme Court did not establish that this testing intruded upon privacy interests until 4 yrs after she refused testing)

c. Dissent: The Constitution guarantees right to privacy…there can be no clearer delineation of public policy. This is the type of situation that cannot survive the *Foley* courts “void-if-they-had-contracted-for-it-test” because it has a constitutional basis. Finally, the public policy at issue is not urinalysis, but the preservation of personal privacy”

5. *Jennings v. Minco Tech*
   a. Plaintiff, who is an at-will employee of the company, sought to enjoin MincoTech from instituting urinalysis screening which called for sample to be given, upon the consent of the employee
   b. Court said when employer notifies employee of proposed change to employment contract employee can either accept or quit and continuing to work constitutes acceptance. Plaintiff continued working.
   c. Plaintiff nonetheless sought to have court “effectuate an important public policy, modify existing common-law precepts pertaining to “at-will” employment contracts” as it had done in *Sabine Pilot*
   d. Court concedes she has a right to privacy and that the plan portends an invasion of her privacy
   e. Plaintiff sought to use her right “offensively and not defensively”
   f. The invasion of her privacy will not be unlawful (according to the policy she must consent to giving the urine sample) therefore the court saw no reason to expand the rights granted in Sabine pilot which forbid employers from discharging for refusal to perform an illegal act

iv. **Collective Approaches to Protecting Employee Privacy:**
   1. Many employers use investigatory tools or surveillance to detect workplace wrongdoing or impediments to productivity
   2. Basis for Collective Employee Rights:
      a. **Labor laws are potentially applicable to both nonunion and union workplaces**
         i. Surveillance will violate NLRA § 8(a)(1) if the surveillance tends to discourage employees exercise of § 7 right to organize
         ii. When employers use surveillance of organizing activity to discharge then it violates § 8(a)(3)
b. Where union is in place, NLRB has concluded that employer investigative tools are subject to bargaining because they affect terms and conditions of employment and under § 8(a)(5) the employer must bargain with the union
   i. Physical exams and polygraph tests are subject to bargaining (Lockheed and Austin-Berryhill, respectively)
   ii. Drug testing of current employers is subject to bargaining (Justine-batemen), while not if it is drug testing of applicants (Star-Tribune)

3. Employer Managerial Interests v. Employee Dignitary Interest
   a. Managerial prerogatives seem to be fairly well protected because the imposition of mandatory bargaining does not mandate an outcome of negotiations nor does it force to company to change course
      i. In employers best interest just to consult from the start
   b. In recent Anheuser-Busch case, the NLRB even allowed information from illegal surveillance to be grounds for dismissal if the company could show cause, even if it is the fruit of forbidden surveillance, but fined for failure to bargain
      i. 7th Circuit has upheld the fine, but it remanded to NLRB to apply, overrule, distinguish earlier cases denying use of this type of illegally obtained information

4. Just Cause Protection and Worker Privacy Rights:
   a. One basis for challenging discharge is lack of industrial due process
      i. Industrial due process is understood to require adequate notice of workplace rules, compliance with progressive discipline, equitable treatment relative to others, substantive reasonableness of rules, misconduct be job-related, and that the penalty imposed be proportional to the work rule violation
      ii. Use of surveillance tools not bargained over strengthens a due process claim
      iii. Generally, plant rules are subject to bargaining however, if they pertain to core entrepreneurial concerns then they are not subject to bargaining
      iv. In W-I Forest Products the NLRB held that a no-smoking ban was subject to bargaining because it was germane to the work environment, and touched on terms and conditions of employment as violators were subject to discharge
         1. the employer claimed core entrepreneurial concern of reducing liability for tobacco induced illness and lowering medical payments for employees who smoked and used company insurance

5. Colgate-Palmolive and Local 14 (NLRB)
   a. Company did not bargain over the installation of surveillance equipment in a bathroom used to investigate employee theft
   b. Those items subject to bargaining are those “germane to work environment” and not among those “managerial decisions which lie at the core of entrepreneurial concern”
   c. Installation of camera is analogous to drug-testing, polygraph testing, and physical exams all of which have been held to be subject to bargaining
d. Also, discharge can be a result of information obtained so the use of cameras affects the terms and conditions of employment

e. This impinges directly on employment security, not some managerial/entrepreneurial concern

f. Employer violated §§ 8(a)(1) and (5)

v. What is the relationship between job security and privacy in the non-union and union areas?

1. Non-union: no real protections because of the at-will rule the only protections are in the extreme cases in violation of public policy or some societal idea of what type of privacy should be afforded a certain intrusion on the seclusion
   a. because presumption is at-will employment lack of legal guarantee of job security make it more difficult for employees to assert their privacy interest
   b. particularly the employee troubled by low level but not egregious intrusion
   c. and the employee that doesn’t like what the employer is doing but isn’t doing anything wrong
   d. employee must show some extraordinary highly offensive intrusion, but employee may have trouble with traction raising the issue

2. Union: to the extent that there is a duty to bargain, and the employer is bargaining over this, the employee will be on notice of a potential invasion of privacy and can make decisions about their desire to stay in the position. Also, because the union is a stronger force than a single employee they might be more able ensure job security
   a. presumption is that workers have job security unless employer must have just cause (a reason connected to employment) it is easier for employees to raise a challenge to the intrusion
   b. so, the inquiry is was the employer justified in firing
   c. then, was their intrusion legal

vi. Off-Duty Conduct and Associations

1. In union workplace “just cause” provision of collective bargaining agreements has been interpreted to limit discharge for non-work related behavior. However, in the non-union workplace protection is low, and the relatively few statutes have their own limitations

2. Recreational Activities:
   a. court decides not to define “romantic dating” as a recreational activity within the meaning of the NY statute

3. Workplace Romance:
   a. Barbee v. Household Automotive
      i. Court held that although CA const. right to privacy restrains private actors (including private employers) employee did not have reasonable expectation of privacy in having relationship with subordinate
      ii. Employer has interest in “avoiding conflicts of interest between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; and preventing family conflicts
from affecting the workplace and potential situations of sexual harassment”

   a. Plaintiff claimed he was fired for having romantic relationship with co-worker
   b. Court held that NY statute which prohibited discrimination for an individuals legal recreational activities outside work hours, off employer’s premises, and without use of the employer’s equipment
      i. Statute included in “recreational activities” the following
         1. any lawful, leisure-time activity, for which he employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material
   c. US Circuit court relied on earlier NY supreme court decision (Wal-Mart) where the court felt romantic dating was not meant to be included in list of protected recreational activities because of the nature of the other things protected
   d. Concurrence: the fact is that work is where people spend most of their time, this is where numerous relationships have begun, surely if the state chose to give protection to activities such as games and hobbies it meant to protect dating. If the Court of Appeals in NY doesn’t find it to be covered, may the state legislature cover it

5. Off-Duty Relationships:
   a. In McCavitt, the employee was dating a co-worker. What is the result when the employee is fired for reasons related to dating someone outside of co-employees
   b. Rulon-Miller v. International Business Machines Corp
      i. Plaintiff began dating co-worker who later went to work for a competitor which was widely known at IBM before she was promoted to manager where she performed well. She was later told to break-off the relationship
      ii. Plaintiff invoked right to privacy guaranteed by IBM memo whose fair application was required by good faith and fair dealing…that is if a company has a policy, that their rules and regulations as well as protections be granted to employees and granted in a manner that is equal to all employees
      iii. The memo clearly insured employees right to privacy and right to hold the job even though “off-the-job” behavior may not be approved of by managers
         1. note: having a memo like this is not a typical measure taken by employers
      iv. There was no company policy prohibiting employees from being friends with or dating employees of competitors
      v. The court noted she had access to now sensitive or confidential information
   c. Note: Courts fair dealing analysis was narrowed by the later Foley decision
d. Also, employees asserting this claim have failed in recent cases (Salazar – fired b/c husband began working for competing supermarket and Miller – continued employment was conditioned on wife resigning from job with another company…wrongful discharge claim failed)
e. Courts have rejected claims by employees who claim they were fired for getting married (Delmonte; Karren)

6. Other lawful Off-Duty Conduct:
   a. Beyond limited statutory protections for things such as those prohibiting discriminating against employees who smoke (in 20 states), employees have little protection against adverse employment actions taken because of lawful, off-duty conduct such as going to law school (Scroghan) or volunteering for an AIDS foundation (Brunner)

D. The Common Law Contract, Property and Tort Claims
E. Worker Adjustment and Retraining
   i. The Statute
   ii. Issues of Statutory Interpretation
F. Collective Job Security Under the National Labor Relations Act
   i. Union Organizing Drives
   ii. Threats to Close in Response to Union
   iii. Plant Closings Where the Workforce is Already Unionized

VIII. EMPLOYEE MOBILITY

B. Covenants Not to Compete
C. Trade Secrets
   i. Protecting Trade Secrets
   ii. Inevitable Disclosure
D. The Duty of Loyalty

IX. DIGNITARY INTERESTS

A. Employee Interests in Voice – General
B. Public Sector Employees
C. Private Sector Employees

X. EMPLOYEE VOICE

A. Employee Interests in Voice – General
   i. “Voice” – the ability to speak out without fear of reprisal from the employer, which runs directly against the employer’s interest in controlling its property and the details of the production process.
   ii. Reasons to care about employees’ speech rights (Professor Cynthia Estlund, Free Speech and Due Process in the Workplace, Working Together: The Workplace, Civil Society, and the Law, and Working Together: How Workplace Bonds Strengthen a Diverse Democracy):
      1. Fosters individual self-realization and fulfillment and promotes self-realization,
2. Promotes “informed self-governance” within the workplace (cooperation between workers and management),
3. May provide information to the public about how private firms operate with regard to working conditions, product safety, environmental practices, and other matters in which society has a well-established regulatory interest, and
4. Plays a unique and crucial role in strengthening democratic institutions.
   a. Workplace is a significant deliberative forum.
   b. Deliberation leads to better decisions.

iii. The purpose of the NLRA was to provide workers with a voice in industrial relations by establishing a system of collective bargaining.

B. Public Sector Employees

i. The 1st Amendment speech rights of public sector employees – basic framework laid out by the U.S. Supreme Court in Pickering v. Board of Education.

1. Pickering v. Board of Education (1968)
   a. Facts: Plaintiff was a schoolteacher who was dismissed after writing a letter to a local newspaper that criticized the Board of Education for its handling of school funds. He challenged his dismissal, claiming that the letter was protected by the 1st and 14th Amendments. The Supreme Court held that Pickering’s rights to freedom of speech were violated by his firing.
   b. The Court articulated the Pickering Balancing Test: – “arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees…”
   c. Holding: 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. Relevant factors cited by the Court include:
      i. Plaintiff’s statements were not directed at any person with whom he would normally be in contact in the course of his daily work as a teacher (no question of the maintenance of discipline by immediate supervisors or harmony among coworkers).
      ii. Plaintiff’s employment relationships with the Board are not the kind of close working relationships for which it can be persuasively claimed that personal loyalty and confidence are necessary to their proper functioning.

ii. In Connick v. Myers, the Supreme Court added to the Pickering test by creating a requirement that public employees first show that their speech was on a “matter of public concern” when invoking the 1st Amendment to challenge their dismissal from public employment – the “public concern” test.

   a. Facts: Employee worked as an ADA in New Orleans. After she was notified that she was being transferred, she distributed a questionnaire to staff members, soliciting views on the workplace. Shortly thereafter she was terminated. Her supervisor told her she was being terminated because she refused to accept the
transfer. She filed suit contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech.

b. **Holding:** The Supreme Court held that the employee’s discharge did not offend the First Amendment.

c. **Rationale:** The Court said that the threshold test was whether the speech was on a matter of public concern, to be determined by the “content, form, and context of a given statement.” The Court stated that the ADA’s questionnaire was an employee grievance concerning internal office policy – a private speech about personal concerns regarding workplace conditions. The questions posed in the survey, with the exception of one, were not matters of public concern. The Court ruled that the limited First Amendment interest involved in the case did not require the supervisor to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. No public concern = no need to move on to the Pickering Balancing test.

iii. **Pickering/Connick** test requires balancing the interests of the public employee in speaking against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees and asks:
1. *Whether, because of the speech, the employer is prevented from efficiently carrying out its responsibilities;*
2. *Whether the speech impairs the employee’s ability to carry out his or her own responsibilities;*
3. *Whether the speech interferes with essential and close working relationships;*
4. *Whether the manner, time, and place in which the speech occurs interferes with business operations.*

iv. Criticisms of the “public concern” test established in Connick:
1. It focuses on the nature of the speech in question rather than on whether the speech interfered with workplace efficiency. *See* Cynthia Lee, Comment, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement.*
2. It’s difficult to apply the test consistently.
3. Courts sometime stretch to fit particular speech within the meaning of “public concern."

v. Recently, in the *City of San Diego v. Roe*, the U.S. Supreme Court explained that “public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”

vi. What if the employer and employee disagree about what was said?
1. In *Waters v. Churchill*, the U.S. Supreme Court concluded that a government employer does not violate the constitution if it discharges an employee for speech that it believes in good faith to be unprotected after undertaking a reasonable investigation.

vii. **Statutory protections for public employees…**
1. In addition to constitutional protections, many public employees are also covered by civil service laws that protect certain categories of public employees from discharge without cause.
2. Civil service laws indirectly protect public employee speech rights by requiring that discharges be justified by legitimate work-related reasons.
3. Many states also have analogous statutes protecting their employees against reprisals for whistleblowing activities.

viii. Political Expression.
1. In Rutan v. Republican Party, a Republican governor of IL instituted a system where hiring, promotions, recall, and transfers were done through a patronage system. The court held: The state can not condition public employment on party support.
   a. Can not deny employment in a way that infringes on constitutional rights – 1st Amendment.
   b. Can dismiss high-level policy implementers and ineffective employees (staff members whose work is inadequate).

C. Private Sector Employees

i. Cases:
   a. Facts: Novosel brought suit against his employer, Nationwide, after being terminated. He alleged that he was terminated for his refusal to participate in a lobbying effort and for his privately stated opposition to Nationwide’s political stand.
   b. Holding: Novosel’s allegations stated a claim because there was no plausible and legitimate reason for terminating his employment, and his discharge violated a clear mandate of public policy.
   c. Rationale: There are areas of private life of an employee into which the employer may not intrude. The court stated that, although Novosel was not a public employee, the public employee cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activity. Freedom of political expression is a compelling societal interest, like that of serving jury duty. The protection of important political freedoms goes well beyond the question whether the threat comes from state or private bodies. The court than stated that on remand the district court should employ the 4-part inquiry derived from Pickering and Connick.
   d. Look to government employee cases to find the source of public policy.
   e. Use Pickering/Connick balancing test ensure that employer is not taking advantage of employee.

   b. Holding: Edmondson does not have a cause of action against his private sector employer who terminated him because of the exercise of his constitutional right of free speech.
   c. Rationale: The 1st Amendment and the relevant provisions in the Idaho Constitution do not apply to alleged restrictions imposed by private parties. In rejecting Novosel, the court stated that in the private sector, 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. Constitutional limitations only apply to state actors; no claim.
ii. The First Amendment as Public Policy.
   1. Novosel and Edmonson represent two contrasting approaches to the question of whether a wrongful discharge in violation of public policy tort claim can be based on the free speech rights guaranteed by the 1st Amendment or an analogous state constitutional provision.
   2. The decision and public policy adopted in Novosel is controversial. Many courts refuse to recognize the same exception.
   3. Most courts that reject the 1st Amendment as a source of public policy do so on the grounds that the Constitution only applies to state action.
   4. Most state courts have followed the federal courts in directly applying state constitutional guarantees only where there is state action.

iii. Speech, Association and Political Expression.
   1. The 1st Amendment’s protection of freedom of speech encompasses not only the right to speak, but also the right to avoid endorsing speech with which one disagrees and the right to associate with others to attain mutually shared goals.
   2. In those states that do not recognize the 1st Amendment as a source of public policy, employees may be dismissed not only based on their speech on public issues, but also because they refuse to participate in employer-sponsored speech with which they disagree.

iv. Statutory responses.
   1. A number of states (e.g. Connecticut) have enacted statutes that specifically protect private employees from retaliation for certain types of speech.
   2. Several other states (e.g. California) more narrowly protect employees’ right to participate in political activities.
   3. Nearly half the states specifically forbid employer interference with employees’ right to vote.
   4. Also, as with public employees, certain types of private employee speech may also be protected if they fall within the scope of statutory of common law protections for whistleblowers.

v. Speech vs. Other Public Policies.
   1. Once a state provides some protection for private employee speech rights, either through the common law or statutory enactments, those rights may come into conflict with other important public policy goals, such as when employees invoke speech rights to protect expression that others find discriminatory or harassing.

D. Collective Voice

i. Where employee speech concerns matters that pertain to workplace issues that are traditional areas of collective bargaining – wages, hours, and working conditions – workplace speech may be protected under § 7 of the National Labor Relations Act whether or not there is a union in the picture.

ii. In order for the speech to be protected it must be for the purpose of:
   1. organizing a union through which to engage in collective bargaining, or
   2. “concerted” and for “mutual aid or protection.”
iii. Discharges or discipline of employees who engage in protected concerted activities – including speech – may be challenged under NLRA § 8(a)(1) as unfair labor practices.

iv. The NLRA has a voice-protection function as well as a market-power-enhancing function.

1. The Voice-Protection Function of the NLRA § 7:
      i. Collective bargaining...was prized as a process for extending constitutional values by bringing an element of democracy into the government of industry.
      ii. Freedom of association and the closely-linked freedom of expression are protected against employer restraints because such freedoms are preconditions to the declared national policy of encouraging collective bargaining, and collective bargaining is to be encouraged because it promotes the constitutional values of democratic decision-making and due process at the workplace.

2. NLRA § 7 Rights in the Non-Union Workplace
   a. The NLRA does not condition § 7 rights on the presence of a union; it declares a right to engage in concerted activity “for the purpose of collective bargaining or other mutual aid or protection.” Congress intended by the broad language of the provision to encourage a flexible and relatively unstructured process.

      i. **Facts:** Several employees left work without permission claiming that it was too cold to work. The employees were discharged later that day. A complaint was filed with the National Labor Relations Board. At a hearing, evidence indicated that, prior to the day of the walkout, the employees had complained about the heating situation. The Board found that the employees’ conduct was a concerted activity to protest the company’s failure to supply adequate heat in its machine shop, that such conduct was protected under § 7 of the National Labor Relations Act (Act), and that the discharge amounted to an unfair labor practice under § 8(a)(1) of the Act. The employer was also ordered to bargain collectively with the union.
      ii. **Holding:** On certiorari, the Supreme Court found that the Board correctly interpreted and applied the Act. Because the employees had no bargaining representative at that time, they were not required to make a more specific demand in order for the activity to fall under § 7 of the Act. The walkout grew out of a “labor dispute” within the plain meaning of § 2(9) of the Act.
      iii. **Rationale:** The Court stated that employees do not necessarily lose their right to engage in concerted activities under § 7 of the National Labor Relations Act (Act) merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the National Labor Relations Board to interpret and apply that language in a restricted fashion would only tend to frustrate the policy of
the Act to protect the right of workers to act together to better their working conditions. Indeed, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which § 7 protects. The Court also noted that Section 7 of the National Labor Relations Act does not protect all concerted activities. The normal categories of unprotected concerted activities include those that are unlawful, violent, or in breach of contract.

c. **Timekeeping Systems, Inc. (1997)**
   
i. **Facts**: Employee was a software engineer who responded to his supervisor’s email requesting feedback on a proposed vacation policy by informing other employees how the policy would actually be less beneficial to them. The question presented was whether the respondent discharged an employee because of his protected concerted activities and therefore violated Section 8(a)(1) of the Act.
   
ii. **Holding**: The judge stated that the employee’s email clearly constituted “concerted activity” for the “purpose of mutual aid or protection,” as required by Section 7 of the Act.
   
iii. **Rationale**: Section 8(a) states that an employer may not retaliate against an employee who exercises his/her Section 7 rights. The court stated that NLRA § 7 and 8(a)(1) protects communications occurring during the course of otherwise protected activity, even where conduct is rude or intolerable, unless it is “so violent or of such serious character as to render the employee unfit for further service.”


d. **Requirements for Protection Under § 7 / Test for whether cause of action exists.** Employee activity is protected under § 7 whether conducted in a union or nonunion workplace if:
   
i. It is “concerted” – involving 2 or more employees or one employee acting on the authority of other employees or seeking to enlist their support in a common endeavor (ask Kim: does employer have to know about the concerted activity?);
   
ii. It relates to wages, hours, or terms and conditions of employment, broadly interpreted; and
   
iii. It is “protected” – i.e., neither disloyal, indefensible, violent, unlawful, or in breach of contract.


e. **Greater Levels of Protection for Concerted Activity in Union Workplaces.**
   
i. In a unionized workplace where a collective bargaining agreement exists, a single employee acting alone in furtherance of rights protected under the collective bargaining agreement will be deemed to be acting “concertedly” for mutual aid or protection because his or her act is a continuation of the ongoing process of employee concerted action that produced the labor agreement. This is the case even where the employee does not explicitly reference the collective bargaining agreement in his or her protest.


f. **Refusals to Work under Hazardous Conditions.**
i. Regulations promulgated under the Occupational Safety and Health Act authorize employee refusals to perform unsafe work if the fear of serious injury or death is objectively reasonable.

ii. NLRA § 7 provides even broader protection for concerted refusals to work, protecting refusals predicated on a genuine fear of harm, even if objectively unreasonable.

g. Employer Prohibitions on Discussions of Wages.

i. Employer handbooks often purport to ban employees from discussing wages or compensation with coworkers, but such prohibitions are inconsistent with NLRA § 7.

ii. The same is true of employer-promulgated “confidentiality rules” that prohibit workers from discussing among themselves complaints concerning sexual harassment or other working conditions.

h. The NLRA as Public Policy: Individual Claims for Wrongful Discharge.

i. Grant-Burton v. Covenant Care, Inc. – plaintiff was a marketing director at defendant’s company and was discharged for engaging in conversation with coworkers about the defendant’s bonus structure. She sued claiming wrongful discharge in violation of public policy. Court held that her discharge was unlawful, stating that “Dissatisfaction due to low wages is the gist on which concerted activity feeds….The possibility that ordinary speech and discussion over wages…may cause jealousies and strife among employees is not a justifiable business reason to inhibit the opportunity for an employee to exercise rights under the NLRA.”

ii. What are the advantages of proceeding on a tort claim for wrongful discharge rather than filing an unfair labor practice with the NLRB?

1. The NLRA authorizes only equitable remedies (backpay, reinstatement, and injunctive relief).

iii. Note: Grant-Burton is an outlier. The doctrine of federal preemption under the NLRA is broad. The majority of courts find that the NLRA preempts state court common law claims challenging conduct that is arguably protected or arguably prohibited by the NLRA, reasoning that Congress has chosen to “occupy the field” of labor law by enacting the NLRA.

i. Right to Have a Representative or Coworker Present at an Investigatory Interview Preceding Disciplinary Action.

i. NLRB v. J. Weingarten, Inc. – the court ruled that § 7 protects employees’ rights, upon request, to the assistance of a union representative at an employer-initiated investigatory interview which the employee reasonably believes may result in disciplinary action. Elements:

1. The right exists only as to interviews that the employee reasonably believes may result in disciplinary, and must be invoked by the employee.

2. The employer has no obligation to notify the employee of the right to request assistance.
3. If the employee invokes the right, the employee may
   a. Choose to forego the interview and proceed to discipline the employee without ever hearing his or her side of the story, or alternatively
   b. Threaten to follow this course and tell the employee that it will proceed with the interview only if the employee relinquishes his or her statutory right.

4. The employer has no duty to bargain with the union representative if it decides to permit his or her attendance.

j. Weingarten Rights in the Non-Union Context.
   i. The NLRB has gone back and forth on whether the right to have another present exists in the non-union context. Most recently (2004), the Board has concluded that changes in the workplace environment, particularly “new security concerns raised by incidents of national and workplace violence” justified permitting employers in non-union settings to conduct investigatory disciplinary interviews without the presence of coworkers.

Insert Chart on how to figure out 1st amend. probs.

XI. WAGES AND HOURS

A. The Short Hours Movement
   i. Scott D. Miller, Revitalizing the FLSA:
      1. Maximum hours labor standards arose from the “short hours movements” of the late nineteenth and early twentieth centuries.
      2. Labor activists and reformers argued that shorter work hours would protect:
         a. Public health and safety – reducing occupational injuries by reducing fatigue,
         b. Welfare – reducing labor strife and providing workers with more time for personal, home, community, and cultural life, and
         c. Morals – eradicate overwork and sweatshops.

B. West Coast Hotel Co. v. Parrish (1937)
   i. Facts: Female employee filed an action for back wages under the Washington Minimum Wages for Women Act. The Hotel employer challenged the Act as repugnant to the Due Process Clause of the Fourteenth Amendment.
   ii. Holding: The Supreme Court held that the Act did not violate the Due Process Clause of the Fourteenth Amendment because it was a valid exercise of the state’s police power to protect the health and safety of women.
   iii. Rationale: The Court reasoned that the state had a valid interest in the wages paid to women because their support would fall on the state if women were not paid adequate wages. The Court specifically overruled a case relied on by the employer which held that minimum wages laws for women were an unconstitutional burden on the right to contract. The Court reasoned that the case could not stand because employers and employees did not stand on equal footing in the contract process, and the state’s interest in the protection of women was valid. Further, the Court held that equal protection was not violated because there was no doctrinal requirement that required the legislation to be couched in all-embracing terms. The Act was directed at a social position unique to women, so the Act did not constitute arbitrary discrimination.
C. The Demise of *Lochner* and the Rise of Protective Legislation.
   i. *West Coast Hotel* signaled the demise of the *Lochner* rationale. In subsequent cases, the Court deferred to state legislative enactments and began upholding state statutes against due process challenges, leading to the establishment of the FLSA.

D. **Fair Labor Standards Act** of 1938 (FLSA)
   i. Enacted as part of the New Deal.
   ii. Overall purpose:
       1. Sought to quell the labor unrest, and
       2. To redress the rampant unemployment and poverty that characterized the Depression era by spreading work across the laboring class.
   iii. The Congressional declaration of policy for the FLSA listed 5 justifications…“Congress finds that the existence of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers
       1. causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States;
       2. burdens commerce and the free flow of goods in commerce;
       3. constitutes an unfair method of competition in commerce;
       4. leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and
       5. interferes with the orderly and fair marketing of goods in commerce…”
   iv. Established a federal minimum hourly wage and imposed a financial penalty (known as the overtime premium) on employers who required employees to work more than a statutorily-imposed weekly hours norm.
       1. The linkage between wages and hours was designed to create an incentive for employers to hire more workers to work shorter hours.
      1. The Basics
         a. § 206 – established minimum wage
         b. § 207 – requires employers to pay 1.5 times regular rate for every hour over 40 hours/week.
         c. Parties are not allowed to contract around the law, i.e. neither the minimum wage nor the overtime provision may be waived by private agreement.
      2. Who is Covered?
         a. First, employees must be covered as individuals (engaged in commerce or in the production of goods in commerce, broadly defined) or employed by an employer that is subject to “enterprise” coverage. The Act applies to all employees of an “enterprise” that has 2 or more employees engaged in commerce and has a gross sales or business volume of at least $500,000; or is a public agency, hospital, or educational institution.
            i. Individual Coverage
               1. Applied on a weekly unit basis to employees engaged in interstate commerce, and
               2. Applies in situations where employer does not satisfy the $500,000 annual gross volume of sales requirement of the enterprise coverage test.
ii. Enterprise Coverage

1. Extends coverage under the FLSA to all employees of the covered employer regardless of the type of work performed by individual employees.

2. In order for an enterprise to be covered by the FLSA under the enterprise coverage test, it must have employees engaged in commerce and have a gross sales or business volume of at least $500,000.

3. The Act explicitly exempts from enterprise coverage any family-owned businesses that do not employ persons outside the immediate family.

b. Second, an employment relationship must exist: the worker must be an employee rather than an independent contractor, a student, or a volunteer, and the employer must act in the interest of an employer relative to the worker.

i. The existence of an employment relationship (The dispute usually revolves around whether the worker is an independent contractor, and therefore not covered by the Act, or an employee who is protected under the Act.)

1. In Goldberg v. Whitaker House Cooperative Inc., the Supreme Court explained that it is the “economic reality” of the relationship that determines whether a worker is an employee within the meaning of the FLSA.

2. The courts have developed various versions of the “economic realities” test.

a. In Donovan v. DialAmerica Marketing, Inc., the court listed the following relevant factors:

i. The degree of the alleged employer’s right to control the manner in which the work is to be performed;

ii. The alleged employee’s opportunity for profit or loss depending upon his managerial skill;

iii. The alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;

iv. Whether the service rendered requires a special skill;

v. The degree of performance of the working relationship;

vi. Whether the service rendered is an integral part of the alleged employer’s business.

3. The inquiry in these cases is intensely fact-specific and no single factor is determinative. In addition, the label the employer applies to the relationship is not dispositive.

4. Under the “joint employer” doctrine, multiple entities may be mutually liable for violations of the FLSA. The most common joint arrangements involve situations where two employers share or exchange employees, or where one is the subcontractor for another. Courts generally use some version of the “economic realities” test to assess the existence of a joint employment relationship (see Heath).
a. Often arises in the agricultural context and in the garment industry.

c. Finally, the Act exempts certain categories of employees from both the minimum wage and overtime provisions; others are exempted only from the overtime provisions but remained covered by the minimum wage provisions.

i. Exemptions from Coverage

1. White Collar Exemptions – exclude those employed in an executive, administrative, or professional capacity. More recently, computer professions have been added. Require payment on a salary rather than an hourly basis, and the salary must not be subject to reduction b/c of variance in the quality or quantity of the work performed.

   a. Executive

      i. Primary duty consists of management of the enterprise and directing the work of two or more employees, as well as having the authority to hire or fire employees or to influence such decisions.

      ii. Scherer v. Compass Group USA, Inc. – the court found an executive chef exempt by examining all of the duties and deciding that his management duty was of principal value to his employer. The court noted that the amount of time spent on a task does not determine the primary duty. In this case, the court used his salary relative to that of the hourly workers as an indication of his primary duty.

   b. Administrative

      i. Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers and that includes work requiring the exercise of discretion and independent judgment.

      ii. Robinson-Smith v. Government Employees Insurance Company (GEICO) – plaintiffs were auto insurance claims adjusters and brought a collective action under FLSA seeking overtime pay for hours worked in excess of 40/week. The court held that the plaintiffs’ work did not include sufficient exercise of discretion and independent judgment to satisfy the administrative exemption. The court noted software that limited their independent judgment.

      iii. Cases will turn on the exercise of discretion and independent judgment with respect to matters of significance.
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c. Professional – 2 types
   i. Learned professionals (lawyers, doctors, nurses, etc.) – primary duty is the performance of work requiring knowledge of an advanced type customarily acquired by a prolonged course of specialized instruction.
   ii. Creative professionals (musicians, writers, graphic artists, etc.) – primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
   iii. Difficult cases arise for journalists. Often the prestige of the employer influences the court’s decision.

d. Computer professionals
   i. May be exempt even if they’re paid hourly as long as their paid approximately $27/hour.
   ii. The regulations require that the primary duties of computer professionals consist of the performance of work that requires theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, etc. and the primary duty include work requiring the consistent exercise of discretion and judgment.
   iii. Martin v. Indiana Michigan Power Co. – not all jobs involving computers require highly specialized knowledge.

2. The 2004 Regulations
   a. Salaried employees earning less than $23,600 annually are guaranteed overtime.
      i. However, certain occupations, like teachers and police officer, do not get this benefit.
   b. Salaried employees earning $23,601 – $100,000 annually…
      i. Problem here is figuring out who should be getting overtime pay.
   c. Salaried employees earning over $100,000.
      i. Subject to a new “highly-compensated” duties test, but almost automatically exempt from overtime.

3. At the lower end of the occupational hierarchy, the Act generally exempts from both minimum wage and overtime requirements employees of seasonal amusement and recreational businesses, certain employees of fishing and aquatic businesses, and domestic workers who perform casual babysitting or care for the disabled or aged.

3. Determining Coverage
   i. **Facts**: Over 100 “chicken catchers” brought a suit seeking to recover overtime wages under FLSA.
   ii. **Holding**: The court ruled that there was an employer/employee relationship between the parties under the FLSA and Maryland Wage and Hour Law, and that the plaintiffs were not exempt, as agricultural workers, from the statutes’ overtime wage requirements. The defendant’s violation of the FLSA was willful, in that it either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA; it was thus liable for three years of back overtime wages, as opposed to two years for non-willful violations.
   iii. **Rationale**: To determine the economic reality of the relationship between workers and their putative employer, the court looked at the following six factors:
      1. the degree of control which the putative employer has over the manner in which the work is performed;
      2. the opportunities for profit or loss dependent upon the managerial skill of the worker;
      3. the putative employee's investment in equipment or material;
      4. the degree of skill required for the work;
      5. the permanence of the working relationship; and
      6. whether the service rendered is an integral part of the putative employer's business.
   iv. **Note**: In this case the plaintiffs also argued that even were the court to find that Perdue was not the sole employer, it is at least a “joint employer” of plaintiffs, along with the crew leaders. The determination as to whether such a relationship exists also involves an “economic reality” multi-factor analysis. The factors are:
      1. ownership of the property and facilities where the work occurred;
      2. degree of skill required to perform the job;
      3. investment in equipment and facilities;
      4. permanency and exclusivity of employment;
      5. nature and degree of control of the workers;
      6. degree of supervision, direct and indirect, of the work;
      7. power to determine the pay rates or the methods of payments of the workers;
      8. the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
      9. preparation of payroll and payment of wages.

4. **Prisoners as Employees.**
   a. Some courts have held that prisoners were “employees” within the meaning of the FLSA.

5. **Unpaid Interns and Trainees.**
a. In *Walling v. Portland Terminal Co.*, the Supreme Court considered whether a railroad trainee was an employee within the meaning of the FLSA, ultimately holding that he was not because his work “served only his own interests.”

6. Undocumented Workers.
   a. Courts consistently find undocumented workers covered by the FLSA.

7. What is Covered Work?
   a. The Department of Labor defines compensable time as “all of the time during which an employee is on duty on the employer’s premises or at a prescribed workplace, as well as all of the other time during which the employee is suffered or permitted to work for the employer.”

b. However, neither the Act nor the regulations promulgated by the DOL specifically define “work.”

c. The Act does contain several exclusions from “hours worked” which help to elucidate the meaning of “work”:
   i. Rest and Meal Periods
      1. No requirement to provide.
      2. Some states have passed laws that require.
      3. FLSA – Generally, rest periods of 20 minutes or less are included in compensable work time, but “bona fide” meal breaks of 30 minutes or longer when the employee is completely relieved of duty are not.
      4. “Predominantly for the benefit of the employer” test.
   ii. Training Time: not compensable if…
      1. Occurs outside of employee’s regular work hours.
      2. Attendance is voluntary.
      3. The course is not directly related to the employee’s job.
      4. The employee performs no productive work during the training.
   iii. Travel Time
      1. Travel to and from work cite (i.e. daily commute) – not compensable.
      2. Travel within workday – compensable.
   iv. Post and Preliminary Activities
      1. Post and preliminary activities are those which are not an integral part of the principal job activities, and they are not compensable unless made so by contract, custom, or practice.
      2. Courts typically distinguish by inquiring whether the employer or employee is the primary beneficiary of the activity.
      3. Supreme Court to rule on issue in *Alvarez* and *Tum*.

d. “Off-the-clock” Work
   i. *Davis v. Food Lion* (1986)
      1. Facts: Plaintiff employee brought an action against the employer, seeking to recover overtime compensation under FLSA. At trial, the district court, sitting without a jury, found that the employee had not proven an element of his case for overtime compensation,
namely, that the employer knew or should have known that he was working overtime hours. Accordingly, the court entered judgment for the employer. The employee appealed, arguing that the district court incorrectly required him to show the employer’s actual or constructive knowledge of his overtime work as an element of his case, and further, that the district court committed clear error in finding that the employer had no such knowledge.

2. **Holding:** The court held that the district court correctly required the employee to prove that the employer had actual or constructive knowledge of his overtime work (employee has burden of proof). The court also found that the district court weighed the evidence and found that the employer did not have actual or constructive knowledge of the overtime work. The court held that such a finding was not clearly erroneous.

3. **Rationale:** The court stated that under the FLSA, a plaintiff must show that he was employed by the defendant/employer in order to prove a violation. As defined, “employ” includes to suffer or permit to work. The words “suffer” and “permit” as used in § 203(g) are consistently interpreted to mean with the knowledge of the employer. Therefore, in order to prove that he is employed for purposes of the act, it is necessary for a plaintiff to show that his employer had knowledge, either actual or constructive, of his overtime work. This element of constructive or actual knowledge is especially significant when an employee deliberately acts in such a way to prevent his employer from acquiring knowledge of his alleged uncompensated overtime hours. The court was critical of the employees for performing “off-the-clock” work in secret.

4. **Establishing Employer Knowledge.**
   a. The employee must show the amount and extent of overtime as a matter of “just and reasonable inference” from the facts proved.
   b. In a similar case the court stated that the plaintiff must establish employer knowledge of “off-the-clock” hours by showing a pattern or practice of employer acquiescence, so that it is reasonable to infer that the employer “suffered” or allowed the plaintiff to work off the clock hours.

e. **“On-call” Time**
   i. The Supreme Court ruled in 1944 that all time “spent predominantly for the employer’s benefit” is compensable under the FLSA.
   ii. The Court further specified that time spent “waiting to be engaged” is not compensable under the FLSA, but if employees are “engaged to wait” the time is compensable. This is a very fact-specific inquiry.

1. **Dinges v. Sacred Heart St. Mary’s Hospitals, Inc. (1999)**
   a. **Facts:** Employees were employed as EMTs and served on standby crews that were on call after hours. They claimed
that the entire time spent on call should have been treated as working time for compensation purposes. Appellee moved for summary judgment. The legal question was whether appellants could use the time effectively for many personal pursuits – can the time be devoted to the ordinary activities of private life?

b. **Holding:** The court stated that in a close case, such as this, we are just going to enforce the private agreement made between the employer and employees. The plaintiffs chose this arrangement b/c it created the best earning opportunity for them.

c. **Rationale:** According to the court, the answer depends on whether the employee has been “engaged to wait” or is “waiting to be engaged.” The court stated time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where the conditions placed on the employee’s activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable, i.e. on-call time will be compensable if the employee is not free to pursue the activities of ordinary life.

f. **Public Sector Employment and “Comp” Time**
   i. In 1985 Congress amended the FLSA to permit public employers to award compensatory time off in lieu of cash compensation for overtime.
   ii. Congress has limited the use of “comp” time in the public sector.
      1. The employee must agree to the use of comp time in lieu of cash.
      2. A public employer must permit employees who have accrued comp time to use it “within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.”
         a. Employer has no obligation to grant comp time to employees on specific dates.
         b. Congress sought to balance the employee’s right to comp time earned against the employer’s need for flexibility.
         c. A 1-year policy has been found to be a “reasonable time period.”
      3. The FLSA caps the maximum amount of compensatory time that can be accrued by employees (240 or 480 hours).
      4. Employees who leave their jobs with accrued comp time are entitled to payment of cash compensation for the overtime work.

vi. **Enforcement of the FLSA – 3 ways to enforce**
    1. Secretary of Labor can bring suit under FLSA on behalf of aggrieved employees.
       a. Can seek injunctive relief, civil penalties, unpaid minimum wages, overtime wages and an equal amount in liquidated damages
    2. Aggrieved employees can bring suit under FLSA.
a. Can seek minimum and overtime wages that have not been paid and an equal amount in liquidated damages.
b. May also recover attorney’s costs and fees.
c. If the Secretary of Labor initiates action, then the employee loses the right to bring an action.

3. Criminal suit can be brought by the Department of Justice for particularly egregious cases.

vii. Other issues:
1. Enforcement is often difficult due to limited resources of the Secretary and also limited education and means of lower level employees.
2. 2 year statute of limitations unless Secretary can show willful violation, then extended to 3 years.
3. Individual states may enact wage and hour laws that are more protective of workers’ rights than the federal law, such as laws that provide for a higher minimum wage or laws that strengthen the child labor provisions.
4. Collective action under FLSA is different than Civil Pro, Rule 23, which binds every member of the class unless they choose to opt out. Under FLSA, opposite occurs. Potential members of a class have to chose to opt in. As a result, with opt in class will have fewer plaintiffs. On the other hand, not subject to the strict certification rules of Rule 23. Huge growth in collective actions under FLSA.

XII. PENSION AND HEALTH BENEFITS

A. ERISA – Employee Retirement Security Act
   i. Passed in 1974 as a comprehensive federal statute that regulates both pension and welfare benefit plans.
   ii. Health and pension benefits are discretionary – no employer is required to provide them. ERISA regulates benefit plans once an employer decides to provide them. In addition, the system is set up so there are tax advantages for employers who provide these types of benefits.
   iii. Welfare benefit plans never vest. Pension benefit plans are subject to limited vesting requirements. So, there are benefits that are not capable of vesting at all, benefits that are about to vest — an employee that is about to vest but is prevented from vesting, and an employee who is already vested but argues that they have the right to accrue additional benefits.
   iv. The statute contains a broad preemption clause that supplants most state regulation.
   v. Section 502 provides federal court jurisdiction for lawsuits brought by plan beneficiaries.
   vi. Basic tension underlying the statute... On the one hand, there’s reluctance on the part of Congress to interfere w/employment relationship. On the other hand, need to regulate benefits provided for employees. Congress wanted to curb abuse not mandate particular benefits. ERISA remedies are somewhat limited. Typically, what an employee can get under ERISA is recovered benefits and injunctive relief but they don’t get compensatory and punitive damages.

B. Health Benefits
   i. U.S. system is largely employer based.

C. Pension Benefits – 3 independent components
   i. Social security,
   ii. Private savings, and
iii. Employer-provided pension plans
   1. Defined benefit plan – offers a fixed benefit during retirement.
      a. ERISA mandates that benefits vest after a certain period of time.
   2. Defined contribution plan – employee is responsible for managing the plan.
   3. Cash balance plan – establishes a “hypothetical” employee account that accrues benefits for each year of service.
      a. This plan favors younger workers because their early credits will accrue interest for a lengthier period of time, and there are fewer pension rewards for staying with an employer during one’s career. It is this feature that has raised the issue of age discrimination. To date, courts are split over whether cash balance plans are inherently discriminatory.

D. Cases
   i. McNevin v. The Solvay Process Company (1898)
      1. Facts: The plaintiff employee filed suit against his employer to recover a sum of money ($52.54) claimed to be due him by virtue of an alleged contract consisting of certain regulations established by the employer creating a pension fund for the benefit of employees who have been employed with the company for the period of two years.
      2. Holding: On appeal, the court reversed, determining that the employee had no vested right to the sum credited to him at the moment the sum was credited. Instead, the court held that, under the terms by which the fund was established, the employee acquired no vested right until the gift was completed by actual payment to the employee.
      3. Rationale: The court determined that the company’s pension fund was simply a promise on the part of the employer to give to its employees a certain sum in the future with an absolute reservation that it may at any time determine not to complete the gift. The court noted that the agreement further provided that if the company did decide not to complete the gift, an employee had no right of action to recover the sum standing to his credit on the books of the pension fund.

   ii. Clark v. Lauren Young Tire Center Profit Sharing Trust (1987)
      1. Facts: Employer laid off plaintiff because of a downturn in business (legitimate business reason that employee does not dispute). Plaintiff took a job with a nearby competitor, and defendant informed him that the new job could result in forfeiture of his pension benefits under a non-competition forfeiture clause. He filed suit for declaratory and monetary relief.
      2. Holding: The 9th Circuit held that ERISA provided that such non-compete clauses were valid so long as the plan provided that benefits accrued after 10 years of service could not be forfeited.
      3. Rationale: Because defendant’s plan vested employees with pension benefits before their tenth year and was thus “more liberal” than ERISA demanded, they could condition their liberality with a non-competition requirement.

      1. Facts: The employer closed the plant where employees worked. As a result of the plant closing, each employee lost the right to qualify for full retirement benefits and claimed that employer discharged them in order to avoid paying them their full pensions. Employees suing for the right to accrue more benefits on their vested pension plans.
      2. Holding: The Court found that the employees could not prevail on their ERISA claims.
3. **Rationale:** While the evidence was sufficient to make out a prima facie case of pension discrimination in violation of ERISA, the employer met its burden of demonstrating that it had a legitimate, nondiscriminatory reason for its actions. Pension expenses were a significant item of cost that made the local plant more expensive to operate than the other plants, and it was undisputed that defendants considered these costs in making its decision to close the plant. However, the decision to close the plant would have been made even if employer had ignored the cost of the pension plan altogether.

   a. **ERISA – § 510** (kicks in when avoiding pension liability is a motivating factor)
      i. § 510 of ERISA prohibits employer conduct taken against an employee who participates in a pension benefit plan for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. This prohibition is aimed primarily at preventing unscrupulous employers from discharging their employees in order to keep them from obtaining vested pension rights. In order to prevail under this section, plaintiffs must prove that an employer made a decision to discharge them from employment with the specific intent to violate ERISA. Plaintiffs need not prove that an employer's desire to interfere with their pension benefits was the sole reason for their termination. Rather, § 510 requires no more than proof that a desire to defeat pension eligibility is “a determinative factor” in the challenged conduct.
      ii. § 510 does protect benefits not capable of vesting – Heath case.
      iii. § 510 also protects benefits that are about to vest – Clark case.
      iv. Nemeth is the third possibility – 510 also protects in this situation in which employee is vested but wants to accrue additional benefits.
      v. Doesn’t matter if it’s a single individual or a group, there will be liability if the motivation is to deprive EE of these benefits.
      vi. **Cases:**
          1. **McGann v. H. & M. Music Co.** (1991)
             a. **Facts:** Employee brought suit under § 510, claiming that employer discriminated against him by reducing benefits under his medical plan for AIDS.
             b. **Holding:** The Court of Appeals found that the employer had the absolute right to alter the terms of the plan, regardless of its intent in making the alterations.
             c. **Rationale:** The court stated that § 510 did not mandate that AIDS coverage had to be available. Further, the court found that the reduction in coverage would affect all employees and not just appellant. The discrimination was not illegal because it was not motivated by a desire to retaliate against appellant or to deprive him of an existing right to which he could become entitled. No promise that the $1,000,000 cap would not be changed and nothing in ERISA prevents the plan from being changed.

   E. **Retiree Benefits**
      i. **Sprague v. General Motors Corp.** (1998)
1. **Facts**: Plaintiffs were general retirees and early retirees (not yet at retirement age but were given various incentives and chose to retire early). Basic issue – they were promised in booklets that GM would provide health insurance for these retirees and their spouses for life. GM announces that they are going to change the health plan after the plaintiffs retire. They sued in a class action alleging that the employer violated ERISA by denying them fully paid-up lifetime health care benefits that were promised in oral agreements upon retirement. Plaintiffs not directly relying on ERISA, but have 4 other theories: (1) Plan itself should be interpreted as creating vested benefits, (2) Bilateral contract theory, (3) Equitable estoppel, and (4) Breach of fiduciary duty.

2. **Holding**: The court affirmed the order that the employer was entitled to summary judgment on the employees’ claims of breach of plan documents because the plan reserved the right to amend the health care benefits. **Welfare benefits do not vest.**

3. **Rationale**: ERISA mandates that employees providing welfare benefits must provide a summary plan description (the little booklets the employees received). The court stated that there’s no inconsistency in the booklets.
   a. Bilateral contract with early retirees – we gave up our jobs and the right to sue and in consideration you gave us health benefits for life. The court stated that the oral statements made aren’t enforceable under ERISA if they conflict with written plan documents.
   b. Estoppel theory… Court stated that employee, among other things, had to reasonably rely on the promises. Court stated that it wasn’t reasonable for employees to rely on these statements regarding lifetime health benefits.
   c. Fiduciary duties do not attach when an employer is making a decision to reduce or terminate a plan.
   d. Courts have set the barrier to showing that the default rule has been overcome very high – clear, unambiguous evidence.

**F. Preemption**

i. ERISA has a very very broad preemption clause – anything that “relates to”… With broad preemption, Congress made a broad exception – “…exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.” But Congress created an exemption to the exception.

ii. **Metropolitan Life Insurance Co. v. Massachusetts** (1985)
   1. **Facts**: The State of Massachusetts brought an action against two employee benefits insurers to force compliance with a Mass. law, which required health insurance policies and benefit plans to provide mental-health coverage.
   2. **Holding**: The Supreme Court held that Met Life has to comply with the law in Mass. and provide the mental health benefits.
   3. **Rationale**: The Supreme Court determined that the statute avoided preemption, because it regulated insurance within the meaning of ERISA’s savings clause, and because benefit plans were not deemed insurance companies under § 514(b)(2)(B)of ERISA. § 514(b)(2)(B) is the exemption to the savings clause, the “deemer clause.”

iii. **Massachusetts v. Morash** (1989)
   1. **Facts**: The employer was criminally charged with violating a Mass. law for failing to compensate two discharged employees for vacation time they accrued but did not use. The employer moved to dismiss, arguing that the vacation pay policy was an ERISA employee benefit plan and the prosecution was therefore preempted.
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2. **Holding**: The Supreme Court ruled that the vacation pay policy was not an employee benefit plan under ERISA.

3. **Rationale**: The fact that vacation compensation was deferred until after termination did not transform it into an ERISA benefit plan. The Court’s holding was expressly limited to payments by a single employer out of its general assets; a different situation would be presented in the case of a trust fund created by a group of multiple employers.

iv. **Ingersoll-Rand Co. v. McClendon** (1990)
   1. **Facts**: Plaintiff sued the defendant alleging that his pension would have vested in another 4 months and that a principal reason for his termination was the company’s desire to avoid making contributions to his pension fund. The employer contended that an employee was terminated during a companywide reduction in force and that the ERISA preempted the employee’s state law claims.
   2. **Holding**: The Court held that because the essence of the employee’s claim related to the pension plan itself, the cause of action improperly attempted to obtain a remedy for the violation of a right expressly guaranteed by the broad pre-emption provision of § 510 of ERISA, as exclusively enforced by § 502(a) of ERISA.
   3. **Rationale**: The Court concluded that there was no basis for limiting ERISA actions to only those causes of action seeking “pension benefits,” and the relief the employee had requested was well within the power of the federal courts to provide. Thus, the employer’s pre-emption argument prevailed notwithstanding the fact that the employee was not seeking to recover pension benefits. A law “relates to” an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Under this broad common-sense meaning, a state law may “relate to” a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is consistent with the substantive requirements of ERISA.

XIII. HEALTH AND SAFETY

A. **General**: Health and safety concerns have always been issues. Today, more often related to things like repetitive injury and exposure to toxic chemicals. Debates over workers compensation

B. **Workers’ Compensation – early common law**
   i. **Farwell v. The Boston and Worchester Rail Road Corp.** (1842)
      1. **Facts**: Plaintiff employee and another employee worked for defendant employer, whose business it was to construct and maintain a railroad. Plaintiff claimed that he was injured because of the carelessness and negligence of the other employee and brought suit against defendant.
      2. **Holding**: The court held that plaintiff was not entitled to recovery against employer.
      3. **Rationale**: The court found that plaintiff’s employment was a voluntary undertaking with full knowledge of the risks incident to the employment. Under the circumstances, the loss was deemed the result of a pure accident and that it must rest where it first fell, unless plaintiff had a remedy against the person actually in fault. Theory court proposes is that the employees are compensated according to the dangerousness or their job and the market will work to correct safety concerns (the market solution).
   
   ii. **New York Central Railroad Co. v. White** (1917)
1. **Facts:** The State of New York enacted a constitutional amendment requiring that certain employers provide workmen's compensation to employees who were disabled or killed while in the scope of employment. The employee was injured while in the scope of his employment with the employer, a railroad company, and his family sought benefits under the workmen's compensation statutes. The employer challenged the amendment, claiming that it was in violation of the U.S. Const. amend XIV's due process clause, since it mandated benefits without regard to the employee's fault or negligence, and deprived the employer of property without due process.

2. **Holding:** The court held that states were entitled to regulate contract rights among their citizens. The court concluded that petitioner's constitutional rights were not affected, and dismissed petitioner's appeal.

3. **Rationale:** The court upheld the New York amendment, holding that the subject matter in respect to which freedom of contract was restricted was the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public had a direct interest in this as affecting the common welfare.

C. **Basic Benefits and Coverage**

   i. Intended to provide prompt, but limited, relief to workers without regard to fault.

   ii. Every state has its own workers’ comp. system (no federally mandated structure but all fairly similar) which tries to compromise between employers and employees:

      1. No fault, but
      2. Limited recovery.

   iii. Typically, workers’ compensation laws provide 2 basic types of benefits:

      1. Medical benefits to cover the cost of treating the on-the-job injury, which in some states include rehabilitation services or therapy, and
      2. Some form of cash benefit. The amount of the benefit is generally measured as a percentage of the worker’s pre-injury wage, subject to certain statutory minimum and maximum amounts.

   iv. If it appears that a worker has become permanently disabled, he or she may also be entitled to permanent disability benefits.

      1. States try to compensate for the loss (think loss of limbs).

   v. In cases where there’s a partial disability, the individual will receive a weekly benefit amount for the duration of the injury – partial wage replacement for lost earning power in form of cash benefit. There is not a 100% wage replacement, and the amount depends on the level and type of disability, as well as the law state in which the injury occurred.

      1. Typically, the weekly benefit is 2/3 of pre-injury wage,
      2. Subject to minimum and maximum amounts.
      3. No attempt to compensate workers for pain and suffering or any consequential damages.

   vi. Employers are required to provide the benefits specified in state workers’ compensation laws and may do so in one of 3 ways:

      1. Purchase private insurance,
      2. Participate in a state administered workers’ compensation fund, or

   vii. In many cases a worker's claim for benefits is uncontested. However, certain types of injuries have been more controversial (higher hurdle for claimants), such as:

      1. Occupational diseases,
      2. Repetitive stress injuries, and
      3. Mental injuries.
viii. All states now include coverage of “disease” in addition to “injury.” However, a number of states’ statutes specifically limit compensation to diseases “characteristic of” or “peculiar to” a particular type of job and exclude “ordinary diseases of life,” further restricting the availability of benefits for diseases whose work connection cannot be conclusively proven.

D. “Arising out of and in the course of employment”

i. Every jurisdiction requires some measure of connection to work in order for an injury to be covered, and most have adopted the same test for establishing coverage: whether an injury is one “arising out of and in the course of employment.”

ii. Cases:


a. Facts: The claimant was a truck driver who delivered boxes secured with elastic bands. Some employees used the bands in horseplay with other employees. During such horseplay, the claimant was struck in the eye.

b. Holding: The court granted his application for workmen’s compensation, because he demonstrated that his injury arose out of or during the course of his employment.

c. Rationale: The court cited and adopted a 4-part to determine whether the horseplay constitutes a substantial deviation as to justify denying compensation. Whether initiation of or participation in horseplay is a deviation from course of employment depends on:

   i. the extent and seriousness of the deviation,

   ii. the completeness of the deviation, that is, whether it is commingled with the performance of duty or involves an abandonment of duty,

   iii. the extent to which the practice of horseplay has become an accepted part of the employment, and

   iv. the extent to which the nature of the employment may be expected to include some such horseplay.

The court stated that (1) the deviation from the claimant’s duties was of short duration and relatively trivial except for the consequences; (2) the horseplay was commingled with the performance of, not the abandonment of, the claimant’s duties; (3) the deviation from the duties was not so substantial that the resulting injury did not arise in the course of employment and was not compensable; and (4) the Commission’s finding, that by engaging in horseplay petitioner had abandoned his duties, was not supported by substantial evidence. The court also stated that the substantial character of a horseplay deviation is not to be judged by the seriousness of its consequences in the light of hindsight, but by the extent of the work-departure in itself.

d. Scope of employment vs. Course of employment

i. Scope of employment – more closely related to activity as part of doing the job…more narrow.

   1. Purpose is to ask: should the employer be liable for acts of employee for purposes of respondeat superior/vicarious liability.

ii. Arise out of or in course of – having something to with workplace during the worktime.
1. Purpose: is this injury sufficiently connected to work that it should be covered under the worker compensation regime.

2. **Houser v. BI-LO, Inc.** (2001)
   a. **Facts:** Plaintiffs’ relative, the employee, was the manager of a grocery store owned by defendant. As manager of the store, he was responsible for ordering stock. One day near Christmas, he arrived at work to discover that another employee had also ordered stock for the store, resulting in the receipt of an excessively large order. Shortly after discovering the extra stock, he suffered a stroke. After a period of hospitalization and recovery, the employee resumed working in the store. He suffered a second, fatal stroke less than two years later, several months after he no longer worked for defendant. Trial court denied plaintiffs’ claim for workers’ compensation benefits. On appeal, plaintiffs argued the employee’s first stroke arose out of his employment, because receiving the shipment of overstock, which caused the employee to become angry, was an abnormal or unusual event.
   b. **Holding:** The court affirmed the judgment of the trial court, denying the employee’s wife benefits under workers’ comp.
   c. **Rationale:** The court made the question of whether the employee’s injury arose out of or in the course of employment a two part test:
      i. An injury occurs “in the course of” employment if it takes place while the employee was performing a duty he or she was employed to perform. In this case, was it in the course of employment? Yes, he was at work doing work-related activities.
      ii. An injury “arises out of” employment when there is a apparent to the rational mind a casual connection between the conditions under which the work is required to be performed and the resulting injury – injury must be related to particular hazards or nature of the work. Did the manager's injury arise out of the employment? No, there were other contributing factors (smoker, etc.).

The court stated that the record was uncontradicted that handling overstock, especially around Christmas, was part of the employee’s job. The first stroke was not caused by a mental or emotional stimulus of an unusual or abnormal nature, beyond what was typically encountered by the manager of a grocery store. Further, employer shouldn’t be responsible for compensating for ordinary stresses of the your life.