OUTLINE
AT-WILL EMPLOYMENT
• Rule→absent an agreement to the contrary, employer and employee can terminate the employment relationship at any time, for any reason, with or without notice
  o Provides employer with flexibility to control the workplace through unchallengeable power to terminate the employment relationship at-will
    ▪ In turn, employee retains freedom to resign if more favorable employment presents itself or working conditions become intolerable
  o At-will rule is a default rule/presumption
    ▪ If employment is for an indefinite term, default rule = employment at-will
      • Traditionally, employment for indefinite term would only be considered permanent employment if additional consideration (other than labor for wage) was exchanged
        o Problems with this reasoning:
          a) Contract law does not require promises mirror one another, i.e. ok that employee can still leave even if employer cannot fire employee
          b) Work performed could act as consideration for both wages paid and permanent employment
    • Modernly, most courts do not require mutuality of obligation and additional consideration to overcome at-will presumption
• At-will rule is NOT the presumption:
  o Union sector
    ▪ Just cause provision contained in virtually all collective bargaining agreements
      • Just cause includes guarantee of fairness
        o Industrial due process
  o Public sector
    ▪ Civil service statutes typically restrict termination except for cause
    ▪ Due process requires notice and opportunity to be heard before life, liberty or property is taken, however court must find that property right exists
      • Property right may arise from employment contract and/or statute
• At-Will Presumption can be overcome by:
  1. Express written contract for definite period
     o Even if contract is silent on the matter, courts presume that contracts for fixed duration include just cause provision
     o Some courts will uphold just cause, indefinite term contracts while others will not
  2. Express oral contracts
     o Employer’s language must be:
       ▪ Sufficiently clear and definite
       ▪ Unequivocal—not optimistic hope for long relationship
       ▪ Context matters
         • Type of job—singular position vs. one of many
     o Consideration may be required
       • Especially if promise is for permanent employment
     o Statute of frauds
- Does not bar most oral employment contracts
  - Most courts construe statute of frauds as barring only those contracts that at the time of making could not possibly or conceivably be completed within a year
  - Some courts still construe statute of frauds strictly
- Promissory estoppel may be used to enforce oral employment contracts
  - Elements:
    - Promise
    - Reasonable reliance
      - Is reliance reasonable if employment is at-will?
        - Yes ➔ gap filler—term parties failed to negotiate
        - No ➔ employee can be fired at anytime
    - Detriment
      - Employee recovers reliance damages ➔ wage under old employment contract multiplied by time needed to find new job
      - Employee has no reliance damages if previously unemployed
      - No expectation damages because no contract
- Employee can bring claim if fired before work begins or before a reasonable time period is up
  - Employee should get good faith opportunity to work
- If an employee relocates:
  - May establish employee’s reliance in promissory estoppel claim
  - Serve as evidence that the parties had in fact agreed to some limitation on employer’s power to discharge
  - Evidence of nothing—at-will rule trumps relocation

3. Implied contract
   a. Employee handbooks
      - Majority ➔ recognize employee handbook as implied employment contract
      - Minority ➔ do not recognize employee handbook as contract in absence of consideration in addition to labor for wage
      - Unilateral contract theory ➔ handbook is an offer which the employee accepts by commencing or continuing to work
        - Performance by employee is consideration for employer’s promise—further consideration is not required
        - Handbook language must be sufficiently definite—evidencing the employer’s intent to be bound (rather than mere guidelines)
          - Objective/reasonable standard is used
          - Court looks to entire document
        - Policy must be communicated to employee
        - Modification: employees may enforce manuals issued after their initial hire because continuing to work after the
issuance constitutes consideration for promises in the manuals

- Some courts allow employers to amend handbooks to revoke rights, as well as add them
  - Some courts allow modification to go into effect immediately upon notice to employees
  - Some courts require a reasonable time period to pass, reasonable notice to employees and modification cannot interfere with vested benefits
    - Decision will turn on court’s definition of reasonable time and reasonable notice
  - Some courts have held that additional consideration (employees continuing employment is not enough) must be given when an employer attempts to modify a handbook to restore at-will status
    - Otherwise promises contained in handbook are illusory because they can be changed at any time

- Some courts do not require that an employee have actually relied on the terms of the handbook
  - Handbook is not an individually negotiated contract

  **Disclaimer** must be
  - Clear
  - Unequivocal
  - Unambiguous coverage
  - Conspicuously placed

- Policy arguments in favor of recognizing handbook as employment contract:
  - Substitute for collective bargaining
  - Unfair for employer to benefit from employees reasonably believing employer was bound by manual

b. In-fact—just cause contract may be inferred from totality of circumstances surrounding employment relationship:
  - Years of service
    - Fact that employee has been with employer for a long time is evidence that employee’s work rises to level of employer satisfaction
  - Oral representations
  - Terms in employment handbook
  - Employer’s past practices

4. Implied Covenant of Good Faith and Fair Dealing
  - Good Faith: dealing with other party honestly and in straightforward manner; neither party cheats the other
Recognized by limited number of courts
- Courts that do not accept it consider its application to employment contracts an attempt to impose a just cause requirement as a matter of law, were as a matter of fact, the relationship is at will
- Where it is recognized—typically used to prevent employers from depriving employee of benefits the employee has already earned
  - Generally a state will only find implied covenant if employee is seeking to protect a benefit other than his/her job (e.g. commissions)
    - Otherwise at-will presumption is challenged

Damages
- Majority ➔ contract damages (value of loss wages and benefits minus any amount earned in subsequent employment)
  - Only worried about protecting benefit of bargain which is the parties’ interests
- Minority ➔ tort damages
  - Implied covenant is implied by law, therefore there is a social interest in enforcing it

Good Cause
- Burden is on employer to show termination was proper
- Economic reasons
  - Indefinite term contract ➔ good cause
  - Definite term contract ➔ not good cause unless contract can be read to support discharge for that reason
- Employee based reasons
  - Misconduct must be substantial
  - Courts are split as to whether employee must have actually committed the acts of which he/she is accused
    - Some courts say employer need only have reasonable belief misconduct occurred
    - Some courts say fact finder must establish that misconduct occurred—employee must actually be guilty of misconduct
  - In union context, employer bears burden or proving that just cause exists for disciplining or discharging an employee (essentially objective proof standard)
    - Most arbitrators use preponderance of evidence standard
    - Some have imposed a clear and convincing evidence standard
    - Some a beyond a reasonable doubt standard

Public Policy Exception
- Does not displace a-will rule, rather it provides a means for identifying certain grounds for firing that will support a cause of action for wrongful discharge
  - Successful employee recovers tort damages
    - Possibility of punitive damages gives employee incentive to perform socially beneficial act
  - Covers private and public employees
Burden is on employee to show termination was improper

- Four Categories of Claims:
  - Refusal to perform unlawful acts
    - Recognized in every state
    - Some states only allow claim where performing illegal act would have resulted in criminal penalties (not civil penalties)
    - Some states do not allow claim where employee had good faith belief conduct was illegal but in fact, the conduct was legal
  - Exercising employment rights
    - Workers’ Compensation
  - Reporting illegal activity (whistleblowing)
    - Majority of states have laws protecting whistleblowers
      - States without whistleblower laws allow claims for whistleblowing under wrongful discharge claim
    - States disagree on whether:
      - Internal and external whistleblowers are covered
      - Employee must be correct about the nature of the reported activity
        - Some states say good faith belief by employee is sufficient
      - Whether wrongdoing must threaten public health, safety and welfare
  - Performing public duties

- What Constitutes Public Policy:
  - Tests:
    - Public vs. Private interests—must involve a matter than affects society at large rather than a purely personal or proprietary interest of the employee or employer
    - Void if Contracted For discharge violates public policy if employer and employee could not have contracted around the action/lack of action
    - Adverse Third Party Effects discharge violates public policy if it has substantial adverse third party effects
  - Sources of policy:
    - Constitution
      - Generally not found to be a source of policy for private employers only public employers, but cf. Novosel v. Nationwide Insurance Co.
    - Statutes and Regulations
      - Main issue here is whether a public policy claim may be maintained if the statute in question has its own enforcement scheme
        - Some states say statutory remedy preclude wrongful discharge claim
Wrongful discharge is gap filler for when there is a public policy but no remedy

- Some states say wrongful discharge claim supplements statutory remedies (unless statute preempts other remedies)
- One cannon of construction if a statute creates a new right and prescribes a remedy for its enforcement, then the prescribed remedy is exclusive. However, where a common law right exists, and a statutory right is subsequently created, the statutory remedy is cumulative unless expressly stated otherwise
  
  - State courts have split on whether federal law can provide a public policy basis for a state law wrongful discharge claim

Case law
  - Not considered a source by all courts

Codes of professional ethics

Constructive Discharge

- Constructive discharge, itself, DOES NOT constitute a cause of action
  
  - Proof that a quit was really a constructive discharge merely satisfies the discharge element in a claim for breach of contract, wrongful or retaliatory discharge
    - If employee had been fired, discharge would be actionable

Issues court must consider in establishing constructive discharge standards:
  - Type of working conditions employee must show
  - Standards by which alleged conditions should be judged
  - Level of employer intent required
    - Knew or should have known conditions were intolerable
    - Intent to force employee to resign

Two common situations:
  - Employer causes constructive discharge by materially breaching the employee’s contract of employment in some manner short of termination
    - Material change in duties
    - Significant reduction of rank and responsibility
    - Reassignment to another position
  - Employer makes working conditions so intolerable that the employee feels compelled to quit
    - Majority Rule employer must have created or maintained working conditions so intolerable that any reasonable employee would have felt compelled to quit rather than endure them
Minority Rule requires employee to prove that employer created the intolerable conditions with the specific intent of forcing the employee to quit.

Generally conditions must be:

- Ongoing
- Repetitive
- Pervasive
- Severe

Working conditions must be related to the facts giving rise to the employee’s claim of wrongful, retaliatory discharge or breach of contract.

Whistleblowers

- **Sarbanes-Oxley Act** Prohibits publicly traded companies from discharging or taking other retaliatory actions against an employee because of any lawful act done by the employee to provide information regarding any conduct the employee reasonably believes a violation of any rule of the SEC.
  - Remedies:
    - Compensatory damages
    - Reinstatement
    - Backpay
    - Special damages (no punitive damages)
  - Does not preempt any state or federal claims plaintiff could bring

Plaintiff’s Burden—plaintiff must show by a preponderance of the evidence:

- She engaged in a protected activity;
- The employer knew of the protected activity;
- She suffered an unfavorable personnel action; and
- Circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action
  - Any factor which alone or in connection with other factors tends to affect in any way the outcome of a decision
    - More lenient than standard used in most other employment cases

Defendant’s Rebuttal Burden:

- Defendant is not liable if he can show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior

Ambiguities:

- What’s a protected activity?
- Who is a protected employer?

**Attorneys**

Two Conflicting State Court Views:

- Whistleblower/wrongful discharge claims do not extend to in-house counsel because:
  - Attorneys don’t need the incentive
Attorneys are required by the Rules of Professional Conduct to act for the benefit of the public and therefore do not need the tort incentive that non-attorneys need to do the right thing.

- Adverse effect on attorney-client relationship
  - Could have chilling effect on attorney-client communications
  - Inappropriate to have client/employer bear economic cost of in-house counsel adhering to Rules of Professional Conduct
  - Relationship is at will because client/employer needs to be able to fire attorney if attorney loses client/employer’s trust

- If ethical rules permit, as oppose to order, an attorney to reveal confidential information if there is a threat of death or bodily harm, court has to decide whether incentive analysis or attorney-client analysis is more important
  - If there’s no risk of death or bodily harm, attorney cannot break confidentiality

- Whistleblower/wrongful discharge claims do extend to in-house counsel:
  - In-house counsel, like any other employee, is subject to economic pressure not to reveal actions that contradict public policy
    - More than other attorneys, in-house counsel is dependent on one client for his/her livelihood
  - Unlikely extending tort will have chilling effect on employers
    - Employers generally seek in-house counsel’s advice so that they can obey the law
  - In-house counsel may reveal client confidences when the lawyer reasonably believes that such information is necessary to establish a claim or defense on behalf of the lawyers in a controversy between the lawyer and client
    - In-house counsel should make every effort practicable to avoid unnecessary disclosure of client confidences

Within the states that do recognize the claim for in-house counsel, split as to how the claims should be treated:
- Normal employee
- Broader claim because ethical rules extend public policy
- Narrower claims due to confidential nature of relationships—require substantial public interest

**NATIONAL LABOR RELATIONS ACT**
- Upheld by *NLRB v. Jones & Laughlin Steel Corp.*
- Principle Rights and Obligations Imposed by NLRA:
  - §7 provides employees have right to:
    - Form, join or assist labor organizations,
    - Engage in concerted activities,
    - Bargain collectively through representatives of their own choosing
    - Refrain from these activities
  - §8 establishes what constitutes an unfair labor practice
    - Forbids an employer to interfere with, restrain, or coerce employees in the exercise of their §7 rights
• Discriminate in a way that discourages union participation
• Retaliate against employees for exercising their NLRA rights
• Refuse to bargain collectively

• Purposes:
  o Protect employees’ right to organize
    • Collective bargaining
      • Required over mandatory subjects
      • Without collective bargaining employees must negotiate one on one—inequality of bargaining power
    • Prohibition on employer interference with worker organization
  o Facilitate industrial peace
    • Collective bargaining is used to resolve disputes rather than strikes

• NLRA DOES NOT impose substantive terms on employment relationship
  o Only requires parties negotiate in good faith
    • DOES NOT require parties come to an agreement
  o Why not impose substantive terms?
    • Parties know better than Congress what is important within a particular industry
    • Congress cannot address needs and standards of every industry

• NLRA creates a mini-democracy
  o Union representatives are elected by majority
  o Union grievance process
    • Arbitrator

Enforcement of NLRA
• Reinstatement of wrongfully terminated worker
• Backpay
• Cease and desist
• Posting of notices of workers’ rights within workplace
• NLRA’s Problems:
  o Provides only for make whole relief
    • Employer can still fire employee for unionizing—employee will eventually get job back but termination still has chilling effect and employer is not otherwise punished
      • Especially true if terminated employee was leading the union movement
  o Lengthy procedural delays
  o Only remedy for a party’s failure to negotiate in good faith is an order to return to bargaining table
  o Employer can hire permanent replacement workers to fill striking employees’ positions
    • Deters employees from striking
    • Deters union’s ability to use threat of strike
- Permanent replacements get right to vote and striking members’ right to vote typically cease 12 months after beginning of strike

**Collective Bargaining**

- Two Mechanisms for dealing with social and economic problems:
  - Exit-Entry employees respond to undesirable working conditions by exercising freedom of choice or mobility
    - Advantages:
      a) Change is Immediate
      b) Employee avoids conflict
    - Disadvantages:
      a) Employer doesn’t know why employee left
      a. May take employer awhile to realize there is problem and change policy
  - Voice direct communications to bring actual and desired conditions closer together
    - Advantages:
      a) Employee doesn’t have to leave his/her job
  - The law adopted the exit-entry theory through at-will employment doctrine
  - Voice direct communications to bring actual and desired conditions closer together

- Modern focus has been on individual employee rights rather than collective rights
  - Anti-discrimination statutes
  - Statutes establishing minimum workplace requirements
  - Consequences:
    - Workers have less involvement in formulation of their rights
    - Standards imposed are less likely to be specific to an industry
    - Rights are enforced through individual lawsuits and government agencies (rather than unions)

- Individual Rights Model
  - Cons:
    a) Costly and intimidating for an individual to enforce his/her rights in court
    a. Lawsuits will focus on higher paid workers
    b) Agency enforcement is only as good as the agency
    a. Enforcement will likely depend on how well agency is funded

- Collective Rights Model
  - Pro:
    a) Union can distribute information about workers’ rights to the workers
Con:
   a) Individuals interests may not be aligned with union’s interests

- No longer assumed that employee will work for an employer for the long-term
  - Why?
    - Employers need more flexibility—short term labor provides this flexibility
  - Implications
    - Employers are less willing to invest in employees
      - Training programs
    - Dependence on employers to provide benefits is less feasible

- Workplace demographics have changed:
  - May make collective action more difficult due to more diverse workforce
    - However collective bargaining may help eliminate wage discrepancies among racial groups
  - Can’t assume one member of household stays at home
    - Requires different work arrangements
      - Arrangement may not qualify for regulation

**COLLECTIVE JOB SECURITY**
- Employer prerogative to determine the future direction, profitability and workforce necessary to operate a business is assumed in law.
  - Accordingly, protection of worker job security at the collective level is limited.
    - There are three possible bases for collective legal claims by workers:
      1. Common law contract, property and tort claims
      2. Notice provision of WARN Act
      3. NLRA’s prohibition on retaliatory partial closings in the context of a union organizing drive and (in unionized workforce) is requirement that the employer bargain over decisions affecting working conditions, including job security

- There is no legally recognized property right in a job

**WARN ACT**
- Notification to unions, workers and affected state agencies of plant closings and mass layoffs required by employers:
  - With 100 or more full-time employees
  - If 50 or more workers at a single worksite are affected or 1/3 workforce is affected or 500+ employees are affected
  - 60 days advanced notice
- Notice period may be reduced or eliminated where the employer can establish:
  - Providing notice at an earlier point would have interfered with good faith efforts by the employer to obtain infusions of capital or new business necessary to avoid or postpone the closing
    - Don’t want WARN to push potentially viable companies out of business
Where closing was caused by unforeseeable business circumstances or natural disasters
  - Unforeseeable = outside employer’s control

- Reductions in penalties available where:
  - Employer establishes that it made good faith efforts to comply with the Act
    - Mere ignorance of the WARN Act is not enough to establish the good faith exception

- Purpose → provide workers transition time to adjust to the prospective loss of employment and to facilitate re-employment
  - Gives community chance to negotiate with company to prevent closing
  - Gives community a chance to implement programs to help workers that get laid off

- Enforcement → through civil action initiated by employees, unions or the municipality in which the employer’s operation is located

- Remedies:
  - Backpay
  - Benefits
  - Civil fines
  - Attorneys fees

- WARN might help with short term problems associated with plant closings and mass layoffs but doesn’t help with long term problems
  - WARN only helps if there are other industries that can offer jobs to laid off workers

**NLRA**

- General Rule → Under the NLRA, an employer has the absolute right to terminate his entire business for any reason he pleases, but that right does NOT include the ability to close part of a business, no matter what the reason
  - Employer cannot partially close a business in an effort to discourage the exercise of NLRA rights among the remaining employees

- Rule tries to balancing employer/employee interests:
  - Generally employers have right to decide whether or not to keep its business open, also don’t want to force employers to stay in business vs. don’t want to frustrate employees right to unionize

- An employer is free to tell his employees 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 on his own volition

- Collective bargaining is required over terms and conditions of employment
  - Three Types of Management Decisions:
    1. Decisions that have only an indirect and attenuated impact on the employment relationship—NO duty to bargain
e.g. choice of advertising, product type and design, financing arrangements

2. Decisions that are almost exclusively an aspect of the relationship between employer and employee—DUTY to bargain
e.g. order of succession of layoffs and recalls, production quotas, work rules

3. Decisions not in itself primarily about conditions of employment, though the effect of the decision impacts employment—DUTY to bargain IF the benefit for labor management relations and the collective bargaining process outweighs the burden placed on the conduct of business

**RESTRAINTS ON EMPLOYEE MOBILITY**

**Non-Compete Agreements**
- Concern the ability of the employer to control employee’s behavior after employment relationship has ended
- Disfavored by courts:
  - Restricts employee’s right to work
  - Potential cost to society
    - Public loses benefit of employee’s services
    - Diminishes competition
  - Non-competes are construed against the employer
  - Employee must leave employment or be terminated in good faith in order for non-compete to be enforced

**Framework**
1. Was there a valid employment contract?
   - Consideration
     - Some courts require more than labor for wages as consideration
       1. look for bonus or increase in salary
   - Written
     - This helps courts determine whether there actually was an enforceable non-compete
2. Is the duration reasonable in light of:
   - Employer’s interest
     - Nature of employer’s interest and time needed to protect that interest
   - Public interest
   - Hardship to employee
3. Is the geographic scope reasonable in light of:
   - Employer’s interest
     - Limited to area in which the former employee actually worked or from which clients were drawn
   - Public Interest
   - Hardship to employee
4. Is the activity restriction reasonable in light of:
   - Hardship on employee
   - Public policy
i. Unique/uncommon services
   ii. Availability of services in the area
   c. No greater than necessary to protect employer’s interest

- If court determines that covenant is overbroad, it has two options:
  o Nullification → covenant is unenforceable
  o Blue Pencil Rule → redraft narrower term that will be upheld
    ▪ Majority position
    ▪ Justified under theory that it is appropriate to uphold the presumed intent of the parties
    ▪ Criticized for giving employer no incentive to draft reasonable covenants

- Remedies:
  o Preliminary Injunction
    ▪ Courts cannot mandate that an employee work for an employer
  o Employer may be able to recover the cost of replacing employee

- Attorneys are prohibited from entering into non-competes
  o However, financial disincentive provisions will be upheld in some states

**Trade Secrets**

- Test:
  1. Does the information have independent economic value that is not readily ascertainable to others?
  2. Were reasonable efforts made to maintain the information’s secrecy?
    a. Non-compete?
    b. Confidentiality agreement?
    c. Knowledge confined to restricted group of employees?
    d. Extent of measures to guard access to information

- Remedies under Uniform Trade Secrets Act:
  o Injunction
  o Damages
    ▪ Only for misappropriation
    ▪ Exemplary damages for willful violations

**Trade Secrets vs. Restrictive Covenants**

- Restrictive covenants: contracted for by parties
- Trade secrets: created by law and imposed on employees regardless of contract

- Why enforce restrictive covenants?
  o Restrictive covenant may be broader than trade secret
    ▪ Restrictive covenants allow for up-front bargaining and put employees on notice as to what the employer considers a trade secret
• If employer has ability to bargain upfront to protect what employer deems important, courts should construe trade secret law more narrowly.
  • Otherwise, employer gets additional benefits without having to bargain for them
    o Employer may have trouble proving trade secret has been used

• Inevitable disclosure doctrine\rightarrow employee cannot help but to rely (consciously or subconsciously) upon knowledge of the former employer’s trade secrets in performing his or her new job duties
  o Factors a court may consider:
    ▪ Are the employers in question direct competitors providing the same or very similar products or services?
    ▪ Is the employee’s position nearly identical to his old one, such that he could not reasonable be expected to fulfill his new job responsibilities without utilizing trade secrets from his former employer?
    ▪ Are the trade secrets at issue are highly valuable to both employers?
    ▪ Other case specific factors
  o Criticism of doctrine\rightarrow gives employer benefit of non-compete without having to negotiate for it up front

Duty of Loyalty
• Employee cannot compete with the employer’s business prior to the termination of the employment relationship if the competition relates to the specific aspect of the business with which the agent is involved.
  o Employee cannot act in a way that directly conflicts with employee’s job duties

• Remedy:
  o Disgorgement of profits defendant obtained as result of breach

• NOTE: Duty of loyalty ends when employment ends, however duty not to reveal trade secrets continues even after employment ends

EMPLOYEE DIGNITARY INTERESTS

Intentional Infliction of Emotional Distress
• Elements:
  1. Employer acts intentionally or recklessly
     a. Some courts require evidence that employer was on notice that employee had a mental or physical condition that made the employee especially susceptible to emotional distress
  2. Conduct was extreme and outrageous
     a. Some courts have found that the existence of the employment relationship is relevant to its analysis of the boundaries of socially acceptable behavior
     b. Some courts may consider whether the employee consented to the outrageous conduct
  3. Actions of employer caused employee emotional distress
4. Resulting emotional distress was severe

- IIED claim is not necessarily at odds with at-will rule
  - Termination, itself may not be outrageous, however manner in which termination occurred may be outrageous
  - Does not allow employee to challenge discharge, only collect damages

- With discrimination claims:
  - Some courts find that the racial and sexual nature of harassment/discrimination, itself, contributes to its outrageousness
  - Other courts demand something more than the level of harassment actionable under anti-discrimination laws before finding tort liability for IIED

Privacy of Public Employees

- Principles of privacy are rooted in the Constitution
  - 4th Amendment → right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures
  - 14th Amendment → protects
    - individual’s interest in avoiding disclosure of personal matters
    - interest in independence in making certain kinds of important decisions

4th Amendment Framework

- Did the employee have a reasonable expectation of privacy?
  - Location?
    - Workplace → includes those areas that are related to work and are generally within the employer’s control.
      - Areas remain in the workplace context even if the employee has placed personal items in or on them
        - Expectation of privacy is lower in workplace than in other places
      - Court looks to actual practices of employer to determine if something is private or in the workplace
  - How is the location used?
    - Who has access?

- Was the search reasonable under all the circumstances?
  - Weigh the employee’s interest in privacy against the employer’s interest in the intrusion

- Was the invasion justified at its inception?
  - Action is justified at its inception when:
    - There are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work related misconduct, or
    - The search is necessary for a non-investigatory work-related purpose

- Was the search reasonable in scope?
  - Reasonable in scope when measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct
Privacy of Private Employees

- NOTE: Some courts have held that privacy rights can be a source of public policy
  - Privacy is a fundamental value that should be recognized as a source of public policy
  - Constitution generally does not serve as a source of public policy for a claim against a private employer

- Four Types of Cases:
  - NOTE: In ALL types, employee must have a reasonable expectation of privacy.
    Factors courts look to determine if employee had reasonable expectation:
    - Historical values
    - Societal understandings
    - Established practices
    - Whether individual manifested expectation of privacy through his/her behavior

1. Unreasonable intrusion upon the seclusion of another
   - Intrusion must be *highly offensive to reasonable person*
   - Why have higher standard for private vs. public employers?
     - Concerned about citizen’s privacy—hold government as employer to same standard as in any other context
     - Government can use information in ways private employer cannot
     - Unlike private employment, no market with some government jobs
       - Employees will be willing to accept lower pay for increased privacy—employers will have to pay premium to invade employee’s privacy
       - Market theory may not adequately protect employees because:
         - Signaling problems
         - Lack of information
         - Invasion of privacy may occur after employee takes job
         - May lead to outcomes society thinks is unacceptable
           - Asking employer permission to get married
   - This tort has been used to challenge employer collection of certain types of private information about employees
     - Courts often hold employer has legitimate interest in obtaining certain types of sensitive information

2. Appropriation of the other’s name or likeness

3. Unreasonable publicity given to the other’s private life
Publicity requires communication to the public in general or to a large number of persons, rather than to one individual or a few:

- Minority—special relationship to plaintiff and the “public” to whom the information is disclosed satisfies publicity requirement
- Majority—private information must be made widely public, with disclosure to persons outside workplace

Information given publicity must be:

- Highly offensive to reasonable person and
- Not of a legitimate concern to public

Employer Defenses:

- Employer may have qualified privilege if the communication is made in good faith and on a subject matter in which the employer has an interest to other person(s) having corresponding interest, even though it contains matter which without this privilege would be slanderous

- Waiver
  - Employee can waive privacy with respect to one group of for one purpose but still asserted in another

4. Publicity that unreasonably places the other in a false light before the public

- One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:
  - The false light in which the other was placed would be highly offensive to a reasonable person, and
  - The actor has knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which it would be placed

Collective Approaches to Privacy

- NLRA employer surveillance violates:
  - §8(a)(1) if the surveillance tends to discourage employees’ exercise of legal rights, particularly the right to unionize
    - NLRB applies this section to cover more technologically advanced methods of surveillance, including video taping
  - 8(3)(a) if information is used to punish or discourage union activists

- NLRB employer surveillance/investigative tools are mandatory subject of bargaining—employers can still use them but must negotiate as to how and where, etc.

- Mandatory subjects of bargaining matters that are plainly germane to the working environment and not among those managerial decisions, which lie at the core of entrepreneurial control.
  - Germane to working environment
    - Potential to affect continued employment
    - Investigatory tools used to discover misconduct
• Raise privacy concerns
  ▪ Not a managerial decision which lies at the core of entrepreneurial control
  ▪ Not a decision concerning the commitment of investment capital
  ▪ Not fundamental to the basic direction of the enterprise
  ▪ Does not infringe only indirectly upon employment security

  o Remedy for termination resulting from illegal surveillance (not bargained over) is currently unclear

**Off Duty Conduct and Associations**

• Generally, an employee discharged for lawful off-duty activities has no recourse under the common law
  o Employee is only protected if statute specifically covers the activity
  o Employees can contract with employers regarding privacy rights

**Reputation**

• Employee interest → avoiding negative assessments by their employers
• Employer interest → facilitating accurate and honest assessments about both current and prospective employees in order to inform their personnel decisions

**Defamation**

1. False and defamatory statement concerning another
   o **Defamatory** → communication that so tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him
     ▪ Mere statement of opinion is not defamation

   o Truth is an absolute defense (Δ’s burden)

2. Unprivileged publication to a third party
   o **Publication** → any communication by the defendant to at least one third person (defamation standard)

   o **Privilege** → Two types:
     ▪ Absolute: Privilege is a bar to defamation action, irrespective of whether the statement was known to be false, and thus made maliciously or in bad faith
     ▪ Conditional: Common Interest Privilege → if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know

   • Will be lost if abused (Π’s burden):
     o Publisher has knowledge of the falsity of a statement or a reckless disregard for whether the statement is true or false
     o Statement is published for a purpose other than the one for which the privilege applies
Statement is published to a person not reasonably necessary to accomplish the purpose for which the material is privileged
Publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged
Publication includes privileged and unprivileged matter

3. Fault amounting to at least negligence on the part of the employer; and
   - Because showing to overcome privilege—abuse or malice—is usually more demanding than a negligence standard, this element is often not significant

4. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication

**Self-publication**
- Employee, himself, communications defamatory statement made by someone else to a third person
  - Not readily accepted by the states
  - Allows defamation’s publication requirements to be satisfied if the plaintiff was compelled to repeat a defamatory statement to another, even though the defendant did not communicate it to anyone other than the plaintiff
    - E.g. employee is compelled to tell prospective employer reason given to employee by ex-employer for employees termination

**Intercorporate Statements**
- Split among courts
  - Some hold that statements made by one employee to another employed by the same company do not meet the element of publication for purposes of defamation law
    - A corporation can only act through its agents or employees. Employees acting on behalf of the corporation are not third persons vis-à-vis the corporation
      - No publication because the corporation is merely communicating with itself
    - Problem—Over-inclusive—protects false statements knowingly made as well as innocent statements made in the best interest of the corporation
  - Some courts hold that a corporation is protected by a conditional privilege if the statements are made in good faith
    - Problem—Under-inclusive—mere fact of ongoing litigation over the privilege may have chilling effect on free expression

**References**
- Number of states have reference immunity laws to protect employers giving references to prospective employers
- Limited number of states recognize liability where an employer gives a POSITIVE but factually inaccurate reference that has no harmful impact on the
employee but presents a *foreseeable* and *substantial* risk of physical harm to a third person

**EMPLOYEE VOICE**

- Employee interest ➔ precursor to collective action, employee involvement in workplace governance
  - Workplace fosters face-to-face conversations among people who have *both* different experiences, perspectives and opinions and a reason to care about and get along with one another
  - One purpose of NLRA was to provide employees with a voice through collective bargaining
- Employer interest ➔ controlling its property and the details of production process

**Public Sector Employee**

- First Amendment implications
  - First Amendment protects two distinct interests:
    - Individual’s interest in self expression, self realization
    - Public’s interest in informed decision making
- **Framework:**
  1. The employee must be speaking as a citizen
     - When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline
     - Criticism ➔ *Pickering* test sufficiently balances all the interests, including the employer’s interest in maintaining a healthy working environment.
       - Not necessary to say that an employee is NEVER protected when speech is made pursuant to job duties
       - This encourages public employees to go straight to public rather than chain of command
  2. The employee must be speaking on a matter of public concern
     - Evaluated according to the content, form and context of the statement
       - Also relevant is the time, place and manner in which statement is made
     - Mundane employment grievances relating primarily to the individual employee have been held NOT to be matters of public concern
     - Burden is on employee to show First Amendment protection
  3. The Court must balance the interests of the employees, as a citizen, in commenting on matters of public concern against the government employer’s interest in running an efficient operation. Factors court should consider:
     - Maintenance of discipline by immediate supervisors
     - Preservation of harmony among co-workers
- Maintenance of personal loyalty and confidence when necessary to the proper functioning of a close working relationship
- Maintenance of the employee’s proper performance of daily duties
- Public impact of the statement
- Impact of the statement on the operation of the government entity
- The existence or nonexistence of an issue of legitimate public concern

4. The employee’s protected conduct must be a motivating factor in the government employer’s decision to discharge

Private Sector Employees
- Generally, courts do not extend First Amendment protections to private employees, therefore employees do not have much speech protection
  - Can try and bring a wrongful discharge claim
    - Only one court—Novosel v. Nationwide Insurance found that Constitution served as source of public policy—fundamental value of freedom of speech
      - Support → Legislature could always say court cannot look to Constitution for public policy
      - Criticism → market forces work to protect employees’ interest in free speech

Collective Voice
- §7 NLRA protects collective speech → Employees shall have right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection
  - §8 NLRA enforces this right → It is an unfair labor practice to interfere, restrain or coerce employees in the exercise of the rights guaranteed by §7
    - NOTE: An employer’s otherwise valid rule cannot be used to thwart §7 activity
  - §7 DOES NOT apply to public sector employees
  - Most courts have held that NLRA cannot serve as a source of public policy for a wrongful discharge claim because NLRA preempts state law

- Framework
  Employee in nonunion or union workplace is protected under §7 if:
  1. Activity is concerted → involving two or more employees, or one employee acting on the authority of other employees or seeking to enlist their support in a common endeavor
    - Need not be express
  2. Is undertaken for mutual aid or protection regarding wages, hours or terms and conditions of employment
    - Broadly interpreted
3. Activity is protected—neither disloyal, indefensible, violent, unlawful or in breach of contract
   o Rule → communications occurring during the course of other protected activity remain likewise protected unless found to be so violent or of such serious character so as to render the employee unfit for further service

Employer committed a violation under §8(a) if:
1. Employee engaged in protected activity
2. Employer knows activity is protected
3. Adverse action was motivated by concerted activity

- Limits on the right to concerted activity:
  o If the walkout is pursuant to economic conditions, workers can be replaced
  o If the walkout is in response to unfair labor practice (and NLRB agrees with employees), the striking workers have a right to be reinstated

**FAIR LABOR STANDARDS ACT**
- Minimum wage
  o Both default rule (no specified wage = minimum wage) and immutable rule (can’t be contracted below)
  o Purpose:
    - Maintenance of health and well-being
    - Less persons on public welfare
  o Costs → price increases, higher unemployment
    - Minimum wage’s effect on unemployment rates is disputed
  o Benefits → more spending money for employees

- Overtime standard
  o 1.5 times regular rate of pay for any time worked exceeding 40 hours
    - **Regular Rate of Pay** = Total pay in a week / Hours actually worked
  o Immutable rule
  o Purposes:
    - Employment spreading
    - Increase quality of work conditions
    - More leisure time for employees
  o DOES NOT establish maximum number of hours that can be worked

- **Framework:**
  1. Is employee covered under individual or enterprise test
     o Individual → engaged in commerce or production of commerce
2. Is there an employment relationship—is the worker an employee (vs. independent contractor?)
   - Employee: any individual employed by an employer
     - Employ: to suffer or permit to work
   - Courts use economic realities test to determine if worker is economically dependent on the business, thus making him and employee for purposes of FLSA—the label the employer applies to working relationship is not dispositive
     a. Degree of control the putative employer has over the manner in which the work is performed
     b. Opportunities for profit or loss dependent upon the managerial skill of the worker
     c. Putative employee’s investment in equipment or material
     d. Degree of skill required for work
     e. Permanence of working relationship
     f. Whether service rendered is an integral part of the putative employer’s business
   - Courts consistently find undocumented workers covered by FLSA
     - Can recover backpay under FLSA because recovery is for work actually performed. Undocumented workers cannot collect backpay under NLRA because it’s remedial in nature
   - Employees can have more than one employer under Joint Employment Doctrine
     - Fairly common in low wage/low skill employment
     e.g. Garment industry: Labels → Jobbers → Garment Workers
     - Requires different test than for employer/employee relationship because economic reality that is being determined is different
       - Employer/Employee: is worker in business for himself or is he dependent on employer
       - Joint Employer: Who do employees work for—who exercises sufficient control to be considered an employer?
         o More tenuous relationship
         o At least one employer will be covered under FLSA, regardless if both are

3. Is the work covered?
   - Compensable time: all 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
     - Excluded: activities which are preliminary to or postliminary to principal activities
a. Off the Clock Work
   o Off the clock work is covered if the employer knew or should have known that 
     overtime work was occurring
      ▪ If employer doesn’t have knowledge, employer shouldn’t have to pay

b. On-Call Time
   o Where conditions placed on employee’s activities are so restrictive that the 
     employee cannot use the time effectively for personal pursuits, such time spend 
     on call is compensable
      ▪ To the extent there is uncertainty, courts may look at whether employees 
        chose the arrangement
        Problem with this rationale:
         o Provisions of FLSA are not waivable, court should not 
           advocate contracting around immutable provisions
         o On call employees may allow employers to hire less 
           workers, contrary to FLSA job spreading goal

c. Rest and Meal Periods
   o FLSA does not require employers to provide rest or meal periods
      ▪ Generally, rest/meal periods of 20 minutes or less are compensable but 
        rest/meal periods of 30 minutes or longer are not

d. Travel Time
   o Time commuting from home to work and back is NOT compensable
   o Compensable travel time:
      ▪ In connection with out of town work
      ▪ While away from home on business
      ▪ Travel time during normal business day from one location to another

e. Preliminary and Postliminary Activities
   o Activities performed at the jobsite are compensable if they are an integral part of 
     the principal activities of the job
      ▪ Principal job activities → those that primarily benefit the employer
   o Preliminary and postliminary activities are not an integral part of the principal job 
     activities and are NOT compensable
      ▪ Preliminary/Postliminary Activities → those that primarily benefit the 
        employees

4. Are there any low end exemptions?
   • Agricultural → various farming activities performed by a farmer or on a farm as an incident to 
     or in conjunction with such farming operations, including preparation for market, delivery to 
     storage or to market or to carriers for transportation to market

   • Domestic Service

5. Are there any high end exemptions?
a. Does the employee meet the salary requirement?
   o $23,660/yr ($455/wk)
     • Anyone making more than $23,660 is presumptively exempt
   o $27.63/hr
   o Primary Duty→ work he or she does that is of principal value to the employer

b. Is the worker an executive employee?
   o Primary duty→ management of the enterprise and customarily and regularly direct
     the work of two or more other employees; and has the authority to hire or fire
     other employees or whose suggestions and recommendations as to hiring, firing,
     advancement, promotion or any other change of status of status of other
     employees are given particular weight
   o Pay differentials between executive employee and those he supervises may be
     indicative that the additional duties performed by the executive are of primary
     value to the employer

c. Is the worker an administrative employee?
   o Primary duty→ 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 whose primary duty includes the exercise of discretion and
     independent judgment with respect to matters of significance

d. Is the worker a professional employee?
   o Learned Professional: Primary duty→ performance of work requiring knowledge
     of an advanced type (work predominately intellectual in character and which
     includes work requiring consistent exercise of discretion and judgment) in a field
     of science or learning customarily acquired by a prolonged course of specialized
     intellectual instruction
     • Education requirement is emphasized
     • If employee has specialized degree, he is only exempt if
       performing primarily expert work in his field of study
   o Creative Professional: Primary duty→ performance of work requiring invention,
     imagination, originality, or talent in a recognized field of artistic or creative
     endeavor
     • Factors:
     • Whether employee contributes a unique interpretation or analysis
       to a product (creative) vs. Collecting, organizing and recording
       information that is routine or already public (not creative)
     • Control of the employer over work product

e. Is the worker a computer professional?
   o Primary duty→ performance of work that requires theoretical and practical
     application of highly specialized knowledge in computer systems analysis,
programming and software engineering and work requiring the consistent exercise of discretion and judgment

- NOTE: Public sector uses comp time in lieu of overtime

- Enforcement of FLSA
  - Claims can be brought by:
    - Secretary of Labor
    - Aggrieved employees
      - Individually
      - Collectively (class actions are not permitted under FLSA)
        - Require employees to opt in
        - Only employees who opt in are bound by judicial decision
    - Criminal Actions by Department of Justice

- NOTE: The FLSA applies to public sector employees, however the Supreme Court ruled that state employees cannot bring suit against a state in its own courts on a FLSA action unless the state waives its immunity.

**ERISA**
- Protects the interests of participants in employee benefit plans and their beneficiaries in enforcing any benefit promise the employer makes by establishing certain minimum standards for all covered plans
  - ERISA DOES NOT require employers to provide benefits

- ERISA is concerned with:
  - Discrimination in offering benefits
  - Mismanagement of benefit funds
  - Employer opportunism
  - Protecting employee expectations
  - Lack of employee information regarding the funds

- ERISA requires all plans to be in writing
  - Require employees be provided with a summary of the plan
    - If there are any discrepancies between the plan and the plan summary, the plan summary will control

- ERISA imposes fiduciary duties
  - Do not apply when plan is created or amended—only to plan’s administration
  - These duties require the fiduciary to act solely in the interest of the participants and beneficiaries

- Governs two types of benefits:
  1. Pensions
2. Welfare—any plan, fund or program established by an employer, an employee organization, or both, for the purpose of providing certain enumerated benefits, through the purchase of insurance or otherwise, to participants and their beneficiaries, including:
   - Medical, surgical or hospital care or benefits
   - Benefits in the event of sickness, accident, disability, death, or unemployment
   - Vacation benefits

Pensions
- Why employers offer pensions:
  - Help regulate their workforce
  - Attract better qualified employees
  - Keep good employees—employee receives benefit for long term service

- Two Types of Pension Benefits:
  1. Defined Benefit Plan—offers a fixed benefit during retirement, typically based on a formula that takes into account (1) an employee’s highest (or average) salary with the employer and (2) length of service
     - Certain dollar amount is promised
     - Employers bears the risk
     - Benefits older employees—account typically increases the most in the last years before retirement

     - Employee:
       - Pros
         - Benefits last throughout employee’s lifetime
         - Insured by federal corporation
     - Employer:
       - Pros
         - Encourages employee loyalty
         - Employer is entitled to any surplus
       - Con
         - Administratively cumbersome
         - Substantial liabilities
         - Estimate life expectancies

  o Cash Balance Plan—Employer establishes a kind of hypothetical employee account that accrues benefits for each year of service and also accrues interest on those benefits
    - Guaranteed benefit
    - Employer bears risk
    - More portable
    - Not dependent on accumulated length of service since pension credit is awarded equally each year
    - Benefits younger employees—get longer period of time to accrue interest
• Does not constitute age discrimination so long as the plan applies to all employees because nothing depends on age except the time value of money

- Employee
  - Pros
    o Easier to understand
    o Allow greater portability
    o Benefits accrue more evenly

- Employers
  - Pros
    o Lessens risk—promised rate of return rather than fixed amount for remainder of retiree’s life
    o Attracts younger employees
    o Surplus belongs to employer

2. Defined Contribution Plan
   - employee, and typically the employer, make contributions into an individual account for each employee, and the employee is responsible for managing the plan
     o Certain contribution to employee’s by employer is promised
     o Employee bears the risk

   - Employee
     - Pros
       • Higher potential for benefit returns
         o Employee controls investment
         o Employee can choose among varying plans and risk levels
       • More portable
         o Employee contributions vest immediately
         o Maximize pension without staying with one employer

     - Cons
       • Risk is on employee (pro for employer)

• Pension benefits MUST vest after a certain period of time
  o Benefits of a pension occur in the future—significant risk of loss
  o Once a pension benefits vests, it cannot be altered and must be paid to the employee at her normal retirement age
    ▪ Expected benefits can be altered or eliminated

Health Benefits
• ERISA does not require the vesting of health benefits
  o BUT Employers can choose to vest benefits
    • Intent to vest must be found in plan documents in clear and express language
  • Why not require vesting:
    o Employers need flexibility to accommodate changing medical costs/medical costs are harder to predict than pension costs
Pension benefits are deferred compensation
- Health benefits are used as needed—less risk of losing them

Employers can alter benefit plans at anytime—generally nothing in plan is permanent/guaranteed
- Can discriminate against diseases so long as every employee is offered the same plan

Interference with ERISA Rights
- §510 protects against interference with employee benefit plan
  - Protects both vested and unvested benefits
    - Employee benefit plans consist of pension and welfare benefits—by their nature, welfare benefits are unvested
    - §510 MUST protect both vested and unvested benefits
  - An act is illegal if taken with the purpose of interfering with benefits, regardless of how many workers are affected by the act

Three Types of Benefits Protected under §510
1. Benefits not capable of vesting
2. Benefits capable of vesting but not yet vested
3. Benefits already vested but will accrue in the future—interference with the right to accrue future benefits
   - If employer has a plan in place, employer must abide by that plan until employer changes it

Prima Facie Interference Case:
1. Plaintiff needs to prove that defendant’s desire to interfere with benefits is a determinative factor in challenged conduct
2. Burden shifts to defendant to prove that it would have reached the same conclusion or engaged in the same conduct in any event
3. If defendant carries burden, plaintiff must demonstrate that the proffered justification is a mere pretext, or that the discriminatory reason more likely motivated the defendant’s action

Preemption
- ERISA has broad preemption clause—§514
  - Creates uniformity
    - Easier for companies to provide plans
    - Plan administration is less costly
  - Problem: ERISA does not regulate welfare benefit plans substantively and broad preemption clause often prohibits States from providing substance
• ERISA preempts any and all State law which relate to any employee benefit plan
  o **Relate to** has a connection with or reference to such a plan
    ▪ Exceptions: state laws regulating insurance, banking and securities
      • Areas of traditional state regulation
    ▪ Supreme Court has held that state statute requiring minimum mental health care benefits was not preempted by ERISA
  ▪ ERISA does not regulate vacation pay, generally—regular compensation
    • WILL regulate benefit funds paid into by multiple employers
      o Vacation pay does not need ERISA’s special protection:
        ▪ Fixed amounts
        ▪ Due at fixed times
        ▪ Low risk of fund mismanagement
  o **Deemer Clause** no employee benefit plan shall be deemed to be an insurance company for purposes of any state law purporting to regulate insurance companies or insurance contracts
    ▪ State cannot regulate self-insured employers—regulated exclusively by ERISA

• A state law claim may be preempted by ERISA in one of two ways:
  o §514 anything not falling within savings clause
  o §510 existence of remedial scheme implies that Congress intended that it should be the only remedy
  o If existence of employee benefit plan is critical to establishing liability under state law claim—ERISA preempts

**WORKERS’ COMPENSATION**

• Prior to Workers’ Compensation, only recourse for injured workers or their survivors was to bring tort claim to try and recover damages
  o Common law defenses:
    ▪ Fellow Servant Rule
    ▪ Assumption of Risk
    ▪ Contributory Negligence
  o Market Theory governed employers who operated dangerous workplaces would have to pay workers more to compensate them for the greater risk of injury
    ▪ Because they are forced to pay higher wages, employers have incentive to take measures to make workplaces safer
    ▪ Employee can use higher wages to buy insurance or save in case he is injured
      • Since employer is not responsible for safety, employee has incentive to act in ways that make him safer
    ▪ Equity Problem all employees get wage premium but only a few need it

• Workers’ Compensation was initially upheld as a valid exercise of State’s police power
• Goals of Workers’ Compensation:
  o Compensation
    ▪ Medical expenses/rehabilitation
    ▪ Partial lost wages
  o Prevention
    ▪ Indirectly: Employers buy insurance, more accidents mean higher insurance rates for employers, employers have incentive to make workplace safer to lower insurance costs

• Workers’ Compensation Bargain:
  o Employer assumes liability for workplace personal injury or death without regard to fault in exchange for limitations on the amount of that liability
  o Employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault in exchange for a wider range of damages potentially available in tort

• Damages:
  o Character of injury
  o Difference in pre-injury wage and post-injury wage

Non-Physical Torts
• State Court split regarding whether IIED claims are barred by Workers’ Compensation exclusivity:
  o Yes ➔ If the emotional injury is caused by employer actions that are a normal course of the employment relationship, exclusivity bars the IIED claim
  o No ➔ IIED claims fall within the exception for intentionally caused injuries

• Torts NOT barred by exclusivity:
  o Defamation and malicious prosecution
    ▪ Injury is not physical or mental
  o Wrongful discharge in violation of public policy
    ▪ Misconduct in violation of public policy is not part of bargain
    ▪ Fundamental public policy is duty imposed by law—cannot be bargained around and is not preempted by other statutory remedies

• When determining exclusivity, many courts look to the nature of the underlying injury
  o Is the injury a type that the legislature contemplated when it enacted Workers’ Comp?
  o Is the injury part of the workplace bargain?

Framework for Compensable Injury
1. Is the worker an employee?
   • Not and independent contractor
• Should be express or implied contract

2. Did the injury arise out of employment?
• A causal connection between the conditions under which the work is required to be performed and the resulting injury
  o The injury must have resulted from an incident involving mental stress of an unusual or abnormal nature, rather than day-to-day mental stresses and tensions to which workers in that field are occasionally subjected

3. Did the injury arise in the course of employment?
• Took place while an employee was performing a duty he or she was employed to perform
  o Focus is on the time, place and circumstances of the injury
    ▪ Regular working hours?
    ▪ Does the employer benefit from the activity?
    ▪ Was the act expressly or impliedly required by the employer?
    ▪ Activities beyond regular duties are typically found to have arisen during the course of employment if undertaken in good faith to advance the interests of their employer

See 627-631 in treatise

4. Was there a substantial deviation from the employee’s course of employment?
• Considerations:
  o Extent and seriousness of the deviation
  o Completeness of the deviation (i.e. whether it was commingled with the performance of duty or involved an abandonment of duty)
  o Extent to which the practice of horseplay had become an accepted part of the employment
    ▪ Generally judged from employee’s perspective
  o The extent to which the nature of the employment may be expected to include some such horseplay
    ▪ Foreseeability of the horseplay

5. Is Workers’ Compensation the exclusive remedy?
• Intentional tort—Workers’ Comp covers accidents, intentional torts are not accidents?
  o Did the employer actually intend to cause injury to the employee?
  o Was the employer substantially certain that death or serious bodily injury would occur?
  o Did employer act in a way that was not contemplated by the bargain?
  o Does State recognize IIED intentional tort claim?

• Wrongful discharge in violation of public policy?
• Was the injury of a type contemplated by the legislature when it enacted Workers’ Comp? Is it part of the workplace bargain?

ARBITRATION
• Arbitration agreement does not change the parties’ substantive rights
  o Merely changes the forum where the parties’ substantive rights are adjudicated

• How arbitration can be beneficial to employees:
  o Faster
  o Cheaper
  o Informal atmosphere makes it easier to resolve a dispute without attorney
  o More conducive to reconciliation

• Purpose of Federal Arbitration Act: place arbitration upon the same footing as other contracts
  o Arbitration agreement is valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

• The issue of whether an arbitration agreement is valid is a matter for the courts—not the arbitrator

• *Gilmer v. Interstate/Johnson Lane Corp.* Parties should be held to agreements to arbitrate

• With collective bargaining agreements, typically only the only claims to which the arbitration agreement applies are contractual claims made by the union
  o In this situation:
    ▪ Individual employee with statutory claim can adjudicate
    ▪ Conflict of interest issue—tension between collective representation and individual statutory claim

• Why arbitration is better suited for collective claims:
  o Union and employer are repeat players—only neutral arbitrators will be hired again
    ▪ With individual claims, only employer is repeat player
  o Union and employer can re-write contract if they don’t like arbitrator’s interpretation
    ▪ Mandatory arbitration agreements are given on take-it-or-leave it basis
  o Collective bargaining context deals with contractual rights which are created, defined and subject to modification by the parties—private interest
    ▪ Statutory rights are created, defined and subject to modification by Congress and the courts—public interest in having rights enforced lawfully
  o Union and employer are not concerned with lack of disclosure because awards usually only involve their rights/concerns
    ▪ Lack of public disclosure favors employer
      ▪ Individual does not have access to information to build a case/establish pattern of conduct
  o Union and employer can negotiate arbitration procedures
    ▪ Individual does not have bargaining power to engage in this negotiation
• Factors to consider with respect to enforceability of arbitration agreement:
  o Neutral arbitrators
  o More than minimum discovery
  o Written award
  o Relief available is that which would be available in court
  o Who is responsible for arbitration costs (employee is not unduly burdened)
    ▪ Should be considered on case-by-case basis

• *Cole v. Burns International Security* at a minimum, statutory rights include both substantive protection and access to a neutral forum in which to enforce those protections
  o Procedural rule cannot block effective vindication of substantive right
  o Even though arbitration agreements are permissible, those agreements must still be scrutinized

• A different approach is to say: when the employer agrees in the arbitration agreement to create procedural rules to be followed by the parties in arbitration, if they rules are biased toward the employer, the employer has violated its duty to act in good faith

• Part of the problem with arbitration agreements is that they usually occur at the outset of employee relationship
  o This makes it difficult for an employee to make an informed cost-benefit analysis because the employee doesn’t know what she is giving up and the differences between arbitration and court
- *Lochner v. New York* (1905) → NY law limiting the number of hours bakery employees could work was unconstitutional.
  - Not a health law—illegal interference with the rights of individuals to make contracts

- *NLRB v. Jones & Laughlin Steel Corp.* (1937) → NLRA is constitutional.

- *Board of Regents v. Roth* (1972) → If an employee is fired in a manner that stigmatizes the employee, the 14th Amendment’s liberty interest is violated if the employer does not provide the employee with procedural due process.

- *Cleveland Board of Education v. Loudermill* (1985) → A public employee with a legally recognized interest in continued employment has a property right within the meaning of the 14th Amendment that the state cannot take away without providing procedural due process.
  - Interest can be created through:
    - Statute
    - Regulation
    - Implied or express contract
  - Due process requirements:
    - Notice of charges
    - Meaningful opportunity to be heard

- *Textile Workers Union v. Darlington Manufacturing Co.* (1965) → Under the NLRA, an employer has the absolute right to terminate his entire business for any reason he pleases, but that does not include the ability to close part of a business no matter what the reason.

- *NLRB v. Gissel Packing Co.* (1969) → An employer is free to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control but not threats of economic reprisal to be taken solely on his own volition.

- *First National Maintenance Corp. v. NLRB* (1981) → A management decision that has a direct impact on employment but has as its focus for management a concern for economic profitability wholly apart from the employment relationship is a mandatory subject of bargaining if the benefit for labor management relations and the collective bargaining process outweighs the burden placed on the conduct of the business.

- *O’Connor v. Ortega* (1987) → Public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judges by the standard of reasonableness under the circumstances. Both the inception and scope of the intrusion must be reasonable.
In determining the reasonability of the search, the court must balance the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control and the efficient operation of the workplace.

- **Connick v. Myers** (1983) ➔ First Amendment only protects public employee’s speech which is a matter of public concern—if this threshold is met court can apply *Pickering* balancing test

- **Garcetti v. Ceballos** (2006) ➔ When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline

- **NLRB v. Washington Aluminum Co.** (1962) ➔ employees’ action of leaving work without permission in protest of extreme cold as a result of a broken heater was protected concerted activity.
  - NLRA §7 is broad enough to protect concerted activities whether they take place before, after or at the same time a demand is made.

- **West Coast Hotel v. Parrish** (1937) ➔ Upheld Washington State minimum wage law for women and children as constitutional

- **Alvarez v. IBP, Inc.** (2005) ➔ time spent waiting for safety equipment is not compensable under FLSA but time putting safety equipment on and anytime after equipment was on is compensable

- **Metropolitan Life Insurance Co. v. Massachusetts** (1985) ➔ state law requiring specified minimum mental health care benefits regulates insurance and therefore falls within ERISA’s savings provision.

- **Massachusetts v. Morash** (1989) ➔ Company’s policy of paying discharged employees for unused vacation time is not an employee welfare benefit plan within the meaning of ERISA.
  - Policy constituted a payroll practice

- **Ingersoll-Rand v. McClendon** (1990) ➔ wrongful discharge claim that employee was unlawfully discharged to prevent his attainment of benefits under a pension plan covered by ERISA is preempted by ERISA.
  - The existence of a pension plan is a critical factor in establishing liability under state’s wrongful discharge law.
  - Cause of action conflicts with ERISA §510 which creates a remedial scheme for certain ERISA violations

- **New York Central Railroad Co. v. White** (1917) ➔ upheld New York’s Workers’ Compensation Act as a valid exercise of State’s police power
• *Gilmer v. Interstate/Johnson Lane Corp.* (1991) → parties should be held to arbitration agreement unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue