I. INTRODUCTION AND HISTORICAL BACKGROUND (1-48)
   A. THE MEANING OF WORK
         a. for many, work is a “Monday through Friday sort of dying”
         b. unemployed
            i. seek work for tangible and intangible rewards (defines person)
            ii. autonomy is expressed and reinforced by free choice of work
            iii. work was medium through which free men demonstrated citizenship
         c. today, work means:
            i. sustaining ourselves and families
            ii. self-sufficiency and industriousness
            iii. learning tasks … increasing authority … increasing pay
            iv. central to the American dream
            v. health care and pensions that attach to jobs
            vi. decent child care becomes family concern
            vii. family status and family security
            viii. exercise of responsibility
            ix. connected to citizenship values of respect, independence, participation
            x. proving yourself in your own eyes and others’
         d. you become your job – work shapes individual identities, general and particular
         e. the work we do affects others’ evaluations of us
         f. rough popular status-ordering of types of work – strongly influenced by differences in
            pay and also affected by:
            i. power associated with a job
            ii. importance of the work to society at large
            iii. difficulty of entry into the job
            iv. individual’s independence in performing the task
            v. complexity of the work
            vi. level of creativity
            vii. level of training
      2. work and gender
         a. significance of work same for men and women?
         b. Vicki Schultz: structure of employment shapes workers’ attitudes about gender roles
            … arguable that work law should play a central role in furthering sex equality – paid
            work should serve as a foundation that secures to all women and men a source of
            equal citizenship, economic wherewithal, social ties, and personal identity
      3. work and race
         a. studies suggest significance of work not same across racial lines
         b. African American workers place higher priority on solidarity with other workers than
            whites
         c. African Americans have higher propensity for collective action/union organization
      4. right to work as constitutional right?
         a. if so important, why not constitutional right?
         b. assertion of an employer’s duty would encounter “state action limitation” read into
            Fourteenth Amendment
         c. statute imposing similar duty would be unconstitutional invasion of employer’s sphere
            of private liberty
d. no comparable duties could be imposed on the states or Congress – government’s duty is noninterference – judges can’t compel legislators and executives to employ the unemployed or take other action on their behalf

B. Historical Roots of Employment At Will

1. early nineteenth century
   a. absence of law regulating employment relationship
   b. employment relationship was master and servant
   c. presumption employment was at will – could be terminated freely by either party with no notice or cause

2. Payne v. The Western & Atlantic Railroad Co. (SCt. Tenn. 1884)
   a. railroad prohibited its employees from trading with merchant Payne
   b. claim is breach of interference with employment relationship
   c. court holds an employer can demand an employee not trade with an individual on penalty of discharge
   d. employment is terminable at will – can discharge for any reason or no reason at all
   e. reasons from general principles – a matter of common law – cites no authority
   f. general principle here is that there’s a freedom to contract with who you will on whatever terms you will
   g. principle limited if parties contracted for fixed term and employer requires something illegal
   h. no authority is cited for the at will rule – this case is the classic statement of the at will doctrine
   i. what kind of response would the at will doctrine provoke from employees?
      i. they could unionize; lobby for a change in law; demand a contract with the employer; work for someone else – market response

3. American rule
   a. Payne first case to embody the American rule of employment at will – can discharge workers for “a good cause, for no cause, or even for cause morally wrong”
   b. still default rule, despite exceptions created by legislative enactment and common law
   c. rooted in though employer has legal right to control operation of its enterprise; workers have right to be paid for labor performed and nothing more

4. employers’ needs for flexibility
   a. employment at will justified by employers’ need to be flexible in response to business fluctuations
   b. explains present-day deference to managerial prerogative

5. employers as guardians of the social welfare
   a. assumed employers would ct as guardians of social welfare – choices may disadvantage individuals, but benefit overall community through business expansion

6. collective action
   a. judicial reaction to early efforts of workers to organize was hostile – perceived as disloyal, selfish, and greedy – criminal conspiracy to injure public welfare (demands for wage increases caused higher prices for goods)
   b. mid-nineteenth century – focus shifted from hostility at organization to the means of protest
   c. strikes and pickets viewed as disloyal
   d. unionism was perceived as challenge to state as sovereign – subversive societies – attempting to legislate without constitutional authority and force employers to follow union mandates instead of state regulations of business

B. The Rise and Fall of Freedom of Contract

1. SCt. elevated employer’s right to discharge to a constitutional due process right
a. federal legislation infringing on the two-sided bargain (employee can quit whenever, employer can discharge whenever) by compelling employer to retain workers is invasion of liberty as well as right of property, guaranteed by the Fifth Amendment
b. subsequently, similar state legislation was invalidated under due process clause of Fourteenth Amendment
c. followed that employers also possessed right to establish standards of employment (rates and hours) through private contract
d. courts applied freedom of contract rationale more broadly to strike down minimum standards legislation enacted by states (Lochner)

2. **Lochner v. New York (SCt. 1905)**
   a. issue: constitutionality of state labor law limiting hours bakers could work
   b. held unreasonable exercise of the state’s police power – interferes with rights of the parties to contract for more than that amount of hours
   c. Constitution guarantees the right to liberty (right to contract)
   d. policy justifications of the state: states can exercise police power by enacting legislation that protects the health and welfare of bakers or the public
      i. Court responded no relation between the number of hours a baker works and the cleanliness of the bread; if you interfere with bakers, then any profession could be regulated (a situation where the court may have come out differently would be with truck drivers, miners, wards of the state, etc.)
   e. reasons to regulate something like hours where they might impact health
      i. inequality of bargaining power
      ii. sense of if the hour limit were more extreme this wouldn’t be an issue – the connection to health would be clear (like 18 hours per day)
      iii. competition between bakeries may push the hours up and the legislature may need to step in and set a ceiling
      iv. relying on the market/workers to bargain for their own interests – requires the workers fully understand their own interests and bakers’ health risks may not materialize until years later

3. slippery slope of government intervention in the market
   a. worried legislation to protect bakers’ health might go to other unknown lengths
   b. distinguished other professions that may need more regulation (i.e., truck drivers, miners, wards of the state, etc.)

4. protective legislation for women workers
   a. **Lochner** aberration in historical context – one of few pre-1920’s cases invaliding protective labor legislation
   b. court later upheld state statute limiting working hours of women in mechanical establishments, factories, or laundries (**Muller**)
   c. distinguished **Lochner** because of women’s physical organization, maternal function, rearing of children, and maintenance of home – justified intervention and didn’t offend liberty of contract

5. **Lochner’s** revival: a gender-neutral freedom of contract?
   a. **Lochner** was later expanded to cover women as well
   b. Court struck down minimum wage law for women and children (**Adkins**) as violative of Fifth Amendment due process and not defensible as exercise of police power

6. a turning point
   a. **West Coast Hotel** (1937) Court changed gears and upheld minimum wage law for women
   b. one factor was Great Depression and public’s support of minimum wage protections
   c. if workers can’t make a living wage, burden of their support cast on community
C. THE NEW DEAL LABOR LEGISLATION
1. 1933 New Deal was program of legislation to spur economic recovery after Great Depression
   a. policy was to reduce wage competition so workers would enjoy higher wages and more secure employment – thus spending more money and stimulating growth that would create jobs
   b. committed to regulation at the local level by agreement between employers and employees
   c. core was commitment to labor unionism as a vehicle for worker representation and collective bargaining to establish terms and conditions
   d. ultimately, NLRA of 1935 protected right to organize and imposed obligation on employers to bargain collectively with union representative
   e. ultimately, FLSA of 1938 regulated federal wage and hour law – threshold minimum wage and incentives to spread work
2. the labor laws
   a. NLRB v. Jones & Laughlin Steel Corp. (SCt. 1937)
      i. dispute over how employer treats labor organizers
      ii. basis of the company’s challenge is whether the NLRA is constitutional – held constitutional
      iii. turns on section of NLRA permitting the board to prevent unfair labor practices that affect interstate commerce
      iv. NLRA guarantees the right to organize, select your own representatives, and collectively bargain
      v. one of the policies behind it is that there is unequal bargaining power between employers and employees and that should be minimized or eliminated
      vi. the connection with interstate commerce is that strikes tend to disrupt interstate commerce, particularly with large, national companies like this one
      vii. does the NLRA impose substantive requirements on the relationship? no, doesn’t compel anyone to do anything – relies on contractual approach
         1. merely requires good faith negotiation with respect to wages, hours, and other terms and conditions of employment
      viii. NLRA came out of a time of intense labor unrest
         1. if we guarantee the right of employees to organize, disputes will be channeled into the bargaining context as opposed to resulting in work stoppages
      ix. NLRA protects right of self organization and facilitates labor peace – 2 central purposes
         1. Senator Wagner suggests the NLRA promotes the ideals of democracy: “let men know the dignity of freedom and self-expression in their daily lives, and they will never bow to tyranny in any quarter of their national life” – the experience at work shapes the workers’ political attitudes to some degree … promotes both industrial and political democracy
         2. if workers are content, that may curb their impulses to act politically, and the idea of industrial democracy is very must a correlation to political democracy
3. impact of strikes on the American economy
   a. a central justification for Wagner Act – need for federal control over labor policy
   b. work stoppages were extraordinarily disruptive – particularly during wartime
4. the Wagner Act as amended (sum of amendments – NLRA)
   a. Taft-Harley (1947)
      i. curbed power of organized labor
ii. added right of employees to refrain from organizing or becoming union members
iii. eliminated closed shop
iv. added union unfair labor practice provisions
v. conferred power on the Board to prevent unfair labor practices by unions
vi. imposed limits on “blackmail” picketing by unions

b. Landrum-Griffin (1959)
i. curbed union power further
ii. banned use of secondary boycott
iii. targeted use of internal union corruption and lack of democratic process
c. Section 7 of NLRA: right to organize, bargain collectively through chosen representatives, engage in concerted activity … for the purpose of collective bargaining or other mutual aid or protection
i. enforceable by filing unfair labor practices charges under Section 8(a) or 8(b)
ii. collective bargaining obligation defined in Section 8(d)
   1. required on mandatory subjects: wages, hours, and terms and conditions of employment
   2. not on permissive subjects: plant closings and product marketing
   3. obligated to negotiate in good faith the impasse
   4. Act doesn’t compel agreement

5. enforcement of the NLRA
a. enforced by the NLRB – investigates and prosecutes unfair labor practices
b. NLRB’s quasi-judicial arm resolves case – first through ALJs, then through a five-member board, then the CTA, then the Supreme Court
c. Act provides for only “make-whole” equitable relief: back pay, reinstatement, orders to post notices detailing the violation and the remedy ordered, and injunctive relief
d. fines, punitive damages, and other penalties are not available (except against unions who violate the Act’s secondary boycott prohibitions)
e. lengthy procedural delays (3 years plus)
f. employers can hire permanent replacement to fill positions of striking employees
   i. lawfully may decline to reinstate a striker so long as position continues to be occupied by a replacement worker
   ii. deters effectiveness and leverage of strikes
   iii. strike replacements can vote in representation elections, voting right of displaced strikers end 12 months after beginning of strike
   iv. effectively gives employer means to rid itself of a union

a. mechanisms to deal with social or economic problems:
   i. market mechanism of exit and entry
   ii. political mechanism (“voice”)
b. collective bargaining is necessary for effective voice because (1) important aspects of industrial setting are “public goods” – goods that affect the well-being of every employee; (2) workers tied to a firm unlikely to reveal true preferences to an employer, for fear employer may fire them
c. if workers could find employment at the same wages immediately, the market would offer adequate protection for the individual, but that isn’t so

7. effects of unionism – by late ‘40s, early ‘50s, trade unionism reached it peak

8. unions as a lobbying force for workers’ rights
a. during ‘60s – lobbied for legislation protecting rights of all workers, not just unionized
b. important political force in enactment of Title VII, OSHA, and ERISA, etc.
c. finance and pursue important impact legislation – pay equity cases advancing the
theory of comparable worth and challenges to maternal fetal protection policies
9. theory of industrial pluralism
a. model of social interaction between employers and employees that eschews outside
interferences – workers empowered to fend for themselves
b. workplaces are miniature political democracies
c. governed by the agreement, rather than outside law – expressly contractarian ideology
d. seeks to put an end to individual bargaining
10. practice of collective bargaining
a. typical agreement pertains to four topics:
   i. union security and management rights
   ii. wage and effort bargain
   iii. individual job security
   iv. administration
11. the decline of unionism, collective bargaining and labor law
a. by 1980, union membership was declining
b. currently, numbers are very low
c. decline attributed to a number of factors, including:
   i. shift in employment from industrial production to white-collar and service work
   ii. substitution of new technology for manufacturing workers and corresponding
      loss of union membership
   iii. shifting demographics of labor force by age, sex, race, ethnicity, and education
      and labor’s failure to adapt is organizing and representation to new workforce
   iv. growth of contingent workforce
   v. globalization of labor and out-sourcing of manufacturing and other low-skilled
      job to the south or to western states where union density is low and more
      recently to low-waged foreign countries
   vi. hardening of employer resistance to unionization, remedial shortcomings of the
      NLRA, and law’s hostility toward organized labor
   vii. tendency toward bureaucracy and complacency in union leadership, loss of
      militancy, and concomitant drop in class consciousness of workers
   i. argues legislative gridlock and judicial application of a strong federal preemption
      doctrine have operated to prevent labor law from adapting to suit modern work
      practices and to isolate it from the creative innovations that have characterized
      the common law of employment and the evolution of constitutional theory and
      doctrine
   ii. ossification of American labor law – has been essentially sealed off both from
democratic revision and renewal and from local experimentation and innovation
   iii. party due to political impasse at federal level
   iv. broad implied federal preemption of state and local laws affecting collective labor
      relations blocks democratically inspired reforms or variations at that level
   v. imperviousness of labor law to most constitutional scrutiny – insulated labor law
      from evolving legal norms
   vi. resistance to transnational legal authority – insulated it from influence of
      international human rights, etc.

D. THE EMERGING INDIVIDUAL RIGHTS MODEL
Review and Critical Assessment (2002)*
a. survey of the individual rights-based statutory and judicial doctrine that have supplanted unionism and collective bargaining for the majority of employees as the primary source of workers’ rights

b. newer statutory enactments: (1) statutes that prohibit discrimination on the basis of certain protected characteristics; (2) statutes that establish minimum workplace requirements

c. antidiscrimination statutes:
   i. Title VII of the Civil Rights Act
   ii. Age Discrimination in Employment Act of 1967
   iii. Americans With Disabilities Act of 1990
   iv. provide protection to workers, not as workers, but as members of a protected class
   v. employers are only prohibited from discriminating – not required to act on the basis of notions of fairness or cause

d. substantive statutory regulation
   i. Occupational Safety and Health Act (OSHA)
   ii. Employee Retirement Income Security Act (ERISA)
   iii. Worker Adjustment and Retraining Notification Act (WARN Act)
   iv. Family and Medical Leave Act (FMLA)

e. judicially created limitations on the at-will rule
   i. over past fifteen years, courts less tolerant of at-will rule
   ii. courts more receptive to adapting traditional tort and contract theories as basis for challenging employment decisions
   iii. various state courts have recognized new causes of action in the employment context:
       1. public policy tort
          a. bar employers from terminating employees who refuse to commit an unlawful act, who exercise statutory rights, or who report employer’s unlawful conduct
       2. contract claims
          a. contract-based exception to at-will rule
          b. imply contractual obligations, such as some form of job security of disciplinary procedure, from an employer’s unilateral promise expressed orally or in an employee handbook
       3. covenant of good faith and fair dealing
          a. a few jurisdictions read a covenant of good faith and fair dealing into employment agreements – requires each party in an employment relationship refrain from acting in bad faith that frustrates the other’s expectations of receiving the benefits of his or her bargain

II. **The Contemporary Era – Shifts in the Demographics and Structure of Work (51-56; 68-72; 74-79)**

A. The Workforce of the Future

   1. five assumptions governed model of work law during the historical period, above:
      a. US economy relatively self-contained so standardizations of wages and working conditions could be implemented without fear of undermining national economy
      b. public economy supported by private, non-waged work of women who were primarily committed to homemaking for the breadwinner on whose wages the family depended
      c. employment norm was full-time, long-term, and stable
d. corporation itself was a large, often industrial, firm with clear boundaries between itself and the external business environment – also clear distinctions internally between management and workers

e. social contract embodied the expectation that wages would rise with seniority and job tenure and the fortunes of employers and workers would be linked so earnings would rise with prosperity

2. contemporary era defined by steady undermining of the above assumptions

   a. over next 50 years, labor force projected to grow much more slowly
   b. women’s share has leveled off at around 48%
   c. lead to slower growth in the economy and slower growth of federal revenues
   d. labor force also projected to become older and more racially and ethnically diverse
   e. global interdependence and technological change will also affect workforce
   f. knowledge-based economy and innovations in management have contributed to need for increased skill levels in many industries
   g. changes have potential to increase wage gap, with significant socioeconomic implications

4. increased diversity
   a. almost half of workforce of 2050 will be minorities
   b. one in four job seekers will be child of a Latino immigrant by 2020

5. an aging workforce
   a. 20% of workforce in 2020 will be older workers
   b. challenges posed by inadequate elder care will grow
   c. due to increases in life expectancy, number of people relying on their adult working children for support will double by 2025
   d. slowdown in labor force growth suggests employers may fill their labor needs by encouraging workers to remain past retirement age

6. women in the workforce
   a. need to combine paid work with care-giving will increase flexible schedules, flex-place, job sharing, and other alternative work arrangements needed to attract and retain skilled workers and to maximize their productivity

7. changes in work time?
   a. question of how much time Americans spend at work is debated – conflicting studies

8. recent economic downturn
   a. in 2000 – US labor market fell into a recession for the first time in 10 years
   b. unemployment rose drastically, particularly for low-income employees
   c. earning inequality has risen
   d. trend toward increased hours of paid work has continued
   e. recovery from downturn been slow

9. the decline of unions and the growth of income inequality
   a. decline of unions and collective bargaining is likely to contribute to an increase in earning inequality, particularly among minorities who’ve benefited most from them

10. the impact of new technologies in a knowledge-based economy
    a. in the future, most work will be performed by computers, and skills will be redefined as a result
    b. focus is on recruiting workers with more education who possess the ability to learn and manipulate new technology as it evolves
    c. (less emphasis on workers with expertise-specific skills like programmers, web developers, etc.)
d. bachelor’s degree will become a minimum

c. technology will improve opportunities for disabled workers = voice recognition software, alternative keyboards, and other assistive measures

d. pressures of global competition will encourage offshoring of jobs, including high-skilled job

e. continue to outsource low-skilled work as well

h. service sector work at the low end of the occupational hierarchy will continue to be available in the US, but American workers will compete with immigrants for this work

11. outsourcing: which jobs are vulnerable?

a. jobs that can be reduced to a concrete description or a series of rules can be shifted overseas or to computers (manufacturing, call centers, tax return prep, reading or X-rays, software design, and architectural engineering)

b. jobs requiring human contact or which rely on complex skills, recognizing patterns, or exercising judgment are more resistant to outsourcing (nursing home aides, janitors, gardeners, massage therapists, primary school teachers, realtors, dentists, political lobbying, advertising)

B. THE RECONSTRUCTION OF WORK: “PRECARIOUS EMPLOYMENT”

1. New “New Deal”


i. “new psychological contract” or “new deal at work” – long-standing assumption of long-term attachment to a single firm has broken down

ii. employment identity comes from attachment to an occupation, a skills cluster, or an industry – not an employer

iii. firms now expect turnover – encourage workers not to expect career-long job security

iv. features of new psychological contract:

1. promise of training to enable employees to develop their human capital to insure they remain employable

2. promise of networks

3. compensation systems that peg salaries and wages to market rates rather than to internal institutional factors

4. flattening of hierarchy

5. lateral as well as vertical movement

6. promotion of contact between employees at all levels and firm constituents (suppliers, customers)

7. use of company-specific dispute resolution devices to redress perceived instances of unfairness


i. takes position of above article

ii. employers less inclined to view employment relationships as permanent – limited incentive to invest in long-term productivity of individual workers

iii. employers outsourcing skills-acquisition process – looking for employees who come with requisite training/experience

iv. desirable to reduce individuals’ dependence on employers for other types of benefits (i.e., health insurance, retirement funds)

v. employment relationships becoming shorter, but more demanding: employers seek employees who engage in “extra-role” behavior, or discretionary activity that goes beyond bare work requirements
vi. in contemporary economy, performance more difficult to monitor, frequent changes in standards, fluidity of job assignments, and intangible nature of work product – employers encourage “tournament” style behavior through implicit promises of above-average compensation and bonuses for employees who outperform their peers

c. the “new psychological contract”
  i. management theorists and CEOs have embraced the idea, though some have not committed to all the elements – particularly training
  ii. a number of commentators believe the majority of workers hold core labor market job that feature training, prospects of continuity, and advancement

d. the demise of the seniority principle

2. contingent employment
      i. from beginning, employment relationship characterized by:
         1. personal master/servant relationship
         2. full-time
         3. continued for a substantial period or indefinitely
      ii. not all employment relationships fit model – “contingent,” “atypical,” “peripheral” employment not a new phenomenon
      iii. contingent employees have greatly increased over past 20 years
      iv. roughly 25-30% of workers are contingent
      v. many are hired to cut costs (lower wages and benefits)

      i. various tests adopted to determine employee status for purposes of protective labor and employment legislation
      ii. common law agency test: most restrictive; focuses on employer’s right to control result of work and details and means by which result reached – if right to control exists, worker is deemed an employee. if not, independent contractor.
      iii. “economic realities” test: used to determine status under FLSA; an employee as a matter of economic reality follows the usual path of an employee and is dependent on the business for which he serves
         1. right to control still important
         2. asks whether the putative employee is economically dependent upon the principal or instead is in business for himself
      iv. “hybrid” test: popular in ‘70s and ‘80s in federal courts to determine status under federal discrimination statutes
         1. examine the economic realities of the work relationship, but with particular emphasis on the employer’s right to control the means and manner of the worker’s performance
      v. SCt. reinvigorated common law test in 1992 – *Nationwide Mutual Insurance Co. v. Darden* (issue of appropriate test for employee status under ERISA)
         1. limited economic realities test to FLSA
         2. instead adopted 13-factor formulation\(^1\) of the common-law test

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\(^1\) 13 factors: (1) hiring party’s right to control manner and means by which product is accomplished; (2) the skill required; (3) the source of instrumentalities and tools; (4) location of the work; (5) duration of the relationship between parties; (6) whether hiring party has right to assign additional projects to hired party; (7) extent of the hiring party’s discretion over when and how long to work; (8) method of payment; (9) worker’s role in hiring and paying assistants; (10) whether work is part of regular business of the hiring party; (11) whether hiring party is in business; (12) provisions of employee benefits; (13) tax treatment of the hired party
3. problematic because unpredictable; prone to entrepreneurial manipulation; and inconsistent with the fundamental objectives of modern labor and employment legislation
4. common-law test used in 19th century to determine reach of respondeat superior blind to goal of protecting individual workers who lack bargaining power to protect their own interests
5. focuses too much on right to control, and denies benefits of protective social legislation to many workers who labor under subordinate economic circumstances

c. legal issues raised by the growth of the contingent workforce
   i. generally, contingent workers fall outside statutory protection in employment
   ii. part-time workers suffer more than a pro rata cut in salary and customarily are not afforded benefits
   iii. advancement opportunities are limited
   iv. job security is negligible
   v. 70% of part-time workers are female; disable persons, teenagers, and over 65

d. who is an employee?
   i. line between independent contractors and employees? significant because individual employment statutes and NLRA exclude independent contractors from coverage
   ii. there’s no uniform test – issue should be examined in context of the legislative purpose of the particular statutory rights at issue

e. “permatemps”
   i. Vizcaino v. Microsoft (1997) – “independent contractors” working at Microsoft hired through a third-party staffing agency were common law employees entitled to participate in a stock option plan that excluded non-employees.
   ii. following an audit, the IRS found them to be common-law employees under Darden’s 13-factor test
   iii. decision was first to utilize the joint employer doctrine to hold both contracting entities and outsourcing companies liable as employers

f. workers as owners
   i. labor and employment laws predicated on idea that labor (workers) and owners (employers) are fundamentally separate entities engage in a struggle for a larger share in the profits
   ii. boundaries are blurred, however

g. who is the employer?
   i. in subcontracting situation, is the employer the contracting entity or the subcontractor?
   ii. really important where undocumented workers involved – contracting entity may subcontract low-waged, low-skilled work to smaller operations, seeking to insulate itself from liability under the IRCA, while simultaneously gaining the wage advantage of employing such persons
   iii. courts look beyond the labels and ostensible relationships
   iv. under “joint employer” doctrine, both entities may be held liable for statutory violations if the contracting entity maintains significant control over the work and the workers are economically dependent upon the contracting entity
III. **Contracting for Individual Job Security**

A. **Presumption of At-Will Employment (81-104)**

1. historical background
   a. by early 20th century, contract-based approach to understanding the employment relationship was firmly entrenched in American jurisprudence
      i. English law
         1. Blackstone’s rule, extended to all classes of servants: “If the hiring be general, without any particular time limited, the law construed it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master shall maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.”
         2. presumption of 1 year, could be rebutted when parties contracted with reference to a custom of the trade for a shorter period
         3. periodic payments alone could not rebut, though was a material factor
         4. courts later developed the rule that unless specified otherwise, service contracts could be terminated on reasonable notice – custom of trade often determinative
         5. 20th century – required notice decreased and is now regulated per Contracts of Employment Act of 1963 – 1-8 weeks notice
   ii. American development
      1. Wood stated employment at will doctrine: “With use the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof … [I]t is an indefinite hiring as is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants
      2. no valid legal support or policy grounds for Wood’s rule
      3. new presumption spread and was not easily rebutted
      4. no basis in contract – parties’ intention is secondary in the employment at will doctrine
      5. little basis for thinking it a response to changing social conditions and accurately reflected the usual duration of employment contracts – most contracts were definite, often a year and more evidence to suggest common perception was permanence in a lot of employment situations
   c. at-will employment as a default rule
      i. at-will rule default rule in every state but Montana
      ii. merely a presumption – employer and employee are free to contract around it
      iii. operates merely as a gap filler, supplying necessary terms when the parties have failed to specify every aspect of their relationship
   d. *Savage v. Spur Distributing Co. (CTA Tenn. 1949)*
      i. not typical of how courts would respond today
      ii. plaintiff claimed breach of contract for improper discharge
      iii. suing for damages – difficult for courts to order reinstatement because would be forcing an unwanted relationship on the parties
      iv. alleging had a permanent contract
      v. court says permanent means indefinite means at will, unless there’s something to take it out of the default
      vi. handful of other cases where employee gives additional valuable consideration to employer that is sufficient to overcome the at will rule
vii. Savage claimed consideration he provided was the moving/housing expenses incurred in transferring to Tennessee.
viii. The court said not sufficient because the employer received no benefit—it was just a detriment to the employee … not part of the bargain with employer.
ix. if the employee says he’s willing to take a lower wage in exchange for job security?
x. one way to read this case is that Savage was trying to make something from nothing and that there was no meeting of the minds
xi. stricter way of reading this case is that you cannot agree to provide job security unless there’s some separate consideration (from services performed) supporting that promise (this is the approach that a lot of courts took in the early 20th century)
xii. why require additional consideration? want to be really sure there was a meeting of the minds; substantive requirement the courts will look for … to turn the at-will rule into an immutable rule as opposed to a default rule
xiii. this case is at-will rule being applied in its strongest form
c. additional consideration
   i. typical of first half of 20th century – required additional consideration beyond the services performed to prove “permanent” employment
   ii. adequate consideration usually only found when employee agreed to release a claim for damages or agreed to give up a competing business
f. mutuality
   i. Savage court’s conclusion no contract existed also rested on absence of “counter-promise” by plaintiff to continue working for any length of time
   ii. unless both are bound, neither are bound
g. default v. substantive/immutables rules
   i. early 20th century – courts applied doctrine like mutuality of obligation and additional consideration to raise the barriers for employees seeking to overcome the at-will presumption and establish contractual rights to job security
   ii. have been criticized as “spurious contract law”

2. alternative models
   a. the union sector
         1. most collective bargaining agreements place “just cause” restrictions on employer’s right to discharge – most do not define
         2. just cause exists when employee has failed to meet his obligations under fundamental understanding of employment relationship
         3. general obligation is to provide satisfactory work
            a. regular attendance
            b. obedience to reasonable work rules
            c. reasonable quality and quantity of work
            d. avoidance of conduct, either at or away from work, which would interfere with the employer’s ability to carry on the business effectively
         4. discipline must further one or more of management’s three legitimate interests for there to be just cause
            a. rehabilitation of a potentially satisfactory employee
            b. deterrence of similar conduct, either by the discipline employee or by other employees
            c. protection of the employer’s ability to operate the business successfully
         5. employee protections guaranteeing “fairness” in discipline
a. industrial due process
   i. actual or constructive notice of expected standards of conduct and penalties for wrongful conduct
   ii. decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union assistance if he desires it
   iii. imposition of discipline in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding
      1. employee’s past record shows unsatisfactory conduct will continue
      2. most stringent form of discipline is needed to protect the system or of work rules
      3. continued employment would inevitably interfere with the successful operation of the business
   iv. proof by management that just cause exists
b. industrial equal protection – treatment of like cases
c. individualized treatment – distinctive facts must be given appropriate weight

ii. Cynthia L. Estlund, Free Speech and Due Process in the Workplace (1995)
   1. just cause clause generated body of arbitral law known as “industrial due process”
   2. if employee grieves employer’s decision, union can take it through several steps of discussion with higher management officials, then to arbitration
   3. attorney or rep for each side presents arguments, documents, witnesses, briefing is limited or nonexistent
   4. standard remedy for discharge without just cause is reinstatement and back-pay
   5. process may take as little as 2-4 months
   6. procedural challenges: employer’s pre-termination process (notice, progressive discipline, equitable treatment)
   7. substantive challenges: reasonableness of employer’s rules, job-relatedness of alleged misconduct, severity of penalty
   8. employee protected by just cause has a kind of property right in employment
   9. burdens of proof and uncertainty fall on employer
   10. industrial due process is a collective right – union is subject to duty to fairly represent employees – but doesn’t guarantee a hearing
   11. duty of fair representation enforceable only through litigation

b. public employment
   i. federal and state civil service statutes restrict public employer’s ability to discharge employees without cause
   ii. public employees may enjoy additional rights under constitutions
   iii. Board of Regents of State Colleges v. Roth (SCt. 1972)
      1. government as employer – that’s why can invoke his constitutional rights (due process clause)
      2. claims deserved notice and opportunity to respond before college deprives him of a renewed contract
      3. due process protects life, liberty (impacts his ability to earn a living, etc.), and property – property is at issue
4. court says no liberty interest – no damage of reputation, integrity, etc. that would inhibit his ability to become reemployed
5. property is a legitimate claim of entitlement – not a mere hope or idle expectation
6. Roth has to show legitimate entitlement to continued employment
7. court looked to the employment contract; could also look to practice, trade, custom (implied contract); and state laws that create interests in jobs (principal source)
8. court found no property interest here and no right to job beyond the one year contract term
9. due process can be invoked by public employees – doesn’t guarantee job security, but guarantees process protections
10. due process is a check on government power to protect individual rights – protects against arbitrary, capricious, and unreasonable government action
11. also want people to feel secure in their rights and lowers the possibility of mistake, innocent error (when government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct)

   1. Court held Sindermann had an implied property interest in retaining his job
   2. could point to traditions of tenure in the system in which he worked

v. the value of process
   1. due process valuable because it protects against arbitrary government action, insure fairness in government decision-making, and avoid mistaken decisions

vi. what process is due?
   1. Cleveland Board of Education v. Loudermill (SCt. 1985)
      a. civil service employee (security guard for Board of Education) can only be discharged for cause in Ohio – then can file administrative appeal afterwards
      b. discharged, claimed Ohio law unconstitutional because deprives him of hearing prior to discharge – and denies him of due process
      c. ought to be some notice to the employee and opportunity to respond, the formality and the requirement of the process due depends on the importance of the interest at stake

3. the contemporary era
   a. many large firms adopted “internal due process” – put pressure on at-will doctrine
   b. by late ‘70s and ‘80s, courts were more willing to find the presumption of at-will employment had been overcome in individual cases – required them to rethink what was required to overcome it and, in particular, doctrines of mutuality and additional consideration of Savage
   c. many courts began to reject these doctrines – opening way for discharged employees to assert employer’s express or implied promises not to discharge without causes were enforceable even if employee remained free to quit and had not provided additional consideration

B. EXPRESS AGREEMENTS – CONTRACTS (104-17)
   1. written contracts
      a. written contract for a fixed term remains most straightforward way to overcome the at-will presumption
         i. former executive constructively discharged
ii. court determined Cleo breached employment agreement and was constructive discharge

iii. way the court uses “constructive discharge” is different than you might see them in like employment discrimination, for example (so intolerable a reasonable person would resign)

iv. company could have removed him from all of his duties for cause (dishonestly, gross negligence, willful misconduct in the performance of his duties or a willful or material breach of the Agreement)

v. what if they hadn’t defined cause? even if contract was silent, reasonable default rule would be that employer can still discharge for cause

vi. opposite wouldn’t be a good idea because some people might overlook it in a contract and it would be unfair not to presume that it was still available

vii. what if Cleo encountered financial difficulties during the term of contract and needed to discharge him? doesn’t fall within definition of “cause,” so would be breaching the contract

viii. without paragraph 7, what would a court say? courts generally held financial reasons are insufficient to constitute “cause” to terminate definite-term contract

ix. damages

1. hinged on interpretation of paragraph 9 – difference between liquidated damages (contingent on breach) and severance pay

2. court says they’re liquidated damages and he gets the full amount – there was a breach

3. employer’s upset because he had a new job and it was an unreasonable penalty to make them pay the full amount

4. court replies that time at the contract was entered, it was reasonable, so it’s irrelevant that he got a new job; no one knew then how much damage he would sustain or if he could get a new job

5. if paragraph 9 had not been included in the contract, what would his damages have been? his actual damages - benefit expected under the contract less any mitigation … his actual damages are $0 … he was able to sufficiently mitigate

6. reason outcome is different here is because paragraph 9 was included

c. definite-term contracts

i. sufficient enough to overcome presumption

ii. even when silent on the issue of termination, courts presume contracts for a fixed period cannot be terminated without cause during the term of the contract

iii. except for unique, highly skilled employees, or those working for employers that operate on a fixed cycle (i.e., schools), individual employees today are unlikely to have written contracts for a fixed term

d. cause

i. courts have held financial reasons are insufficient to constitute “cause” to terminate a definite-term contract

e. employee breach

i. employers do occasionally sue employees who quit before the end of a fixed-term contract

f. written agreements for an indefinite term

i. some courts till persist in traditional view was that indefinite-term contracts are per se unenforceable (must be construed as at-will), even when protections of job security are included in a written contract

ii. most modern courts are willing to enforce indefinite-term contracts restricting employer’s power to terminate where the parties’ intentions are clear
2. oral contracts
      i. from *Savage* to now, courts no longer require a showing of separate legal consideration or mutuality of promises
      ii. courts are simply looking at the terms on their face to find an oral contract
      iii. court here set up a pretty liberal standard and take employer statements and say they’re binding promises
      i. situation different from *Toussaint* – one interview, no negotiation of job security, etc.
      ii. court is asking a bit more of plaintiff – must show some objective evidence that statements from employer were intended to be binding promises
      iii. difficult to distinguish between mere puffery and promise, and it’s difficult to determine exactly what was said long after the fact
   c. establishing oral contracts for job security
      i. in theory same as written, but in practice oral contracts face substantial hurdles
      ii. hard to distinguish between “puffery and promise” particularly in hiring process
      iii. difficult to determine what was said long after the fact
      iv. look for evidence parties intended job security to be part of the bargain
   d. additional consideration
      i. many courts have abandoned requirement, but doctrine presents a hurdle in some jurisdictions, particularly when plaintiffs rely on oral promise
   e. statute of frauds
      i. another hurdle of oral promises – bars enforcement of oral contracts that are not capable of performance within a year
      ii. many courts take position that indefinite-term contracts are not barred by statute of frauds because performance could be completed within a year (death, retirement, voluntary departure, layoff, discharge for cause)
      iii. others strictly enforce it – so oral contracts of employment for longer than one year, including indefinite-term contracts, are unenforceable
   f. promises that cannot be kept
      i. strike-replacement workers promised permanent employment, but under federal labor law regular workers can be reinstated if employer engaged in unfair labor practices – SCt. held company not immunized from responding in damages to the replacement workers’ breach of contract claims (*Belknap, Inc. v. Hale* (1982))

C. **IMPLIED AGREEMENTS (117-62)**

1. employee handbooks
      i. no written employment contract
      ii. plaintiff discharged
      iii. claimed breach of contract – express and implied promises in handbook created a contract under which he could not be fired at will, but only for cause and after certain procedures
      iv. trial court held manual not contractually binding, appellate division affirmed – SCt. New Jersey reversed
      v. held – termination clauses of manual could be found to be contractually enforceable and should be construed in accordance with reasonable expectations of employees
      vi. manual covers all employees
vii. courts will not allow an employer to offer attractive inducement and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief they are unenforceable

viii. provisions supported by consideration – continued work

ix. reliance presumed under circumstances


i. employee fired, claims employer didn’t follow progressive discipline provisions of handbook

ii. issue: was an employment contract created?

iii. held: not sufficiently definite to constitute a valid offer because of disclaimer

iv. handbook is unilateral promise when: (1) sufficiently definite in its terms to create an offer; (2) communicated to and accepted by employee so as to constitute acceptance; and (3) employee provides consideration

v. unnecessary employee have knowledge of the promise – so all employees, whether they’ve read the handbook or not, are treated equally

vi. look at offer issue from perspective of reasonable employee’s construction of handbook

vii. when considering if definite enough to create a contract, we look at language and context

1. is language mere guidelines or policy, or directive? (contains language of command)

2. is language detailed and definite or general and vague? (procedures are fairly specific)

3. does employer have unilateral power to alter language at will or is it invariable? (employer retained power to alter language at will)

viii. issue of disclaimer saying no intent to create a contract

1. many jurisdictions require disclaimer to be clear and conspicuous to be enforceable and negate the contractual relationship

2. disclaimer should be considered as any other language in handbook

3. it’s clear in its terms

4. nothing about its location suggests it doesn’t apply to progressive discipline policies

5. a reasonable person reading handbook could not believe employer has assented to be bound by provisions contained in manual

c. doctrine and policy

i. *Woolley* a leading case holding employer’s policy manual could give rise to binding contractual obligations

ii. operates on formal contract doctrine and policy

d. alternative theories

i. majority of states have held personnel manuals can give rise to binding obligations, though vary a to specific factors necessary to make handbook promises enforceable

ii. *Woolley* most common reasoning – employees handbooks give rise to unilateral contracts, thus making negotiation over terms and an exchange of promises unnecessary

iii. a few states also relied on promissory estoppel

iv. others rely on basic fairness, not formal contract theory (*Toussaint*)

v. and some refuse to find them binding at all – insisting on offer, acceptance, and bargained-for consideration

e. reliance
i. *Woolley* and *Anderson* held unnecessary for plaintiffs to prove had knowledge of particular promises that gave rise to employer’s contractual obligation
ii. other courts require employee actually rely on the provisions in a handbook before finding them contractually binding

f. terms of agreement
   i. where enforceable – question as to what was promised
   ii. even if not discharge without cause, may be promise to follow certain procedures before discharge (i.e., progressive discipline)
   iii. even where enforceable, courts won’t find contractual rights if language of handbook not sufficiently clear to create a promise

g. an alternative approach to disclaimers
   i. courts take varying approaches to disclaimers
   ii. in contrast to *Anderson*, has been held when terms are ambiguous or send mixed messages (i.e., inconsistent with disclaimer) regarding employee’s status, question of whether presumptive at-will status has been modified is properly left to jury

h. disclaimers and contract theory
   i. Befort suggests if a simple, formalistic disclaimer is allowed to negate promises in handbook, then policy reasons for enforcing handbook promises are left unaddressed
   ii. disclaimer not automatically determinative of enforcement issue, but should be weighed with other provisions

i. the effectiveness of disclaimers
   i. most workers view discharge without cause as unlawful, even with disclaimer statement

   i. contract can only be altered if there is adequate consideration, etc.
   ii. if plaintiffs had won, employers are locked in and can’t respond to changes in the market
   iii. may be an issue with illusory contracts
   iv. for an employer to modify, there has to be reasonable notice, reasonable time, no interference with vested benefits (but what is reasonable?)
   v. if these requirements are met, there’s no additional consideration required from the employees
   vi. this employer is also sympathetic in that it also provided additional benefits to people at the same time it was changing its policies regarding job security
   vii. takes a middle of the road approach

k. the middle ground?
   i. seems to take middle ground on employer modifications of contractual rights based on handbook provisions
   ii. case relied on by *Asmus* held once an implied contract was formed by handbook, terms couldn’t be modified unilaterally – to effectively modify, must be: (1) offer to modify; (2) acceptance of offer; and (3) consideration
      1. court was concerned unilateral modification and then firing someone would make original contract illusory
      2. employee’s continued work alone not consideration for modification
      3. continued employment after issuance of new handbook not acceptance of the new terms
   iii. contrasting approach:
      1. employer obligations only existed while policies were in effect – employer permitted to unilaterally modify earlier policies, and the new policy was effective upon giving actual notice to the affected employees
l. employer interests?
   i. Toussaint suggested handbook provisions guaranteeing job security should be enforced because employer derives benefit of an orderly, cooperative, and loyal workforce as a result of its promises
   ii. in later case, same court found employer could unilaterally modify those written policy statements, even if not expressly reserved right to do so

2. promissory estoppel
      i. left good job been at 11 years to work for employer with less benefits/salary at employer’s request
      ii. provided uniforms and schedule, no copy of handbook
      iii. day before she was to start, called and told her she should not come in
      iv. sought replacement employment, but was not able to secure it for a while – and then on less favorable terms
      v. trial court determined since she was employee at will, could be terminated any time, even before she began working
      vi. oral agreement was for indefinite term, and default is at-will – trial court decision affirmed on contract claim
      vii. promissory estoppel claim
         1. reliance must be reasonable and foreseeable
         2. held: promissory estoppel can be asserted in connection with the offer of at-will employment and that the trial court erred in granting employer’s motion for summary judgment
         3. damages as justice requires – not based on benefit of bargain
         4. damages are not to be based on wages the employee would have earned in new job because employment was terminable at will
      viii. dissent would not have allowed promissory estoppel claim
   b. Restatement elements
      i. a promise for 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
   c. reasonable reliance on at-will employment?
      i. has been held that a promise of at-will employment can provide basis for promissory estoppel claim (*Grouse v. Group Health Plan, Inc. (1981)*)
   d. estoppel after commencing work
      i. *Grouse* court stated under appropriate circumstances promissory estoppel claim would apply even after at-will relationship began
   e. low success rates
      i. promissory estoppel claims have limited success in employment context
   f. the relevance of relocation
      i. under promissory estoppel, moving might establish plaintiff acted in reliance on an employer’s promise
      ii. might also strengthen plaintiff’s claim an express contract existed between the parties
      iii. some courts use relocation and other visible forms of reliance as extrinsic evidence that the parties had in fact agreed to some limitation on the employer’s power to discharge

3. implied in fact contracts
      i. trial court held a non-verdict for employer
ii. appellate court found a triable issue – should have gone to the jury to decide if there was an implied-in-fact contract

iii. not traditional bilateral negotiated contract – it’s more that the totality of the circumstances of their relationship over time constitutes a contract

iv. factors court considered to determine existence of contract:
   1. personnel policies or practices of the employer
   2. employee’s longevity of service
   3. actions or communications by the employer reflecting assurances of continued employment
   4. practices of the industry in which the employee is engaged, for example

v. what kind of the impression has the relationship given the employee?

vi. why should longevity matter?
   1. should be enough in and of itself
   2. but taken with the other factors tends to reinforce idea that there’s an implicit promise employee won’t be terminated
   3. also, because of policy, seems inherently unfair for employer to take best years of the employees’ lives then let them go

vii. court held there was enough to find an implied-in-fact contract, but what are the terms? it’s for jury to decide

viii. judge borrowing from Title VII to develop a proof structure (a “good cause” standard)

b. implied contracts in California
   i. courts see no reason to exempt employment relationship from ordinary rules of contract which permit proof of implied terms
   ii. purpose of implied-in-fact contract theory is to enforce the actual understanding of the parties

c. and elsewhere
   i. other jurisdictions permit Pugh-type claims to varying degrees
   ii. some analyze oral promises of job security or personnel manuals not as express contracts, but implied-in-fact contract
   iii. some reject Pugh as overly expansive, others look at a variety of factors similar to those in Pugh
   iv. those willing to find implied contracts on basis of “totality of circumstances” test may differ in what type of evidence is required to prove existence of an implied contract

d. longevity of service
   i. relevant factor
   ii. employee’s mere passage of time in the employer’s service cannot alone form an implied-in-fact contract that the employee is no longer at will
   iii. however, over a period of time, the employer can communicate, by written and unwritten policies and practices, or by informal assurances, that seniority and longevity do create rights against termination at will

e. wrongful demotion

f. good cause
   i. Pugh court suggests “good cause” means something different when determining propriety of terminating definite-term contract

4. determining whether good cause exists
i. accusation of sexual harassment – Cotran’s fired, he sues
ii. claimed breach of an indefinite term implied-in-fact contract that he’d only be fired for cause
iii. trial court said relevant question was whether employer proved by objective evidence harassment actually occurred (objective standard) … too restrictive of management prerogatives – there has to be some discretion given to employer
iv. defendant employer is saying standard should be that the decision to fire was honest and in good faith (subjective standard) … very little protection for employees
v. the court ended up in the middle
vi. the question for the jury becomes: “was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?”
vii. both subjective and objective – essentially a default standard/rule for an indefinite term contract
viii. so how much does the employer have to do to satisfy the standard? employer has to have made reasonable investigation; given employee notice and opportunity to respond … basic procedural protections

b. burdens of proof
i. Cotran court takes middle ground
ii. ordinarily, party alleging failure to perform bears the burden of proving the existence of a breach
iii. in collective bargaining setting – arbitrators requires employer prove conduct justifying dismissal (just cause) actually occurred (most use “preponderance of evidence” standard, occasionally the “clear and convincing evidence” standard or even “beyond a reasonable doubt” for serious discipline)

c. additional issues
i. parties disagreed only whether alleged conduct actually occurred
ii. stealing from employer or committing acts of violence at the workplace clearly good cause
iii. business reasons, such as financial difficulties, constitute good cause under implied contract
iv. more difficult when employee discharged for performance reasons, particularly when not measured objectively (higher level employees)
v. another issue when employer alleges termination for legitimate reason, but employee contends it was a pretext for another illegitimate reason – jury decides true motive

D. Good Faith and Fair Dealing (162-75)

1. generally
   a. at-will written contract
   b. claiming breach of contract
   c. got demoted right after large sale consummated, so missed out on the remaining 25% of his commission
   d. no breach of the express terms of the contract
   e. employee’s claiming that despite lack of violation of express terms – employer’s actions were in bad faith
   f. in every contract there is an implied duty of good faith and fair dealing
   g. Monge is one of the early employment cases that applied the duty to the employment context – once you’ve agreed to certain things and made promises, you can’t thwart their ability to reap the benefits of the bargain
h. this court doesn’t adopt *all* aspects of Monge
i. court holds in favor of plaintiff – no error in submitting issue of “bad faith”
termination of an employment at will contract to jury

   a. indefinite term, at-will employee (no express contract)
   b. claims entitled to compensatory and punitive damages because employer acted in bad
      faith in requiring him something and then firing him for doing it
   c. court dismissed claim, saying this is at-will employment and the employer can
      discharge at any time
   d. understands covenant of good faith and fair dealing as inconsistent with the at-will
doctrine – won’t limit the at-will arrangement
   e. if purpose of covenant is to protect the party so they receive benefit of the bargain,
      Murphy’s desired remedy has much greater tension with at-will rule
   f. Fortune was simply asking for something he’d earned – he’s not really challenging the
      underlying termination or the basic premise of at-will rule
   g. dissent argues would be bad policy to read out the good faith and fair dealing
      obligation … the at-will term is an implied term, but Murphy was expressly told he
      had certain duties and we should sustain the implied right of termination as a
      limitation upon the express obligation imposed upon the employee

4. good faith contracting
   a. good faith and fair dealing speaks in contractual terms, but obligation not based on
      any express promises made by the parties to deal in good faith

5. good faith v. at-will
   a. many courts refuse to recognize duty of good faith in employment at all
   b. others have held the duty exists, but doesn’t limit the employer’s ability to discharge an
      at-will employee without cause
      i. covenant doesn’t protect from a “no cause” termination because tenure was
         never a benefit inherent in the at-will agreement
      ii. covenant does protect from discharge based on an employer’s desire to avoid
         payment of benefits already earned (“benefits of the agreement” such as sales
         commissions in *Fortune*) but not the tenure required to earn the pension and
         retirement benefits

6. an exception for lawyers
      – alleged ultimately discharged because of his insistence the professional misconduct
      be reported, as required by bar disciplinary rules
   b. common professional enterprise here – erecting disincentives to compliance with the
      applicable rules of professional conduct would subvert the central professional
      purpose of his relationship with the firm – the lawful and ethical practice of law

7. remedies
   a. CA has held tort damages were available for employer breaches of the implied
      covenant of good faith and fair dealing (relied on precedent from insurance context)
   b. *Foley v. Interactive Data Corp. (SCt. Cal. 1988)* – CA SCt. struck down this line of
      cases – making it clear that claims based on covenant gave rise only to contract, not
      tort, damages in the employment context
   c. ordinarily limited to recovering value of lost wages and benefits less any amounts
      earned in subsequent employment – many will find not worth while to sue
   d. currently, only a very few states make tort damages available

8. other approaches
   a. in states that apply covenant to employment contracts, most adopt the “benefit of the
      bargain” approach, limiting recovery to cases like *Fortune*, where employer’s actions
have deprive employee of a particular promised benefit – least intrusive into management discretion

b. a few courts have taken different approaches:
   i. Delaware looks for employer conduct with an aspect of fraud or deceit
   ii. Alaska takes broadest view – covenant requires employer to act in a manner that a responsible person would regard as fair
   iii. New Hampshire restricts claims to situations where employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn

IV. PUBLIC POLICY PROTECTIONS FOR INDIVIDUAL JOB SECURITY

A. PUBLIC POLICY EXCEPTION (177-187)
      a. at-will quality control agent
      b. reported violations of CT code, was fired – he claims – in retaliation
      c. no statute prohibited his termination
      d. asserting wrongful discharge in violation of public policy
      e. not trying to argue there’s some circumstance or agreement that overcomes the at-will presumption, but for an exception to the at-will rule
      f. there’s also a public interest – public may have an interest in the integrity of the food
      g. competing interest in employer’s need for managerial discretion
      h. court does recognize the public policy exception
      i. other situations in which courts have recognized the exception:
         i. refusal to commit perjury/illegal act
         ii. filed workers’ comp claim/exercise employees’ rights
         iii. jury duty/public duty
         iv. union activity [protected under NLRA or other statutes that preempt the common law claim]
      j. if we’re assuming he wasn’t really at risk for criminal sanctions, we might call this a whistleblowing situation/reports illegality
      k. dissent says the majority’s not just making a small carve-out – this is like giving the employee a sword to challenge all kinds of discharge
         i. dissent also skeptical about real reason for discharge – if he was so concerned about the public health, why didn’t he report the conduct himself (hasn’t had to prove motive for discharge at this point in the trial)
         ii. it’s the legislature’s job to create this public policy exception – and it passed on it, so it’s not the courts’ job
   2. courts v. legislatures
      a. dissent in *Sheets* complained majority created open-ended area for judicial policy-making and the usurpation of legislative function
      b. some argue legislature has greater resources and procedural means to discern public will
      c. it at-will rule to be tempered, should be through principled statutory scheme, adopted after public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants
      d. this is a distinctly minority view
   3. the majority rule
      a. overwhelming majority recognize public policy exception to the at-will rule, although its scope varies significantly
   4. mistaken belief
a. most courts recognize the public policy tort will protect employee who believes that what her employer has asked her to do is illegal, but in fact is not, if she has a good faith (or at least objectively reasonable) belief that the act was illegal, even if she turns out to be wrong

5. contract v. tort
   a. argument tort action should be available for wrongful discharge in violation of public policy
      i. employer’s obligation not to fire employee for refusing criminal activity doesn’t depend on express or implied promises in an employment contract – it’s a duty imposed on all employer to implement the public policies of the state
      ii. contract actions are for having promises performed, tort actions are to protect the interest in freedom from various kinds of harm
      iii. overwhelming majority view
   b. argument only contract remedies should be available
      i. claim is predicated on breach of an implied provision that employer will not discharge employee for reasons violative of public policy
      ii. minority view

6. types of public policy cases (seminal public policy cases)
      i. employee of defendant union – alleged union official instructed him to testify falsely before legislative committee, and when refused, was fired next day
      ii. perjury is criminal and against public policy
      iii. plaintiff can proceed with claim
   b. Frampton v. Central Indiana Gas Co. (SCt. Ind. 1973)
      i. plaintiff alleged retaliatory discharge for claiming workers’ comp benefits
      ii. claim can proceed – in order for goals of workers’ comp act and public policy to be effectuated, employee must be able to exercise her right in an unfettered fashion without being subject to reprisal
   c. Nees v. Hock (SCt. Or. 1975)
      i. clerical employee was allegedly discharged for serving on a jury
      ii. suffered emotional distress, even though secured higher-paying job for after jury duty
      iii. jury awarded her compensatory and punitive damages
      iv. jury duty high on scale of American institutions and citizen obligations – sufficient source of public policy

B. WHAT CONSTITUTES PUBLIC POLICY? (188-212)
   1. “clearly mandated public policy” been defined as concerning what is right and just and what affects the citizens of the State collectively – must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed
   2. Texas defines it only as discharge “for the sole reason that the employee refused to perform an illegal act that carried criminal penalties”
   3. courts more commonly identify three categories of public policy wrongful discharge cases, corresponding to fact patterns in Petermann, Frampton, and Nees – and then whistleblowing
   4. alternative approach to identifying public policy is not fact pattern, but legitimate source of public policy
      a. employee believed supervisor was embezzling – complained and then investigated – discharged
      b. first argues what he was doing was consistent with a clear and compelling public policy (trying to prevent criminal activity)
i. court rejects – sees his actions as a purely private interest – no threat to the public or a public wrong

c. then argues he refused to ignore his duty of loyalty to his employer
   i. court rejects – it’s the rights of employer being harmed

d. claim properly dismissed

6. whistleblowers
   a. *Hayes* is a whistleblowing situation, but presents special difficulties
   b. employees who choose to report illegal activity by employer differs significantly from employee forced to choose between his job and actual participation in illegal behavior
   c. at least one court imposed higher standard of proof on financial whistleblower as opposed to clear public policy concerns (public health and safety concerns)
   d. also issue of internal v. external whistleblowers – should external whistleblowing be required before protection of public policy exception applies

7. public policy v. private interests
   a. exception only protects public and not purely private interests
   b. *Foley v. Interactive Data Corp. (1988)* – allegedly discharged because reported to management that newly hired supervisor under investigation by FBI for embezzlement from former employer BofA
      i. argued public policy imposed duty on him as employee to report relevant business information to employer – pointed to Labor Code provision
      ii. CA. Scrt. held identifying statutory touchstone insufficient – still must inquire whether discharge is against public policy and affects duty which inures to the benefit of the public at large rather than to a particular private employee
      iii. court found no public policy
      iv. if employer and employee were to expressly agree employee has no obligation to inform employer of any adverse information employee learns about, nothing in the state’s public policy would render such an agreement void
      v. suggests this “void if contracted for” test

8. third-party effects
   a. tort law should only intervene in contractual relationships to ensure the parties consider the costs they impose on outsiders
   b. if the parties, while furthering their own self-interests, ignore the effects of their deal on third parties, we refuse to enforce it

   a. coworker of Gantt was fired, filed a claim with the DFEH for sexual harassment
   b. DFEH wanted to talk to Gantt, and that’s how he got into a dispute over his employment
   c. claiming discharge in violation of public policy – CA says plaintiff must show public policy was fundamental, substantial, and well established at the time of discharge
   d. courts in wrongful discharge actions may not declare public policy without a basis in either the Constitution or statutory provisions … strikes proper balance among interests of employers, employees, and public
   e. employers would be aware of, at least, the Constitution and basic statutes; employees are protected against employer actions that contravene fundamental state policy; and society’s interests are served through more stable job market, in which its most important policies are safeguarded
   f. statute generally prohibits interference with a DFEH investigation; and CA constitutional provision prohibiting sex discrimination
   g. there is a constitutional and statutory basis for this claim – Gantt can proceed
   h. concurrence and dissent
i. majority didn’t need to reach the question of what basis was required for a claim of wrongful discharge in violation of public policy – court limited the possible sources when it wasn’t part of this case
ii. shouldn’t foreclose possibility of other legitimate sources of public policy

10. sources of public policy
   a. *Gantt* holds employee bringing wrongful discharge claim must identify a public policy delineated in a constitutional or statutory provision
   b. other state recognize non-legislative sources (i.e., administrative rules/regulations)

11. codes of professional ethics
   a. when addressing professionals other than lawyers, several courts have held their ethical codes may be public policy (CPAs, etc.)
   b. however, ethical provision must be designed to serve interests of the public rather than interests of the profession and be sufficiently concrete to notify employers and employees of the behavior it requires

12. federal law and state public policy
   a. courts are divided on whether or not federal law can provide basis for state common-law wrongful discharge claim
   b. some say plaintiffs must do more than show possible violation of a federal statute that implicates only her own personal interest - must allege public policy of *this* state is implicated, undermined, or violated
   c. others say substantial public policy interests can reside in certain federal statutory provisions
   d. additionally, in some situations, the existence of a comprehensive federal statute may preempt any common-law claim based on the public policy articulated in that statute

13. multi-part tests
   a. CA courts have read into *Gantt* a four-part test for determining whether a public policy exception applies … the public policy must be:
      i. delineated in either constitutional or statutory provisions
      ii. “public” international eh sense that it “inures to the benefit of the public” rather than servicing merely the interests of the individual
      iii. well established at the time of discharge
      iv. substantial and fundamental
   b. WA SCt.’s four-part test:
      i. plaintiffs must prove existence of clear public policy (“clarity” element)
      ii. plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (“jeopardy” element)
      iii. plaintiffs must prove the public-policy-linked conduct caused the dismissal (“causation” element)
      iv. defendant must not be able to offer an overriding justification for the dismissal (“absence of justification” element)

14. **Kirk v. Mercy Hospital Tri-County (CTA Mo. 1993)**
   a. RN claims wrongful discharge in violation of public policy
   b. claims motive for dismissing is that she advocated on behalf of patient when she thought the care was substandard
   c. but the service letter she received stated reason for discharge was for making statements about the hospital and staff that were untrue and detrimental
   d. trial court found no specific prohibition of her discharge in any constitutional or statutory provision
   e. MO courts looks for statutes, constitutional provisions, or a regulation that mandates such a policy
   f. she claims the NPA satisfies requirement
g. defendant says the NPA is too vague a basis on which to bring a public policy claim
h. court interprets the NPA as a whole to be about ensuring the safe, competent practice of nursing, and thinks plaintiff acted consistent with the policy
i. court seems to be saying that you don’t need to literally show us something that’s been violated, but rather you need to point to something that sets out a general policy and that may be enough
j. trial court erred in requiring her to point to a statute that specifically forbade her discharge

15. “carefully tethered to fundamental policies”
a. Kirk relied on a quite general source, speaking in broad aspirational terms
b. some courts have looked for quite specific statutory prohibitions
c. some courts don’t restrict public policy to violations of the literal language of the constitutional or statutory provision, but consider whether discharge contravenes the spirit as well as the letter of the provision
d. others have been reluctant to find public policy violations without a specific showing of an actual violation

C. Preclusion (212-219)
1. Amos v. Oakdale Knitting Co. (SCt. NC 1992)
a. employer lowered wage below minimum wage, employees were fired
b. bring wrongful discharge in violation of public policy
c. Wage and Hour Act regulated minimum wage – public policy
d. in the statute sufficient to state a public policy? legislature states that it’s public policy
e. remedies available under the statute: continue working and seek back-pay
f. argument that where the statute provides a remedy, courts should not recognize a public policy exception:
   i. the legislature has spoken and is in the best position to determine what best remedy (and type (contract as opposed to tort) of remedy) is
   ii. the point of having public policy remedy is to protect public policy, if there are already remedies in place to do that, don’t need to recognize common law claim
g. the NC SCt. says no, the CTA got it wrong, there should be a public policy remedy here … the public policy exception is not just a remedial gap filler – it is a judicially recognized outer limit to a judicially created doctrine, designed to vindicate the right of employees fired for reasons offensive to the public policy of the state
h. we have to look at the legislation, and if it’s federal legislation, there’s always the risk of preemption … the FLSA doesn’t preempt the Wage and Hour Act
   i. state legislature didn’t intend for Wage and Hour Act to supplant the common law with exclusive statutory remedies

2. the absence of remedy
a. Wehr v. Burroughs Corp. (1977) – if public policy is preserved by other remedies, then it’s sufficiently served, so application of the exception requires: (1) discharge violate some well-established public policy; and (2) there be no remedy to protect the interest of the aggrieved employee or society
b. other courts, like Amos, hold existence of alternative statutory remedy doesn’t automatically preclude common-law wrongful discharge claim
c. state courts are divided on the issue of preclusion by state and federal statutes governing employment relationship
d. important to litigants because remedies under many employment statutes are more limited than full range of compensatory and punitive damages typically available in tort

3. adequacy of remedies
a. courts also divided on whether tort claim can proceed when statutory remedy perceived as inadequate by plaintiff
b. one court said no – to allow full tort damages in the name of vindicating statutory public policy goals upsets the balance between right and remedy struck by the legislature in establishing the very policy relied upon

c. another court held where plaintiff wanted to claim in tort rather than filing with OSHA to induce Secretary of Labor to bring suit, he was permitted to claim in tort
i. the Secretary’s discretion is a significant limitation on the employee’s right of redress – under OSHA, the decision of a government employee could be influenced by budget constraints or political pressure

4. statutory interpretation
a. where common-law wrongful discharge actions not automatically barred where statutory remedy available, becomes question of did the legislature intend to preclude overlapping common-law claims?

b. federal
i. in some areas, strong legislative policy favoring a uniform approach (i.e., NLRA, ERISA) gives a statute strong preemptive effects
ii. in areas like health and safety, or wage and hour regulation, case for federal preemption of state law remedies is much weaker because some overlap is anticipated

c. state
i. federalism concerns absent where state legislation overlaps
ii. common approach asks about eh state of the law at the time the statute was enacted (Hodges v. S.C. Toof & Co. (1992)) – if a statute creates a new right and prescribes a remedy for its enactment, the prescribed remedy is exclusive, but where a common-law right exists, and a statutory remedy is subsequently created, the statutory remedy is cumulative unless expressly stated otherwise

D. CONSTRUCTIVE DISCHARGE(219-227)
a. payroll clerk involved in dispute over superintendent’s withholding
b. ultimately resulted in her feeling like she was forced to resign
c. claims discharge in violation of public policy
d. issue: whether she can bring a constructive discharge theory in this context, when she was not in reality discharged
e. constructive discharge is not a generic, free-flowing cause of action … the presence of some motivation that violates public policy makes this so … behavior alone does not give rise to constructive discharge
f. first evolved in the context of the NLRA
g. standard for constructive discharge?
i. when there are working conditions so intolerable that a reasonable employee in that situation would feel compelled to resign
ii. contrast this with the Giuliano case – court found constructive discharge based on the language in the contract … did the company essentially breach the contract … very different idea
h. what level of knowledge on the part of the employer is required? should the plaintiff be required to prove that the employer knew of the intolerable conditions?
1. one reason for requiring knowledge on the part of the employer is to give it a chance to correct situations
j. argument for the “should have known” standard is that the employer is responsible for the condition of the workplace

2. constructive discharge
a. first developed in case law interpreting the NLRA and later antidiscrimination statutes
b. most courts considering the issue have adopted the constructive discharge theory in the context of wrongful discharge in violation of public policy claims

c. three issues to look at to establish standards for constructive discharge:
   i. what type of working conditions must employee show?
   ii. by what standards should the alleged conditions be judged?
   iii. what level of employer intent is required?
   1. some courts adopt a “known or should have known” standard
   2. CA requires actual knowledge, not merely constructive knowledge, of the allegedly intolerable conditions (permits employers to correct situation)

d. Strozinsky and numerous other courts – proof that employer expressly intended to make employee quit not required

3. is illegality intolerable?
   a. Strozinsky suggested employer’s request employee engage in illegal activity may be enough to create intolerable conditions such that a reasonable employees would be compelled to resign
   b. other courts have held no

4. wrongful retaliation
   a. courts are divided on whether to recognize torts below level of wrongful discharge and constructive discharge (i.e., wrongful demotion, wrongful transfer, etc.)
   b. some say would be opening floodgates to frivolous litigation and substantially interfere with employer’s discretion to make personnel decisions
   c. others say permissible to prevent employers from believing they should just demote rather than fire to avoid liability

E. STATUTORY PROTECTIONS FOR WHISTLEBLOWERS (227-231)

1. generally
   a. 39 states offer protection to public employees
   b. 23 offer same protection to all workers
   c. contrast more significant in light of fact whistleblower statutes often protect public employees who report waste or mismanagement by employers, but court typically reject wrongful discharge claims by private employees who report similar problem on grounds they’re purely private concerns
   d. tended to emphasize threats to health and safety rather than financial wrongdoing

   a. explains the reaction at Enron to Sherron Watkin’s whistleblowing on the accounting scandals

3. no relief in Texas
   a. at that time, Texas’ whistleblower act only applied to government employees and can only sue for wrongful discharge in violation of public policy for the sole reason that employee refused to perform an illegal act that she had not been directed to participate in any illegal accounting practices

4. Sarbanes-Oxley
   a. created new protections for whistleblowers
   b. prohibits publicly-traded companies from discharging or retaliating against employees for providing information regarding conduct the employee “reasonably believes” constitutes fraud or a violation of federal securities laws
   c. extends protection to both internal and external whistleblowers
   d. victims of retaliation can file complaint with Secretary within 90 days – if no decision within 180 days, can file in federal court
   e. provides for compensatory damages including reinstatement, back-pay with interest, and “any special damage sustained as a result of the discrimination”
f. creates criminal penalties for retaliation who provides information about a federal crime to law enforcement
g. extends the Victim and Witness Protection Act to include actions harmful to any person, including interference with the lawful employment or livelihood of any person for providing truthful information relating a federal offense
h. does not preclude rights, privileges, or remedies under federal or state law or collective bargaining agreement

F. The Special Case of Attorneys (231-46)

   a. in-house counsel insisted company refuse shipment of adulterated dialyzer machines
   b. claims fired in retaliation and asserts wrongful discharge in violation of public policy
c. issue revolves around him being an attorney
d. if he weren’t an attorney, would he have a claim? almost certainly (against federal regulations and had a serious effect on the public safety)
e. attorney/client relationship is a relationship of trust, mutual confidence, and privilege
f. concern of the court is that if attorney can reveal confidential information in suit for wrongful discharge, could have a chilling effect on the attorney/client relationship
g. client is the one who’s in charge of relationship, and has full discretion to terminate relationship in any context
h. attorneys have a mandatory ethical duty to reveal this information anyway – courts are arguing that we don’t need the wrongful discharge suit because he had to make this disclosure
   i. Kim believes this is a minority rule that it’s mandatory disclosure
   ii. most states say that the attorney “may” reveal such information
i. what if the harm at issue was financial, not physical, harm … in that case, the ethics rule is not mandatory disclosure or mandates no disclosure at all – unless practicing under the SEC
j. an attorney could resign from her position, where cannot reveal the wrongdoing but does not want to facilitate client's action

   a. associate general counsel discovered general counsel didn’t have license to practice in state – discussed with member of board of directors
   b. GC eventually passed bar, but didn’t take MPRE
c. suffered retaliation
d. informed Board of Law Examiners under her own ethical duty
e. fired by GC
f. claims common-law action for retaliatory discharge in violation of public policy
g. contrary to *Balla* – some courts now allow in-house counsel to bring the claim
h. this court also held claim could proceed (preventing unauthorized practice of law important public policy)
i. in-house counsel do not forfeit employment protections provided to other employees merely because they’re lawyers
j. sole reliance on the mere presence of the ethical rules to protect important public policies gives too little weight to actual presence of economic pressures designed to tempt in-house counsel into subordinating ethical standards to corporate misconduct (some DO choose to violate ethical rules)
k. like other corporate employees, in-house counsel is dependent upon one client-employer for their livelihood – to guard it, there is some risk that ethical standards could be disregarded
l. also, there should be no discernible impact on attorney-client relationship by
recognition of this type of action, unless the employer expects his counsel to blindly
follow his mandate in contravention of the lawyer’s ethical duty
m. permitting employer to shift cost of adhering to public policy from itself to an
employee – regardless of whether a lawyer – is an inherently improper balance
between employment-at-will doctrine and rights granted employees under well-defined
public policy
n. in-house counsel must avoid unnecessary disclosure of confidential information, limit
disclosure to those needing to know it, and obtain protective orders to minimize risk
of disclosure
3. mandatory v. permissive disclosures
   a. Model Rules (majority) – lawyer may reveal information relating to the representation
of a client to the extent she reasonably believes necessary to prevent reasonably certain
death or substantial bodily harm
   b. lawyers are permitted to reveal confidential information to the SEC to extent
reasonably necessary to prevent a material violation likely to cause substantial financial
injury to the issuer or investors
4. a middle way
   a. General Dynamics court held retaliatory discharge remedy available to attorneys
   terminated for adhering to mandatory ethical norms
   b. held where conduct is ethically permissible, but not required, court must first ask
whether conduct is of type that would give rise to action by a non-attorney employee,
then whether some statute or ethical rule specifically permits attorney to depart from
usual requirements of confidentiality with respect to the client-employer and engage in
the “non-fiduciary” conduct for which he was terminated
5. difficulties of proof
   a. in jurisdictions that require attorneys to maintain client confidences in the wrongful
discharge action, proof is a problem and depends to some extent on whether the state
has adopted the Model Code
   b. trial courts can also limit public disclosure of client confidences through seal and
protective orders, limited admissibility of evidence, orders restricting use of testimony
in successive proceedings, in camera proceedings

V. COLLECTIVE JOB SECURITY (261-300)
A. COMMON LAW CONTRACT, PROPERTY, AND TORT CLAIMS
   1. Kent Greenfield, The Unjustified Absence of Federal Fraud Protection in the Labor
      Market (1997)
      a. chronicles the steel mill decline in Youngstown, Ohio
      b. mill need capital and needs to maintain employee morale and productivity
      c. officials misrepresented to investors to gain capital
      d. officials also misrepresented to employees who were thinking of taking jobs elsewhere
         . . . induced them to stay (told workers if they increased productivity, the plants would
         remain open)
      e. company shuts down, investors lose value of securities, and workers lose jobs
      f. capital investors have recourse in federal securities laws, the workers have no recourse
      g. company also misrepresented to the general public
   2. Local 1330, United Steel Workers of America v. United States Steel Corp. (6th Cir.
      1980)
      a. the closing of two steel plants will affect the 3500 workers fired, in addition to the
      entire economy of the community
b. plaintiffs sought an order to keep the plants open, or an injunction to require the company to sell the plants to plaintiffs
c. no breach of contract claim – there was a collective bargaining contract containing a management rights clause
d. promissory estoppel claim
i. workers argued applied because of oral statements and newspapers that told workers if they increased productivity the plants would become profitable and stay open
ii. workers claim that’s a promise and they relied to their detriment by increasing productivity
iii. court doesn’t buy it – statements were not definite enough promises that it would be reasonable for workers to rely on them
iv. there was also a dispute over profitability – workers look at cost and income, corporation said we look at additional factors the workers don’t
v. court said it wouldn’t make the judgment as to who’s correct – no definite promise here
e. community property claim
i. because of long standing relationship between workers, community, and company, workers feel they have some say regarding the disposition of the plants
ii. court says no precedent for affording community property rights to workers
iii. also a concern for stepping on company’s management of capital, labor, etc. – traditional presumption that employer has the right to control its property and how the business is conducted

3. the aftermath: the community impact of the mill closings
a. workers abandoned efforts to buy business as a going concern – two large plants were destroyed
b. workers did buy a smaller one through a lease agreement – became successful
c. Youngstown lost 1/3 of its population and presently has one of the highest unemployment rates in the state

4. the community property claim
a. suggested by district court judge when he granted a preliminary injunction before trial to prevent mills from closing
b. judge decided no precedent for such a property right existed, and he didn’t have authority to create one
c. this author suggests the right should have been found and a precedent for such does exist
i. wrongly searched for the “owner” of the property and then assumed owner could do whatever it wanted with the property
ii. property rights are generally shared and rights to use and dispose are never absolute
iii. also can’t lose focus of relations of mutual dependence between industrial enterprises and their communities – legitimate to rely on those relationships
iv. real issue is how to allocate those entitlements among the managers, the shareholders, and the workers – we decide who wins the dispute on grounds of policy and morality, and then we call that person the owner
v. judge believed he would infringe on private freedom by recognizing the claim – but by not, he infringed on private freedom of workers to rely on their relationship with the company
vi. judge also thought he would be acting tyrannically to make new law when that’s the job of the legislature, but by ruling for the company he made new law anyway

5. the family law origins of the community property claim
a. a few states apply community property principles to characterize and divide property at divorce
b. most other states have marital property, divisible at death regardless of title
c. premise of both is that marriage is a partnership
d. law recognizes mutual dependence of the parties and expectation relationship will continue – creates property rights from this

6. the contract claim
   a. some scholars argue promissory estoppel claim wrongly decided – what value should contract law place on promoting trust as a public good?

7. equitable grounds for relief
   b. recited promises to the town to maintain operations in exchange for 12 years’ worth of property tax abatements

8. a role for unions?
   a. management rights clause of collective bargaining agreement reserved to the company exclusive right to make decisions about future of the enterprise
   b. clauses are standards in labor contracts

9. claims for a breach of the covenant of good faith and fair dealing
   a. available on individual level, why not on collective level?
   b. one commentator suggests: claim should be available where employers keeps secret plans to close plant until an unreasonably short time before closing; where employer gives false assurances of job security whether or not they rise to the level of enforceable promises

10. fraudulent misrepresentation claims
   a. recent case suggests individuals who can show specific damage from employer misrepresentation made during hiring process may recover in tort

11. litigation as consciousness-raising
   a. *Local 1330* laid foundation for questioning cultural norm that private ownership and management of property creates only private property rights
   b. and unsuccessful test cases can inspire political action and educating the public
   c. *Local 1330* and similar cases provided impetus for the WARN Act

B. **Worker Adjustment and Retraining Act of 1988 (WARN Act)**

1. the statute
   a. requires employers with more than 100 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 and authorized the Department of Labor to promulgate regulations clarifying applicability
   b. provides employees transition time to seek new jobs or retrain and obtain swift dislocated worker assistance from the state
   c. notice period may be reduced or eliminated where employer can prove earlier notice would have interfered with good faith efforts to obtain capital or new business to postpone or avoid closing or where closing was caused by unforeseeable business circumstances or natural disasters
   d. pertinent provisions
     i. Section 2101 – Definitions; exclusions from definition of loss of employment
        1. employer – business employing 100 or more full-time employees; 100 or more employees working 4000 hpw without overtime
        2. plant closing – permanent or temporary shutdown of a single site, or one or more of its facilities within a single site, if the shutdown results in an
employment loss during any 30-day period for 50 or more employees (full-
time)
3. mass layoff – reduction in force which is not result of a plant closing and 
results in employment loss at a single site during any 30-day period for at 
least 33% of full-time employees and at least 50 employees; or at least 500 
employees
   ii. Section 2102 – Notice required before plant closings and mass layoffs 

e. impact of WARN
   i. purpose – to permit workers transition time to adjust to the prospective loss of 
employment and facilitate re-employment
   ii. advance notice of plant closings associated with lower unemployment and 
poverty rates three years later and lower usage of social welfare services
f. WARN compliances problems
   i. WARN not strictly adhered to – may be difficulty in applying its calculations 
(layoff thresholds in particular) due to many inquiries about its applicability

g. enforcement
   i. enforced solely through civil actions brought by employees, their bargaining 
agents, or on rare occasions by the local municipality where company is based 
(but most don’t want to suffer political repercussions of driving business away)
   ii. nonunionized employees less aware of rights and private attorneys don’t like to 
take cases because of limited remedies (up to 60 days’ backpay and benefits, 
reduced by each day employer gave notice if less than 60 days and reasonable 
attorneys’ fees)
iii. labor unions have played significant role – have standing to sue

h. state regulation
   i. Section 2105 authorizes state regulation of plant closings and layoff 
   ii. half the states have enacted WARN equivalents that broaden coverage

2. issues of statutory interpretation
   a. Childress v. Darby Lumber, Inc. (9th Cir. 2004)
      i. issue of how you count employees? not so much addressed in the book, but 
nonetheless critical
      ii. factual determination by court – looks at nature of operations, relationship 
between principles, etc. and concludes there is one company
      iii. issue is applicability of basic exceptions
         1. good faith exception – intent to comply and position taken is objectively 
reasonable
            a. court didn’t buy … they conceded elsewhere they didn’t know about 
WARN Act and weren’t paying attention … ignorance of the law no 
excuse
         2. business circumstances exception
            a. reasonable business judgment of a similarly situated employer in 
predicting the demands of its particular market is the standard
         3. faltering company exception
            a. applies to plant closing, but not mass layoffs
            b. should be narrowly construed
            c. permits reduced notice when (1) employer actively seeking capital at 
time 60-day notice was required; (2) realistic opportunity to obtain 
financing sought; (3) financing would have been sufficient to keep 
facility open for a reasonable period of time; (4) employer reasonably 
and in good faith believed giving notice would have precluded the
obtaining of capital or business – must show financing or business 
source would not choose to do business with a troubled company 
d. not satisfied here

b. litigation under WARN
i. ambiguities permit employers to avoid WARN by spreading layoffs over various 
worksites or a period of several months
ii. no statute of limitations – courts forced to look to most analogous state statute 
of limitations
iii. most litigated issues:
1. single site?
2. application to sale of company
3. who are “affected employees”?
4. what will suffice as good faith efforts to comply for purposes of damages?
5. how to calculate back-pay
6. which employers are responsible for providing notice where two companies 
are closely related?
7. whether the unforeseen business circumstances defense has been 
established
8. whether closure or mass layoff threshold has been reached

c. the unforeseeable business conditions defense
i. standard for assessing whether employer exercise such commercially reasonable 
business judgment as would a similarly situated employer requires a case-by-case 
examination of the facts with an industry-specific focus

d. sale of a business as mass employment loss?
ii. Ninth Circuit has said sale of business doesn’t trigger WARN notice 
requirements for the seller

C. Collective Job Security Under the NLRA
1. Section 7 – protects employees’ rights to form, join, or assist labor organizations; bargain 
collectively
2. Section 8(a)(1) – unfair labor practice to interfere with, restrain, or coerce employees 
exercising rights under Section 7
3. Section 8(a)(3) – 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
4. Section 8(a)(5) – unfair labor practice for employer to refuse to bargain collectively with the 
majority representative of its employees
5. charges may be filed with the NLRB under Sections 8(a)(1), (3), or (5); equitable remedies 
are available
6. common plant closing related violations:
a. where employer closes plan in response to union organizing campaign, potentially 
vioating §§ 8(a)(1) and 8(a)(3)
b. where employer threatens to close plan in an effort to discourage union organizing 
activity or as part of an anti-union campaign during a union organizing drive, 
implicating §§ 8(a)(1) and 8(a)(3)
c. in already unionized workforce, where an employer shift work to another operation 
without first bargaining with the union in violation of its § 8(a)(5) duty to bargain of if 
there is a labor contract, in violation of a provision barring such contracting out
7. union organizing drives
i. Darlington Manufacturing (Roger Milliken) owned 1 mill

ii. Darlington was controlled by Deering Milliken (Roger Milliken)

iii. Deering Milliken owned 17 companies with 127 mills

iv. union’s claim is company engaged in an unfair labor practice by frustrating right to organize and bargain

v. if employer is truly closing down and liquidating its company, there’s no NLRA violation

vi. partial closing would be a different story, but employers have the right to stop being employers

vii. employer gets no benefit from the closing

viii. if there’s a single employer choosing to close, what’s the remedy here? the employer’s out of business. in Darlington, Deering was ordered to pay backpay to the workers and put the workers on preferential hiring lists at its other mills

ix. there was evidence Milliken was trying to chill union organization at his other mills

x. because the NLRA protects employees’ right to organize, that might in some circumstances put a limitation on an employer’s absolute right to close a plant, but that right is limited because, if an employer is honestly going completely out of business it had a right to do so

8. threats to close in response to union organizing activity

a. NLRB v. Gissel Packing Co. (1969) – employer facing union organizing drive sought to persuade employees not to support the union, verbally and through dissemination of “propaganda” pamphlets … union lost election

i. Court held although First Amendment and §8(c) protect employer’s right to speak to its employees, context of labor relations setting and need to give full effect to §7 rights necessitated a balancing of interests

ii. rule: employers are free to communicate to their employees any of their general views about unionism or any of their specific views about a particular union, so long as the communication do not contain a “threat of reprisal or force or promise of benefit”

iii. any prediction made on the precise effects unionization will have on the company must be carefully phrased on the basis of objective fact to convey employer’s belief as to demonstrably probably consequences beyond its control or to convey a management decision already arrived at to close the plant in case of unionization

iv. rule has proven difficult to administer

9. plant closings where the workforce is already unionized

a. Fibreboard Paper Products Corp. v. NLRB (1964) – Court held 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 cost savings – falls within terms and conditions of employment

b. First National Maintenance Corp. v. NLRB (1981) – Court refused to require a unionized employer to bargain over its decision to terminate a contract with a customer even though the decision necessitated job loss for the employees who performed work pursuant to that contract … employer’s only obligation under the NLRA was to bargain with the union over the effects of the decision to close its business

c. where a collective bargaining agreement exists containing provisions limiting the employer’s rights to close or to subcontract out work, the agreement itself can furnish the basis for a damage award in a breach of contract action by union against employer
10. the decline of unions and the rise of collective job insecurity
   a. has been suggested decline in union density is responsible for the collective job insecurity today
   b. broader public interest demands legislative action to protect worker voice – where employee representatives would possess “consultation rights” on matters of employee interest, enforceable via injunctive relief in the federal courts, but no rights to collectively bargain or to strike

11. communal rights v. individual rights
   a. NLRA § 7 seeks to protect communal rights
   b. labor movement based on communal values

12. a role for law in market restructuring?
   a. where sectors of the economy are disappearing due to technology or are being outsourced overseas, is it desirable for law to intervene to protect against job losses occasioned by those shifts? will intervention impair the ability of the US to compete at a global level?

VI. Employee Mobility (301-32)

A. Generally
   1. with demise of long-term employment, employees expect to be able to take their services to a higher bidder (part of “new psychological contract”)

B. Covenants Not to Compete
      a. vet employed by another vet, signs a noncompete, goes and buys another practice in the same city
      b. principal claim is violation of the noncompete – seeks injunctive relief and damages
      c. court looks at employer's legitimate and protectable interest, employee's interest/undue hardship, and public interest
      d. must be: in writing, part of a valid contract, consideration, reasonableness of geographic scope and time limitations
      e. legitimate employer interest
         i. trade secrets, confidential information, special influence
         ii. employee given access to customers, pricing policy, etc.
      f. scope of activity – employee undue hardship
         i. small animal medicine
         ii. related to legitimate employer interest (protecting customer base of small animal patients)
         iii. employee services not unique or uncommon
         iv. no undue hardship on employee because can still practice in chosen field
      g. geographic limitation
         i. 5 mi. within Laramie
         ii. in light of legitimate employer interest, it was reasonable
      h. time limitation
         i. 3 years
         ii. in light of legitimate employer interest, it was unreasonable
         iii. court determined that 1 year was more reasonable … within a year all regular customers would have cycled through; could put a new vet in place and prove they could still provide superior services
         iv. the court modifies the covenant to comply with the 1 year restriction – blue penciling the agreement
         v. some courts won't modify
      i. court said damages are speculative
2. blue-pencil rule
   a. most courts follow blue-pencil rule and permit modification of unreasonable parts of the noncompete – there are a few holdouts, however
3. modern approaches to covenants
   a. courts recently more willing to enforce noncompete for the reasons suggested by Posner:
      i. original policy behind noncompetes no longer applicable – was paternalism in a culture of poverty, restricted employment, and an exiguous social safety net; feared that workers would be tricked into agreeing to covenants that would propel them into destitution
      ii. focus has shifted to anticompetitive consequences – judicial hostility towards them has waned, social value more recognized (particularly where trade secrets)
      iii. also important to protect employer’s investment in the employee’s human capital or earning capacity
      iv. if abuse possible, doctrines of fraud, duress, and unconscionability are available
4. covenants and training costs
   a. some employers try to restrict mobility of even lower-level employees as a means of recouping training costs
   b. one court, in a dispute between two temp agencies, held the mere cost associated with recruiting and hiring employees is not a legitimate interest protectable by a noncompete … no allegations that the noncompete was necessary to keep the light industrial laborers from appropriating the company’s confidential information, trade secrets, or goodwill
   c. contractual agreements requiring employees to pay back costs of training if they do not work for a certain period of time are generally upheld, so long as (1) costs are properly documented; (2) the time period of expected employment is reasonable; and (3) the employee knowingly entered into the agreement
      i. may be held invalid under state statutory law regulating wage payment systems or because the agreements are unreasonable penalty clauses
5. professionals
   a. different rules may apply to noncompetes of professionals (i.e., physicians) to protect the public interest
   b. noncompetes among attorneys are generally prohibited
   c. professional entertainers are often held strictly to their contractual commitments
6. covenants in a mobile labor market
   a. courts require well-defined geographical limitations – less concerned about time period
   b. increasingly the emphasis has reversed – allow nationwide restrictions for national companies, but short durations to balance the competing employer and employee interests
7. refusals to sign unenforceable agreements
   a. some employers use noncompetes for their in terror um effect – assuming even if unenforceable, most employees won’t challenge them in court
   b. California courts have permitted wrongful discharge in violation of public policy claims when employees have been required to sign noncompetes that are in violation of the state’s public policy against such agreements
   c. New Jersey recently held no public policy tort was available because no clear state policy mandate was violated
8. California’s prohibition on covenants
   a. long prohibited the agreements at all
   b. some suggest has fueled much of the ingenuity in its high-tech community
C. **Trade Secrets**

1. protecting trade secrets
      i. trade secrets case – customer lists are potentially trade secrets
      ii. trial court said no trade secret – you can get the list from publicly available sources
      iii. Vermont SCt. said summary judgment was inappropriate – problem was how much culling was involved in making the list
      iv. but grants summary judgment on the second part of the test – employer did nothing to attempt to keep the information secret
   b. advising employers
      i. many prefer noncompetes for their greater certainty – one court has said “[i]t will often be difficult, if not impossible, to prove that a competing employee has misappropriated trade secret information belonging to his former employer.”
   c. Uniform Trade Secrets Act
      i. trade secret law developed under the common law, but 42 states have adopted some form of the UTSA
      ii. most adopted same broad definition of trade secret (including, *inter alia*, customer lists, actual trade secrets (formulas, etc.), pricing information, entire business process)
      iii. critical question in cases not whether something is or is not a trade secret, but whether the information was readily ascertainable or whether the employer took sufficient steps to guard its secrecy
      iv. common means to establish intent to preserve secrecy is to require confidentiality agreements (also, passcodes/passwords, restrictions on public disclosures of confidential information)
      v. if information can be “ascertained” by something like reverse engineering, will not likely qualify for trade secret protection

2. inevitable disclosure
   a. *PepsiCo, Inc. v. Redmond (7th Cir. 1995)*
      i. PepsiCo. seeking injunction to prevent employee (without noncompete) from doing new job and divulging Pepsi’s trade secrets under Illinois Trade Secrets Act
      ii. ITSA provides court may enjoin actual or threatened misappropriation of trade secrets
      iii. but there isn’t misappropriation that’s occurred yet … but new job necessarily involves the information and its inevitable disclosure
      iv. Quaker/employee are arguing that Quaker has a confidentiality policy in place to protect against this
      v. court doesn’t buy argument – hints that to the extent employee’s ability to protect the information turns on good faith, he’s in trouble – hasn’t proven himself the most trustworthy
      vi. also, Quaker recruited 3 different execs. from PepsiCo. to fill the position employee holds and court suspicious of Quaker’s motives
      vii. employee can’t work at Quaker for 6 months, and can’t ever disclose information he knows about PepsiCo.
      viii. establishes the **inevitable disclosure doctrine (controversial)**
   b. remedies
      i. under UTSA § 1(4), damages are available for the misappropriate of trade secrets, and exemplary damages may be available for willful violations – in general, preferred remedy is injunction to preserve value of secret
   c. policy justifications
i. without inevitable disclosure doctrine employers might seek to hide information from their employees, or under-invest in their development and, consequently, under-invest in innovation

d. who pays?
   i. England – practice (“garden leave”) is that the company pays the employee’s full salary and benefits during the time he is restrained from working for a competitor by a noncompete

e. critique of inevitable disclosure doctrine
   i. managers may have departures to work in area they know enjoined at the option of their employer
   ii. factors to consider in weighing appropriateness of injunctive relief:
      1. employers in question are direct competitors providing the same or very similar products or services
      2. employee’s new position is nearly identical to old – such that could not reasonably be expected to fulfill new job without utilizing former employer’s trade secrets
      3. trade secrets at issue are highly valuable to both employers
      4. nature of the industry and trade secrets
   iii. risk – imperceptible shift of bargaining power when employment relationship hampered by confidentiality agreement – may be wielded as a noncompete when relationship ends and risk of litigation might have a chilling effect on employee
   iv. courts are left without frame of reference because no express noncompete – must grapple with more nebulous standard of inevitability

f. a collective approach
   i. trade secret law combines elements of property, contract, and tort
   ii. been suggested to incorporate a “collective” element to the bargaining process
   iii. better model for governing trade secrets – collective bargaining system
   iv. would balance collective interest of employees in individual liberty to change jobs, investments of time and firm-specific human capital
   v. would better reflect society’s interest in incentive for the production of intellectual property and wide dissemination of ideas and skills
   vi. allows employees to claim a share of the “quasi-rents” generated by the employer through its competitive advantage due to enforced trade secret protection
   vii. advocates for legislation requiring any trade secret invalid unless fair compensation has been negotiated collectively with employees involved in developing them

D. THE DUTY OF LOYALTY

1. what do employees owe to their employer?
   a. Isotronics is subsidiary of Augat
   b. Scherer left Augat to form Aegis in May 1984
   c. Greenspan moved over to Aegis in September
   d. the other 4 managers moved over between November and January
   e. plaintiff asserts common law breach of duty of loyalty
   f. notion of unfair competition; if you’re being paid to do something you should act with loyalty and good faith/fair dealing
   g. can’t take trade secrets, solicit customers, take customer lists, use employer funds for personal gain
   h. can prepare to compete, but can’t sabotage current employer in process
   i. breach of duty by Greenspan
j. breached because he actively solicited other managers to leave while still employed by plaintiff
k. no one else breached their duties
l. difference between duty of loyalty and trade secrets
   i. duty of loyalty broader – doesn’t have to satisfy narrow definition of trade secret
   ii. however, the duty of loyalty may be narrower because it only applies during employee relationship and doesn’t protect employer after employee leaves
   iii. trade secrets law protects employer even after employment relationship ends
3. duty of loyalty v. trade secrets
   a. duty of loyalty third means of restricting employee mobility
   b. New Jersey SCt. has imposed a duty on employees not to take information relating to customers even if the information was not protected under trade secrets law
4. clients
   a. soliciting clients can also lead to breach of duty of loyalty
   b. like employees, absent a contractual agreement, clients are free to take business elsewhere
   c. courts draw line between solicitation of clients and announcing one’s new business to those clients (permissible)
5. remedies
   a. breach of duty of loyalty – disgorgement of the profits defendant obtained as a result of the breach
   b. in Augut, court found profits not proper measure, and required plaintiff to prove their lost profits due to the breach of duty

VII. DIGNITARY INTERESTS
A. REPUTATION (436-53)
      a. claimed defamation, wrongful discharge, and invasion of privacy based on statement concerning his discharge published in company newsletter
      b. jury awarded on defamation and privacy claims – wrongful discharge dismissed
      c. defamation
         i. court holds information in newsletter conditionally privileged as communication of common interest concerning employer-employee relationship (privilege may be lost if abused)
         ii. defamatory communication – harms reputation of another so as to lower him in estimation of the community or deter third persons from associating or dealing with him
         iii. privileged defamation
            1. absolute – complete protection without inquiry into defendant’s motives
            2. conditional – (one example is) statements made on subject matter person making state and person to whom it is made have a legitimate common interest (i.e., common property, business, or professional interests)
               a. policy that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common
               b. particularly germane in employer/employee relationship
               c. employee have legitimate interest in knowing reasons for fellow employee’s discharge
               d. employer has interest in maintaining morale and quieting rumor which may disrupt business
            iv. conditional/qualified privilege may be abused if:
1. defendant’s knowledge or reckless disregard as to falsity of defamatory matter
2. defamatory matter published for purpose other than that for which privilege is given
3. publication is made to person not reasonably believed necessary for accomplish of purpose of privilege
4. publication includes defamatory matter not reasonably believed necessary to purpose of privilege
5. publication includes unprivileged matter as well as privileged matter

vi. no abuse here (made only enough copies for employees and circulated only in lunchroom)

d. privacy
   i. credible evidence supported his invasion of privacy claim – but conditional privilege also defense to that

2. the Restatement definition
   a. to create defamation, there must be:
      i. a false and defamatory statement concerning another
      ii. an unprivileged publication to a third party
      iii. fault amounting at least to negligence on the part of the publisher; and
      iv. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication
   b. in employment context, some courts presume the existence of harm where statement imputes unfitness for one’s profession

3. intracorporate communications
   a. some courts hold statements made by employee to another employee in same company are not published – effectively grants exception for intracorporate communications (absolute exception – can be over-inclusive)
   b. is like corporation communicating with itself
   c. chilling effect on employee communication may impede corporation’s ability to investigate important subjects
   d. jurisdictions that reject it, prefer a qualified privilege that precludes lawsuits if the statements are made in good faith during discharge of public or private duty (can be under-inclusive)

4. false and defamatory
   a. truth is an affirmative defense on which the defendant bears the burden or proof

5. false light tort
   a. liable for placing another before the public in a false light for invasion of privacy if: (1) false light would be highly offensive to a reasonable person; and (2) actor has knowledge of or acted in reckless disregard as to the falsity of the publicized matter and false light in which other would be placed

   a. claimed defamation against former employer and supervisors for giving false references to prospective employers after her resignation
   b. trial court held no publication – entered summary judgment for defendants
   c. holds qualified privilege exists regarding former employer’s statements given to a prospective employer concerning a former employee
   d. plaintiff claims privileged abused because of former supervisor’s ill will – court not persuaded
   e. pure animosity not enough – animosity must provide underlying basis for otherwise privileged statement

7. employer reference practices
a. employers now more reluctant to provide references for fear of defamation
b. many employers will only release dates of employment and job title

8. “immunity” statutes
a. 36 states passed “job reference immunity” laws in the ‘90s
b. one professor argues have little, if any, impact on employers’ practices or the advice given by lawyers and others who counsel employers
c. some statutes appear to impose a higher evidentiary burden on plaintiff than common law standards – but still lingering threat of being sued, regardless if easier to win summary judgment

9. labor market effects
a. lack of information creates three inefficiencies in the labor market:
   i. mismatching – lack of information leads employers to hire workers for jobs for which ill-suited, reducing productivity
   ii. churning – unproductive employee turnover when mismatched employees return to labor market
   iii. scarring – employers, when relying on imperfect labor market signals, or false negative information, refuse to hire someone who would be a productive employee
b. explain lack of significant change in law, despite commonplace complaints that defamation law results in too few employment references

10. reference pools
a. proposed solution is to encourage employers to use technology to create reference pools which all participating employers can access with permission of job applicants
b. state laws would protect truth of information and protect against abuse, as well as permit employees to view and correct any information
c. allow for arbitration of disputed facts to eradicate purely conflicting information

11. liability for positive references
a. factually inaccurate, but positive references, may harm others – sexual criminal with positive reference who abuses child as teacher
b. theory of liability not yet widely accepted – imposes liability only when employer makes an affirmative misrepresentation that raises a substantial risk of physical harm to others
c. can avoid by giving “no comment” reference
d. at least one court has adopted negligent misrepresentation tort in the context of employment references

d. self-publication
a. some courts hold publication requirement satisfied if plaintiff was compelled to repeat a defamatory statement to another, even though defendant didn’t communicate it to anyone other than plaintiff
b. reason for termination, etc.
c. liability where defendant knows or should know of circumstances where plaintiff has no reasonable means of avoiding publication
d. some argue self-publication liability will keep employers from giving employees any reason for their discharge
e. doctrine not readily accepted by states

B. AVOIDING EMOTIONAL HARM (351-65)

1. Wornick Co. v. Casas (SCt. Texas 1993)
   a. can’t sue for breach of contract – at-will employee
   b. can’t sue for wrongful discharge in violation of public policy – no source of public policy that would satisfy the Texas courts
c. she claims IIED (intended to redress conduct so outrageous and extreme as to go beyond all possible bounds of decency and be regarded as utterly intolerable in a civilized society)
d. issue: is IIED a tort that ought to be recognized in employment context
e. elements:
   i. intentional/reckless
   ii. outrageous/extreme conduct
   iii. caused emotional distress
   iv. emotional distress severe
f. court finds conduct was not outrageous
g. in another state she might have a claim for wrongful discharge in violation of public policy (and she could also seek damage for her emotional distress)
h. to extent IIED claim is about termination, it runs headlong into at-will rule – most courts will say can’t stand
i. most states recognize it in the employment context

2. discipline and discharge
   a. in employment context, employee are going to be discharged and disciplined and that’s inevitably going to cause some emotional distress

3. “a sea of factual circumstances”
   a. note suggests that perhaps can have IIED claim when manner of termination is so outrageous, even if can’t stand on termination alone (firing waitresses in alphabetical order until someone confesses to stealing, etc.)

   a. sues for the tort of outrage (IIED)
   b. plaintiff must show, with respect to the employer, that the conduct was intentional or reckless
   c. plaintiff must show, with respect to Golden, that the conduct was intentional
   d. held – enough evidence to go to a jury – neither defendant entitled to summary judgment
   e. no longer holds true – distinction between employer and stranger

   a. physician’s assistant who’s cursed at all the time, etc.
   b. court says no claim for IIED, because the conduct isn’t outrageous enough
   c. fact of the employment situation didn’t affect court’s analysis in same way as in Bodewig
   d. Holloman even goes so far as to say that employers have to do things in the course of their work that hurts people sometimes, and we need to give them broad discretion in handling their business
   e. it almost seems to cut the other way
   f. court also stated plaintiff hasn’t shown any particular susceptibility to this kind of behavior – that seems to be part of her burden of proof to even get her to a jury – almost made it sound like a requirement, when in fact it’s just something to look at that may help determine outrageousness … this case is a little out of sync
      i. in contrast, the Bodewig court used evidence that plaintiff was a shy, modest woman to add to the outrageousness of the customer’s action
   g. should the identity of the plaintiff matter in IIED cases?
      i. some courts say if an employer can be liable under Title VII, we don’t need IIED unless it’s above and beyond that, while other courts are more willing to permit the tort

6. the employment setting
a. Oregan courts later clarified law after *Bodewig* – existence of a special relationship was relevant, not to determining the requisite level of intent, but in deciding what behavior may be found to be extreme or outrageous
b. regardless of relationship, intent element satisfied if defendant acted with desire to inflict severe emotional distress or knew that such distress is certain or substantially certain to result from his conduct

7. “ordinary” abuse
   a. one critic thinks courts should redress more abusive workplace behavior – not just the nearly bizarre and rare
   b. she believes it is in fact more common and exploits unorganized workers by accentuating their wage dependence and belittling the worth of their work so as to undermine their ability to demand better terms of employment … and that it’s a device of oppression that reproduces economic inequality by compounding racial, ethnic, and sexual prejudice

8. employee susceptibility to emotional distress
   a. outrageousness may arise from defendant’s action in face of knowledge plaintiff is particularly susceptible to emotional distress, by reason of some physical or mental condition
   b. *Hollomon* court twisted the IIED doctrine out of shape by requiring defendant’s knowledge of unusual sensitivity, rather than seeing it as a factor contributing to outrageousness

9. bias and harassment
   a. victims of race and sex harassment often bring IIED claims in addition to their discrimination claim – some courts view the racial and sexual nature of the harassment itself to contribute to outrageousness, while others demand something more than the level of harassment actionable under anti-discrimination laws before finding tort liability

10. other hurdles
    a. sometime difficult to prove severity of emotional distress – some courts expressly require expert testimony to prove the severity of emotional distress
    b. also, may be difficult to prove employer’s liable for acts of an abusive supervisor – liability may turn on whether view conduct as falling within scope of supervisor’s employment

11. alternative to tort law?
    a. collective vision of the Wagner Act
    b. collective bargaining by workers should tend to curb extreme cases of abuse
    c. establishes grievance arbitration system

C. PRIVACY (366-414)
   1. constitutional protection for public employees
      a. *O’Connor v. Ortega (SCt, 1987)*
         i. physician discharged for wrongdoing
         ii. hospital staff searched his office during their investigation
         iii. Ortega claims violation of Fourth Amendment
         iv. court determines Fourth Amendment should apply here
         v. employer has legitimate interest in conducting search in government workplace
         vi. have to ask whether claimant has a reasonable expectation of privacy that society is prepared to consider reasonable
         vii. Ortega had a reasonable expectation of privacy in his desk and file cabinets
         viii. balance nature and quality of intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion to determine reasonableness
ix. take into account the employee’s expectation of privacy
x. in the cases of searches conducted by public employer, we 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
xi. manner in which the search is executed has to be reasonably related to the purpose of the search
xii. no warrant or probable cause requirement
xiii. held: public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, and for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances (both inception and scope must be reasonable)
b. government as employer
i. Fourth Amendment usually restricts government action in law enforcement – comes into play here because Ortega worked for government employer
c. separating work and private life
i. dissent argues can’t effectively separate work and private life – illusory
ii. workplace is another home for working Americans
iii. not all private activities take place at home, and not all private possessions stay in the briefcase or handbag
iv. majority has a certain insensitivity to the operational realities of the workplace
d. constitutional protection for confidential information and personal autonomy
i. Fourteenth Amendment’s “concept of ordered liberty” has been interpreted to protect two types of privacy interests: (1) individual interest in avoiding disclosure of personal matters; and (2) interest in independence in making certain kinds of important decisions
ii. public employees raise constitutional challenge when government employer seeks to access sensitive personal information (medical or financial records)
iii. right of confidentiality not absolute – balanced against government’s interest in disclosure
iv. also asserted challenges under “autonomy” prong, with mixed success to challenge employers based on their off-duty relationships
e. surveillance
i. telephone company set up surveillance cameras in their monitoring center that operate 24/7 with no microphones
ii. plaintiffs challenged system constitutionally because could not scratch, yawn, or perform any other movement in privacy
iii. First Circuit held no reasonable expectation of privacy would not be viewed in open area
iv. fact observation made my video rather than naked eye and recorded on tape instead of supervisor’s memory doesn’t make it constitutionally forbidden
v. also dismissed Fourteenth Amendment claim, finding autonomy branch only protected decisions relating to intimate matters like marriage and procreation

2. common law protections for private employees
a. generally
i. Fourth and Fourteenth Amendments don’t apply directly to private employers
ii. four common-law privacy torts
   1. unreasonable intrusion upon the seclusion of another
   2. appropriate of the other’s name or likeness
   3. unreasonable publicity given to the other’s private life
b. **K-Mart Corp. Store No. 7441 v. Trotti (CTA Texas 1984)**
   i. employee found her locker opened, and personal things searched
   ii. used her own lock and key with the permission of employer
   iii. to prove invasion of privacy, must show that employer intentionally intruded on her seclusion in a way highly offensive to a reasonable person
   iv. trial court did not add the highly offensive to a reasonable person language
   v. on appeal, the defendant says that’s error
   vi. appellate court says that this is an important element of the tort
   vii. plaintiff says as a matter of law, what defendant did was highly offensive … court rejects, but states that there’s enough evidence to take it to a jury

c. expectations of privacy
   i. one professor has argued making legitimacy of privacy rights contingent on business practices offers little real protection

d. offensive intrusions
   i. *Trotti* holds intrusion “highly offensive to a reasonable person” is an essential element of tort of invasion of privacy

e. the market argument
   i. a well-functioning labor market will produce an optimal level of protection – privacy respect to extent employees actually value those rights more highly than employers value freedom to invade workers’ privacy
   ii. question whether market will function in this way – employees’ lack of information, cognitive biases, signaling problems, and other barriers to negotiation may interfere with efficient bargaining so privacy interests are insufficiently protected when workers contract with employer on individual basis
   iii. in union setting, employers may be required to bargain over privacy issues affecting working conditions
   iv. in protecting employees’ off-duty conduct, body of arbitral law restricts employers’ ability to rely on such conduct as a basis for termination where “just cause” provision

f. protected privacy interests
   i. state that recognize invasion of privacy tort (majority) generally permit employees to bring claims
   ii. easy cases where employers enters employee’s home or hotel room without permission
   iii. some courts found liability where “intrusion” more psychological than physical – often don’t prevail
   iv. courts frequently find reduced expectation of privacy in workplace
   v. claims also defeated when courts find employer’s intrusion was justified for business reasons or employee consented to intrusion

   i. firm associate who’s gay and finds out companion has AIDS
   ii. later fired – suing for wrongful discharge because of sexual orientation (Denver ordinance which prohibits discrimination based on sexual orientation) and then invasion of privacy
   iii. unreasonable publicity given to the private life of another
      1. private matter
      2. publicized
      3. not of legitimate concern
      4. highly offensive
   iv. publication can be satisfied by letting one other person know
v. publicity means letting lots of people know
vi. reversible error for trial court to instruct jury publication was required
vii. what is the public? the public may be a smaller group with whom plaintiff has a special relationship and not the whole world

h. a partial reversal
i. on appeal, court affirmed Colorado recognizes tort claim of invasion or privacy based on unreasonable publicity of private facts, reversed on the adequacy of the jury instructions – public disclosure connotes publicity, “publicity” is distinct from “publication”
ii. didn’t address court of appeals finding that Borquez’s coworkers were a “public” with whom he had a “special relationship” satisfying the publicity requirement

i. private information
   i. threshold inquiry – whether matters disclosed are in fact private

j. information gathering by employers
   i. inclusion upon seclusion tort been used to challenge employer collection of private information (i.e., medical, sexual, etc.)
   ii. courts often hold employers have a legitimate interest in obtaining certain types of sensitive information
   iii. apart from common law, federal and state laws also limit employers’ ability to collect certain types of information (i.e., ADA, anti-discrimination laws, etc.)

   i. e-mail between plaintiff and supervisor
   ii. against company’s stated policy, e-mails were looked at
   iii. claims intrusion on seclusion
   iv. did he have a reasonable expectation of privacy in his e-mail? court held no.
   v. court says no – contents of e-mail didn’t include private personal information that would ordinarily be protected; and in reality the contents were inappropriate
   vi. 2 distinct privacy considerations – content of e-mail; whether people have privacy in certain forms of communication (court overlooks this one)
   vii. social norms, expectations, and choices inform whether or not people expect to have privacy in their e-mail communications – take away point

l. expectations of privacy
   i. mentions factors of voluntary communication, to a supervisor, over the company e-mail system in their finding
   ii. to determine if reasonable expectation of privacy, courts have looked to historical values, societal understandings, established practices, and whether individual has manifested expectation of privacy through behavior
   iii. don’t really help when new technology
   iv. small number of cases raising e-mail privacy concerns have no generally succeeded

m. statutory regulation of e-mail interception
   i. ECPA

3. tension between privacy rights and at-will employment
   i. employees instructed to provide urine sample and consent to drug testing – she viewed as offensive and refused to comply
   ii. fired with no hearing
   iii. won jury verdicts on wrongful discharge in violation of public policy, breach of implied covenant of good faith and fair dealing (upheld on appeal), and IIED
iv. measured against *Foley* standard, she didn’t state a claim for wrongful discharge – parties could have lawfully agreed she’d submit to urinalysis without violating public policy
v. also, public policy must be one about which reasonable persons can have little disagreement – court says there’s a lot of disagreement about whether urinalysis and privacy rights involve public policy
vi. and court says public policy not firmly established at time of termination – city didn’t ban urinalysis until after she was terminated
vii. dissent would have given her public policy based on privacy clause of the state constitution

i. employer implemented drug-testing program where employees would be randomly tested with their consent
ii. employee sued for violation of common-law right to privacy
iii. at-will employee
iv. to modify the agreement between employer and employee, there must be mutual assent – if employee continues working, she assents
v. employee here doesn’t wish to accept change – contends entitled to continue working without accepting change
vi. privacy right at stake – right to be free of unwarranted intrusion into her private affairs
vii. court rejects her claim – employer threatens no unlawful invasion of her privacy – it’s consensual testing
viii. court disagrees consent is illusory

c. options for the at-will employee
i. employees can: (a) submit to the search or testing procedure and sue later for invasion of privacy; (b) go to court immediately to seek injunctive relief barring the alleged invasion of privacy; or (c) object to the employer’s plans, be fired, and sue for wrongful discharge after the fact

d. private rights as public policy
i. courts could extend the wrongful discharge in violation of public policy to apply to cases in which employee if fired for asserting legitimate privacy interests
ii. articulated in viable source of public policy?
iii. coherent to talk about *privacy* as matter of *public policy*?
iv. Alaska came out opposite of *Luck*:
   1. state statutes support the policy that there are private sectors of employee’s lives not subject to direct scrutiny by their employers
   2. Alaska’s Constitution contains a right of privacy clause
   3. there is a common-law right of privacy
   4. sufficient evidence to support conclusion there exists a public policy protecting spheres of employee conduct into which employers may not intrude

e. balancing employer interests
i. majority in *Luck* also argued against claim in that policy must be one on which reasonable persons can have little disagreement – no firmly established public policy against urinalysis (but is this really the policy at stake?)
ii. if policy is employee’s privacy interest, then balanced against employer’s legitimate interests in health and safety
iii. if policy is no urinalysis drug testing – recognition of the policy would entail prohibiting workplace drug testing without further inquiry into the circumstances

4. collective approaches to protecting employee privacy
a. labor laws potentially applicable to union and non-union workplaces
b. employer surveillance will violate NLRA § 8(a)(1) if surveillance tends to discourage employees’ exercise of those rights, particularly the right to organize a union
c. where employers use information obtained to punish or discharge union activists, § 8(a)(2) will also be violated
d. where union in place, Labor Board concluded, variety of employer investigative tools used to detect employee misconduct are mandatory subjects of bargaining
e. if employer fails to bargain, violates § 8(a)(5)
f. \textit{Colgate-Palmolive Co. and Local 15, International Chemical Workers Union (NLRB 1997)}
   i. cameras in bathrooms and fitness center
   ii. brought unfair labor practice charges
   iii. specifically, 8(a)(5) of the NLRA, employer has duty to bargain in good faith with the collective bargaining agent over working conditions
   iv. are the surveillance cameras terms and conditions of employment that require bargaining
      1. germane to the working environment
         a. it’s a kind of investigatory tool that has implications for discipline and discharge of the workers
         b. because of this, and that it’s similar to other investigatory tools that we’ve found in the past to be mandatory subjects of bargaining, it’s germane
         c. to the extent that the cameras have an effect on the privacy interests of the employees, it’s also germane
   2. not among those managerial decisions which lie at the core of entrepreneurial control
      a. this is not fundamental to the basic direction of the enterprise, and impinges directly upon employment security
   v. problem was use of cameras before negotiating
   vi. ordered to bargain in the future and post a notice of the violation

g. accommodating employer managerial interests and employee dignitary interests
i. in recent case, Board indicated managerial prerogative protected where employer disciplines or discharges workers based on information gleaned from illegal surveillance – discipline won’t be rescinded where employer can show cause – even where proof is essentially the fruit of illegal surveillance (surveillance without opportunity to bargain)

h. the relationship between just cause protection and worker privacy rights
i. employers’ unilaterally issued rules impacting unionized workers’ privacy or autonomy, and potentially job security (discipline/discharge) may fact challenges under “just cause” provision of collective bargaining agreement – strong due process challenge where rules have not been bargained over
ii. generally plant rules are mandatory subjects of bargaining
iii. smoking ban mandatory subject of bargaining

i. alternative bases for protection
   i. one professor argued OSHA should be utilized to redress situations where workplace rules endanger worker health (i.e., restrict bathroom breaks)
   ii. in absence of union, enforcement of statutory rights under OSHA difficult

D. \textsc{Off-Duty Conduct and Associations}
   1. generally
      a. autonomy concerns sometimes characterized as type of privacy interest
b. limited focus of common law privacy tort, provides little protection against adverse employment actions based on an employee’s off-duty activities or associations
c. “just cause” provisions have been interpreted to limited discharge for non work-related behavior, but for non-union employee, finding a legal basis for challenging such a dismissal is difficult
d. handful of states protect off-duty conduct or associations incidentally
e. few states passed acts to protect employees for retaliation based on off-duty activities – may be of limited effect

2. **McCavitt v. Swiss Reinsurance America Corp. (2d Cir. 2001)**
   a. plaintiff could have claimed wrongful discharge in violation of public policy, but that would be an up-hill battle … pretty private interest
   b. invasion of privacy? likely problem with publicity element of tort
   c. these two claims don’t really fit with the core of his complaint
   d. relied on the NY statute
   e. should dating be a “recreational activity”? court says no.
   f. there was no impact on his work performance here
   g. employers might have legitimate concerns related to nepotism, sexual harassment claim

3. regulating workplace romance
   a. **Barbee v. Household Automotive Finance Corp. (2003)** – employee didn’t have reasonable expectation of privacy in pursuing an intimate relationship with a subordinate
   b. employers have interest in avoiding conflict of interests between work-related and family-related obligations; reducing favoritism; and preventing family conflicts from affecting workplace
   c. and managerial-subordinate relationship present issues of potential sexual harassment

4. off-duty relationships
   a. if McCavitt fired for dating someone not an employee/coworker, would still not have been protected under NY statute
   b. **Rulon-Miller v. International Business Machines Corp. (1984)** – common law claims (IIED and wrongful discharge) of employee discharged for dating employee of competitor … jury found for employee on both claims, upheld
   c. suggests employee privacy rights may arise through contract – in practice claims rarely brought
   d. few companies have policies like IBM explicitly promising employees protection against unwarranted interference with off-the-job behavior
   e. courts have rejected claims by employees that they lost their jobs because of decision to get married

5. other lawful off-duty conduct
   a. only a few states in addition to NY have statutes protecting employees from discrimination based on their off-duty activities
   b. 20 states prohibit discrimination against employees who use tobacco or other lawful products outside the workplace
   c. beyond limited statutory protections, employees have very few protections against adverse employment actions taken because of off-duty activities

VIII. **EMPLOYEE VOICE**
A. **EMPLOYEE INTERESTS IN VOICE (455-58)**
   1. generally
      a. “voice” is a form of self-expression, crucial to self-realization (individual)
b. collective speech necessary precursor to collective action, formal or informal (employees as group)
c. interests in voice run directly against employer’s interest in controlling property and details of production process
d. public may have interests that should be weighed in the balance
e. speech has “intrinsic value” – promotes self-realization and individual autonomy
f. free speech in workplace promotes “informed self-governance”
g. employee speech provides information to public about operation of private firms (working conditions, product safety, environmental practices, etc.)

a. argues workplace – and employee speech at the workplace – plays a unique and crucial role in strengthening our democratic institutions
b. conversations with coworkers are less private, less particularistic, and more public than conversations among family members
c. conversations among coworkers are more likely to cross lines of social division
d. workplace fosters face-to-face conversation among people who have both difference experiences, perspectives, and opinions and a reason to care about getting along

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

B. Public Sector Employees (458-72)

1. *Pickering v. Board of Education* (SCt. 1968)
   a. teacher critical of school board’s handling of funds – wrote letter to local paper that was highly critical
   b. board fired him, but not before giving him full due process
   c. claimed violation of his First Amendment rights
   d. if Pickering had not been a government employee, and sent the same letter, the government couldn’t punish him – so, as a teacher, does he have the same right?
   e. balancing test – employee’s interest v. government interests
   f. maybe we want to be particularly weary of government preventing this type of speech, because the public needs to know more about what’s really going on in the schools
   g. but if there would be impact on close working relationships (defiant to authority, etc.) could be problems
   h. Court said the employee’s interest outweighed the government’s – no close working relationship, his job was not affected, etc. – the government has no particularly compelling interest

   a. “at will” employee, but can’t fire her for unconstitutional reasons
   b. employee resisted job transfer, created and distributed questionnaire at work
   c. held Court needs to defer to discretion of employer – he shouldn’t have to wait for serious problems to develop … Myers’ speech was unprotected, and she didn’t have basis for challenging discharge
   d. Court purports to be following Pickering, but it adds a gloss
   e. Court is essentially saying that a threshold matter is whether or not the speech is a matter of public concern … if it’s not, that’s it
   f. if plaintiff first shows that speech was on a matter of public concern we apply the balancing test
   g. we look to the content/context of the speech to determine public concern
i. Court determines most of questionnaire was not public concern – excepting one question (which we’re concerned about because tends to entrench party in power, and might have effect on democratic process)

h. Brennan dissents and says that there shouldn’t be that threshold question
   i. Brennan says we weigh it twice, and it’s really a thumb on the scale on the side of the employer
   ii. he would forget about context and look at content … see if it’s something that would inform the public, then do balancing
   iii. thinks Myers’ speech is something of public concern – public has reason to know whether the DA’s office is being efficiently run and morale is high
   iv. Brennan says doesn’t matter what the motive in speaking is – the majority says it does – context is important

3. matters of public concern
   a. “public concern” threshold question criticized because focuses on nature of speech rather than whether it interfered with workplace efficiency
   b. also been criticized because difficult to apply consistently
   c. Rankin v. McPherson (1987) – sheriff’s clerical employee made private comment about attempt on Reagan’s life – Court said speech was a matter of public concern and, finding no evidence interfered with efficient functioning of office, upheld employee’s First Amendment challenge to her dismissal
   d. SCt. has explained that “public concern” mean something that is the subject of legitimate news interest; a subject of general interest and of value and concern to the public at the time of publication

4. which speech?
   a. Waters v. Churchill (1994) – a government employer doesn’t violate Constitution if it discharges an employees for speech that it believes in good faith to be unprotected after undertaking a reasonable investigation

5. promoting the efficiency of public services
   a. focus in public employee speech cases on potential disruption of workplace reflect influence of traditional master/servant image of the employment relation borrowed from common law, in which management is entitled to demand loyalty from employees

6. statutory protections for public employees
   a. Myers was public sector equivalent of at-will employee – didn’t need cause to fire her, so long as not unconstitutional
   b. in addition to constitutional protections, civil service laws protect from discharge without cause – must be justified by legitimate, work-related reasons (i.e., Whistleblower Protection Act)

7. political expression
   a. Rutan v. Republican Party (1990) – reaffirmed holding of Elrod that under First Amendment, newly elected officials cannot replace incumbent employees with members or supporters from their own political party (political patronage)
   b. it’s tantamount to coerced belief to force employees to either identify and support the particular party or lose their employment
   c. can result in the entrenchment of one or a few parties and is an effective impediment to the associational and speech freedoms
   d. though non-policymaking government employees are protected against patronage practices by First Amendment, many have limited rights of political expression because of their government jobs
i. Hatch Act prohibits covered federal employees from engaging in forms of partisan political activity (i.e., soliciting political contributions or being candidates for public office in partisan elections)

ii. Hatch Act also restricts state and local employees employed in connection with federally financed programs

iii. Some states have similar legislation – held constitutional by SCt.

C. PRIVATE SECTOR EMPLOYEES (472-85)

   a. claims wrongful discharge in violation of public policy
   b. no specific source, but court says can derive a source from either federal or state constitutional provisions for free speech
   c. court sites public employee cases, even though this is a private sector case
   d. permits the claim
   e. minority rule

   a. alleging was fired for not supporting employer’s proposal to the feds on how to deal with lands
   b. trying to point to constitutional right to free speech as the public policy – brought wrongful discharge in violation of public policy claim
   c. court says too bad – in the private sector, as an employee at will, he can be discharged for any reason and cannot claim constitutional protection

3. uncertain authority
   a. **Novosel** and **Edmondson** represent contrasting approaches to whether wrongful discharge in violation of public policy can be based on free speech rights
   b. **Novosel** decision proven controversial (though some courts have endorsed it) – a number of courts have rejected its reasoning, holding constitutional guarantees of free speech don’t restrict actions of non-governmental entities
   c. in other cases, courts have rejected wrongful discharge claims without reaching issue of the First Amendment’s basis for a public policy claim – issued turned on nature of employee speech at issue and threat it posed to employer’s legitimate interest

4. the First Amendment as public policy
   a. most courts that reject it do so on a theory of state action problem
   b. plaintiffs in **Novosel** and **Edmondson** didn’t argue constitutional guarantees of free speech applied directly to their employers, however, but that they provided a source of public policy for recognizing an exception to the at-will rule

5. speech, association and political expression
   a. in states that do not recognize First Amendment as source of public policy, employees may lawfully be dismissed not only based on speech on public issues, but because they refuse to participate in employer-sponsored speech with which they disagree

6. statutory responses
   a. some states enacted statutes specifically protecting private employees from retaliation for certain types of speech
   b. some are broader, some more narrow
   c. nearly half of states specifically forbid employer interference with employees’ right to vote
   d. and as with public employees, certain types of private employee speech may be protected if falls within statutory or common-law protections for whistleblowers

7. speech v. other public policies
   a. private employee speech rights may conflict with other public policy goals
   b. when employees invoke speech rights to protect expression that others find discriminatory or harassing (displaying confederate flag on toolbox)
c. employer never said can’t speak out about views on confederate flag, merely said he
must voice views in a manner less likely to goad one of his coworkers into an
emotional confrontation or expose company to Title VII claim

D. COLLECTIVE VOICE (485-88; 495-511)
1. generally
   a. individuals in private sector don’t possess First Amendment rights vis-à-vis their
      employers
   b. only exceptions where jurisdictions permit wrongful discharge in violation of public
      policy and then recognize First Amendment or state constitutional provision as
      sufficiently well-defined public policy or where jurisdiction afford specific statutory
      protection
   c. where employee speech concerns matters pertaining to workplace issues traditionally
      the subjects of collective bargaining (wages, hours, working conditions, etc.), speech
      may be protected under Section 7 of NLRA, whether or not there is a union in place
   d. to be protected, speech must (1) be for the purpose of organizing a union through
      which to engage in collective bargaining; OR (2) be “concerted” and for “mutual aid
      or protection”
   e. discharge of employees who engaged in concerted activities can be challenged under
      NLRA § 8(a)(1) as unfair labor practice
   f. in Connick v. Myers, Myers speech not protected because public sector employees to
      whom NLRA doesn’t apply – would have been protected if private sector or state
      employees covered by public sector bargaining law

2. the voice-protection function of NLRA Section 7
   a. Clyde W. Summers, The Privatization of Personal Freedoms and Enrichment
      of Democracy: Some Lessons From Labor Law
      i. NLRA has voice-protection function as well as market-power-enhancing
         function
      ii. freedom of association was statutorily protected in private employment as
          necessary precondition to broader purpose of encouraging collective bargaining
      iii. most obvious function of collective bargaining – market function, to provide
          better balance of bargaining power
      iv. also promotes constitutional values of democratic decision-making and due
          process in the workplace

3. NLRA Section 7 rights in the non-union workplace
   a. NLRB v. Washington Aluminum Co. (SCt. 1962)
      i. nonunion employees exercising § 7 rights under the NLRA
      ii. board held they had right to walk out (as concerted activity) due to cold working
          conditions
      iii. court of appeals refuses to uphold the board’s decision
      iv. SCt. said court of appeals is wrong – must uphold correct board determination
      v. didn’t have to present a specific demand to the employer – SCt. said it would be
         unreasonable because they’re not a group with resources to make some sort of
         formal demand – and they’d all complained individually in the past
      vi. lack of formal demand doesn’t matter for § 7 protection
      vii. employer also argued didn’t have to reinstate the workers because had cause to
         discharge them – there’s a rule that you can’t leave the shop floor without
         permission, and they did
         viii. court didn’t buy it – if the reason for cause is that they were engaged in § 7
             concerted activity, impermissible to discharge
   b. Timekeeping Systems, Inc. (NLRB 1997)
      i. bringing similar claim as in Washington Aluminum
ii. what is a concerted activity?
   1. he wasn’t speaking alone – he was engaging/mobilizing more than one 
      employee towards a common end
   2. protected when for purpose of mutual aid or protection
   3. really about working conditions

iii. court says emailing was concerted activity dealing with a company policy

iv. also must show concerted activity is protected

v. communications occurring during course of otherwise protected activity remain 
   likewise protected unless found to be “so violent or of such serious character as 
   to render the employee unfit for further service”

vi. disloyalty also might count – public disparagement of the employer or its product 
    might be unprotected – like in middle of a labor dispute

vii. no problem meeting elements (concerted activity, employer knew of concerted 
     activity, and discharge because of concerted activity)

viii. remedy was reinstatement, back-pay, and posting of notice of violation

ix. in individual wrongful discharge cases it’s all about damages, and courts basically 
    never issue reinstatement

x. NLRA is protecting a collective right – so to pay an individual damages, doesn’t 
    meet that goal

xi. tort law focuses on individual harm; there’s very little attention paid to how there 
    might be an impact on others in the workplace, so the damages are framed in 
    terms of compensatory damages

xii. if didn’t send the email to other workers and just acted on his own, the activity 
     might not be concerted

xiii. if the workplace was unionized and he spoke out alone, he’d still be considered to 
      be engaging in concerted activity – protecting the collective bargaining agreement

c. requirements for protection under Section 7
   i. employee activity protected whether conducted in union or non-union workplace 
      if: (1) “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; (2) relates to wages, hours, or terms and conditions of employment, 
      broadly interpreted; and (3) “protected” – neither disloyal, indefensible, violent, 
      unlawful, or in breach of contract

d. greater levels of protection for concerted activity in union workplaces
   i. in union workplace, individual worker acting alone in furtherance of rights 
      protected under collective bargaining agreement is acting “concertedly” for 
      mutual aid or protection – continuing ongoing process that produced the labor 
      agreement – even where employees doesn’t explicitly reference agreement in her 
      protest

   ii. union workers receive broader protection than non-union workers

   iii. employee’s invocation of statutory rights under FLSA or OSHA has been held 
        not “concerted” activity ... any concerted activity in the lobbying process that led 
        to passage of employment legislation has only “attenuated” link to workplace 
        assertion of individual rights

   iv. unless explicitly authorized by other workers, invocations of statutory rights not 
        protected concerted activity under § 7 of NLRA ... employment legislation 
        confers individual rights, not collective rights

e. refusals to work under hazardous conditions
   i. regulations promulgated under OSHA authorize employee refusals to perform 
      unsafe work if fear of serious injury or death is objectively reasonable
ii. Section 7 provides even broader protection for concerted refusals to work, protecting refusals predicated on a genuine fear of harm, even if objectively unreasonable

f. employer prohibitions on discussions of wages
   i. employer handbooks often purport to bar employees from discussing wages or compensation with coworkers – inconsistent with NLRA § 7
   ii. same true for employer-promulgated “confidentiality rules” prohibiting workers from discussing complaints concerning sexual harassment or other working conditions

g. the NLRA as public policy: individual claims for wrongful discharge
   i. Grant-Burton v. Covenant Care, Inc. (2002) – court upheld the NLRA as public policy noting well-established statutory support for the public policy and fact that it inured to the public benefit – policy both fundamental and substantial
   ii. more advantageous to proceed in tort – NLRA only provides equitable remedies (back-pay, reinstatement, and injunctive relief)
   iii. this case is an outlier – doctrine of federal preemption broad and powerful – vast majority of courts find the NLRA preempts state court common law claims challenging conduct protected by NLRA reasoning Congress has chosen to “occupy the field” of labor law

h. right to have a representative or coworker present at an investigatory interview preceding disciplinary action
   i. NLRB v. J. Weingarten, Inc. (1975) – Court held Section 7 protects employees’ rights, upon request, to the assistance of a union representative at an employer-initiated investigatory interview which the employees reasonably believes may result in disciplinary action
   ii. reasoned employee’s request for union rep protected concerted activity because would function to safeguard interests of all employees in the unit against unjust disciplinary procedures
   iii. right must be invoked by employee
   iv. if invoked, employer may choose to forego interview and proceed with discipline
   v. employer has no duty to bargain with union rep if decides to permit his or her attendance – the rep’s function is to assist the employee who lacks knowledge of rights, to clarify the facts, or to suggest other employees who have knowledge of them

   i. Weingarten rights in the non-union context
      i. dissent argued rights should exist in non-union context, Labor Board has found question vexing – has flip-flopped on opinion
      ii. most recently – Bush administration Board has found Weingarten right does not apply to employees in non-union workplaces

IX. THE REGULATION OF WAGES AND HOURS (699-749; 754-63; 772-94)
   A. HISTORICAL ORIGINS
      1. the short hours movements
         a. Scott D. Miller, Revitalizing the FLSA (2001)
            i. short hours movement – late 19th, early 20th centuries
            ii. embraced workers’ desire for personal time
            iii. law enforcing max hours were Progressive and New Deal Era political responses to the labor question
            iv. advocates argued would protect worker health and safety, welfare, and morals
      2. early protective legislation and the judicial response
a. by 1800s, states began enacting restrictions on work for women, minors, and hazardous occupations
b. 1840 – federally established 10-hour workday
c. earliest statutes lacked enforcement mechanisms and allowed waiver by contract
d. became non-waiveable to correct market abuses (i.e., _Lochner_)
e. Court later acknowledged states’ authority to legislate minimum standards for workers’ protection in a case involving women workers (_Muller v. Oregon (1908)_)
f. soon after court struck down minimum wage law applicable to women and children – interfered with freedom of contract and Fifth Amendment due process
g. _West Coast Hotel Co. v. Parrish (SCt. 1937)_
   i. challenge to minimum wage law for women
   ii. chambermaid sought to enforce the law and receive her minimum wage
   iii. SCt. signaled a sea change in its approach to challenges of this kind of legislation
   iv. what used to be a violation of due process because it interfered with freedom of contract – this type of legislation isn’t going to be subject to such scrutiny as it has bee
   v. legislatures took the hint and passed the FLSA
h. the Court’s “stitch in time”
   i. some think _West Coast_ response to tumultuous political period triggered when Court struck down NIRA in _Schechter Poultry_
   ii. in face of Roosevelt’s plan to pack Court, the decision’s “switch in time” save the nine Justices and ensured future constitutionality of minimum standards legislation and NLRA
i. the demise of _Lochner_ and the rise of protective legislation
   i. _West Coast_ signaled demise of _Lochner_ rationale
   ii. deferred to state legislative enactments and began upholding state statutes against due process challenges
   iii. five justifications for FLSA: detrimental labor conditions …
      1. cause commerce and channels of commerce to be used to spread and perpetuate labor conditions among workers of the several states
      2. burden commerce and the free flow of goods in commerce
      3. constitute an unfair method of competition in commerce
      4. lead to labor disputes burdening and obstructing commerce and the free flow of goods in commerce
      5. interfere with the orderly and fair marketing of goods in commerce
   iv. linked minimum wages and maximum hours in one piece of legislation
   v. contained child labor provisions
   vi. upheld against constitutional challenge in _United States v. Darby_ – constitutional exercise of commerce power and didn’t violate due process clause
j. the goals of the shorter hours movement
   i. FLSA didn’t accomplish all goals of the shorter hours movement (improve health, spread work, increase leisure time, establish hours as a sphere or worker control over process of industrial production
   ii. leisure time and worker control never been embraced by federal government as a reason to shorten working day
k. the union role in the struggle for shorter hours
   i. reduced working hours receded to margins of agendas of US unions
l. a public policy against overtime work?
   i. policy behind FLSA’s overtime provision not to establish limit on weekly working hours
B. THE FLSA: MINIMUM WAGE AND OVERTIME PROVISIONS

1. the basics
   a. work spreading one goal – hire more workers to work shorter hours
   b. established a federal minimum wage and imposed overtime premium on employers requiring more hours than statutorily-imposed weekly norm
   c. regulates oppressive child labor
   d. permits individual and group claims
   e. §§ 206 and 207 establish wage and hour provisions
      i. minimum wage $5.15/hr.
      ii. overtime is one and one-half time regular rate of pay (calculated on hourly basis even if salaried employee, paid piece-rate, or on commission) for all hours in excess of 40
      iii. rates for tipped employees
      iv. neither minimum wage nor overtime may be waived by private agreement

2. who is covered?
   a. generally
      i. employees must be covered as individuals engaged in commerce or in the production of goods in commerce, or employed by an employer subject to “enterprise” coverage
         1. enterprise coverage – 2 or more employees with gross sales or business volume of at least $500,000, or public agency, hospital, or educational institution regardless of dollar volume
         ii. must exist an employment relationship – employee rather than independent contractor, student, or volunteer – and employer must act in interest of any employee relative to the worker
            1. agents or subcontractors can be employers if exercise sufficient control over workers
            2. can be more than one employer under “joint employer” doctrine
            iii. exempts certain categories of employees from minimum wage and overtime provisions, others only from overtime provisions
   b. individual or enterprise coverage of employees
      i. applied on weekly unit basis – covered if employee engages in interstate commerce that week
      ii. “enterprise” – related activities performed either through unified operation or common control by any person or persons for a common business purpose
      iii. explicitly exempts from enterprise coverage any family-owned business that don’t employ people outside family
   c. the existence of an employment relationship
      i. SCt. has explained the “economic reality” of the relationship that determines whether a worker is an employee within the meaning of FLSA
      ii. various versions of test:
         1. early test (Bonnette):
            a. whether alleged employer: (1) had power to hire and fire employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined rate and method of payment; and (4) maintained employment records
            b. looked primarily to whether exercised control over nature and structure of employment relationship and possessed economic control over the relationship
         2. Donovan test:
            a. degree of employer’s right to control manner in which work performed
b. employee’s opportunity for profit or loss depending on managerial skill
c. employee’s investment in equipment or materials required for work, or
employment of helpers
d. whether service rendered requires special skill
e. degree of permanence of working relationship
f. whether service rendered is an integral part of alleged employer’s
business
3. no single factor in these tests determinative
4. label employer applies to relationship not dispositive, even where worker
accepts designation
iii. “joint employer” doctrine
1. courts generally utilize some version of economic realities test to assess
existence of a joint employment relationship
d. exemptions from coverage
i. exempt from both minimum wage and overtime
1. white collar workers (executive, administrative, and professional)
2. outside salesmen
3. computer professionals
4. employees of seasonal amusement and recreational businesses
5. fishing and aquatic businesses
6. most agricultural workers
   a. if employed on small farms
   b. work on farm owned by immediate family
   c. harvest laborers paid on piece-rate basis
   d. harvesting and processing of tobacco
7. publishers of small newspapers
8. domestic workers who perform casual babysitting or care for disabled/aged
   ii. exempt only from overtime
   1. transportation industry
   2. some agricultural workers
   3. live-in domestic workers
e. determining coverage
1. chicken catchers working with crew leaders (who work as “independent
contractors” for Perdue)
2. issues: are the catchers employees of Perdue? and second, do they fall
under the agricultural worker exception to FLSA?
3. label of independent contractor is not determinative
4. look at economic reality of relationship
5. six factors:
   a. degree of control putative employer has over manner in which work is
performed
   b. opportunities for profit or less dependent upon the managerial skill of
worker
   c. putative employee’s investment in equipment or material

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* 9 factors economic realities test for “joint employer”: (1) ownership of the property and facilities where work occurred; (2)
degree of skill required to perform job; (3) investment in equipment and facilities; (4) permanency and exclusivity of employment;
(5) nature and degree of control of workers; (6) degree of supervision; (7) power to determine pay rates or methods of payment of
workers; (8) right, directly or indirectly, to hire, fire, or modify employment conditions of workers; and (9) preparation of payroll
and payment of wages
d. degree of skill required for work
e. permanence of working relationship
f. whether service rendered in an integral part of the putative employer's business

6. court concludes crew leaders are employees for purposes of the FLSA
7. implication for chicken catchers is that they are also employees
8. under common law there is also a test for determining whether there are employees: whether the principal has the right to control the manner and means of work (under this test, they're still employees)
9. we have a separate test under the FLSA because we're asking the question for a different purpose (i.e., not vicarious liability as under the common law)

ii. agricultural exemption

1. Holly Farms v. NLRB (1996) – SCt. deferred to NLRB’s determination that live-haul chicken catchers at Holly Farms, sub of Tyson, were covered under the NLRA (which uses same definition of agriculture found in FLSA)

iii. the joint employer doctrine

1. where farmers hire “farm labor contractors” (FLCs) most courts hold farm workers are employees of the FLC, but not the farm itself
2. 11th Cir. recently held no joint employer status in similar situation – as a matter of economic reality, migrant farm workers are employees of the FLC rather than of the farm
3. garment industry (similar situation) – garment workers contract out in-house production of garments to “jobbers” who arrange with sewing contractors to sew, press, and finish garments according to patterns the jobbers provide
4. FLCs and jobbers are frequently undercapitalized and may have no assets to pay workers, leaving workers who cannot proceed against farms or manufacturers

iv. prisoners as employees

1. some courts have applied Bonnette factors to prison labor cases and determined prisoners were employees within meaning of FLSA (where on work-release)
2. where employed by Department of Corrections inside prison – Bonnette may not be appropriate (fear would entitle prisoners to minimum wage for all prison activities
   a. some have used “totality of circumstances” test instead
   b. look closely at type of work performed and relationship between employer and employee
   c. and then consider: (1) whether work primarily benefited employer or employee; (2) whether worker displaced other workers; and (3) whether purpose of statute will be frustrated if employment relationship isn’t found
   d. courts have found purpose of FLSA to establish minimum standards of living necessary for health, efficiency, and general well-being not furthered by applying to inmates, whose basic needs are met

v. unpaid interns and trainees

1. debatable, but seems that most are not covered by FLSA (work serves own interest and FLSA not intended to cover everyone under minimum wage umbrella)

vi. volunteers
1. FLSA been held to apply to religious foundation employer operating commercial business staffed by “associates” (former drug addicts and criminals) because of complete dependence on Foundation (*Tony & Susan Alamo Foundation v. Secretary of Labor (1985*))

vii. undocumented workers
1. courts consistently find undocumented workers covered by the FLSA
2. availability of back-pay remedies for undocumented workers proceeding under labor standards legislation was called into question by SCt. in Hoffman Plastic Compounds Inc. v. NLRB (2002)
3. same reasoning doesn’t apply in FLSA context – undocumented workers still entitled to recover back-pay for work actually performed, by contract to the NLRA context where the back-pay award is remedial in nature – recovered for work that would have been performed had the plaintiff not been unlawfully discharged

3. what is covered work?
   a. “compensable time” defined 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 to permitted to work for the employer”
   b. “off-the-clock” work
      i. *Davis v. Food Lion (4th Cir. 1986)*
         1. meat manager working overtime to meet production standards
         2. Davis argued he couldn’t possibly get his work done on the clock
         3. off-the-clock hours can be compensable when employer knows or should know employee is working off-the-clock
         4. ensures purposes of statute are met – so long as employee is doing work, he should be compensated
         5. employee has burden of proof of showing that employer should have known or knew that employee is working off-the-clock
         6. Davis didn’t meet standard, but claims that employer should have known that production standards could not be met
         7. company also had policy that there was no working off-the-clock
         8. court concludes this is not a situation where employer knew or should have known he worked off-the-clock, so hours are not compensable
         9. court thought should have complained through company, but that might not be feasible as an at-will employee
      ii. establishing employer knowledge
         1. *Davis* stated employee must show amount and extent of overtime as a matter of “just and reasonable inference” from the facts proved
         2. must show a pattern or practice or employer acquiescence (i.e., employer giving employee keys so could work off-the-clock)
      iii. the Wal-Mart model
         1. managers sought to reduce labor costs by under-staffing employees, forcing employees to work off-the-clock, causing employees to work without receiving their contractually required meals and rest breaks and manipulating time and wage records to reduce amount paid to Wal-Mart employees
   c. “on-call” time
      i. time spent “waiting to be engaged” is not compensable, but if employees are engaged to wait” the time is compensable
      ii. *Dinges v. Sacred Heart St. Mary’s Hospitals, Inc. (7th Cir. 1999)*
         1. EMTs wanting compensated for on-call time
2. issue: whether the worker is engaged to wait or waiting to be engaged
3. turns on what they can do while on-call … are they free to pursue personal activities (but not all personal activities) while on-call?
4. is fact that there’s a long list of things they can’t do decisive? nothing is dispositive per se
5. employees also argue that a 7-minute leash is too short
6. court not sympathetic to that argument, particularly in middle-of-nowhere Wisconsin
7. this is just a close case … court says the parties agreed to this and we’re just going to enforce it

iii. employees’ ability to make effective use of their time
   1. core distinction is whether employee can make effective use of on-call time to tend to the ordinary activities of private life

iv. always on call
   1. where 100% of employee’s time is spent on-call, court saw no distinction – concluded employee was able to make effective use of time on-call (Bright v. Houston Northwest Medical Center Survivors, Inc. (1991))
   2. dissent didn’t like his permanent “20-minute leash” and saw lack of relief over period of almost 1 year to justify compensation

v. employees as “prisoners”
   1. Ninth Cir. has held electric utility employees who lived in employer-provided housing were owed overtime pay for a portion of the 24-hour shift they spent waiting to be called for a potential emergency (located in remote site, during on-call time were permitted to be home, but remain sober and respond instantly)

d. rest and meal periods
   i. FLSA doesn’t contain requirement that employers provide rest or meal periods to workers
   ii. 8 states have passed statutes requiring rest period, and 14 additional have laws mandating meal periods
   iii. many employers provide rest or meal periods as a matter of custom or because of collective bargaining agreements
   iv. generally rest periods of 20 minutes or less are included compensable work time under FLSA, but bona fide meal breaks of 30 minutes or longer when employee is completely relieved of duty are not
   v. some courts looking at the bona fide meal regulation have typically applied a “predominantly for the benefit of the employer” test, asking whether the meal period is used predominantly for the employer’s benefit

e. training time
   i. time spent attending employer-sponsored lectures, meetings, and training programs is compensable unless: (1) it occurs outside the employee’s regular working hours; (2) attendance is voluntary; (3) course is not directly related to the employee’s job; and (4) employee performs no productive work during the training
   ii. all four criteria must be met

f. travel time and other “preliminary and postliminary” activities
   i. Portal-to-Portal Act excludes from compensable time commuting to and from work
   ii. travel time incurred in connection with out-of-town work, travel on business, and travel time during normal business day from one location to another or from office to job site is compensable
iii. in general (washing-up time, changing in and out of uniforms, safety and protective gear, waiting in line to obtain equipment or to clock in, etc.) are compensable if an integral part of the principal activities of the job

iv. preliminary or postliminary activities which are not an integral part of the principal job activities, and they are not compensable unless made so by contract, custom or practice

v. courts distinguish based on whether employer or employee is primary beneficiary of activity

4. enforcement of the FLSA
   a. basics
      i. administered and enforced by Secretary of Labor
      ii. can be enforced through civil actions brought by Secretary of Labor or by aggrieved employees themselves – or through criminal prosecutions brought by Department of Justice
      iii. authorizes Secretary to sue for recovery of unpaid minimum wages, overtime comp, and an equal amount in liquidated damages
         1. civil penalties up to $10,000 for violations of child labor provisions
         2. up to $1,000 per violation for willful violations of the minimum wage and overtime provisions
         3. can seek injunctive relief
         4. can prosecute recordkeeping violations
   iv. employees can sue for unpaid minimum wage and overtime violations and an equal amount in liquidated damages
      1. collective action claim available for claims by multiple employees
      2. contains anti-retaliatory provision that can be enforced through suit (internal complaint to employer satisfies “complaint-filing requirement” of provision for some, others require formal complaint to government or court)
         a. where formal complaint is required, employer free to discharge employee in retaliation for asserting rights under the FLSA as long as the employer acts prior to the formal filing of any complaint
         b. where retaliated against for asserting rights under the FLSA or state wage and hour law, can challenge discharges as wrongful, pointing to relevant legislation as evidence of public policy
         c. HOWEVER, majority of jurisdictions hold statutory remedies under the FLSA are adequate and preempt a claim for wrongful discharge in violation of public policy
      3. if Secretary brings claim, forecloses employees right to an individual claim
   v. Department of Justice may prosecute willful violations as criminal actions
      1. maximum sanctions are a fine of not more than $10,000 for a first violation, or fine and/or imprisonment for not more than 6 months for subsequent violations
      b. defenses and limitations on liability
         i. Portal-to-Portal Act provides complete defense for failure to pay minimum wage or overtime if employer can show violation of the FLSA was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the Wage-Hour Administrator, even if the opinion is later rescinded
         ii. Act also establishes statute of limitations for the FLSA (2 years for non-willful and 3 for willful)
iii. willful means employer knew or showed reckless disregard for the FLSA regulation
iv. court may reduce or eliminate liquidated damages if employer acted in good faith
v. employer bears burden of proof – confusion will not suffice
c. state wage and hour laws
   i. individual states may enact wage and hour law more protective than federal law
   ii. FLSA expressly avoids preemption
   iii. 12 states have higher minimum wage
   iv. many also have more stringent overtime standards
   v. most states allow class actions to collect unpaid wages
   vi. state law regulates wage collection, limits on deductions or amount withheld, regulation of wage payment on termination, including accrued vacation pay
d. Rule 23 class actions and FLSA collective actions
   i. class actions not permitted under the FLSA
   ii. permitted under state wage and hour laws
   iii. FLSA authorizes employees to bring collective actions – require employees opt-in by filing a consent to join the suit (only ones bound)
   iv. can be difficult to get them to opt-in (fear of retaliation, lack of understanding of legal system, language barriers, difficult in contacting prospective claimants, failure to respond to notices received in mail)
   v. attractive because potential for big payouts/attorneys’ fees, complexity of the FLSA’s provisions combined with employer neglect, lack of an intent requirement to prove violation, relative ease of collective action versus a Rule 23 action/certification
   vi. two circuits held union funding of legal services for filing of suits under individual employment rights statutes violate NLRA if during union election campaign because tantamount to bribing employees to support union
e. public sector employment
   i. FLSA doesn’t apply to public sector
   ii. absent a waiver by state, public employees must rely on Secretary of Labor to enforce their rights or sue under state law
   iii. although Secretary can theoretically enforce rights of public sector employees, it lack resources to do so

C. RECONSIDERING THE FLSA’S EFFICACY AS A WEALTH REDISTRIBUTION MECHANISM
1. impact of the minimum wage
   a. Scott D. Miller, Revitalizing the FLSA (2001)
      i. historic purpose of minimum wage standard was to maintain a minimum standard of living, lessen the need for government aid to families, and prevent disputes between employers and organized labor
      ii. has greater impact in southern and other right-to-work states with lower wage structures than in regions with higher union density
      iii. minimum wage has failed to keep pace with increasing prices, poverty thresholds, and average wages – cannot achieve its purpose
   b. historical impact of minimum wage
      i. many of the most needy workers were excluded by the exemptions from agricultural and domestic service workers
   c. declining value of the minimum wage
      i. real value of minimum wage (adjusted for inflation) has dropped significantly since late ‘60s, early ‘70s, which most studies identify as its high point
      ii. pressure to raise it is mounting
   d. winners and losers in a minimum wage increase

66
i. fewer than 3% of all hourly-paid workers earn at or below minimum wage
ii. many workers spend their first years in the labor market at minimum wage jobs
iii. those who stay are disproportionately female, African American, and/or Hispanic.
iv. many are also part-time and in service-type jobs
v. those who earn just above current minimum wage would indirectly benefit from an increase
e. the employment effects of raising the minimum wage
   i. has been concluded that raising the minimum wage had no disemployment effect – and would actually increase employment – results criticized
   i. most economists agree that minimum wage is self-defeating – destroys jobs in the low-wage sector of the economy and hurts those intended to help
   ii. market demand decline as its price increases
g. Richard B. Freeman, What Will a 10% … 50% … 100% Increase in the Minimum Wage Do? (1995)
   i. five issues in assessing the policy of using the minimum wage to help low-paid workers:
      1. does minimum wage redistribute income to low-wage workers?
      2. does minimum wage divide the workforce into insiders, employed permanently at the minimum, and outsiders who suffer long-term joblessness because of the minimum?
      3. are low-wage workers low-income workers?
      4. how does minimum wage fit with other economic policies?
      5. at what level should we fix the minimum wage if we are to redistribute income without risking sizeable job loss?
   ii. real question may not be whether increases in the minimum wage are desirable and efficacious, but instead at what level their detrimental impact on employment outweighs their positive effect in reducing poverty among low-income families
h. the impact of a minimum wage increase on businesses
   i. opponents of increases argue small businesses would bear a disproportionate share of the costs of a higher minimum wage – recent studies suggest opposite
   ii. would be helped because would assist them in competing with larger rivals who pay employees less and can therefore discount prices on goods and services sold
   iii. some suggest minimum wage helps marginal workers and efficient employers who pay higher wages by driving inefficient employers out of business
i. the minimum wage as an anti-poverty measure
   i. minimum wage is non-waivable
   ii. although other wealth redistribution mechanisms exist that might be more effective, minimum wage laws are most politically feasible

D. THE OVERTIME BARGAIN: TIME, MONEY AND CLASS STATUS
1. work time: increasing or decreasing?
   a. overtime provisions of the FLSA offered a route to higher pay and higher class status for the working class in exchange for longer working hours
   b. for many employers it was cheaper to pay overtime then to hire additional workers who would require additional benefits and training
   c. shopping became leisure – “work-spand cycle” developed
   d. workers chose money over leisure and engaged in compensatory spending
   e. whether Americans work more or less hours per week is debated in conflicting studies
2. public sector employment and “comp” time
a. overtime was a problem for public agencies and government employers who couldn’t afford to pay it
b. special rules for comp time in lieu of overtime were developed
c. although the FLSA originally applied only to the private sector employees, amendments in the ‘60s and ‘70s expanded coverage to the public sector — but amendments were struck down as impermissible intrusion on state sovereignty
d. non-traditional government functions, however, remained subject to the statutory wage and hour requirements under the FLSA
e. 1985 amendments permit public employers to award comp time in lieu of cash for overtime at a rate of 1.5 hours per hour of overtime
f. Congress limited use of comp time in public sector — employee must agree to it (agreement, regular practice of employer, etc.)
g. employer must permit its use within a reasonable amount of time after the request to use it if won’t unduly disrupt operations of the employer
h. max amount is 240 hours – some professions capped at 480 – then must pay cash
i. employer may cash out accrued comp time by paying cash
j. employees who leave jobs with accrued time can receive cash
k. those who support extending comp time to private employees argue it will: (1) increase employee flexibility to balance work and family schedules; (2) establish parity between public and private sector; and (3) improve employee’s ability to keep down costs
l. opponents suggest: workers depend on overtime cash, will not afford workers sufficient control and is subject to abuse by employers, involuntary pay cut on workers and employers will actually gain flexibility, not employees, promises will prove to be illusory (no time to take time off)

3. high-end exemptions: white-collar employees and computer professionals
   a. 3 categories require payment on salary basis, and computer professionals can be paid hourly but must make at least $27.63 per hour
   b. the 2004 regulations
      i. job title alone insufficient to establish exempt status
      ii. exempt employee’s salary must be at least $455/wk.
      iii. salaried employees earning less than $23,660 per year are guaranteed overtime
      iv. earning between $23,660 and $100,000 subject to “standard duties” test (exempt only if employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee)
      v. completely exempt from salary-level test teachers, lawyers, and doctors
      vi. white-collar exemptions don’t apply to manual laborers or other blue-collar workers performing work involving repetitive operations with their hands, physical skill and energy, police officers, detective, sheriffs, troopers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, EMTs, ambulance personnel, rescue workers, hazardous materials workers and similar employees regardless of pay level
      vii. many will likely lose overtime protection under new regulations
      viii. $455/wk. too low
   c. application
      i. executive employees
         1. includes employees whose primary duty is the management of the enterprise … and who customarily and regularly direct the work of two or more other employees; and who have the authority to hire or fire other employees or whose suggestion and recommendations as to hiring, firing, advancement,
employees are given promotion, or any other change of status of other employees are given particular weight

2. **Scherer v. Compass Group, USA, Inc. (W.D. Wis. 2004)**
   a. executive chef at Commons
   b. court said primary duty was management of kitchen, not food preparation
   c. even though spent 75% of his time preparing food, court said “primary” duty is work that done that is of principal value to employer
   d. court looked at his salary – twice that of other workers – even managers may perform manual labor
   e. exempt – not entitled to overtime

ii. administrative employees
   1. includes employees whose 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 whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

      a. nonexempt – entitled to overtime
      b. court said the software limited their discretion in their jobs to the point that there’s not really independent judgment
      c. rejects categorical determination that all auto claims workers are nonexempt … should be a case-by-case analysis for the workers at issue

iii. professional employees
   1. learned professionals – employee whose primary duty is the performance of work requiring knowledge of an advanced type (predominantly 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
      a. law, medicine, nursing, accounting, engineering, and architecture, etc.
   2. creative professionals – employee whose primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
      a. musicians, writers, and graphic artists, etc.
   3. include teachers, tutors
   4. for a journalist or professional working in communications to be exempt under the white-collar exceptions, courts generally require employee be classified as a creative professional (d.j.s, tv anchors, investigative interviewers, interpreting public events, writing eds., narrators/commentators)

iv. computer professionals
   1. computer systems analysts, programmers, software engineers, etc.
   2. primary duties must consist of performance of work that requires theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering, and that the employee’s primary duty include work requiring the consistent exercise of discretion and judgment
   a. nonexempt – entitled to overtime
   b. provides only computer workstation maintenance
   d. the FLSA’s class line-drawing function
      1. pre-New Deal hours legislation was health oriented – white collar working conditions not as injurious to health
      2. white collar workers not organized into unions, and didn’t see themselves as overworked
      3. identified upward with their bosses, no downwards with manual workers
      4. didn’t mobilize to seek government protection from long working hours
      5. we should rethink the line-drawing of FLSA though – overtime exemptions send working people powerful messages about their class line-drawing
   ii. Department of Justice attorneys?
      1. Doe v. United States – 10,000 trial attorneys with DOJ brought class action for overtime pay under Federal Employees’ Pay Act (protection for public sector employees parallel to FLSA) … initially won, overturned on appeal because overtime was not ordered or approved in writing as required by a regulation of the Office of Personnel Management – not compensable despite fact it was induced by government policies

X. **PENSION AND HEALTH BENEFITS**

A. **PENSION BENEFITS** (795-96; SR 1-20; 837-47)
   1. generally
      a. ERISA regulates health and pension plans
      b. “welfare benefit plans” include medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services
      c. health benefit plans are most common welfare benefit plans, with other benefits, like life and disability plans, also falling in that category
      d. prior to ERISA, pension funds were going bankrupt, being mismanaged or were vulnerable to looting by plan administrators
      e. ERISA provides for comprehensive federal regulation – broad preemption
      f. virtually no substantive provisions regulating health or other welfare benefit plans
      g. plan administrators have fiduciary duties to act in sole interest of plan beneficiaries
      h. neither punitive or consequential damages can be recovered by a plan beneficiary under § 502
      i. § 514 - broad preemption clause
      j. § 510 – prohibits discrimination against plan participants
      k. health and pension benefits are discretionary
      l. system of pension benefits has 3 components:
         i. social security
         ii. employer-provided pension plans
         iii. private savings
      m. traditional pension plans have waned in significance – with decrease in career employment, employers don’t have much of a need to regulate workforce turnover and encourage retirement with financial security
n. more employers offer health insurance then pension benefits; union members more likely than non-union to have retirement benefits; full-time employees more likely than part-time; low-income typically do not have access to pension benefits

2. defined benefit plans
   a. offers fixed benefits during retirement – formula takes into account employee’s highest or average salary and length of service
   b. have become less popular
   c. found almost exclusively among union members and some state retirement systems
   d. employer responsible for managing plan and assumes risk for plan investments
   e. detailed requirements of how much employers must contribute to ensure adequate funding
   f. insured by PBGC – ensures plan benefits in event of bankruptcy or severely under-funded pensions – only DB plans
   g. administratively cumbersome
   h. vesting of benefits
      i. § 203 of ERISA mandates pensions vest and become nonforfeitable
      ii. cliff vesting is 3 years post 2002
      iii. graded vesting is 2-6 years (20%, then 100%, respectively) post 2002
      iv. employee contributions vest immediately, and employers may establish earlier vesting
      v. vested benefits must be paid at normal retirement age – commonly 65, but early retirement plans can advance age
   i. cash balance plans
      i. pension plans establish a “hypothetical” employee account that accrues benefits for each year of service and also accrues interest on those benefits
      ii. technically DB plans because offer guaranteed benefit and employer is responsible for ensuring adequate funding
      iii. more portable – attracts younger, mobile workforce
      iv. if company has older workforce, may be cheaper to administer
      v. less-expensive to employers because award benefits earlier in career
      vi. not dependent on accumulated length of service – since pension credit is awarded equally for each year of service
      1. employee’s DB plan was changed to a cash balance plan and then amended to remove grandfather provision, so he ultimately received less annual benefits
      2. claimed age discrimination and violation of ERISA
      3. court held for Bank
         a. no forfeiture because no accrued benefits were reduced; only expected benefits were reduced
         b. didn’t raise discrimination argument before district court … waived (court split on issue, but IRS has determined not discriminatory)
      4. problem comes when switch to cash balance plan
      5. benefits stopped accruing and lost $3,000 a year in pension benefits
      6. under ERISA accrued benefits can’t be forfeited, but benefits yet to be earned can be taken away
   viii. age discrimination controversy
      1. plans not controversial until in context of transition from DB plan to cash balance plan
2. Cash balance plan favors younger workers because early credits will accrue
to the present job-mobility of contemporary labor
3. Courts are split – IRS has found the plans nondiscriminatory, but under
congressional pressure, regulations withdrawn and no further action
ix. Benefits of cash balance plans
1. To employees:
   a. Easier to understand
   b. Portability
   c. Benefits accrue more evenly over employee’s life-cycle
   d. Better suited to the present job-mobility of contemporary labor
2. To employers:
   a. Employees better appreciate value of pension rights, employer’s fringe
      benefit dollar has greater impact
   b. Employer retains funding advantages of DB plan (actual contributions
      made to single trust fund based on actuarial assumptions and
      investment experience in excess of the promised interest credits
      belongs to employer)
3. Transition litigation
   1. So long as employer doesn’t decrease the accrued amounts but affects only
      future accruals, action will be permissible
4. Defined contribution plans
   a. Employee and employer make contributions into individual account and employee is
      responsible for managing plan and assumes risks for plan investments
   b. Most common is the 401(k)
   c. Twice as many workers have DC plans as DB plans
   d. Only contribution, not benefit, is guaranteed
   e. More portable
   f. Employee contributions vest immediately – not same incentive to stay with one
      employer to maximize pension
4. Supplemental Reading Materials
   a. McNevin v. The Solvay Process Company (NY SCt. 1898)
      i. Employee discharged, seeking the amount in his passbook
      ii. Trustee denied request – dispute over whether or not he’s entitled to his pension
      iii. Court determines was within employer’s discretion – it was a gift, and the
           employer decided he didn’t want to give it
      iv. Dissent argues fund created a contract between the parties and employer didn’t
          have discretion to withhold it
      v. Employers have pension funds to entice employees to work for them – and can
          pay employees less and defer payment to them
   b. Clark v. Lauren Young Tire Center Profit Sharing Trust (9th Cir. 1987)
      i. Worked less than 10 years and the plan required divesting of benefits if leave with
         less than 10 years of service to work for a competitor
      ii. Clark argues Oregon has law that disfavors this kind of forfeiture under
          noncompetition clauses
      iii. Court doesn’t buy it and says that state law is preempted by ERISA anyhow
      iv. Clark also argues that forfeiture clause shouldn’t be applied to him
      v. Company was more liberal with vesting period, but then conditioned it on
         noncompetition, which is permissible
vi. if he could prove he was laid off to prevent vesting, he might have a § 510 action under ERISA
c. **Heath v. Varity Corporation (7th Cir. 1995)**
   i. claim is that employee was about to become eligible for early retirement plan, and was fired
   ii. claims he was in part fired to prevent him from benefiting from the early retirement plan (which does not vest)
   iii. district court says § 510 is about vested benefits
   iv. early retirement plan never vests (it’s a welfare plan) … it’s like medical plans, etc.
   v. under § 510, a plan includes both pension and welfare benefits – not just pension benefits
   vi. an employer can get rid of the plan all together, but not with respect to one employee
   vii. he could have been fired, but not with the specific purpose of stripping him of access to the benefits
   viii. they didn’t follow the correct procedures for terminating a plan
   ix. court holds § 510 applies not only to vested, but to unvested benefits, and protects persons who lay claim to or seek to qualify for unvested benefits
   x. remanded for further proceedings for determination of reason for discharge
   i. 3 plants, lots of costs, need to close one
   ii. closed the Benton Harbor plant – plaintiffs are employees of that plant that were within months or years of receiving their pensions
   iii. claim a § 510 violation that they’ve been denied right to accrue more benefits
   iv. has to be a determinative factor – not the sole reason … § 510 kicks in when avoiding pension liability is a motivating factor
   v. burdens shift back and forth
   vi. plaintiff bears ultimate burden of showing motivation of employer
   vii. defendant argues § 510 doesn’t apply to vested benefits
   viii. if this is true – that doesn’t make sense – older employees need the protection of § 510 more than non-vested employees
   ix. ERISA (§ 510) covers benefits that:
      1. are not capable of vesting (*Heath*)
      2. employee about to vest/prevented (*Clark*)
      3. employee is vested/about to accrue additional benefits (*Nemeth*)
   x. employer also argues that where termination cuts along independently established lines, rather than individuals, § 510 doesn’t apply – not true – motivation is the key factor and § 510 covers both situations
   xi. employer here looked at several different factors and the bottom line
   xii. no ERISA violation because the pension costs were only part of picture, and employer would have made the same decision regardless
   xiii. if the pension costs had been greater, then § 510 would say the employer couldn’t take it into account
   xiv. net impact is that pension costs get privileged above other types of labor costs in general

B. **Health Benefits (796-98; 816-35; SR 21-38)**  
   1. generally
      a. US health insurance is principally employer-based
      b. large employers far more likely to offer health benefits than smaller employers
      c. lower-income workers less likely to have insurance then higher-wage workers
      d. union members more likely to have access than non-union members
e. when ERISA enacted, most health insurance fee-for-service, where employee chooses own doctor and submitted bill for payment to insurance
f. managed care (institutional arrangement where one company provides and insurance function and provides, or arranges with subcontractors for the provisions of, healthcare services) has dwarfed fee-for-service programs
g. late 19th century – healthcare benefits began to be provided by employers – health employees are better employees and tied them to the employer
h. during WWII, price controls prevented wage increases, so as a substitute to compete for labor, employers increased insurance and pension benefits
i. increasingly, employers are requiring employees to pay greater share of healthcare costs – effort to shift costs to employees has been core of several labor disputes

2. antidiscrimination under Section 510
a. *McGann v. H&H Music Co. (5th Cir. 1991)*
i. employee with AIDS claims § 510 (both prongs) discrimination when employer changes plan (knowing his condition) to limit his healthcare benefits payout to $5,000 (from $1,000,000)
ii. argues provision limiting coverage for AIDS-related expenses directed specifically at him in retaliation for exercising his rights under medical plan and for purpose of interfering with attainment of a right to which he may become entitled under plan
iii. employer argues cuts apply to everyone across the board – not a § 510 violation
iv. employer didn’t promise employee the $1,000,000 total coverage … employer reserves the right to amend medical plan to reduce benefits respecting subsequently incurred medical expenses
v. highlights tension built into ERISA – wanting to protect employees from abuses and reluctance to actually mandate any specific terms on employers

b. the employer’s motive
   i. keep in mind AIDS was new medical condition
c. amending plans
   i. courts have upheld changes in health plans, even when designed to deny a particular employee certain benefits
   ii. exception in *Wheeler v. Dynamic Engineering, Inc. (1995)* – court held employer could not apply the change to exclude experimental treatment for breast cancer to employees who were undergoing treatment but the change could only be made prospectively
d. the scope of Section 510
   i. classic violation when employer fires employee in order to prevent her pension from vesting
   ii. employee fired for seeking to use health benefits would likewise state a claim
e. the ADA and the *McGann* case
   i. courts have rejected argument that plans that provide longer benefits for physical as compared to mental disabilities are discriminatory – consistently held employers need not prove similar benefits for all disabilities
   ii. so long as every employee is offered the same plan regardless of the employee’s condition or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities

3. retiree benefits
a. *Sprague v. General Motors Corp. (6th Cir. 1998)*
i. general retirees and early retirees
ii. promised in various SPDs GM would provide health insurance for retirees and spouses for life
iii. some SPDs reserved right to change plan, some didn’t
iv. after these people retire, GM announces they’re going to change the health plan – and retirees think this is unfair
v. early retirees were certified in the court below on a contract theory and an estoppel theory
vi. reversed on appeal – decertified the class – now just addressing the claims of the named plaintiffs
vii. health benefits can only vest if employer specifically states they’ve vested
viii. rule that they don’t vest is a default rule
ix. what’s necessary to overcome default is at issue here
x. plaintiffs assert 4 theories:
  1. plan documents vested health benefits
     a. if there’s a conflict between the SPD and the plan itself, SPD governs
     b. doesn’t see inconsistency or ambiguity where SPDs state employer has the right to amend plan at any time
     c. those that are silent on the issue, but ERISA doesn’t say that SPDs must state when welfare benefits vest … no inconsistency
     d. doesn’t read SPDs from perspective of a reasonable employee (hearken back to the employee handbook cases)
  2. early retirees argue bilateral contract with employer that vested the benefits
     a. we gave up our jobs and right to sue, and in consideration you promised us benefits
     b. court said oral statements made in exit interview or SPDs are not enforceable if conflict with the plan document … requirement of written plan documents was intended to protect employees
     c. no bilateral contract here
  3. equitable estoppel
     a. can bring equitable estoppel claims under ERISA
     b. elements:
        i. must be conduct or language amounting to a representation of material fact
        ii. party to be estopped must be aware of the true facts
        iii. part to be estopped must intend the representation be acted on, or the party asserting the estoppel must reasonably believe that the party to be estopped so intends
        iv. party asserting the estoppel must be unaware of the true facts
        v. and party asserting the estoppel must reasonably or justifiably rely on the representation to his detriment
     c. is it reasonable to rely on statements that they would have health benefits for life when GM was also saying it reserved the right to amend or terminate benefits
  4. breach of fiduciary duty
     a. duties do not attach when employer is amending or terminating a plan
     b. court says GM never actually said benefits were vested, merely that they would provide benefits for life unless decided to amend or terminate plan
xi. each of these theories is viable under an ERISA scheme
xii. what’s really driving this case is enormous cost to industries like auto and airline in fulfilling promises made in more lucrative times
xiii. courts have been unwilling to put that burden on the employers when they can find a way out – raise the bar for plaintiffs really high
b. eliminating health coverage
   i. majority analysis would also apply to the elimination of health benefits, and has been held to

c. reliance interests
   i. a number of courts have found reliance interest in the SPDs
   ii. generally, courts have held that where a SPD conflicts with the plain language of the plan, it is the SPD that controls
   iii. courts are divided over whether plaintiff must demonstrate actual reliance on the plan document
   iv. one court looked at all the case law and determined neither actual reliance nor prejudice was necessary to establish a reliance claim

d. fiduciary duty
   i. fiduciary cannot lie or mislead plan participants
   ii. plan administrators are not obligated to inform plan participants when it is merely contemplating plan changes
   iii. number of courts have held when changes are under “serious consideration” (involving a specific proposal being discussed by senior management for the purposes of implementation) fiduciary must disclose
   iv. many courts say fiduciaries have duty to provide information even when not specifically requested typically only when fiduciaries have actual or constructive knowledge that the information would be important to plan participants

4. Supplemental Reading Materials

a. *Metropolitan Life Insurance Co. v. Massachusetts (SCt. 1985)*
   i. Mass. statute requires minimum level of mental health benefits in general insurance policies
   ii. important for the state because taxpayers end up picking up the bill when coverage isn’t provided
   iii. insurance companies are saying don’t have to provide coverage because the statute is preempted by ERISA
   iv. state law doesn’t have to explicitly mention an ERISA plan – but if the state law has any connection to or reference to an ERISA plan, it falls within § 514 … even state laws that are consistent with ERISA
   v. court says this state law clearly relates to welfare plans governed by ERISA
   vi. MetLife argues savings clause doesn’t exempt the insurance contract, but the state says isn’t preempted
   vii. court agrees with the state – this is a law regulating insurance and therefore it falls within the savings clause
   viii. MetLife has to comply with the state law – bottom line

   i. issue: whether company’s policy of paying discharged employees for unused vacation time constitutes an “employee welfare benefit plan” under ERISA and whether criminal action to enforce the policy is foreclosed by ERISA preemption
   ii. Mass. (plaintiff) claimed against bank and bank president charging criminal violations of a Mass. statute
   iii. statute requires employer to pay a discharged employee full wages, including holiday or vacation payments, on the date of discharge – failed to compensate to bank employees for accrued, but unused, vacation
   iv. held: policy to pay employees for unused vacation not employee welfare benefit plan
   v. present no risks ERISA intended to address
vi. would reach different conclusion if a separate fund had been created by a group of employers to guarantee payment of vacation benefits to laborers who regularly shift jobs from one employer to another – but here it’s a single employer paying out of its general assets

vii. some of Court’s arguments and possible responses:
    1. only funded programs are covered by ERISA (but ERISA’s definition of welfare plan covers plans and programs, as well as funds)
    2. benefits should be covered only if they pose a risk different than that posed by ordinary employment (but case involved deferred vacation benefits built up over a number of years)
    3. employees elected to accumulate vacation benefits (but many welfare benefits, such as health insurance and day care, are available at the discretion of the employee)
    4. many states regulate payment of vacation benefits (but one of ERISA’s principal purposes was to free employers from inconsistent state regulation

viii. Fort Halifax Packing Co. v. Coyne (1987) – SCt. held Maine statute requiring employers to make a one-time severance payment to employees after a plant closing was not preempted (not related to an employee benefit plan

ix. Ingersoll-Rand Co. v. McClendon (SCt. 1990) –
   i. issue: whether ERISA preempts a state common law claim that an employee was unlawfully discharged to prevent attainment of benefits under a plan covered by ERISA
   ii. employee worked just under 10 years before fired – claimed in state court that pension would have vested in four months and principal reason for termination was desire to avoid making contributions to the pension
   iii. sought compensatory and punitive damages under various tort and contract theories
   iv. Texas SCt. held not preempted because wasn’t seeking lost pension benefits, but future lost wages, mental anguish and punitive damages as a result of the wrongful discharge
   v. existence of pension plan is a critical factor in establishing liability – cause of action relates not merely to pension benefits, but to the essence of the plan itself
   vi. held: claim relates to an ERISA-covered plan and is therefore preempted
   vii. no cause of action if there is no plan
   viii. even if no express preemption, would be preempted because the claim conflicts directly with an ERISA cause of action – squarely within § 510
   ix. Texas cause of action purports to provide remedy for violation of a right expressly guaranteed by § 510 and exclusively enforced by § 502(a)
   x. some wrongful discharge actions are not preempted – claim that a discharge was in violation of a written contract against an employer that maintains no pension or welfare plans

XI. **Health and Safety**

A. **Workers Compensation (861-78; 887-922)**
   1. generally
      a. developed early 20th century – just post-industrial revolution when America was in an “accident crisis”
      b. real problem/fear with injured workers or families of deceased workers becoming public burdens
      c. state-based scheme mandating employers insure workers against workplace accidents
      d. provide modest benefit for workers/families without requiring proof of fault
e. goal is not to provide income support for victims

2. the origins of workers' compensation laws
a. the common law approach
i. prior to enactment of workers’ comp laws, only recourse was lawsuit to recover damages
ii. tort system costly, slow, and damages turned on proof of fault, not need
iii. Farwell v. The Boston and Worcester Rail Road Corp. (SCt. Mass. 1842)
   1. articulation of the “fellow-servant” rule
   2. employee engineer is suing employer because injured by another employee’s negligence
   3. if plaintiff were a stranger could sue employer under respondeat superior
   4. no express contract and court won’t find implied contract
   5. employee is assuming risk of working for railroad and risk is taken into account in his wages
   6. prevention is taken into account in that the employees are better situated to perceive risks, negligent coworkers, etc. – so burden of risk should fall on them because they’ll have incentive to do something about it
   7. also, to the extent the employer has to pay premium to get workers to work in this job, employers will have an incentive to make the workplace safer so they can lower the wage … but will only spend money up to the point where added cost of safety measure equals, but does not exceed, savings they would gain in lower wages if they were to implement the safety measure
   8. court is relying on market theory to meet the public policy goals of prevention and compensation and to promote safety
iv. the market solution
   1. studies differ on whether workplace/market function as described in case – whether workers in riskier jobs receive premium wages
   2. Rose-Ackerman – doubts market forces employers to fully account for workplace injuries
      a. employees initially uninformed about risks
      b. hazardous can take long time to produce injury
      c. even if immediate, participants in large market won’t witness injuries
      d. because of differences in people, may be difficult for workers to perceive their own risks by observing harm to others
      e. workplace conditions change with technology – past poor guide to future
      f. many actions employers take are “local public goods” – if no union, employees may be unwilling to modify wage demands enough to make the health and safety investment worthwhile
   3. suggests a role for unions
v. common law defenses
   1. “fellow-servant” rule
   2. “assumption of risk” doctrine
   3. contributory negligence
   4. by mid-19th century states began to abrogate the defense through legislation
vi. workingmen’s cooperatives
   1. late 19th century, workers formed cooperative associations to provide disability and life insurance to their members
2. trade unions played an important role – providing benefit funds encouraged loyalty, to insure insolvency costs of union membership rose – conflicting with their goal of increasing membership
3. eventually waned – workplace became diverse, but immigrants weren’t welcomed
4. low-risk members left, leaving high-risk workers would couldn’t maintain funds
5. government intervention was needed
b. the compensation acts
1. state commissions began investigating compensation possibilities – first 10 years of 1900s produced a flurry of activity
2. many were held unconstitutional on grounds imposition of liability without fault on employer was taking of property without due process under state and federal constitutions
3. fear of unconstitutionality led legislatures to create “safe” but less-than-idea coverage
4. “elective” or “optional” statutes became popular – employers could choose whether or not to be bound by compensation regime (alternative was being subject to common-law actions without benefit of three common-law defenses)
5. some states limited coverage to “hazardous” employment because of doubt of extent of police power
6. SCt. eventually removed fears of constitutional problems – instituting growth in the compensation system
7. by 1920 all but eight states had compensation acts and by 1949 all fifty did
ii. New York Central Railroad Co. v. White (SCt. 1917)
1. widow of deceased worker claims for compensation
2. railroad says the worker comp law is unconstitutional
3. boils down to a due process claim and a freedom of contract claim
4. employers have to pay modest damages without showing of fault
5. employees get modest compensation without having to prove fault
6. exceptions if the employee’s injury is a result of intoxication or intentionally inflicted
7. purpose behind statute: prevention of pauperism, among others
8. focused on compensation after the problem – not prevention of injury
9. may give employers incentives to take preventive measures
10. court rejects the constitutional challenges
11. opened the door for other states to enact this type of legislation
3. basic benefits and coverage
   a. benefits and procedures
      i. state laws differ on issues of type of compensable injury and determination of benefit level
      ii. also, several federal statutes establish separate compensation schemes for certain workers
      iii. two typical basic types of benefits:
         1. medical care necessitated by on-the-job injury (some states cover rehabilitation services or therapy; fewer cover vocational rehabilitation/retraining)
2. cash benefit (generally measured as percentage of worker’s pre-injury wage, subject to certain minimum and maximum amounts)

iv. permanent disability (unable to work) may entitled worker to permanent disability benefits (weekly benefit for duration of disability or for life maybe limited by total dollar amount or duration)

v. permanent impairments (even if not totally disabling): schedule of benefits – i.e., loss of hand equals 244 weeks of pay; or percentage of totally disabled (75% totally disabling loss equals 75% of benefits paid when totally disabled)

vi. survivor’s benefits (based on percentage of prior wage, subject to minimums and maximums; varies with number of dependents; pays funeral and burial expenses)

vii. workers’ comp not intended to provide complete compensation

viii. no compensation for pain and suffering or consequential damages

ix. employers may purchase private insurance, participate in a state-administered fund, or self-insure

x. administrative structure for overseeing entire state system

xi. disputes first heard, generally, by ALJ … then state workers’ comp board … then state court of appeal

xii. repetitive stress and mental injuries (particularly with non-physical origins) have proven controversial – “accidental” injuries?

xiii. all states now cover disease (usually “particular” to a kind of job, and not “general diseases of life”) as well as injury, but if origin of disease ambiguous difficult to claim

b. “arising out of and in the course of employment”

i. test for coverage of work-related injury


1. employee claims after being injured during horseplay with rubber bands and a large piece of wood

2. test for whether an injury is compensable in workers’ comp: does it “arise out of and in the course of employment”

3. different than “scope of employment” test to determine employer’s liability under respondeat superior

4. four part test with respect to horseplay

   a. extent and seriousness of the deviation

   b. completeness of the deviation (whether it was commingled with the performance of duty or involved an abandonment of duty)

   c. extent to which the practice of horseplay had become an accepted part of the employment

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

iii. scope v. course of employment

1. scope of employment – master/servant law to determine liability under respondeat superior (fn.1, 888)

2. “arising out of and in course of employment” for workers’ comp

iv. two tests?

1. “arising out of and in course of employment” here interpreted as a single test, but some courts have seen each phrase as independent and necessary for compensation (majority view)


1. grocery store manager died of stroke after smaller stroke suffered upon realizing too much stock ordered
2. court said the stroke occurred in the course of employment, but did not arise out employment
3. physical or mental injuries caused by a mental or emotional stimulus; excessive and unexpected mental anxiety; or stress, tension, or worry attributable to the employment can justify an award of benefits, but the ordinary mental stresses and tensions of one’s occupation do not because emotional stress, to some degree, accompanies the performance of any contract of employment
4. not intended to be general health insurance, shouldn’t be compensable unless the incident is connected to the work in some causal way
vi. “arising out of” three tests:
1. increased risk – whether the employment increased the quantity of a risk, even if that risk is qualitatively not peculiar to the employment
2. actual risk – whether the employment subjected the claimant to the actual risk that caused the injury (adoption of test permits recoveries in most street-risk cases and in a much great proportion of act-of-God cases)
3. positional-risk – requires only that the injury would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured (supports compensation in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force
vii. Carroll v. Workers’ Compensation Appeal Board (2000) – suppressed sneeze at meeting caused detached retina – court held compensable because injury occurred while acting in furtherance of his employer’s affairs (avoid spreading germs)
vi. how much stress?
1. strokes, heart attacks, etc. – difficult to determine when such common conditions are sufficiently connected to the particular employment to warrant benefits
ix. “arising out of” but not “in the course of” employment
1. satisfying only one part of the two parts of the test is not sufficient to prove compensability
4. exclusivity of remedies
a. the fundamental bargain
i. Eckis v. Sea World Corp. (CTA Cal. 1976)
1. issue is whether or not secretary-employee injured by riding Shamu for publicity stunt can bring tort suit
2. claimed employer didn’t give warning that could have protected her from ultimate injury
3. the jury in the trial court found for her in the tort suit
4. basis for employer’s appeal is that she wasn’t permitted to bring tort suit because of workers’ compensation exclusivity bar
5. she argued claim never fell within the workers’ comp statute at all and that incident didn’t take place within course of employment
6. employer paid all medical expenses and salary while missing work
7. court said not enough for her to say that riding the whale was not part of her typical job duties … she was on employer’s premises during regular working hours, employer requested her to undertake activity causing the
i. Jury-causing activity is of service to employer and benefits employer’s business

8. Case pushes the bounds of basis for exclusivity principle that this is part of the workers’ comp bargain

ii. Absence of remedy

1. Should exclusivity bar tort suit to recover for injuries (i.e., psychological trauma) if worker will otherwise receive nothing under workers’ comp system?

2. Courts take varying approaches: (1) possibility of lack of recovery in a few situations doesn’t abrogate workers’ compensation exclusivity; (2) exclusivity unconstitutional to extent it leaves a worker with no process through which to seek redress for an injury for which a cause of action exists at common law

b. Exception for intentional acts

i. Can avoid exclusivity by proving an intentional tort – only “accidents” are covered by most state statutes

ii. Policy: affording employers immunity for intentional acts does not promote objective of safe work environment and would permit employers to shift liability to fund paid with premiums collected from innocent employers

iii. **Whitaker v. Town of Scotland Neck (SCt. NC 2003)**

1. Defendant making worker’s comp exclusivity argument

2. Court held in favor of defendant – insufficient evidence to show defendants intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death

3. Exception encompasses situations where employer acted having a “substantial certainty” that serious injury or death would result

4. Narrowest possible reading would limit it to situations where the employer really specifically wanted to cause harm to a person (basically assault) … this court’s reading it a little more broadly

5. This case distinguishable from *Woodson* … defendant here not on the job site; no fines or citations beforehand; no similar evidence that defendant was manifestly indifferent to the health and safety of the employees; no evidence that defendant knew that the latching mechanism on the truck was substantially certain to fail or that if such failure did occur, serious injury or death would be substantially certain to follow

iv. Substantial certainty

1. Handful of states don’t recognize exception for intentional acts, but most permit common-law actions based on intentional torts in certain circumstances

2. Some states require employer actually intended to cause injury (gross negligence or willful and wanton conduct not enough for tort liability) – “actual intent” test criticized as unduly harsh but courts reluctant to move away from strict requirement of actual intent to harm fearing too expansive exception to exclusivity could undermine workers’ comp exclusivity altogether


   a. Issue of how to define “intentional wrong”

   b. Mere knowledge and appreciation of risk – short of substantial certainty – not intent
c. adopted “substantially certain” standard – every undertaking (business judgments) involves some risk, but willful employer misconduct not meant to go undeterred
d. difficult to distinguish recklessness from intentional conduct, or a serious risk from substantial certainty

v. fraudulent concealment
1. *Millison* involved disease stemming from exposure to asbestos
2. workers alleged (1) employer deliberately exposed them to a hazardous work environment; (2) employer fraudulently concealed results of medical exams showing they suffered from asbestos-related diseases
3. court held count (1) barred in tort by workers’ comp exclusivity
4. count (2) could proceed in tort as an intentional wrong – goes beyond bargain struck by workers’ comp act
c. non-physical torts
1. union representative harassed by superiors who knew he had high blood pressure
2. suffered a severe and totally disabling stroke
3. sued for IIED
   a. extreme and outrageous conduct
   b. intentional /reckless conduct
   c. causing emotional distress (severe)
4. issue: is tort claim barred by workers’ comp exclusivity?
5. tried to invoke exception for intentional conduct
6. can’t proceed on a reckless theory because inconsistent with what we’ve done in all the physical cases (not level of substantial certainty)
7. can’t proceed on an intentional theory of IIED because everything employer does is intentional – can’t hold an employer liable every time someone emotionally distressed at work (demoting and disciplining stressful to anyone)
8. court was pushed by practical considerations – too easy for employees to allege an alternative motive
9. strong dissent arguing that if requiring “extreme and outrageous” conduct, that should automatically fall outside the bounds of workers’ comp – since workers’ comp doesn’t allow claims for pain, suffering, or punitive damages, no incentive for employers to refrain from engaging in such egregious acts

ii. a normal risk of employment?
1. state courts divided on whether claims for IIED are barred by workers’ comp exclusivity
2. some look at nature of injury and, to the extent mental distress is compensable under workers’ comp, find the claims barred
3. other permit claims on grounds they fall within the exception for intentionally caused injuries

iii. intentional acts of co-workers
1. often difficult to bring IIED claim because based on conduct of co-worker, not employer
2. most courts require intentional act be one commanded or directly authorized by employer

iv. other non-physical torts
1. other common-law torts like defamation and malicious prosecution are generally *not* barred by workers’ comp exclusivity because essence is not physical or mental injury


1. plaintiff claimed wrongful termination in violation of whistleblower statute and wrongful termination in violation of public policy
2. employer raised defense that claims should be barred by workers’ comp because of the mental and physical injuries
3. injury compensable under worker’s comp, but also compensable under whistleblower statute
4. the court ultimately looks to purpose behind each of the statutes
5. workers’ comp really about compensation bargain for accidental injuries
6. whistleblower statute doesn’t conflict – workers’ comp doesn’t encompass retaliatory discharge
7. exclusivity would defeat purpose of whistleblower statute, but permitting tort suit wouldn’t necessarily undue bargain of workers’ comp
8. with respect to public policy claim, same analysis seems to apply – no exclusivity bar under that line of thinking

vi. public policy and the compensation bargain

1. *Shoemaker* left open question of whether a tort action for wrongful discharge in violation of public policy is barred by workers’ comp exclusivity – California resolved it in *Gantt*
2. *Gantt* court held such conduct not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain
3. obligation to refrain from such conduct can’t be bargained away and it’s not preempted by other statutory remedies

B. OSHA (922-47)

1. generally
   a. seeks to prevent occupational injury and disease through direct regulation of working conditions
   b. created the OSH Administration within the Department of Labor
   c. OSHA governs virtually all private workplaces
   d. often relies on “general duty” clause rather than specific regulations
   e. unless a state has an approved plan, OSHA generally preempts state health and safety regulations
   f. (see excerpt about young plumber buried alive)
2. the structure of the statute
   a. promulgating standards
      i. OSHA charged with promulgating regulations through formal notice and comment procedures of APA – cumbersome process
      ii. may of its standards have been subject to litigation – average of 6 years for OSHA to promulgate one standard
      iii. ergonomic standards
         1. musculoskeletal disorders (i.e., carpal tunnel and other repetitive stress syndromes
         2. adjusting workstations, changing heights on assembly lines, frequent rest periods, etc.
         3. account for about 1/3 of workplace injuries
         4. businesses concerned about implementation costs
         5. extremely difficult time getting anything implemented (upwards of 10 years)
iv. other enforcement means
   1. OSHA was authorized to issue temporary standards – many remain in place
      as interim, but enforceable standards
   2. “general duty” clause – Section 5(a)(1) – general duty for employer to
      “furnish to each of his employees employment and a place of employment
      that are free from recognized hazards that are causing or are likely to cause
      death or serious physical harm to his employees”

b. inspection and enforcement scheme
   i. standards are enforced through inspections: 4 types of investigations
      1. investigations targeting workplaces where hazards posing imminent danger
         are present;
      2. investigations that follow documented injuries or deaths;
      3. inspections prompted by employee (or union) complaints; and
      4. programmed complaints
   ii. state OSHAs conduct similar investigations
   iii. SCt. held Department of Labor must obtain administrative warrant to conduct
        search to which the employer doesn’t consent (can be issued ex parte by
        magistrate and routinely granted where there’s “specific evidence of an existing
        violation” or where the inspection is conducted pursuant to a valid regulation
        (i.e., programmed inspection)
   iv. provides no advance notice of inspections and issues citations for any violations
       uncovered at time of inspection
   v. criminal penalties available where knowing violations resulted in death of
      employee, but only misdemeanor punishable by 6 months jail time max
   vi. states may prosecute workplace deaths under general criminal laws
   vii. in addition to fines, employers must abate the hazardous conditions – can be
        more costly than the fines
   viii. employer may contest citation before an independent commission – OHSRC,
        which then assigns an ALJ – then further review under OHSRC, then US CTA
   ix. Act provides for no private causes of action

3. the general duty clause
   a. *Caterpillar, Inc. v. Occupational Safety and Health Review Commission (7th
      Cir. 1997)*
      i. OSHA issued citation based on general duties clause after flying stud hit worker
         in head
      ii. heard before and ALJ, company appealed penalty/citation – upheld
      iii. elements of general duty clause violation: (1) existence of a hazard likely to cause
           death or serious physical harm; (2) employer’s recognition/awareness of the
           hazard; (3) availability of feasible means to abate the hazard; and (4) employer’s
           failure to implement the feasible means of abatement
      iv. supervisor’s knowledge is imputed to the employer – regardless of supervisor
          turnover
      v. willful violation means showing a heightened level of awareness of the harm and
         then an indifference to employee safety
      vi. good faith efforts at compliance that are incomplete or not entirely effective can
         negate a willfulness finding provided that they were objectively reasonable under
         the circumstances – caution tape and signs not reasonable
   b. the purpose of the general duty clause
      i. fills the gap when specific standards are unavailable
ii. neither courts nor commission require specific knowledge of the hazard – rely on objective standard to determine whether “the employer knew, or through the exercise of reasonable diligence, could have known of the violative condition”

c. general duty clause and specific standards
   i. as a general matter, inappropriate to cite employer for violation of general duty clause when in compliance with a specific standard designed to address the hazard at issue
   ii. if specific standard inadequate, however, may be appropriate
   iii. without knowledge of inadequate of specific standard, compliance with that standard will satisfy the employer's duty under general duty clause

d. abatement of the hazard
   i. one requirement of general duty clause is that the hazard could have reasonably been abated

e. unforeseeable employee misconduct
   i. to establish defense of “unforeseeable employee misconduct,” employer must prove:
      1. it established work rules to prevent the violation
      2. the rules were inadequately communicated to the employees
      3. it took steps to discover violations
      4. if effectively enforced the rules when infractions were discovered
   ii. most courts treat as affirmative defense, though two require Secretary of Labor to establish employee's act not idiosyncratic and unforeseeable

f. obvious hazard
   i. whether an employer has a duty to protect against obvious injuries, then if an obvious hazard does exist, is it so obvious that no instruction about how to conduct injury-causing activity safely was required?
   ii. experienced highway worker example – because so experienced, suggests danger not so obvious that employees would not have benefited from systematic instruction

g. enforcement
   i. safety standards could be enforced by having a safety inspector on-site (but employers may be more concerned with cost, etc. than safety)
   ii. unions could have a safety inspector themselves or include in collective bargaining agreement certain terms of safety
   iii. union can also demand safety information through collective bargaining process (job safety is a “working condition” – mandatory subject for bargaining)

4. employee rights
      i. screen under conveyor belt – faulty – worker collecting fallen debris fell to his death
      ii. two new workers refused to walk on screen and were disciplined; requested OSHA information
      iii. OSHA filed a suit because of the alleged discrimination pursuant to regulation issued under Section 11(c)(1) of the Act
      iv. particular situation not covered in OSHA
      v. Secretary relying on regulation permitting employees to refuse to work under certain circumstances
      vi. must be an imminent risk of death or serious injury and employee must really believe such risk exists and belief must be reasonable and employee has to reasonably believe there is no alternative to walking off the job
      vii. factual situation here falls within regulation's purview
viii. issue: is the regulation authorized by the statute – court says yes
ix. consistent with purposes of act – OSHA’s protective legislation that should be liberally construed
x. court defers to agency and allows claim to proceed – reasonable interpretation of act

b. alternative approaches
i. walkout by nonunion workers to protest an unsafe workplace can be considered concerted activity under Section 7 of the NLRA
ii. in context of union workers, one court interpreted Section 502 of the LMRA as protecting work in abnormally dangerous conditions, and there is objective evidence to support their belief (Section 502 protects such workers despite existence of a no-strike clause in their collective bargaining agreement)
iii. courts also have concluded employees need not follow the OSHA complaint procedures in order to be protected under Section 502, which can afford superior protection to employees in exigent circumstances

c. section 11(c)(1) of the Act
i. “No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act”

C. Reflections on Worker Safety

1. workplace fatalities have decreased significantly since OSHA was founded
2. workplace injuries and illnesses have also declined, but days lost from work have not
3. remains widespread dissatisfaction in workplace regulation
4. costs of workers’ comp system has ballooned – exceeds $70 billion annually
5. levels of compensation still inadequate to meet needs of disabled workers and employers still not taking affirmative steps to prevent injury
6. OSHA also widely criticized – regulations unduly burdensome for employers, agency is ineffective in protecting workers’ health and safety because of limitations on authority and funding
7. criminal penalty for causing worker’s death still misdemeanor
8. only 1000 OSHA inspectors to regulate safety of entire country of workers
9. low-wage, low-skilled employees most susceptible to dangerous workplace conditions – fear of retribution by immigrant workers for reporting dangerous work conditions
10. many have lack of alternatives