

EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE



DAVID J. WALSH

6E

EMPLOYMENT LIFE CYCLE APPROACH

Future managers and human resource professionals need to understand the employment life cycle: hiring, managing, and terminating. Employment law affects every stage of the cycle. This text shows how these laws apply to human resource practice.



Part 1

Introduction to Employment Law

- Overview of Employment Law
- The Employment Relationship
- Overview of Employment Discrimination

Part 2

The Hiring Process

- Recruitment
- Background Checks, References, and Verifying Employment Eligibility
- Employment Tests
- Hiring and Promotion Decisions

Part 3

Managing a Diverse Workforce

- Harassment
- Reasonably Accommodating Disability and Religion
- Work–Life Conflicts and Other Diversity Issues



Part 4

Pay, Benefits, Terms and Conditions of Employment

- Wages, Hours, and Pay Equity
- Benefits
- Unions and Collective Bargaining
- Occupational Safety and Health
- Privacy on the Job

Part 5

Terminating Employment

- Terminating Individual Employees
- Downsizing and Post-Termination Issues

Employment Law for Human Resource Practice

SIXTH EDITION

DAVID J. WALSH

Miami University



Australia • Brazil • Mexico • Singapore • United Kingdom • United States

***Employment Law for Human Resource
Practice, Sixth Edition***
David J. Walsh

Senior Vice President, Higher Ed Product,
Content, and Market Development: Erin Joyner

Product Director: Bryan Gambrel

Product Manager: Vicky True-Baker

Project Manager: Julie Dierig

Content Developer: Tara Slagle, MPS

Product Assistant: Christian Wood

Digital Content Specialist: Jennifer Chinn

Digital Project Manager: Derek Drifmeyer

Manufacturing Planner: Kevin Kluck

Intellectual Property

Analyst: Jennifer Bowes

Property Project Manager: Jillian Shafer

Art Director: Michelle Kunkler

Cover Image Credit: © Shutterstock.com/kentoh

Cover Designer: Chris Miller

© 2019, 2016 Cengage Learning, Inc.

Unless otherwise noted, all content is © Cengage

ALL RIGHTS RESERVED. No part of this work covered by the copyright herein may be reproduced or distributed in any form or by any means, except as permitted by U.S. copyright law, without the prior written permission of the copyright owner.

For product information and technology assistance, contact us at
Cengage Customer & Sales Support, 1-800-354-9706

For permission to use material from this text or product, submit all requests online at www.cengage.com/permissions
Further permissions questions can be emailed to
permissionrequest@cengage.com

Library of Congress Control Number: 2018940935

ISBN: 978-1-337-55532-6

Cengage

20 Channel Center Street
Boston, MA 02210
USA

Cengage is a leading provider of customized learning solutions with employees residing in nearly 40 different countries and sales in more than 125 countries around the world. Find your local representative at www.cengage.com.

Cengage products are represented in Canada by
Nelson Education, Ltd.

To learn more about Cengage platforms and services, register or access your online learning solution, or purchase materials for your course, visit www.cengage.com.

Brief Contents

Preface xv
Acknowledgments xxi

PART 1 Introduction to Employment Law 1

- CHAPTER 1 Overview of Employment Law 3
- CHAPTER 2 The Employment Relationship 37
- CHAPTER 3 Overview of Employment Discrimination 71

PART 2 The Hiring Process 111

- CHAPTER 4 Recruitment 113
- CHAPTER 5 Background Checks, References, and Verifying Employment Eligibility 155
- CHAPTER 6 Employment Tests 197
- CHAPTER 7 Hiring and Promotion Decisions 233

PART 3 Managing a Diverse Workforce 279

- CHAPTER 8 Harassment 281
- CHAPTER 9 Reasonably Accommodating Disability and Religion 323
- CHAPTER 10 Work–Life Conflicts and Other Diversity Issues 373

PART 4 Pay, Benefits, Terms and Conditions of Employment 415

- CHAPTER 11 Wages, Hours, and Pay Equity 417
- CHAPTER 12 Benefits 461
- CHAPTER 13 Unions and Collective Bargaining 495
- CHAPTER 14 Occupational Safety and Health 551
- CHAPTER 15 Privacy on the Job 595

PART 5 Terminating Employment 635

CHAPTER 16 Terminating Individual Employees 637

CHAPTER 17 Downsizing and Post-Termination Issues 703

Glossary 745

Case Index 761

Subject Index 769

Contents

Preface	xv
Acknowledgments	xxi

PART 1 Introduction to Employment Law

CHAPTER 1

Overview of Employment Law.....	3
Heard at the Staff Meeting	3
U.S. Employment Law Is a Fragmented Work in Progress	4
Sources of Employment Law	4
Constitutions	4
Statutes	5
Executive Orders	5
Regulations, Guidelines, and Administrative Decisions	5
Common Law	5
Substantive Rights under Employment Laws	6
Nondiscrimination and Equal Employment Opportunity	6
Freedom to Engage in Concerted Activity and Collective Bargaining	6
Terms and Conditions of Employment That Meet Minimum Standards	6
Protection of Fundamental Rights	6
Compensation for Certain Types of Harm	6
<i>Dukowitz v. Hannon Security Services</i>	7
Determining Which Employment Laws Apply	9
Public- or Private-Sector Employment	9
Unionized or Nonunion Workplace	10
Employer Size	10
Geographic Location	11
Government Contracts	12
Industry and Occupation	12
Historical Development of U.S. Employment Law	12
Procedures for Enforcing Employment Laws	14
What Does an Employee Decide to Do When She Believes That Her Rights Were Violated?	14
How Long Does the Employee Have to Bring a Case?	14
Can a Lawsuit Be Brought? By Whom?	16
Class-Action Lawsuits	17
Is There an Administrative Prerequisite to a Lawsuit?	18
Must the Employee Exhaust Internal Dispute Resolution Mechanisms Before Proceeding?	19
Enforceability of Arbitration Agreements	20
<i>Chavarria v. Ralphs Grocery Company</i>	22
Remedies for Violations of Employment Laws	27
<i>EEOC v. AutoZone</i>	27
The Role of Managers in Legal Compliance	33

Key Terms 33
 Chapter Summary 34
 Practical Advice Summary 34
 Chapter Questions 35

CHAPTER 2

The Employment Relationship 37

The Importance of Determining Whether an Employment Relationship Exists 38

Who Is an Employee? 39

Independent Contractors 40

***Keller v. Miri Microsystems* 42**

Using Independent Contractors 47

Temporary Workers 48

Students and Interns 49

***Glatt v. Fox Searchlight Pictures* 51**

Volunteers 54

Partners 56

Other Issues Concerning Employee Status 57

Who Is the Employer? 57

Agency 58

Integrated Enterprise 58

Joint Employers 59

***Salinas v. Commercial Interiors* 60**

Key Terms 66
 Chapter Summary 66
 Practical Advice Summary 67
 Chapter Questions 68

CHAPTER 3

Overview of Employment Discrimination..... 71

The Continuing Reality of Employment Discrimination 71

The Concept of Employment Discrimination 73

Protected Classes 75

Types of Discrimination 76

Disparate Treatment: A Closer Look 79

Types of Disparate Treatment Cases 79

Pretext: Indirect Method of Analyzing Disparate Treatment Cases 81

***Jones v. Oklahoma City Public Schools* 87**

Direct Method of Analyzing Disparate Treatment Cases 89

Subordinate Bias Theory of Liability 90

***Vasquez v. Empress Ambulance Service* 91**

Disparate Impact: A Closer Look 94

Analyzing Disparate Impact Cases 95

Retaliation: A Closer Look 97

Analyzing Retaliation Cases 97

***DeMasters v. Carilion Clinic* 99**

Key Terms 105
 Chapter Summary 106
 Practical Advice Summary 107
 Chapter Questions 107

PART 2 The Hiring Process

CHAPTER 4

Recruitment 113

Recruitment Methods 113

 Want Ads and Job Announcements 113

 Employment Agencies 115

 Nepotism and Word-of-Mouth Recruiting 115

 Enlisting Day Laborers 117

Proving Discrimination in Recruitment: Statistical Evidence 118

***NAACP v. North Hudson Regional Fire & Rescue* 119**

Affirmative Action 122

 Reasonable Self-Analysis 124

 Reasonable Basis for Affirmative Action 124

 Reasonable Affirmative Actions 124

Recruiting Foreign Nationals for U.S. Employment 126

 Visa Programs 126

 Labor Trafficking 129

Application Process 131

***EEOC v. Target Corp.* 132**

 Preemployment Inquiries 135

***Harrison v. Benchmark Electronics Huntsville* 138**

 Statements by Employers 142

***Spears v. Amazon.com. KYDC LLC* 143**

 Statements by Employees 147

Key Terms 148

Chapter Summary 149

Practical Advice Summary 150

Chapter Questions 151

CHAPTER 5

Background Checks, References, and Verifying Employment Eligibility 155

Background Checks 155

 Employer Responsibility for Employee Wrongdoing 155

 Negligent Hiring 156

***Navarete v. Naperville Psychiatric Ventures* 160**

 Privacy Rights and Background Checks 165

Criminal Records 165

Credit Reports 168

 Fair Credit Reporting Act 169

***Goode v. LexisNexis Risk & Information Analytics Group* 171**

References 176

 Defamation 176

***Thompson v. Bosswick* 178**

 Negligent Referral 181

Verifying Employment Eligibility 183

 The Immigration Reform and Control Act 183

***Ketchikan Drywall Services v. Immigration & Customs Enforcement* 185**

Key Terms 190

Chapter Summary 190

Practical Advice Summary 191

Chapter Questions 193

CHAPTER 6	
Employment Tests	197
Drug Tests	197
Drug-Testing Procedures	200
Use of Drug Test Results	202
Medical Examinations	203
Limitations on the Use of Medical Examinations under the ADA	204
<i>Wright v. Illinois Department of Children & Family Services</i>	206
Genetic Tests	210
Polygraphs and Honesty Tests	213
Scored Tests of Ability	213
Examining Test Items	214
Examining Test Results	214
Establishing That Tests Are Job-Related and Consistent with Business Necessity	216
<i>EEOC v. Dial Corp.</i>	216
Determining Appropriate Cutoff Levels for Test Scores	222
<i>Bauer v. Lynch</i>	222
Accommodating Disabled Persons in Testing	227
Key Terms	228
Chapter Summary	228
Practical Advice Summary	229
Chapter Questions	230
CHAPTER 7	
Hiring and Promotion Decisions	233
Facially Discriminatory Policies/Practices: BFOQ Defense	233
Grounds for Recognizing BFOQs	235
<i>Ambat v. City & County of San Francisco</i>	237
Sex-Plus Cases	242
Affirmative Action Preferences	242
The Legality of Affirmative Action Preferences under Title VII	243
<i>Shea v. Kerry</i>	243
The Legality of Affirmative Action under the U.S. Constitution	249
Weight and Appearance	250
Sex stereotyping	252
<i>Lewis v. Heartland Inns of America</i>	254
Discrimination against Caregivers	257
Subjective Criteria	258
Interviews	261
<i>Hilde v. City of Eveleth</i>	262
Offering and Accepting Employment	265
Promotions	267
Glass Ceilings	270
Key Terms	271
Chapter Summary	272
Practical Advice Summary	273
Chapter Questions	274

PART 3 Managing a Diverse Workforce

CHAPTER 8

Harassment 281

Harassment as a Form of Discrimination 281

 Because of Sex 281

Recognizing Harassment 286

 Which Behaviors Constitute Harassment? 286

 Harassment That Results in Tangible Employment Actions 286

 Hostile Environment Harassment 288

Gerald v. University of Puerto Rico 289

 Are the Harassing Behaviors Unwelcome? 294

Liability for Harassment 296

 Harassment by Top Officials, Managers, and Supervisors 296

EEOC v. Management Hospitality of Racine 298

Hardage v. CBS 304

 Harassment by Coworkers or Third Parties 308

Eliminating Harassment 310

 Harassment Policies and Complaint Procedures 310

 Responding to Reports of Harassment 312

 Investigating Reports of Harassment 313

Key Terms 317

Chapter Summary 317

Practical Advice Summary 318

Chapter Questions 319

CHAPTER 9

Reasonably Accommodating Disability and Religion 323

Reasonable Accommodation of Disability 323

 Disability 325

Samson v. Federal Express 330

 Reasonable Accommodation 334

 The Process of Reasonably Accommodating Disability 334

 What Makes an Accommodation Reasonable? 336

Keith v. County of Oakland 337

EEOC v. Ford Motor Co. 344

 When Does an Accommodation Impose Undue Hardship? 350

Reasonable Accommodation of Religion 351

 Religion 351

 Failure to Reasonably Accommodate Religion 353

Davis v. Fort Bend County 356

Religious Advocacy and Religious Harassment 362

 Religious Organization Exemption 364

Key Terms 365

Chapter Summary 365

Practical Advice Summary 367

Chapter Questions 368

CHAPTER 10

Work–Life Conflicts and Other Diversity Issues. 373

Leave Policies under the Family and Medical Leave Act 375

 Who Is Entitled to FMLA Leave? 375

What Are FMLA Qualifying Events? 376
 What Must Employees Do to Obtain Leave? 379
White v. Beltram Edge Tool Supply 380
 What Does the FMLA Require Employers to Provide? 384
 How Should Employers Respond to Requests for FMLA Leave? 388
Leave Policies under the Pregnancy Discrimination Act 388
Young v. UPS 389
Leave to Perform Civic Duties 392
Leave for Military Service 393
Huhmann v. Fed. Express Corp. 394
Language Requirements and National Origin Discrimination 398
 English Fluency and Accents 398
 English-Only Rules 400
Discrimination Based on Sexual Orientation and Gender Identity 401
 Protection under Federal Law 401
Hively v. Ivy Tech Cmty. College of Ind. 402
 Protection under State and Local Laws 407
 Discrimination Based on Gender Identity 407
 Key Terms 408
 Chapter Summary 409
 Practical Advice Summary 409
 Chapter Questions 411

PART 4 Pay, Benefits, Terms and Conditions of Employment

CHAPTER 11
Wages, Hours, and Pay Equity 417
Wage and Hour Standards: Fair Labor Standards Act 417
 Minimum Wage 417
 Overtime Pay 420
Determining Compliance with Wage and Hour Standards 422
 Compensation Received 422
 Compensable Time 423
Kellar v. Summit Seating 424
 Exemptions from FLSA requirements 432
 White-Collar Exemptions 432
Pippins v. KPMG LLP 436
Other Wage Laws 444
 What about Farmworkers? 445
Limitations on Work Hours 446
Discrimination in Pay: Equal Pay Act 446
 Proving Pay Discrimination under the Equal Pay Act 447
 Equal Work 448
 Factors Other Than Sex 449
Riser v. OEP Energy 451
 Salary History 454
 Pay Secrecy Policies 454
 Key Terms 455
 Chapter Summary 455
 Practical Advice Summary 456
 Chapter Questions 458

CHAPTER 12

Benefits 461

Which Benefits Must Employers Provide? 461

What Does ERISA Require? 462

 Inform Employees about Their Benefits 463

 Deliver on Promised Benefits 464

Harrison v. Wells Fargo Bank, N.A. 465

 Provide Claims and Appeals Procedures 468

 Manage Plans Wisely and in Employees' Interests—Fiduciary Duties 469

 Refrain from Interference or Retaliation 470

Pensions 471

 Vesting and Participation 471

Battoni v. IBEW Local Union No. 102 Employee Pension Plan 472

 Types of Pension Plans 474

Whitley v. BP, P.L.C. 479

Health Insurance 481

 Health Insurance Reform 481

 Maintaining Coverage: COBRA 484

 Retiree Health Benefits 485

Discrimination and Benefits 486

Wellness Programs 487

Key Terms 489

Chapter Summary 489

Practical Advice Summary 490

Chapter Questions 492

CHAPTER 13

Unions and Collective Bargaining 495

The Idea of Collective Bargaining 495

The National Labor Relations Act (NLRA) 496

 Employee Rights under the NLRA 497

DirectTV v. NLRB 500

The Boeing Company 506

Unfair Labor Practices 514

Union Organizing and Representation Elections 518

 Union Organizing Campaigns 518

 Employer Responses to Union Organizing 518

AutoNation, Inc. v. NLRB 521

 Representation Election Procedures 529

Bargaining 534

 Duty to Bargain in Good Faith 534

NLRB v. Whitesell Corp. 535

 What Happens When Parties Cannot Reach Agreement? 539

 Labor Agreements 542

 Enforcing Labor Agreements: Grievance Procedures and Arbitration 543

Key Terms 544

Chapter Summary 545

Practical Advice Summary 546

Chapter Questions 548

CHAPTER 14	
Occupational Safety and Health	551
The Occupational Safety and Health Act	551
How Safe Is “Safe Enough”?	552
<i>R. Williams Construction Co. v. OSHRC</i>	554
<i>SeaWorld of Florida v. Perez</i>	559
How Is the OSH Act Enforced?	565
Recording and Reporting Requirements	569
Mine Safety and Health Act	571
Preventing Occupational Injuries and Illnesses	572
Workers’ Compensation	574
Exclusive Remedy	576
<i>State Ex Rel. Gross v. Industrial Commission of Ohio</i>	578
Arising Out of and in the Course of Employment	581
“Arising Out of Employment”	584
<i>City of Brighton v. Rodriguez</i>	585
Responding to Workplace Injuries	589
Key Terms	590
Chapter Summary	590
Practical Advice Summary	591
Chapter Questions	592
CHAPTER 15	
Privacy on the Job	595
Overview of Workplace Privacy Protections	595
Constitutional Protection	595
Common Law Protection	597
Statutory Protection of Privacy	600
Handling Records and Employee Information	600
Personnel Records	600
Medical Information	601
Monitoring and Surveillance of Employees	605
Video Surveillance	605
<i>Koeppel v. Speirs</i>	606
Electronic Communications	610
<i>Ehling v. Monmouth-Ocean Hospital Service Corp.</i>	614
Investigation of Employee Conduct	620
Searches	621
Interviews and Interrogations	622
<i>Estrada v. Wal-Mart Stores</i>	623
Polygraphs	627
Acting on Results of Investigations	628
Key Terms	629
Chapter Summary	630
Practical Advice Summary	631
Chapter Questions	632

Part 5 Terminating Employment

CHAPTER 16

Terminating Individual Employees..... 637
Constructive Discharge 638
Employment at Will with Exceptions 640
Impermissible Grounds for Termination 640
 Breach of an Implied Contract 641
 Reynolds v. Gentry Fin. Corp 643
 Retaliation for an Act Supporting Public Policy 649
 Dorshkind v. Oak Park Place of Dubuque II 653
 Whistleblower Protection Statutes 658
 Rhinehimer v. U.S. Bancorp Invs., Inc. 660
 Discriminatory Termination 667
Just Cause/Due Process 670
 Unionized Employees 670
 Public Employees 673
 Civil Service and Tenure Laws 673
 Constitutional Protections 675
 Munroe v. Cent. Bucks Sch. Dist. 680
 Montana Wrongful Discharge from Employment Act 688
Performance Appraisals 689
Handling Terminations 691
 Key Terms 694
 Chapter Summary 694
 Practical Advice Summary 696
 Chapter Questions 697

CHAPTER 17

Downsizing and Post-Termination Issues 703
Downsizing 703
 The Decision to Downsize 703
 Informing Employees Prior to Downsizing: The WARN Act 707
 Varela v. AE Liquidation, Inc. (In re AE Liquidation, Inc.) 710
 Selecting Employees for Downsizing 717
 Barnett v. PA Consulting Group 719
 Early Retirement Incentives 727
 Effects of Bankruptcy on Employee Rights 729
Post-Termination Issues 730
 Unemployment Insurance 730
 Restrictive Covenants 733
 NanoMech, Inc. v. Suresh 734
A Concluding Thought 739
 Key Terms 740
 Chapter Summary 740
 Practical Advice Summary 741
 Chapter Questions 742

Glossary 745
 Case Index 761
 Subject Index 769

Preface

This is a book about employment law—the set of legal requirements that govern the workplace. A distinction is often made between “employment law” and “labor law,” with the latter describing laws related to unions and collective bargaining, but I will generally use the term “employment law” to refer to both. This book has two main objectives. The first is to *explain the major employment laws and types of legal claims faced by employers*. Which things are legal matters? What does the law say about those matters? How are cases decided? The second objective is to *explain what employment law means for human resources practice*. What is it that employers should be doing to comply with the law? What is the legal reasoning behind this practical advice?

Special Features of This Text

Unique Employment Life Cycle Approach

This dual purpose of understanding the substance of employment law and its implications for human resources practice accounts for the way this book is organized. The first three chapters provide broad overviews. The remainder of the book traces the steps in the employment process and addresses the particular legal issues associated with them. We start with issues that lead up to hiring and promotion, including recruitment, interviewing, background checks, references, and employment testing. We then turn to a range of issues that arise when a person is on the job, including harassment, reasonable accommodation of disability, compensation, benefits, performance appraisal, and occupational safety and health. The last two chapters of the book deal with issues related to the termination of employment. This structure is intended to highlight the legal issues that managers regularly confront.

The employee life cycle approach to this text offers students the ability to understand the employment process, from beginning to end, while considering the legal environment and its implications for business success. Walsh’s personnel law book provides a solid foundation for students to successfully navigate the always changing and rarely certain areas of personnel law within an organization.

Professor Sarah Sanders Smith, SPHR, Purdue University

Of all of the texts that I reviewed, this one has the most practical and usable advice for soon-be-HR practitioners. The life cycle approach is strong and the writing easy to read.

Nancy K. Lahmers, JD, The Ohio State University

Practical Focus

This book is full of advice for carrying out human resource activities in a lawful manner. *These guidelines are general principles for sound human resources practice. They cannot be—and do not purport to be—specific legal advice for particular situations that you might encounter. Only a trained legal professional thoroughly familiar with the details of your case can provide the latter.*

This text offers a unique human resources perspective of employment law that is typically not afforded attention in other comparable texts.

Dr. Kim LaFavor, Athens State University

Interesting Features Included in Each Chapter

Clippings This feature consists of brief synopses of recent cases, events, or studies that illustrate the issues dealt with in each chapter. The clippings should pique your interest and begin to show how employment law relates to real things that are happening in the world around us.

I love the Clippings features—they are well chosen and give the students a great intro into why what we are covering is relevant to their businesses.

Alexis C. Knapp, Houston Baptist University

The Changing Workplace This feature adds a forward-looking flavor to the book by highlighting contemporary developments in the workplace, the workforce, and human resource practices that have particular implications for the law. The business world is nothing if not dynamic. Changes in the workplace raise new legal questions and point to the types of legal disputes that we can expect to see more of in the future.

Just the Facts This feature provides succinct statements of the facts from some interesting court decisions. You are not told the outcomes of the cases; instead, you are given the information needed to make your own determinations (“just the facts”). Thinking through these cases and arriving at decisions is a great way to test your grasp of legal concepts.

Practical Considerations Employers need to follow many rules to meet their legal obligations to employees. But legal compliance is not entirely cut-and-dried. Managers have many choices about how to comply with the law, and this feature highlights some of those choices.

Elements of a Claim In any situation that gives rise to a legal dispute, numerous facts might be considered. The facts that we deem most relevant and the order in which we consider them go a long way toward determining the outcome of our deliberations. When judges decide cases, they typically rely on established frameworks that spell out a methodology for deciding those cases. Who has the burden of proof? What must the plaintiff show? What must the defendant show? In which order should certain facts be considered? This feature lays out these frameworks—the “elements” of particular legal claims. Grasping this information gives us real insight into how cases are decided. Judges still exercise considerable discretion and judgment in applying these frameworks, but they make the process of arriving at decisions in legal disputes far more systematic and consistent than it would otherwise be.

Practical Implications of the Law Each chapter in this book contains many suggestions for carrying out human resources activities in a lawful manner. This advice appears in italics to make it stand out from the rest of the text. This advice should be considered in the context of the specific legal problems that it aims to help employers avoid. *It is important to know not only what to do but also the legal reasoning for why those things should be done.*

The law is a basic determinant of human resources practice and one that cannot be ignored. However, the law is best conceived of as providing a “floor,” rather than a “ceiling,” for such practices. In other words, it establishes minimum standards of acceptable treatment of employees, but often it is sensible for employers—based on motivational, pragmatic, or ethical considerations—to go well beyond the bare minimum legal requirements. Thus, our purpose in understanding what the law requires is not to identify “loop-holes” that can be exploited or to advocate superficial measures that look good on paper but fail to realize the underlying purposes (e.g., equal employment opportunity) of the law. Instead, *this book encourages you to embrace the “spirit”—and not merely the “letter”—of the law. It invites you to consider how to achieve these important social purposes by implementing policies and practices that also make sense given the operational realities of the workplace.*

Practical Advice Summary For easy reference, the practical advice sprinkled liberally throughout chapters is collected at the end of each chapter. This summary can be used as a convenient “checklist” for legal compliance.

Legal Cases Each chapter contains three or four substantial excerpts from decisions in court cases. One of the things that is unusual (and admirable) about legal decision making is that the decision makers (e.g., judges) often set down in writing their rationales for the decisions they make in the cases that are brought before them. This gives us the opportunity to read firsthand accounts of legal disputes, to have the decision makers explain the relevant rules of law, and to see how those principles were applied to the facts of cases to arrive at decisions. I describe the law and other cases for you as well, but there is nothing like reading cases to get a real feel for the law. Getting comfortable with reading legal cases is a bit like learning a new language. It will take some doing, but with diligent effort and practice, it will pay off in terms of enhanced ability to access and understand the law.

The words in the case excerpts are the same as those you would find if you looked up the cases online or in print. However, to maximize readability, I have shortened the case decisions by focusing on a brief statement of the facts, the legal issue, and (at greatest length) the explanation of the decision maker’s rationale. Where part of a sentence is removed, you will see three dots (. . .). Where more than part of a sentence is removed, you will see three stars (* * *). This marker alerts you that text that appears in the full case decision has been removed in this book. Legal decisions are replete with numerous footnotes and citations to previous cases that addressed similar questions. In most instances, I have removed the citations and footnotes from the case excerpts. Occasionally, I have included in brackets [] a brief explanation of a legal term.

What Is New in This Edition

This edition of *Employment Law for Human Resource Practice* retains the essential structure and focus of the previous editions. Linking a thorough understanding of principles of employment law to advice on how to conduct human resources practice remains the central aim of this book. Consistent with this aim, the book continues to be organized around stages in the employment process, from the formation of an employment relationship through the termination of that relationship. This sixth edition is the product of a thorough, line-by-line revision of the previous edition, aimed at enhancing clarity and ensuring that the material is as current as possible. I have streamlined the presentation of material in this edition by placing the most essential information regarding affirmative action, performance appraisals, and training within other chapters to which they apply, rather than having them appear as separate chapters.

Users of this text will find a significant number of new case excerpts. Indeed, more than half of the chapter cases are new to this edition. If, through a lapse in taste or judgment, I have eliminated one of your favorite cases from the previous edition, chances are the case still appears somewhere in this edition, perhaps as a new end-of-chapter question. I have also included a number of new case problems to puzzle over.

My hope is that both students who are reading this book for the first time and instructors who have used previous editions will find it engaging and informative.

Significant Revisions

Here are some highlights of the revised contents of this edition.

- **Chapter 1:** This chapter includes two new excerpted cases, *Dukowitz v. Hannon Security Services* (employment at will) and *Chavarria v. Ralphs Grocery Company* (enforceability of arbitration agreements). The issue of mandatory arbitration agreements receives updated and extended treatment.

- **Chapter 2:** This chapter maintains the previous edition's focus on the misclassification of employees as independent contractors and includes a new case applying the economic realities test (*Kellar v. Miri Microsystems*). The discussion of the employment status of unpaid interns, graduate assistants, and student-athletes has been updated. The leading appeals court decision on the employment status of interns, *Glatt v. Fox Searchlight Pictures*, is included. The evolving question of joint employment is taken up in a new chapter case, *Salinas v. Commercial Interiors*.
- **Chapter 3:** Two of the three cases excerpted in this chapter are new to this edition. These new chapter cases are *Vasquez v. Express Ambulance Service* (subordinate bias theory of liability) and *DeMasters v. Carilion Clinic* (retaliation).
- **Chapter 4:** Legal issues surrounding the use of social media for recruiting are highlighted in a new "Changing Workplace" feature. A discussion of the role of affirmative action plans in recruitment is new to this edition. The discussion of temporary work visas for foreign nationals is updated.
- **Chapter 5:** Coverage of immigration, undocumented workers, and recent changes in the enforcement of immigration laws is expanded and updated. A new Fair Credit Reporting Act case is included (*Goode v. LexisNexis Risk & Information Analytics Group*).
- **Chapter 6:** A new case on requiring fitness-for-duty medical exams of current employees is included (*Wright v. Illinois Department of Children & Family Services*). The issue of sex-differentiated physical fitness standards is taken up in a new chapter case, *Bauer v. Lynch*.
- **Chapter 7:** The legality of using preferences in affirmative action is now addressed in this chapter. New chapter cases include *Shea v. Kerry* (affirmative action preferences under Title VII) and *Hilde v. City of Eveleth* (subjective judgment of interview performance).
- **Chapter 8:** The discussion of harassment is updated with "Clippings" features focusing on contemporary incidents and extended consideration of the role of training in addressing harassment.
- **Chapter 9:** The important issue of telecommuting as a reasonable accommodation for disabled employees is taken up in a new chapter case, *EEOC v. Ford Motor Co.* Accommodation of the religious beliefs and practices of employees in scheduling work is the topic of another new chapter case, *Davis v. Fort Bend County*.
- **Chapter 10:** This chapter's substantial coverage of the Family and Medical Leave Act is retained and updated. There is expanded coverage of pregnancy discrimination (*Young v. UPS*) and discrimination based on sexual orientation (*Hively v. Ivy Tech*).
- **Chapter 11:** Coverage of the minimum wage for tipped employees and compensable time under the Fair Labor Standards Act (FLSA) is updated. There is additional discussion of the use of salary history in making pay decisions. *Pippins v. KPMG* (FLSA exemption for professional employees) and *Riser v. QEP Energy* (Equal Pay Act) are new to this edition.
- **Chapter 12:** The ongoing legal challenges to the Patient Protection and Affordable Care Act are reviewed. The discussion of the fiduciary duties of employers with defined contribution plans is updated. Closer attention is given to multi-employer pension plans and legal issues surrounding wellness programs. New chapter cases are *Harrison v. Wells Fargo Bank, N.A.* (denial of benefits, abuse of discretion) and *Whitely v. BP* (stock-drop suits).
- **Chapter 13:** This chapter retains and expands its discussion of concerted activity in nonunion workplaces. The treatments of worker centers, agency fees, and right-to-work laws are updated. New chapter cases include *The Boeing Company* (facially neutral rules and concerted activity) and *AutoNation, Inc. v. NLRB* (employer threats, illegal opposition to union organizing).
- **Chapter 14:** This chapter includes a new discussion of the Occupational Safety and Health Administration's revised silica standard. New "Clippings" features include one that raises the issue of safety hazards posed by humans working alongside robots.

- **Chapter 15:** *Estrada v. Wal-Mart Stores* (interrogations) is a new chapter case.
- **Chapter 16:** The discussions of whistleblower protections for employees in the financial industry and of challenges to tenure are updated. New chapter cases include *Reynolds v. Gentry Finance* (employee handbooks and implied contracts), *Rhinehimer v. U.S. Bancorp Investments* (Sarbanes–Oxley Act), and *Monroe v. Central Bucks School District* (First Amendment speech rights applied to blog posts).
- **Chapter 17:** Noncompetition agreements are given more extended consideration and are the topic of a new “Changing Workplace” feature. New chapter cases are *Varela v. AE Liquidation* (unforeseen business circumstances exception under the WARN Act) and *NanoMech, Inc. v. Suresh* (appeals court decision in this case considering the enforceability of a noncompete agreement).

Instructor Resources

Instructor’s Manual

www.cengage.com/login

The Instructor’s Manual for this edition of *Employment Law for Human Resource Practice* provides a succinct chapter outline, answers to questions raised in the “Just the Facts” and “Practical Considerations” features, answers to case questions following excerpted cases, answers to end-of-chapter questions, and suggestions for in-class exercises and discussions (including role-plays, practical exercises, and more). *Citations for the cases from which the “Just the Facts” and end-of-chapter questions are drawn can be found in the Instructor’s Manual.* Donna J. Cunningham of Valdosta State University revised the Instructor’s Manual for the sixth edition.

Test Bank

www.cengage.com/login

The Test Bank questions for this edition not only test student comprehension of key concepts, but also focus on those concepts’ business applications and ethical implications. The questions have been updated to reflect the new content and cases of the sixth edition and expanded to include hypothetical questions that ask what the student, as a human resources manager, should do in particular situations. Donna J. Cunningham of Valdosta State University edited and updated the Test Bank for the sixth edition.

PowerPoint Slides

www.cengage.com/login

PowerPoint slides have been created to highlight the key learning objectives in each chapter—including case summaries and hyperlinks to relevant materials. In addition, “What Would You Do?” slides emphasize applying legal concepts to business situations (answers to these questions are provided in “Instructor’s Note” slides at the end of the presentation). The PowerPoint slides were prepared by Donna J. Cunningham of Valdosta State University.

Note to the Instructor

Since I have been touting the contents of this book, it seems only fair to acknowledge material that is largely omitted. Beyond a glancing blow struck in Chapter 1, this book provides relatively little information about such matters as the legislative process, courtroom procedures, and the historical development of employment laws. These are all worthwhile topics, but they are not emphasized in this book because its focus is the current substance of employment law and the implications for human resources practice. The treatment of labor law in this book does not reach a number of the more specialized issues in this area, but I do attempt to show how labor law continues to be relevant to both unionized and nonunion workplaces. Additionally, while cross-national comparisons can enhance our understanding of U.S. law, a comparative perspective is beyond the scope of this book.

For Susan, "Gus," and "Dusty."

Acknowledgments

Thanks to the many faculty and students who have used *Employment Law for Human Resource Practice*. I hope that this edition will serve your needs even better. If you are not presently using this book, I hope that you will consider adopting it. Please do not hesitate to contact me regarding any questions you have about the book (and ancillary materials) or suggestions for improvement (walshdj@miamioh.edu).

Many thanks also to numerous others at Cengage and its business partners. Being an author provides a small glimpse of the “cast of thousands” who are needed to produce a work of this type.

Finally, I wish to thank and publicly acknowledge the following individuals who provided valuable comments and suggestions that helped shape this edition and previous editions:

FREDERICK R. BRODZINSKI
The City College of New York

LISA A. BURKE
University of Tennessee at Chattanooga

BRUCE W. BYARS
University of North Dakota

TERRY CONRY
Ohio University

DIYA DAS
Bryant University

THOMAS DAYMONT
Temple University

LINDA SUE FICHT
Indiana University, Kokomo

JASON M. HARRIS
Augustana College

MICHAEL A. KATZ
Delaware State University

ALEXIS C. KNAPP
Houston Baptist University

KIM LAFEVOR
Athens State University

NANCY K. LAHMERS
The Ohio State University

SUSAN LUBINSKI
Slippery Rock University

JEANNE M. MACDONALD
Dickinson State University

JAMES F. MORGAN
California State University, Chico

DIANE M. PFADENHAUER
St. Joseph's College

SARAH SANDERS SMITH
Purdue University North Central

VICKI FAIRBANKS TAYLOR
Shippensburg University

CHRISTINE M. WESTPHAL
Suffolk University

PART 1

Introduction to Employment Law

Chapter 1

Overview of Employment Law

Chapter 2

The Employment Relationship

Chapter 3

Overview of Employment Discrimination

CHAPTER 1

Overview of Employment Law

The purpose of this first chapter is to present a big picture of the body of law that we will apply to particular human resources practices throughout this book. This chapter contains an overview of employment laws, the rights they confer on employees, and the processes involved in enforcing these laws. Special attention is given to the use of alternatives to litigation to resolve employment disputes.

Heard at the Staff Meeting

Congratulations on your new job as human resources manager! You pour a cup of coffee and settle into your seat to hear the following reports from staff members:

“We’ve lined up some interns from a local college to take the place of vacationing staff members this summer. We won’t pay the interns, of course, but hopefully they will be self-starters who can make a real contribution.”

“In the interest of security, we now have a firm that checks the backgrounds of our job candidates. Anyone with an arrest or conviction is immediately dropped from consideration for employment.”

“Our employees’ use of social media has gotten out of hand. To deal with this problem, we have developed a new company policy that strictly prohibits employees from airing criticisms of the company’s employment practices or its managers via social media. We hope this will put an end to any disparaging comments.”

“Do you remember the chemist that we hired recently? She’s been doing a great job, but she mentioned the other day that she might have a problem regarding a noncompetition agreement that she had signed with her former employer. I told her that we did not intend to get involved in the matter, but I was confident that she would be able to work things out.”

You get up to get another—large—cup of coffee and feel fortunate that you were paying attention during that employment law class you took.

Which legal issues emerged during this staff meeting? What should this company be doing differently to better comply with the law? Although you might not encounter this many legal problems in one sitting, employment law pervades virtually every aspect of human resources practice, and managers regularly confront employment law questions.

Clippings

Cities and counties have become more important as sources of employment law in recent years. They have enacted, or attempted to enact, laws providing for higher minimum wages, paid sick time, and expanded protection against discrimination, among other things. But there has also been a counter-trend of state legislatures acting to “preempt” these local initiatives. Just since 2011, 22 states have enacted laws prohibiting localities from adopting their own employment laws. In general, state governments have the authority to do so.

SOURCE: Jay-Anne B. Casuga and Michael Rose. “Are State Workplace Preemption Laws on the Rise?” *Labor Relations Week* 30 (July 20, 2016).

U.S. Employment Law Is a Fragmented Work in Progress

“Just tell me what the law is, and I’ll follow it.” Were matters only that simple! No single set of employment laws covers all workers in the United States. Instead, the employment law system is a patchwork of federal, state, and local laws. Whether and how laws apply also depend on such things as whether the employees work for the government or in the private sector, whether they have union representation, and the size of their employer. Our principal focus will be on federal laws because these reach most widely across U.S. workplaces and often serve as models for state and local laws. However, we will also mention significant variations in the employment laws of different states.

There is another problem with the idea of just learning the legal rules and adhering to them. Employment law is dynamic. New law is created and old law is reinterpreted continuously. Recent political changes and the prospect of a significant realignment of the U.S. Supreme Court have engendered more than the usual degree of uncertainty about what the law will be in the future. Changing workplace practices also pose new legal questions. At any point in time, there are “well-settled” legal questions on which there is consensus, other matters that are only partially settled (perhaps because only a few cases have arisen or because courts have issued conflicting decisions), and still other questions that have yet to be considered by the courts and other legal decision makers. Attaining a solid grasp of employment law principles will allow you to make informed judgments in most situations. You must be prepared to tolerate some ambiguity and keep learning, however, as the law of the workplace continues to develop.

Sources of Employment Law

What comes to mind when you think of the law? Judges deciding court cases? Congress legislating? The Constitution? All of these are parts of the law in general and employment law in particular. Legal rules governing the workplace are found in the U.S. Constitution and state constitutions, statutes enacted by legislatures, executive orders issued by presidents and governors, regulations created by administrative agencies, and judicially authored common law.

Constitutions

Constitutions are the most basic source of law. **Constitutions** address the relationships between different levels of government (e.g., states and the federal government) and between governments and their citizens. A legal claim based on a constitution must generally assert

a violation of someone's constitutional rights by the government (in legal parlance, the element of "state action" must be present). In practical terms, this means that usually only employees of government agencies—and not employees of private corporations—can look to the U.S. Constitution or state constitutions for protection in the workplace. Constitutional protections available to government employees include speech rights, freedom of religion, protection from unreasonable search and seizure, equal protection under the law, and due process rights.

Statutes

In our system of government, voters elect representatives to legislative bodies such as the U.S. Congress. These bodies enact laws, or **statutes**, many of which affect the workplace. Among the many important statutes with implications for human resources practice are Title VII of the Civil Rights Act, the National Labor Relations Act, the Equal Pay Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act.

Executive Orders

The executive branch of government has the power to issue executive orders that affect the employment practices of government agencies and companies that have contracts to provide goods and services to the government. **Executive orders** function much like statutes, although they reach fewer workplaces and can be overridden by the legislative branch. One important example of an executive order affecting employment is Executive Order (E.O.) 11246, which establishes affirmative action requirements for companies that do business with the federal government.

Regulations, Guidelines, and Administrative Decisions

When Congress enacts a statute, it often creates an agency, or authorizes an existing one, to administer and enforce that law. Legislators do not have the expertise (and sometimes do not have the political will) to fill in all the details necessary to put statutes into practice. For example, Congress mandated in the Occupational Safety and Health Act that employers provide safe workplaces but largely left it to the Occupational Safety and Health Administration (OSHA) to give content to that broad principle by creating safety standards governing particular workplace hazards. Formal **regulations** are put in place only after an elaborate set of requirements for public comment and review has been followed. Regulations are entitled to considerable deference from the courts (generally, they will be upheld when challenged), provided that the regulations are viewed as reasonable interpretations of the statutes on which they are based.¹ Agencies also contribute to the law through their decisions in individual cases that are brought before them and the guidance that they provide in complying with laws.

Common Law

Courts are sometimes asked to resolve disputes over matters that have not been objects of legislation or regulation. Over time, courts have recognized **common law** claims to enforce private agreements and to remedy certain types of harm. Common law is defined by state courts, but broad similarities exist across states. One branch of common law is the traditional role of the courts in interpreting and enforcing contracts. The other branch is recognition of various **tort** claims to compensate persons who have been harmed. Tort claims relevant to employment law include negligence, defamation, invasion of privacy, infliction of emotional distress, and wrongful discharge in violation of public policy.

¹ *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).