

EMPLOYMENT AT WILL

- Absent a contrary agreement or law, an employer may terminate an employee *at any time, for any reason, or for no reason at all*, without recourse. There are exceptions:
 - **Implied Employment Contract:** Even where there is no written contract, courts may imply a contractual limit on termination from, *e.g.*, an employment manual, a personnel bulletin, or employer policies and procedures.
 - Some states imply a duty of **good faith**, which may limit the employer's right to terminate the employee.
 - **Abusive Discharge:** The manner of discharge may give rise to a claim of defamation or emotional distress.
 - **Public Policy:** Many states prohibit an employer from terminating an employee for refusing to perform an illegal or unethical act or for refusing to take any other action contrary to fundamental public policy.
 - **Whistleblower statutes** prohibit employers from terminating employees who report illegal or unethical conduct to the authorities, the press, or their superiors.
- An employee terminated in violation of law, public policy, or the terms of the employment contract may sue her employer for *wrongful discharge*.

WAGE AND HOUR LAWS

- **Fair Labor Standards Act (FLSA):** Federal law, applicable to the employees of all employers engaged in interstate commerce. Among its provisions are:
 - **Child Labor:** FLSA prohibits children **under the age of 14** from most types of work, making exceptions for, *e.g.*, lawn care, newspaper delivery, and entertainment. Children aged **14 or 15** are allowed to work in any non-hazardous occupation; however, FLSA establishes strict limits on the number of hours per day, the number of days per week, as well as the hours and days on which they may work. Children aged **16 to 18** do not face such hour and day restrictions, but still may not work in hazardous occupations or do other work detrimental to their health and well-being.
 - **Minimum Wage:** The lowest wage that an employer may pay an hourly-wage employee (currently \$7.25 per hour).
 - **Maximum Hours/Overtime:** Except for so-called *exempt employees* (*e.g.*, professionals, executives), FLSA requires that any employee who works more than 40 hours per week must be paid overtime wages – at least 1-1/2 times their regular wage – for all hours worked in excess of 40.

LAYOFFS

- **Worker Adjustment and Retraining Notification (WARN)**

Act: Any employer with at least 100 full-time employees, must give 60 days' notice prior to a *mass layoff* or closing a plant/office that employs more than 50 full-time employees.

- **Mass Layoff:** A reduction in the workforce that, during any thirty-day period, results in at least

- (1) 50 employees and 33 percent (33%) of the full-time employees at a single site or

- (2) 500 full-time employees

being laid off for more than six months or having their work hours reduced by more than 50% during each month of any six-month period.

- **Notice:** The employer must give the required notice to

- (1) the affected employees, including part-time and seasonal employees (who do not count when determining whether the employer's actions trigger the WARN Act), and

- (2) state and local governments in the affected location(s).

FAMILY AND MEDICAL LEAVE

- **Family and Medical Leave Act (FMLA):** Federal law requiring employers with 50 or more employees to provide their employees with up to 12 weeks of family or medical leave during any twelve-month period.
- During the leave period, the employer must continue to provide benefits to the employee; however, the employer is not required to pay the employee while on leave.
- The employer must also guarantee that the worker may return to his or her prior job or to a comparable job unless the employee
 - (1) has worked for the employer less than one year,
 - (2) worked less than 25 hours per week for the previous year, or
 - (3) is a **key employee** whose pay falls within the top 10 percent of the employer's workforce.

VIOLATIONS OF THE FMLA

- An employer that violates the FMLA can be required to provide various remedies, including:
 - (1) Damages to compensate the employee for lost wages and benefits, denied compensation, and actual monetary losses.
 - (2) Job reinstatement
 - (3) Promotion, if a promotion has been denied
 - (4) Court costs and attorneys' fees

EMPLOYEE HEALTH AND SAFETY

- **Occupational Safety and Health Administration (OSHA):** The federal agency empowered to promulgate workplace health and safety standards, to conduct workplace inspections, and to investigate employee complaints.
- Employers must promptly report any **workplace accident** as a result of which an employee was killed or at least five employees were hospitalized.
- Failure to comply with OSHA standards or failure to promptly report incidents may result in **severe fines** for the employer and **possible imprisonment** for culpable supervisory personnel.
- **Workers' Compensation Laws:** State laws establishing an administrative procedure for compensating workers for their workplace or work-related injuries
 - (1) arising out of, or in the course of, their employment,
 - (2) regardless of fault.
- Generally speaking, compensable injuries must be **accidental**; intentionally inflicted injuries are excluded.

INCOME SECURITY

- **Social Security:** Government-assured supplemental income for (1) retired persons, (2) their survivors, and (3) disabled persons. Social Security is funded by (non-voluntary) employer and employee “contributions.”
- **Medicare:** Government-administered health insurance program for those eligible for Social Security.
- **Pension Plan:** A private plan into which an employee and her employer may contribute toward the employee’s retirement savings, subject to the requirements of the *Employee Retirement Income Security Act* (ERISA).
- **Unemployment Insurance:** Government-assured, short-term income insurance for qualified persons who are unemployed. Funded by employers’ payments to the unemployment tax fund.

HEALTH INSURANCE SECURITY

- **COBRA:** Federal law extending an employee's right to participate (at the employee's expense) in employer-provided medical, dental, or optical insurance beyond the date of the employee's voluntary or involuntary termination.
 - COBRA generally does not apply to employers (1) with fewer than 20 workers, (2) who provide no non-wage benefits to their employees, or (3) who completely eliminate non-wage benefits for present employees.
- **Health Insurance Portability and Accountability Act (HIPAA):** Federal law limiting the ability of an employer that provides its employees health insurance to exclude coverage for "preexisting conditions" and requiring an employer to decrease the qualifying (*i.e.*, waiting) period for a new employee still covered by health insurance provided by a former employer.
- **Affordable Care Act (ACA):** Also known as "Obamacare", the ACA requires employers with fifty or more full-time employees to offer health-insurance benefits. An employer who fails to do so can be fined up to \$2000 for each employee after the first thirty people.

ELECTRONIC MONITORING

- The **Electronic Communications Privacy Act** prohibits an employer from intentionally
 - (1) intercepting any wire or electronic communication or
 - (2) accessing an employee's stored electronic communications.
- **Business-Extension Exception:** Employers may monitor their employees' electronic communications
 - (a) if the employee **consents**, or
 - (b) lacking consent, if the employee sent, received, or stored the communication using a device the **employer furnished**, which the employee uses in the **ordinary course of the employer's business**.
- **Balancing Test:** Courts generally balance the employer's interest in discovering its employees' communications and the employees' **reasonable expectation of privacy**. Thus, an employer who informs its employees that it intends to monitor their communications will fare better than one who monitors without **prior disclosure**.

OTHER EMPLOYEE PRIVACY ISSUES

- The **Employee Polygraph Protection Act** prohibits employers from
 - (1) **requiring or causing** employees or applicants to take a lie-detector test; and
 - (2) taking or threatening any **negative employment action** based on an employee's or applicant's lie-detector test results or her refusal to take a lie-detector test.
- **Drug testing** of employees or applicants for evidence of drug use is subject to both state statutory and state and federal constitutional limitations, and may also be prohibited or regulated by the terms of a collective bargaining agreement or even an individual employee's contract.
- The **Genetic Information Nondiscrimination Act** prohibits employers who conduct genetic tests of employees or applicants to identify those more likely to develop significant health problems from deciding to hire, fire, place, or promote based on the genetic-testing results.

CONTROLLING ILLEGAL IMMIGRATION

■ The **Immigration Reform and Control Act (IRCA)**

- (1) prohibits hiring or recruiting *illegal immigrants*,
- (2) requires employers to complete a **Form I-9** for each employee, verifying that each employee is either a U.S. citizen or is otherwise entitled to work in the U.S., and
- (3) prohibits employment discrimination on the basis that the person **might be** an illegal immigrant (but excuses discrimination if the person *is* an illegal immigrant).

■ An employer violates IRCA if it

- (a) hires someone not entitled to work in the U.S. and **knows or should know** of the employee's status,
- (b) subsequently becomes aware of an employee's illegal status but **does not promptly fire** him, or
- (c) fails to satisfy IRCA's **paperwork** requirements.

■ **Immigration and Customs Enforcement (ICE)** investigates possible violations of IRCA and has the authority to pursue both **administrative** and **criminal sanctions** against employers who knowingly hire or retain illegal workers.

LEGAL IMMIGRATION

- The **Immigration Act of 1990** limits the number of *legal immigrants* entering the U.S. each year by capping the number of visas issued each year.
- Employers wanting to hire noncitizens have several options:
 - (1) hire an immigrant who is a **permanent resident alien** or already has a valid temporary **Employment Authorization Document (EAD)**;
 - (2) obtain a nonresident **labor certification**, entitling the employer to hire the noncitizen for a permanent, full-time position;
 - The employer must (a) show that **no American worker is qualified, willing, and able** to take the job, and (b) offer the immigrant worker no less than the *prevailing wage* for the position, including fringe benefits.
 - (3) obtain a temporary **nonimmigrant visa**, which allows a noncitizen to work in the U.S. for three to six years; or
 - (4) obtain a **specialty temporary visa** or **guest worker visa**.

THE NLRA AND THE NLRB

- The **National Labor Relations Act (NLRA)** establishes employees' rights to **bargain collectively** and to strike to protect that right, and prohibits certain employer *unfair labor practices*, such as
 - interfering with employees' efforts to organize;
 - dominating a labor organization or contributing financial or other support to it;
 - hiring or tenure practices based on a (prospective) employee's union affiliation (or lack thereof);
 - discriminating against an employee who files a grievance or testifies against the employer regarding labor practices; and
 - refusing to bargain collectively with the employees' chosen representative.
- The NLRA empowers the **National Labor Relations Board (NLRB)** to investigate employees' charges regarding unfair practices, to file complaints based on those investigations, and to issue **cease-and-desist orders** compelling employers to stop engaging in unfair practices.

OTHR FEDERAL LABOR LAWS

- **Norris-LaGuardia Act:** Protects employees' rights to peacefully strike, picket, and boycott.
- **Labor-Management Relations Act (LMRA):** Prohibits certain *unfair union practices*, such as requiring union membership as a condition of employment (a *closed shop*) or continued employment (a *union shop*), refusing to negotiate with management, and causing employers to hire unneeded employees (*featherbedding*).
- **Labor-Management Reporting and Disclosure Act:** Sets forth an “employee bill of rights,” regulating internal union procedures, and prohibits all (1) *secondary boycotts* – refusals by a union to work for, purchase from, or handle the products of a company in order to force that company to stop dealing with an employer with whom the union has a labor dispute – and (2) *hot-cargo agreements*, in which employers agree not to handle, use, or deal in non-union goods.

UNION ORGANIZATION

- **Authorization:** If a majority of employees sign *authorization cards* stating their desire to unionize, union supporters may seek formal recognition from their employer.
- **Petition:** If the employer refuses to formally recognize the employees' desire to unionize, they may petition the NLRB for an election. Union supporters must demonstrate to the NLRB that at least 30 percent of those to be represented support a union or an election on unionization.
- **Campaign:** Employers may limit campaign activities at the workplace and campaign against unionizing.
 - Restrictions on union campaigning in the workplace during working hours must be *nondiscriminatory*.
 - The employer's efforts to prevent unionization must not be accompanied by **threats of reprisal** against those who support the unionization effort.
- **Election/Certification:** At the appropriate time, an election will be held. If the NLRB deems the election to be fair and a majority of eligible employees vote for unionization, the NLRB will *certify* the union as the employees' *collective bargaining* representative.

COLLECTIVE BARGAINING

- **Collective Bargaining:** The union bargains with the employer on behalf of all employees – even non-members.
- **Terms and Conditions of Employment:** The union and employer typically bargain collectively about:
 - wages and hours of work,
 - health and safety rules,
 - physical examinations, drug/alcohol testing, and polygraph testing,
 - insurance, pension, and disability plans, and
 - discipline and grievance procedures.

GOOD FAITH BARGAINING

- Both the employer and the union are obligated to bargain in *good faith*. Among those practices deemed not to be in good faith are:
 - excessive **delaying tactics**;
 - insisting on obviously **unreasonable terms**;
 - **refusing to discuss** modifications to terms;
 - making **unilateral changes** in working conditions;
 - attempting to **undermine** the union;
 - appointing bargainers **without authority** to make concessions or agreements.
- Failure to bargain in good faith constitutes an *unfair labor practice* and may result in sanctions by the NLRB.

STRIKES AND LOCKOUTS

- **Strike:** When unionized workers leave their jobs and refuse to work – typically accompanied by picketing.
- Employers may hire **replacement workers** during a strike.
- Whether the employer may hire **permanent** replacements depends on whether the employees are striking for economic reasons or in reaction to the employer's unfair labor practices
- If the employer has not permanently replaced all strikers, it must rehire former strikers to fill any vacancies and must reinstate any rehired worker's seniority rights.
- **Lockout:** An employer shutdown to prevent union employees from working – typically used to forestall an imminent strike.