Contents

Preface **xvii**

Acknowledgments **xix**

Chapter 1 • Introduction **3**
§ 1.01 Historical Overview and the Multi-Layered Nature of Employment Law 3
[A] At-Will Employment 3
[B] Workers' Compensation 4
[C] New Deal Federal Legislation 4
[D] Federal Antidiscrimination Legislation 5
[E] Federal Legislation Setting Workplace Standards 5
[F] State Legislation and Common Law 6
§ 1.02 Scope of This Book 7

Chapter 2 • Legal Boundaries of the Employment Relationship **9**
§ 2.01 Employees versus Independent Contractors 9
[A] Introduction 9
[B] The Control Test 10
[C] The Economic Realities Test 12
[D] The ABC Test 15
[E] Applying the Tests to Employment Laws 16
§ 2.02 Covered Employees 17
[A] Exclusion by Statute 17
[B] Exclusion by Contract 19
[C] Contingent Workers 21
[D] On-Demand Employees 22
§ 2.03 Covered Employers 24
[A] Statutory Exemptions 24
[1] Certain Types of Employers 24
[2] The "Small Employer" Exemption 25
[B] Joint Employees 25
[C] Leased Employees 27

Chapter 3 • Historical Foundations of Employment at Will **29**
§ 3.01 Introduction 29
§ 3.02 English Origins 29

§ 3.03 Horace Wood's Treatise 31
[A] Contrasting Approaches 31
[B] Flexibility 32
[C] As Legal Scholarship 32
[D] Explanations for the Rule 33
§ 3.04 Historical Application 34
§ 3.05 Modern Application 35
§ 3.06 Evaluating the At-Will Rule 35

Chapter 4 • Contract Erosions of Employment at Will 37
§ 4.01 Express Modification of At-Will Contracts, Written and Oral 37
[A] Definite-Term Contracts 38
[B] Oral Contracts 39
[C] Statute of Frauds 41
§ 4.02 Promissory Estoppel 43
§ 4.03 Reliance and Implied-in-Fact Contracts 45
§ 4.04 Employment Manuals 47
[A] Disclaimers 49
[B] Amendments 50
§ 4.05 Contract Damages 52

Chapter 5 • Tort Erosions of Employment at Will 53
§ 5.01 Introduction 53
§ 5.02 Wrongful Discharge in Violation of Public Policy 54
[A] Defining Public Policy 55
[B] Pigeonholing Public Policy Claims 55
[1] Refusing to Commit an Unlawful Act 56
[2] Exercising a Statutory Right 56
[3] Fulfilling a Public Obligation 57
[4] Whistleblowing 57
[a] Source of Legal Protection 57
[b] Scope of Legal Protection 58
[c] Burdens of Proof 59
[d] The Sarbanes-Oxley Act of 2002 60
[e] Whistleblowing Lawyers 61
§ 5.03 Intentional Infliction of Emotional Distress 62
[A] Introduction 63
[B] Elements 63
[1] Extreme and Outrageous Conduct 64
[2] Severe Emotional Distress 65

Chapter 6 • Good Faith and Fair Dealing 67
§ 6.01 Implied Covenant of Good Faith and Fair Dealing 67
[A] Good Faith Not Applicable to At-Will Employment 67
[B] Good Faith Protects Earned Benefits 68

[C] Good Faith Requires General Fairness 69
[D] The *Restatement* Approach 70

Chapter 7 • The Future of Wrongful Discharge Law 71
§ 7.01 A Brief Reprise of the At-Will Rule 71
§ 7.02 Defending the At-Will Rule 73
§ 7.03 Critiquing the At-Will Rule 74
§ 7.04 Alternatives to the At-Will Rule 75
§ 7.05 Dismissal Standards in Other Countries 76

Chapter 8 • Employee Free Speech and Political Protections 77
§ 8.01 Introduction 77
§ 8.02 The Public Workplace 78
[A] Public Employee Equal Protection Claims 79
[B] Public Employee Political Affiliation Protections 81
[C] Public Employee Free Speech: The *Connick/Pickering/Garcetti* Line of Cases 82
§ 8.03 The Private Workplace 85
[A] *Novosel v. Nationwide Insurance Co.* and Using Public Policy Torts for Political Protection 85
[B] Private Sector Employee Free Speech, the National Labor Relations Act, and Off-Duty Conduct Statutes 86

Chapter 9 • Employee Privacy Protections 89
§ 9.01 Introduction 89
§ 9.02 Privacy Claims on the Job 90
[A] Public Employment 90
[B] The Tort of Invasion of Privacy 93
[C] Wiretap Act and Electronic Communications Privacy Act (ECPA) 94
§ 9.03 Privacy Claims off the Job 97
[A] Legal Off-Duty Conduct 97
[1] Common Law Protections 97
[2] The Union Context 98
[3] State Off-Duty Conduct Statutes 98
[B] Romantic Relationships 99
[C] Public Employee Sexual Privacy Claims in Light of *Lawrence v. Texas* 100
§ 9.04 Drug Testing 101
[A] Public Employees and the Fourth Amendment 102
[B] Private Employees and Invasion of Privacy 103
§ 9.05 Polygraphs and Honesty Testing 106
[A] Polygraph Testing 106
[B] Honesty Testing 107
§ 9.06 Genetic Testing 109

Chapter 10 • Defamation and Employment References 111
§10.01 Introduction 111
§10.02 The Tort of Defamation 112
[A] The Basic Framework 112
[1] False and Defamatory Statement 112
[2] Publication and Self-Publication 113
[3] Fault 113
[4] Special Harm 113
[B] Conditional Privileges and Abuse of Privilege 114
[C] False Light Claims 115
§10.03 Employment References 116
§10.04 Invasion-of-Privacy Claims 118

Chapter 11 • The Duty of Loyalty, Trade Secrets, Covenants Not to Compete, and Employee Inventions 119
§11.01 Introduction 120
§11.02 The Theory of Human Capital and High-Velocity Markets 120
[A] Rubin and Shedd on Human Capital 121
[B] Hyde on High-Velocity Markets 121
§11.03 The Duty of Loyalty and the Misappropriation of Trade Secrets 122
[A] Common Law Duty of Loyalty 122
[B] The Tort of Misappropriation of Trade Secrets 125
§11.04 Covenants Not to Compete 129
[A] Factors to Consider for Enforceability 130
[1] Employer's Legitimate Interest and Employee's Unique Skills 130
[2] Duration of Covenant 131
[3] Geographic Scope of Covenant 132
[4] Adequate Consideration 133
[B] Special Issues under Covenants Not to Compete Law 133
[1] Employees Who Are Terminated 133
[2] Blue-Penciling and Other Responses to Overbroad Covenants 134
[3] Confidentiality and Non-Solicitation Agreements 135
[4] Covenants in Employee Severance Agreements 135
[5] Employer Suits against Subsequent Employers 135
§11.05 Employee Inventions 136
[A] The Common Law: The Duty to Assign and the Shop Right Rule 136
[B] Contractual Agreements 137
[C] Statutory Law: The Case of California 138

Chapter 12 • Regulation of Compensation and Leave Time 139
§12.01 Introduction 140
§12.02 Fair Labor Standards Act 141
[A] Coverage 141

[B] Child Labor 145
[C] Minimum Wage 147
[D] Overtime 149
[1] Salary Basis Test 151
[2] Duties Test 153
[a] Executive Exemption 154
[b] Administrative Exemption 156
[c] Professional Exemption 158
[E] Determining Wage Rates 160
[F] Enforcement 165
§12.03 Wage Payment Laws 166
[A] Overview 166
[B] Form of Wage Payment 166
[C] Wage Payment after Separation 167
[D] Restrictions on Assignment and Garnishment 168
[E] Tips 170
§12.04 Family and Medical Leave Act 171
[A] Coverage 172
[B] FMLA Rights 172
[1] Leave and Restoration 173
[2] Health Benefits 175
[3] Interference and Retaliation Prohibitions 175
[C] Serious Health Condition 177
[D] Notice and Certification Requirements 178
[E] Enforcement 182

Chapter 13 • Unemployment and WARN 185
§13.01 Introduction 185
§13.02 Unemployment Insurance 186
[A] History and Overview of Unemployment Insurance in the United States 186
[B] Disqualifications from Benefits 188
[1] Voluntary Separation 189
[2] Willful Misconduct 191
[3] Work Search Requirement 192
§13.03 Worker Adjustment and Retraining Notification Act of 1988 (WARN) 194
[A] Coverage and Notice Requirement 194
[B] Exceptions 196
[1] Faltering Company 197
[2] Unforeseen Business Circumstances 197
[3] Natural Disaster 198
[C] Enforcement 199

Chapter 14 • Employee Benefit Plans under ERISA 201
§ 14.01 Introduction 202
§ 14.02 Employee Retirement Income Security Act of 1974 (ERISA) 204
[A] Statutory Structure 204
[B] ERISA Plans 205
[1] Types of ERISA Plans 205
[2] Plans Exempt from ERISA 206
[C] Plan Documents, Trust Requirements, and Plan Amendments 206
[D] Summary Plan Description (SPD) and Reporting and Disclosure Requirements 207
§ 14.03 Retirement Plans 208
[A] Types of Retirement Plans 208
[1] Defined Benefit Plans 209
[2] Defined Contribution Plans 209
[3] Cash Balance Plans 211
[B] Participation and Vesting Standards 211
[1] Minimum Participation Standards 211
[2] Minimum Vesting Standards 212
[C] Plan Termination Issues and the PBGC 213
[1] Distress Terminations with Insufficient Assets 214
[2] Standard Terminations with Sufficient Assets 215
§ 14.04 Health and Welfare Plans 216
[A] Introduction 216
[B] Insured versus Self-Insured Health Plans 216
[C] Health Savings Accounts and High-Deductible Health Plans 217
[D] Retiree Health Care Issues 218
[E] COBRA and Continuation of Health Coverage 219
[F] Health Insurance Portability and Accountability Act (HIPAA) 220
[G] Affordable Care Act of 2010 (ACA) 221
§ 14.05 Common Issues to Retirement and Welfare Plans 223
[A] Fiduciary Duties under ERISA 223
[1] The Definition of an ERISA Fiduciary 224
[2] Responsibilities of ERISA Fiduciaries 225
[a] Basic Fiduciary Duties 225
[b] Co-Fiduciary Liability and Prohibited Transactions 226
[3] Duty to Inform Cases 227
[a] Early Retirement Plan Cases 227
[b] Participant Communication Cases 228
[B] ERISA Preemption 229
[1] Section 514 "Relates to" Language 229
[2] The Savings Clause 232
[3] The Deemer Clause 233

[C] ERISA Civil Enforcement Actions 234
[1] Overview and Jurisdictional Issues 234
[2] Claims for Benefits 235
[3] Claims for Fiduciary Breaches under Section 502(a)(2) 237
[4] Claims for Equitable Relief under the Catch-All Provision 239
[5] Discrimination Claims under Section 510 241

Chapter 15 • Safety and Health 243
§15.01 Introduction 244
§15.02 Occupational Safety and Health Act (OSHAct) 244
[A] Coverage 244
[B] OSHA Administration 245
[C] General Duty Clause 245
[D] OSHA Standards 246
[1] Promulgation of Standards 247
[2] Interim Standards 247
[3] Emergency Temporary Standards 248
[4] Permanent Standards 249
[5] Variances 251
[6] Substantive Criteria for Evaluating and Challenging Standards 251
[a] Technological Feasibility 252
[b] Economic Feasibility 254
[c] Benefit to Employees' Health and Safety 255
[d] Cost-Benefit Analysis 256
[E] Employee Rights 257
[F] Employer Responsibilities 259
[G] Enforcement 261
[1] Procedures 262
[2] Recordkeeping and Inspections 262
[3] Penalties 264
[4] Imminent Danger 265
[5] State Regulation of Safety and Health 266

Chapter 16 • Enforcing Employment Rights 269
§16.01 Introduction 269
§16.02 Remedies 269
§16.03 Choice of Enforcement Forum: Agencies or Courts 270
[A] Administrative Agencies 270
[1] Compensation versus Fines 270
[2] Agency versus Court Adjudication 271
[B] Individual Enforcement 271
[C] Hybrid Enforcement 272

Chapter 17 • Arbitration of Employment Disputes **273**
§ 17.01 Arbitration Generally 273
§ 17.02 A Brief History of Arbitration in Labor and Employment Law 275
§ 17.03 Employment Arbitration Law Today 276
§ 17.04 Current Issues in Employment Arbitration 279
§ 17.05 The Advantages and Disadvantages of Employment Arbitration 282

Table of Cases **285**

Index **293**