INTRODUCTION

Every business student should have a basic familiarity with general laws in the area of employment. This chapter looks at some of the significant laws that regulate employment and the workplace. Unions and collective bargaining, the employment-at-will doctrine, employees' privacy rights, workers’ compensation, workplace safety, whistleblowing, and retirement and security income are among the topics discussed.

ADDITIONAL RESOURCES—

🌟🌟🌟 AUDIO & VIDEO SUPPLEMENTS ⭐⭐⭐

The following audio and video supplements relate to topics discussed in this chapter—

**PowerPoint Slides**

To highlight some of this chapter's key points, you might use the Lecture Review PowerPoint slides compiled for Chapter 33.

**South-Western’s Business Law Video Series**

The situational video Employment Law illustrates some of the material included in this chapter.
**Drama of the Law II**

- Employer's Duty of Care and Issues of Compensation
- Family Related Issues
- Electronic Surveillance of Employees
- Drug Testing of Employees

*** ANSWER TO VIDEO QUESTION LTR. A ***

In the video, Laura asserts that she can fire Ray “For any reason. For no reason.” Is this true? Explain your answer. Under the employment-at-will doctrine, either party may terminate an employment contract at any time and for any reason, unless a contract specifies otherwise or the termination would violate a federal or state statute, such as a statute prohibiting employment discrimination. The employment-at-will doctrine still applies to the majority of workers in the United States. Therefore, Laura is right. Generally, as a private employer, she can fire Ray for no reason and for (almost) any reason so long as her action does not violate a federal or state statute.

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**ADDITIONAL BACKGROUND—**

**Employment Relationships before the Twentieth Century**

In the early years of this nation’s history, most Americans were self-employed. For these individuals, problems arising from employment relationships did not exist. For those who were employed, employers usually determined the terms of employment.

Generally, contract, tort, and agency law governed employment relationships before the twentieth century. Most employment contracts were considered to be “at will,” which meant either party could terminate the contract at any time for any reason, unless a particular period was specified. Generally, employers could fire workers for good, bad, or no cause in response to changing economic conditions. If an employee was injured on the job, it was difficult for him or her to recover from the employer, because an employee was considered to have assumed the risks of employment when he or she accepted the job.

The nature of employment changed with the Industrial Revolution, beginning about 1760 in Europe and 1800 in the United States. Fewer Americans were self-employed, and employment relationships lost some of their paternalistic character. Terms of employment came to be determined by bargaining between employees and employers, but because an employer usually bargained from a superior position, the terms tended to favor the employer. Also, because most industrial enterprises were in their infancy, to encourage their development, they were given considerable freedom under the law to respond to changing conditions—freedom to hire and fire and freedom from potentially crippling liability.

With increasing industrialization, the size of corporate employers and the number of workplace hazards increased. Employers discouraged employees’ collective activities to improve conditions, but as labor gained political influence, legislators responded with minimum wage, maximum hour, child labor, and other laws. At the end of the nineteenth century, the courts generally sided with business and struck many of these laws as unconstitutional.
CHAPTER 33: EMPLOYMENT AND LABOR LAW

CHAPTER OUTLINE

I. Employment at Will

Under the at-will employment doctrine, employers can fire workers for good, bad, or no reasons. Federal statutes and state court rulings provide exceptions to the at-will doctrine in actions based on a wrongful-discharge theory.

A. EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE

1. Exceptions Based on Contract Theory

Some courts have held, based on employees’ reasonable expectations, that an implied contract exists between employer and employee under an employer’s handbook, personnel bulletin, or the like that workers will be dismissed only for good cause. An employer who fires a worker contrary to this promise may be liable for breach of contract. In a few states, all employment contracts are considered to contain an implied covenant of good faith. If an employer fires an employee arbitrarily or unjustifiably, the employee can claim breach of this covenant.

2. Exceptions Based on Tort Theory

In a few cases, discharge may give rise to a tort cause of action (an abusive discharge may result in intentional infliction of emotional distress or defamation, for example).

3. Exceptions Based on Public Policy

Under this exception (the most widespread common law exception to the at-will doctrine), an employer may not fire a worker in violation of a fundamental public policy.

a. Requirements for the Public Policy Exception

The policy must be clearly expressed in statutory law.

b. Whistleblowing and Public Policy

Most states have held that firing workers who refuse to perform illegal acts violates public policy. Whistleblowers may be protected for public policy reasons.

CASE SYNOPSIS—

Case 33.1: Wendeln v. The Beatrice Manor, Inc.

Rebecca Wendeln, a twenty-one-year-old certified nursing assistant, worked at The Beatrice Manor, Inc., in Beatrice, Nebraska, as a staffing coordinator. Aides told Wendeln that a patient had been improperly moved and injured. When Wendeln reported this to the Nebraska Department of Health and Human Services, as required under the state Adult Protective Services Act (APSA), her supervisor confronted her and ultimately she was fired. She filed a suit in a Nebraska state court against Beatrice Manor, alleging in part that her discharge was a violation of the state’s public policy. A jury awarded damages of $79,000. Beatrice Manor appealed.

The Nebraska Supreme Court affirmed. Under public-policy exceptions to the employment-at-will doctrine, an employer may not discharge an at-will employee for, for example, filing a claim under the state workers’ compensation law. Similarly, an employee has a cause of action for retaliatory discharge when she is fired for reporting nursing-home patient abuse, as state law requires.
Notes and Questions

To state a cause of action for retaliatory discharge under the public-policy exception recognized in this case, should an employee be required to show that a report of abuse under the APSA was made in “good faith”? The state supreme court in the Wendeln case held that a report of abuse under the APSA “must be based upon reasonable cause ... to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse.” The court pointed out that the statute expressly requires this. But “[w]e find no reason to write ... an additional requirement [of good faith] into the public policy expressed by the APSA. ... Such broadly encouraged reporting [as the APSA requires] simply begins a further investigatory process which may or may not ultimately result in a conclusion that the abuse actually occurred.”

ANSWER TO “THE ETHICAL DIMENSION” QUESTION IN CASE 33.1

Is it fair to sanction an employer for discharging an employee who reports on the employer’s unsafe or illegal actions to government authorities or others? Discuss. Yes, it is fair, because otherwise the rights of the employee to work in safe conditions or to obey the law “could simply be circumvented by the employer’s threatening to discharge the employee if he or she exercised those rights.” The purpose of any law being violated would also be frustrated in such a circumstance.

ANSWER TO “THE GLOBAL DIMENSION” QUESTION IN CASE 33.1

In many countries, discharging an employee is more difficult and costly for the employer than it is in the United States. Why? Employment laws in many other countries are more restrictive of their employers’ ability to discharge their workers. Typically, workers may be discharged only for the most serious causes (violence or imprisonment, for example) and sometimes only by following certain procedural requirements (mediation or a hearing before an independent committee, for instance). The purpose is of course to protect the employees in their jobs, which in many markets can be hard to obtain. There may be political, economic, social, or cultural reasons in support of the restrictions on the employers, just as there are such bases for the reluctance to impose similar restraints in this country.

c. Whistleblowing Statutes

Federal and state statutes may offer protection. Federal law also may provide an incentive for whistleblowing (the text mentions the False Claims Reform Act of 1986) and protection for having done so (the text mentions the Whistleblower Protection Act of 1989).

B. WRONGFUL DISCHARGE

Federal statutes and state court rulings provide exceptions to the at-will doctrine in actions based on a wrongful-discharge theory. Punitive damages have been awarded against employers.

☆☆☆ ANSWER TO VIDEO QUESTION LTR. B ☆☆☆

What are the exceptions listed in the chapter to the employment-at-will doctrine? Does Ray's situation fit into any of these exceptions? Three main exceptions to the employment-at-will
doctrine are discussed in the chapter. Courts sometimes make exceptions based on contract theory, such as when an employer's manual, a personnel bulletin, or the employer (verbally) states a policy that the employee will be fired only for good cause. Other exceptions are based on tort theory, such as when the employer fires a worker for reasons that violate a fundamental public policy of the jurisdiction. Ray's situation does not give rise to a contract or tort exception under the facts presented in the video. (He does not allege that he understood that he could only be fired for good cause or that Laura made any misrepresentations.) Ray might, however, be able to claim an exception to the employment-at-will doctrine based on public policy. The courts would require, though, that the public policy involved be expressed clearly in the statutory law of the jurisdiction. In the video, Ray claims that Laura is firing him for refusing to commit a crime by producing an ad that was “misleading if not false.” If the statutes in the jurisdiction prohibit the type of advertising that Laura asked Ray to produce, and if Ray could prove that he was fired for not producing the ad, he could claim that he was wrongfully discharged in violation of public policy. Ray would have to prove that a clear public policy existed against this type of misleading advertising, which may be difficult if the ad was not illegal but only slightly misleading (as are many advertisements). He would also have to show that Laura was unjustified in considering his refusal to produce this ad as a factor in his termination. This would be difficult in Ray's case because obviously an advertising firm is justified in considering what type of ads an employee will produce in its decision as to whether to hire or fire a particular employee.

ANSWER TO VIDEO QUESTION LTR. C

Would Ray be protected from wrongful discharge under whistleblowing statutes? Why or why not? Whistleblowing statutes are typically aimed at protecting whistleblowers from employer retaliation. A whistleblower is an employee who tells a government official, upper-management authority, or the press that her or his employer is engaging in some unsafe or illegal activity. That is not the situation in the video. Ray has not “blown the whistle” on Laura's advertising firm by telling anyone else about the advertisements that he considers to be false and misleading. Therefore, most states' whistleblowing statutes would not apply.

ANSWER TO VIDEO QUESTION LTR. D

Assume that you are the employer in this scenario. What arguments can you make that Ray should not be able to sue for wrongful discharge in this situation? An employer faced with this situation can argue that the employee was terminated because he refused to do what he was hired to do—produce advertisements. There was no discrimination or retaliation involved in this termination, just professional differences. An advertising firm has a legitimate interest in the kind of advertisements that its employees produce and should be able to terminate employees who refuse to do the work assigned to them. The employer can assert that Ray was not asked to commit a crime; he was only asked to do the job on schedule and to be creative. Public policy considerations should weigh in favor of the employer here, because if employees are allowed to pick and choose which duties they will perform, what will happen to the firm and the advertising industry as a whole? Employers will no longer be able to control and direct their employees' work, and their businesses will suffer. Advertising is a competitive industry, and employers should have the right to make the strategic decisions controlling the ads they produce.
II. Wage and Hour Laws
   The Fair Labor Standards Act (FLSA) of 1938, which covers employers engaged in interstate commerce, regulates child labor, maximum hours, and minimum wages.

   A. CHILD LABOR
      Children under fourteen can work in only limited occupations, children under sixteen cannot work full-time except for a parent under certain circumstances, and children under eighteen cannot work in hazardous jobs or in jobs detrimental to their health and well being.

   B. HOURS AND WAGES
      The current federal minimum wage is stated in the text. Employees who agree to work more than forty hours per week must be paid no less than one and a half times their regular pay for all hours over forty.

   C. OVERTIME EXEMPTIONS
      Exempted from federal overtime regulations are employees who earn more than a specified amount per week and devote their efforts to certain duties. The text provides the details.

CASE SYNOPSIS—
Case 33.2: Mims v. Starbucks Corp.

In Starbucks Corp.’s stores, baristas wait on customers and managers oversee customer service, process paperwork, and develop revenue-enhancing strategies. Kevin Keevican began as a barista, in less than two years became a manager, and quit three years later. Keevican and other former managers, including Kathleen Mims, filed a suit in a federal district court against Starbucks, seeking unpaid overtime and other amounts.

The court dismissed the claims. The plaintiffs were exempt from the FLSA’s overtime provisions as executive employees. An employee’s “primary duty” is “what the employee does that is of principal value to the employer.” The factors are “(1) the relative importance of managerial duties compared to other duties; (2) the frequency with which the employee makes discretionary decisions; (3) the employee’s relative freedom from supervision; and (4) the relationship between the employee’s salary and the wages paid to employees who perform relevant non-exempt work.” The barista chores “quite obviously were of minor importance to Defendant when compared to the significant management responsibilities *** that directly influenced the ultimate commercial and financial success or failure of the store.” Also, each plaintiff was “the single highest-ranking employee in his particular store and was responsible on site for that store’s day-to-day overall operations.” He or she was “vested with enough discretionary power and freedom from supervision to qualify for the executive exemption.” Finally, the “marked disparity in pay and benefits between Plaintiffs and the non-exempt employees is a hallmark of exempt status.”

Notes and Questions

What duties qualify as “managerial tasks”? The court in the Mims case noted that under the FLSA regulations “management” includes such activities as interviewing, selecting, training, and disciplining employees; setting pay rates and hours of work; directing and assigning employees’ work; handling employees’ complaints; overseeing the budget and inventory; ensuring workplace safety; and monitoring legal compliance.

All of these tasks were responsibilities of Starbucks’ managers. In the Mims case, the plaintiffs “performed many management tasks, including: interviewing applicants and deciding whom to hire
and promote for certain positions within their authority, training and supervising staff, evaluating staff performance, disciplining some infractions, creating weekly work schedules, assigning staff’s day-to-day tasks, deciding the amount of products to order, overseeing their stores’ financial performance, controlling costs, and ensuring compliance with Defendant’s policies.

How have managers of retail outlets fared in other cases in which their exemption from overtime requirements was at issue? According to the court in the Mims case, “with managers of retail establishments—who often perform managerial and non-managerial tasks concurrently and perform non-exempt tasks to ‘teach by example’—the case law is replete with decisions holding them to be exempt, notwithstanding the fact that they spent the majority of their time performing non-exempt tasks or their need to obey corporate policies and/or follow the orders of their corporate superiors.”

In issuing the new overtime regulations, the U.S. Department of Labor (DOL) noted that “[f]ederal courts have found many employees exempt who spent less than 50 percent of their time performing exempt work,” particularly in restaurant and retail settings, in which “an employee can have a primary duty of management while concurrently performing nonexempt duties.” The DOL cited the collection of cases listed in Posely v. Eckerd Corp., 433 F.Supp.2d 1287 (S.D.Fla.2006). And see, for example, such cases as:

- Jones v. Virginia Oil Co., 69 Fed. Appx. 633 (4th Cir.2003) (unpublished) (per curiam) (manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she “could simultaneously perform many of her management tasks”).
- Murray v. Stuckey’s, Inc., 939 F.2d 614 (8th Cir.1991) (store managers who spent 65 to 90 percent of their time on ‘routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves’ were exempt executives).

**ANSWER TO “WHAT IF THE FACTS WERE DIFFERENT?” IN CASE 33.2**

Suppose that Keevican’s job title had been “glorified barista” instead of “manager.” Would the result have been different? Explain. No, the result would not have been different. The reasoning behind the court’s decision focused on the duties of the employees, not their specific job titles.

**ANSWER TO “THE LEGAL ENVIRONMENT DIMENSION” QUESTION IN CASE 33.2**

What might the court have concluded if the store could have operated successfully without the plaintiffs’ performing their “managerial” functions? In that circumstance, in the plaintiffs’ words, the “sum total of [Plaintiffs’] duties” would have shown that their primary duty was “that of a barista, not a manager.” The court might then not have considered the plaintiffs to be managers and could have held them eligible for overtime pay.
**Answers to Critical Analysis Questions in the Feature—Emerging Trends in Business Law**

1. Why might telecommuting employees sometimes accept being wrongly classified as an “executive” or a “professional” under the overtime-pay requirements and thus be exempt from overtime pay? These employees might accept a misclassification if it involves a higher salary or other perks that the employees might want: a different job title or additional authority, for example, or a more attractive entry on a resume. They might accept a misclassification out of ignorance of the law, or because they enjoy other aspects of telecommuting, or because they simply like their work.

2. If more class-action lawsuits claiming overtime pay for telecommuters are successful, what do you think will be the effect on telecommuting? Why? Most likely in the short term, if such suits are more successful, would be a closer watch on telecommuters’ time by both the telecommuters and their employers. In the longer term, there might be other ways in which employers would keep close tabs on an employee’s time—a clock on a laptop or home computer, for example, or a requirement to “punch in” and “out” in cycles.

**Enhancing Your Lecture—**

*EMPLOYMENT ISSUES IN THE VIRTUAL WORKPLACE*

Over thirty million workers in the United States telecommunicate, up from fewer than twenty million at the end of the last decade. Between eight and ten million U.S. workers now telecommunicate full-time—never laying eyes on, or feet in, a physical office building. As often happens, though, a spurt in technology—mainly due to the growth in Internet use—has caused real-world conditions to leap ahead of the law. After all, virtually all state and federal statutes governing employment were drafted when the only workplace was the traditional workplace.

**Do Overtime and Minimum-Wage Laws Apply to the Virtual Work Force?**

Not until the early 1990s did the U.S. Department of Labor issue regulations defining exemptions to the overtime-pay requirements for employees in computer-related occupations. Under the regulations, these employees can qualify as “professionals” and thus be exempt from the overtime-pay requirements. When an employee falls within this (or any other) exemption to the overtime-pay requirements of the Fair Labor Standards Act, the employee is not entitled to be paid time and a half for overtime hours.

For employees in computer-related occupations to qualify for this exemption, they must meet certain requirements. They must be (1) highly skilled in computer analysis, programming, or related work; (2) involved in the application of systems analysis, techniques, and procedures or in the design, development, creation, or testing of computer programs; or (3) involved in the modification, or creation or testing of machine operating systems.

Just because employees work in a remote location—telecommute—does not mean that they are exempt from the overtime-pay requirements or the minimum-wage laws. Any employer who misclassifies employees as exempt from these regulations may be subject to both criminal and civil penalties. Under all circumstances, employers are required to monitor the hours worked by nonexempt telecommuting employees, even if doing so presents a challenge. Today there are software programs that will monitor hours of work for a telecommuting employee.
NONEXEMPT EMPLOYEES IN COMPUTER-RELATED OCCUPATIONS

The professional exemption does not apply to trainees or to entry-level employees in computer specialties, such as programming and analysis. Individuals operating computers or manufacturing, repairing, or maintaining computer hardware are also not included in the professional exemption for overtime pay. Moreover, just because an employee relies heavily on computers or computer software in his or her work does not qualify that person for a professional exemption.

Under most circumstances, junior programmers, programmer trainees, keypunch operators, and computer operators are considered not to have sufficient discretion and independence to qualify as administrative employees. They are, consequently, subject to federal overtime regulations.

REGULATING THE SAFETY OF AT-HOME WORK SITES

The Occupational Safety and Health Administration (OSHA) did not issue a formal directive on home-office safety until 2000. At that time, OSHA stated that it would not conduct home-office inspections and would not hold employers liable for their employees' home offices. It also stated that it did not expect employers to inspect the home offices of their telecommuting employees.

Nonetheless, OSHA holds employers responsible for any situation in which hazardous materials or work processes are provided or required to be used in an employee's home office. Additionally, employers are required to keep OSHA injury and illness records for any work-related injuries and illnesses that occur in home work environments (these records will be discussed further later in this chapter). In contrast, OSHA has not applied these record-keeping requirements to virtual workers working out of their cars, hotel rooms, and airports, for example. At some point in the future, however, OSHA may audit remote work-sites and increase record-keeping requirements.

IMPLICATIONS FOR THE BUSINESSPERSON

1. Simply designating an employee as a telecommuting employee whose work site is no longer a physical office environment does not change the employer's status with respect to the overtime-pay requirements of state and federal laws. If an employee did not fall under a professional or management exemption prior to her or his switch to the virtual work force, then once that switch is made, overtime requirements will still apply.

2. Because OSHA may in the future change its audit requirements for remote work sites, businesses are well advised to take reasonable preventive measures. That is to say, businesses should encourage remote employees to maintain safe and healthful work environments away from the office.

FOR CRITICAL ANALYSIS

Why might telecommuting employees sometimes accept being wrongly classified (and not being paid overtime)? Under what scenario might a home-based employee sue his or her employer for injuries in the home office?

III. Labor Unions

A. FEDERAL LABOR LAWS

Labor legislation outlined briefly in the text includes—

1. Norris-LaGuardia Act
   The Norris-LaGuardia Act of 1932, which protects peaceful strikes, picketing, and boycotts.

2. National Labor Relations Act
   The National Labor Relations Act (NLRA) of 1935, which established employees' rights to organize, to engage in collective bargaining, and to strike. The NLRA created the National
Labor Relations Board (NLRB) to oversee union elections and to prevent employers from engaging in specific unfair labor practices, which are listed in the text.

**ADDITIONAL BACKGROUND—**

**National Labor Relations Act**

When Franklin Roosevelt took the oath of president of the United States in the depths of the Great Depression, less than 10 percent of the industrial work force was unionized. This was the lowest figure in this century—membership in unions affiliated with the American Federation of Labor had been more than twice as much in 1920. In 1933, Congress passed the National Industrial Recovery Act, which provided that “employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, and coercion of employers of labor.” This provision was due less to labor leaders’ political strength, which was negligible at the time, than to a fear that unorganized workers might go on strikes that would hinder economic recovery.

General Hugh Johnson, Administrator of the National Recovery Administration (NRA), proved to be more sympathetic to management than labor. By the second half of 1933, more than two-thirds of the largest manufacturing companies had established company unions, and unorganized labor responded with the greatest wave of strikes since 1919. Roosevelt responded by establishing the National Labor Board (NLB), headed by Senator Robert Wagner, to mediate labor disputes. Employers and the NRA resisted the NLB, which had no enforcement powers.

In April 1934, a new wave of strikes began—auto workers, truck drivers, longshoremen, and textile workers. In June, with a steel workers’ strike imminent, Congress passed a resolution empowering the president to establish the National Labor Relations Board (NLRB), an agency independent of the NRA. Three weeks before the NIRA was to expire, it was declared unconstitutional by the United States Supreme Court in *Schechter Poultry Corp. v. United States* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

In July 1935, Congress passed the **National Labor Relations Act** (NLRA), which was sponsored by Senator Wagner. The NLRA states that unequal bargaining power between employees and employers leads to economic instability and that refusals of employers to bargain collectively lead to strikes. These disturbances impede the flow of interstate commerce. It is declared to be the policy of the United States, under the authority given to the federal government under the commerce clause, to ensure the free flow of commerce by encouraging collective bargaining and unionization.

The NLRA gave the NLRB enforcement powers.

Employers viewed the NLRA as a drastic piece of legislation. Those who opposed the act claimed that the Constitution’s commerce clause (Article I, Section 8, Clause 3) did not grant Congress the power to regulate labor relations. They argued that labor was subject to state, not federal, law. Those who were willing to admit that labor regulation did fall under the commerce clause claimed that the NLRA created an undue burden, which therefore rendered it unconstitutional. The constitutionality of the act was tested in *NLRB v. Jones & Laughlin Steel Corporation.* [301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)]. In its decision, the United States Supreme Court held that the act and its application were constitutionally valid.

3. **Labor-Management Relations Act**

The Labor-Management Relations Act (Taft-Hartley Act) of 1947, which proscribes certain union practices.
4. Labor-Management Reporting and Disclosure Act
The Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act) of 1959, which established an employee bill of rights and reporting requirements for union activities, and strictly regulated internal union business procedures (including hot-cargo agreements, in which employers agree with unions not to handle, use, or deal in non-union-produced goods).

B. UNION ORGANIZATION
The first step in union organizing is to have the workers sign authorization cards.

1. Union Elections
If a majority of the workers sign the cards, an employer may recognize the union as their representative. If the employer refuses, union organizers can petition the NLRB to supervise an election.

2. Union Election Campaigns
During an election campaign, the employer can limit campaign activities on company property during working hours, for a legitimate business reason, and can campaign against the union. If, in the election, the union receives majority support, the NLRB certifies the union as the employees' bargaining representative. If the employer issued threats or engaged in other unfair labor practices, the NLRB may certify the union even if it loses the election.

C. COLLECTIVE BARGAINING
The central legal right of a union is to engage in collective bargaining on the members’ behalf. In collective bargaining, as in most business negotiations, each side uses its economic power to pressure or persuade the other side to grant concessions. Both sides must bargain in good faith (examples of bad faith are in the text). Refusing to bargain in good faith without justification is an unfair labor practice.

D. STRIKES
When collective bargaining results in an impasse, a union may call a strike.

1. The Right to Strike
The right to strike is guaranteed by the NLRA, within limits, and strike activities are protected by the free speech guarantee of the First Amendment. Nonworkers have a right to picket. Workers have the right to refuse to cross a picket line. Employers have a right to hire replacement workers.

2. The Rights of Strikers after a Strike Ends
In an economic strike, strikers have no right, however, to return to their jobs (although employers must give former strikers preferential rights to any new vacancies and also retain their seniority rights). After an unfair labor practice strike, an employer must give the strikers back their jobs.

IV. Worker Health and Safety

A. THE OCCUPATIONAL SAFETY AND HEALTH ACT
The text covers the Occupational Safety and Health Act of 1970, which provides for workplace safety standards.

1. Enforcement Agencies
The three federal agencies involved in determining workplace standards, making inspections, enforcing the act, and hearing appeals are the Occupational Safety and Health Administration (OSHA), the National Institute for Occupational Safety and Health, and the Occupational Safety and Health Review Commission.
2. Procedures and Violations
Specific requirements of the act and penalties for its violation are also mentioned. Generally, an employer cannot discharge an employee who files a complaint with OSHA or who, in good faith, refuses to work in a high-risk area; an employer must keep records of work-related injuries and deaths and report every incident.

B. STATE WORKERS’ COMPENSATION LAWS
The purpose and some of the details of workers’ compensation laws are covered in the text. A state agency or board administers the claims.

1. Employees Covered by Workers’ Compensation
These laws establish state procedures for compensating most workers injured on the job.

2. Requirements for Receiving Workers’ Compensation
Recovery is predicated on an injury being accidental (not intentional) and occurring on the job or in the course of employment.

3. Workers’ Compensation versus Litigation
In return, workers cannot sue for the injuries, even if caused by an employer’s negligence (and employers cannot argue standard negligence defenses).

V. Income Security, Pension, and Health Plans
The text touches briefly on government programs designed to protect employees and their families by covering the financial impact of retirement, disability, death, hospitalization, and unemployment.

A. SOCIAL SECURITY
The Social Security Act of 1935 provides for old-age retirement, survivors, disability, and hospital insurance (OASDI); employers and employees contribute under the Federal Insurance Contributions Act (FICA).

B. MEDICARE
Medicare is administered by the Social Security Administration for people sixty-five years of age and older and for some under sixty-five who are disabled. Details regarding contributions are included in the text.

C. PRIVATE PENSION PLANS
The Employee Retirement Income Security Act (ERISA) of 1974 regulates operators of private pension funds. Pension vesting requirements are mentioned in the text (employee contributions vest immediately, and employee rights to employer contributions vest after five years of employment). Under ERISA, pension managers must invest pension funds cautiously (with not more than 10 percent of the fund in the employer’s securities).

D. UNEMPLOYMENT COMPENSATION
Under the Federal Unemployment Tax Act of 1939, employers pay into a fund that compensates unemployed individuals. The text notes some of the details.

E. COBRA
The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, which prohibits the elimination of a worker’s medical, optical, or dental insurance coverage on the voluntary or involuntary termination of the worker’s employment, is outlined in the text.

1. Application of COBRA
Except for workers fired for gross misconduct, a terminated worker can decide whether to continue coverage. If so, he or she must pay the full premium plus an administrative fee.
Coverage must be continued for up to eighteen months (twenty-nine, if the worker is disabled).

2. **Employers’ Obligations under COBRA**

Some of the details, including which employers are covered, what they are required to do, and the penalties for violations, are noted in the text.

**F. EMPLOYER-SPONSORED GROUP HEALTH PLANS**

Under the Health Insurance Portability and Accountability Act (HIPAA), employers who provide health insurance are restricted in whom they can exclude for a “preexisting condition.” The collection, use, and disclosure of health information is also regulated, and violations of these provisions are subject to civil and criminal penalties. The text spells out details.

**VI. Family and Medical Leave**

The Family and Medical Leave Act (FMLA) of 1993 protects employees who need time off work for family or medical reasons. Most states have similar laws.

**A. COVERAGE AND APPLICATION OF THE FMLA**

The text sets out some details, including which employers are covered, which employees are not covered (key employees, part-time employees, and those who have worked less than a year), the purposes of the leave (to care for new children, to care for seriously ill, close relatives, or to care for themselves in some circumstances).

**CASE SYNOPSIS—**

**Case 33.3: Nevada Department of Human Resources v. Hibbs**

In the past, many state laws limited women’s employment opportunities and subjected women to distinctive restrictions, terms, conditions, and benefits for the jobs that they could obtain. These laws were based on the beliefs that a woman is, and should remain, the center of home and family life. Congress enacted Title VII of the Civil Rights Acts of 1964, in part, to outlaw gender discrimination in the workplace. William Hibbs worked for the Nevada Department of Human Resources. Hibbs asked for time off under the FMLA to care for his sick wife. The department granted Hibbs's request, allowing him to use the leave intermittently. After several months, the department told Hibbs that he had exhausted his FMLA leave and that he must return to work. When he did not, he was discharged. Hibbs filed a suit in a federal district court against the department. The court held that the U.S. Constitution’s Eleventh Amendment barred the suit. On Hibbs’s appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The department appealed.

The United States Supreme Court affirmed, concluding that the FMLA is “congruent and proportional” to the discrimination that Congress intended the FMLA to address, and thus, the FMLA, which expressly covers public employees, can serve as the basis for a suit against a state employer whether or not the state consents. The Court emphasized that “[a]fter the enactment of Title VII, state gender discrimination did not cease. ... Because employers continued to regard the family as the woman’s domain, they often denied men ... accommodations [for leave granted to women] or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views.” The FMLA, “[b]y setting a minimum standard of family leave for all eligible employees, irrespective of gender, ... attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”
Notes and Questions

According to the Court in this case, “some States had adopted some form of family-care leave before the FMLA's enactment,” but there were “important shortcomings to some state policies. First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in ‘establishment [s] in which females are employed.’ ... Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member. Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. ... Finally, four States provided leave only through administrative regulations or personnel policies.” What might be concluded from these policies and programs? The Court stated in part, “Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate.” Also, “in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.”

ANSWERS TO QUESTIONS AT THE END OF CASE 33.3

1. What did the Court hold with respect to the primary issue in this case? The primary issue in this case was whether a state employee can recover damages in a federal court against a state employer who violated the FMLA's family-care provision. The United States Supreme Court held that yes, a state's employee may recover such damages. The Court reasoned that “Congress may enact ... prophylactic legislation that proscribes facially constitutional conduct” if the legislation exhibits “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” In this case, the impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family care-giving and that men lack domestic responsibilities, is significant. And Congress' chosen remedy, the FMLA's family-care provision, is “congruent and proportional to the targeted violation.”

2. How might a law foster discrimination even when the law is not obviously discriminatory? As the Court stated in this case, in enacting the FMLA, “Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the serious problems with the discretionary nature of family leave, because when the authority to grant leave and to arrange the length of that leave rests with individual supervisors, it leaves employees open to discretionary and possibly unequal treatment. Testimony supported that conclusion, explaining that the lack of uniform parental and medical leave policies in the workplace has created an environment where sex discrimination is rampant.”

B. REMEDIES FOR VIOLATIONS OF THE FMLA

Remedies for violations include damages, job reinstatement, promotion, costs, and fees.
CHAPTER 33: EMPLOYMENT AND LABOR LAW

C. INTERACTION WITH OTHER LAWS
The FMLA does not affect federal or state laws that prohibit discrimination, nor does it restrict other laws or employment agreements that provide more generous benefits.

VII. Employee Privacy Rights
The law protects the privacy of employees in a number of areas. Privacy rights are protected at common law (invasion of privacy) and under the U.S. Constitution and state constitutions. Different rules apply to public and private employment.

A. ELECTRONIC MONITORING IN THE WORKPLACE
The text notes some of the methods for employers to monitor employees electronically.

1. Employee Privacy Protection under Constitutional and Tort Law
Privacy rights are protected at common law (invasion of privacy) and under the U.S. Constitution and state constitutions.

2. The Electronic Communications Privacy Act
Electronic monitoring may violate the Electronic Communications Privacy Act (ECPA) of 1986, which prohibits the intentional interception of any wire or electronic communication or the intentional disclosure or use of the information obtained by the interception. The ECPA has a “business-extension exception,” however, which permits employers to monitor employee phone conversations in the ordinary course of business (though not to monitor employees’ personal communications).

ENHANCING YOUR LECTURE—

HOW TO DEVELOP AN INTERNET POLICY

Employers that make electronic communications systems (such as access to the Internet and e-mail) available to their employees face some obvious risks. One risk is that e-mail could be used to harass other employees. Another risk is that employees could subject the employer to liability by reproducing, without authorization, copyright-protected materials on the Internet. Still another risk is that confidential information contained in e-mail messages transmitted via the Internet could be intercepted by an outside party. Finally, an employer that monitors employees’ Internet use in an attempt to avoid these risks faces yet another risk: the risk of being held liable for violating the employees’ privacy rights. If you are an employer and find it prudent to monitor employees’ Internet use, you should take certain precautions.

Remember, a small company can be bankrupted by just one successful lawsuit against it. Even if your company wins the suit, the legal fees incurred to defend against the claim could be devastating for your profits.

INFORM YOUR EMPLOYEES OF THE MONITORING AND OBTAIN THEIR CONSENT
First of all, you should notify your employees that you will be monitoring their Internet communications, including their e-mail. Second, you should ask your employees to consent, in writing, to such actions. Generally, as discussed earlier in this chapter, if employees consent to employer monitoring, they cannot claim that their privacy rights have been invaded by such practices. You will find it easier to obtain employees’ consent to monitoring if you explain why it is necessary or desirable and let them know what methods will be used to monitor Internet communications. As a rule, when employees are told the reasons for monitoring and clearly understand their rights and duties with respect to the company’s communications system, they are less offended by the surveillance.
SPELL OUT PERMISSIBLE AND IMPERMISSIBLE INTERNET USES

Employees should be told which uses of the firm’s communications system are permissible and which uses are prohibited. To clarify Internet policy standards, develop a comprehensive policy setting forth your standards of Internet use and illustrate through specific examples what kinds of communications activities will constitute impermissible uses. It is also important to let employees know what will happen if they violate the policy. The policy might state, for example, that any employee who violates the policy will be subject to disciplinary actions, including termination.

CHECKLIST FOR THE EMPLOYER

1. Inform employees that their Internet communications will be monitored, why monitoring is necessary or desirable, and how it will be conducted.

2. Obtain employees’ written consent to having their electronic communications monitored.

3. Develop a comprehensive policy statement explaining how Internet communications should and should not be used and indicating the consequences of misusing the firm’s communications system.

B. OTHER TYPES OF MONITORING

1. Lie-Detector Tests
   The Employee Polygraph Protection Act (1988) prohibits the use of lie detectors by most employers (not including the government, certain security service firms, and companies making and distributing controlled substances) except when investigating losses attributable to theft. Exactly what is prohibited is spelled out in the text.

2. Drug Testing
   a. Public Employers
      Drug tests have been held constitutional when there was a reasonable basis for suspecting a government employee’s use of drugs or when drug use in a government job could threaten public safety.
   b. Private Employers
      Some state constitutions or statutes may inhibit private employers’ testing. A collective bargaining agreement may provide protection against testing. In other cases, employees may bring an action for invasion of privacy.

3. AIDS and HIV Testing
   Some state laws restrict AIDS testing, and federal statutes offer some protection to employees or applicants who have AIDS or have tested positive for the AIDS virus. The Americans with Disabilities Act of 1990 (Chapter 34) prohibits discrimination against “handicapped” individuals, which includes individuals with AIDS. This law may not prohibit testing, but it may prohibit the discharge of employees based on the results of those tests. The HIPAA restricts the use and disclosure of the test results to unauthorized parties.

VIII. Employment-Related Immigration Laws

The text mentions two important immigration laws governing employer-employee relations.

A. IMMIGRATION REFORM AND CONTROL ACT
   The Immigration Reform and Control Act (IRCA) of 1986 prohibits employers from hiring illegal immigrants and requires the processing of special forms for other employees.
B. IMMIGRATION ACT

The Immigration Act of 1990 limits the number of legal immigrants entering the United States and requires employers recruiting workers from other countries to complete a certification process. The text fills in some details.

TEACHING SUGGESTIONS

1. Students may have a difficult time understanding that the development of effective labor law is fairly modern and is still going through a growing process. For example, some states have right-to-work laws and some do not. Students might be asked to discuss the advantages and disadvantages of right-to-work laws. Students may also be asked to discuss recent developments concerning unions, which seem to be declining in popularity. *What has contributed to this decline? Is management today more responsive to the needs of employees than was management of the nineteenth and earlier twentieth centuries?*

2. Ask students to discuss with the class whether they or any of their immediate family members have ever belonged to a union and their experiences with the union. *What were their attitudes towards elections, strikes, collective bargaining, and other union topics discussed in this chapter?*

3. To discuss the material in this chapter, you might start from the students’ personal perspective. Undoubtedly, they, or at least many of them, have had jobs. *What was their chief concern? The money, the accomplishment, the respect or friendliness of co-workers, the employer’s praise?* If the chief concern was the money, they may also have been concerned that the money keep coming, that there be some security in the job. Ask then why there isn’t more protection against termination of employment at will.

4. Society does not stand still, and neither can the law that governs it. The Family and Medical Leave Act of 1993 (FMLA) provides an excellent illustration of how the law can recognize and effect change. The FMLA reflects the realities of today’s world. Nearly two-thirds of women with children now work, by choice or necessity. Also, about a fourth of all adults now provide care for elderly relatives or anticipate the need to provide such care within the next five years. With so many women now working, there is often no caretaker available to attend to medical emergencies or other family needs in the home. By allowing employees to take a leave from work for family or medical reasons, the FMLA recognizes the changing face of America. From an ethical perspective, the act may be viewed as a choice on the part of society to shift to the employer family burdens caused by changing economic and social needs. In effect, Congress, by passing the act, addressed the pressing needs of the so-called baby-boomer (or “sandwich”) generation—caught between the pressures of providing child care on the one hand and care for their parents on the other.

5. Students may be surprised to learn that their e-mail may not be private, technologically or legally, when it is sent or received through their workplace. Students might be asked to discuss the advantages and disadvantages of this circumstance. *Would they rather work for an employer who monitors their communications or one who does not? Why?*

**Cyberlaw Link**

*How might the existence of the Internet affect employees’ attempts to unionize and employers’ attempts to prevent employees from unionizing? What are the legal questions and complications of monitoring employees’ use of the Internet during working hours? What are some of the key points of a good policy regarding the use, and monitoring of the use, of the Internet in the workplace?*
DISCUSSION QUESTIONS

1. What are some important provisions of the Fair Labor Standards Act? The Fair Labor Standards Act (FLSA) of 1938, which covers employers engaged in interstate commerce, regulates child labor, maximum hours, and minimum wages. Children under sixteen years of age cannot work full-time except for a parent under certain circumstances. Children between sixteen and eighteen cannot work in hazardous jobs or in jobs detrimental to their health and wellbeing. Employees who agree to work more than forty hours a week must be paid no less than one and a half times their regular pay for hours over forty. Exempted are employees with certain duties or threshold-exceeding rates of pay. A minimum wage must be paid to employees in certain industries. Wage includes the reasonable cost to furnish employees with board, lodging, and other facilities if they are customarily furnished by that employer.

2. Do federal labor laws cover all workers? No. Coverage of the federal labor laws is broad and extends to all employers whose business activity either involves or affects interstate commerce. Some workers are specifically excluded from these laws due to the existence of industry-specific legislation.

3. What state and federal statutes protect employees from the risks and effects of employment-related injury, death, or disease, and what is that protection? State workers’ compensation statutes establish procedures for compensating employees injured on the job. Claims are administered by a state agency or board that has quasi-judicial powers. All rulings are subject to court review. Recovery is determined without regard to fault, predicated on an injury being accidental (not intentional) and arising out of, or in the course of, employment (commuting does not generally qualify). Recovery for medical problems arising out of preexisting conditions is allowed in some states. In return for this protection, employees cannot sue for their injuries, even if they attributable to an employer’s negligence. The federal Occupational Safety and Health Act of 1970 requires that businesses with one or more employees and affecting commerce be maintained free from recognized hazards. Employees file complaints with the Department of Labor through the Occupational Safety and Health Administration (OSHA), which issues standards, makes inspections, and enforces the law. An employer cannot discharge an employee who files a complaint or refuses to work in a high-risk area. Employers with eleven or more employees must keep injury and illness records for each employee for five years and report every work-related injury or disease. After an accident resulting in a death or five or more hospitalizations, an OSHA inspection is mandatory. Criminal penalties for willful violation of the Occupational Safety and Health Act are limited. Employers may be prosecuted under state laws.

4. What protection do employees have from the financial impact of retirement, disability, death, hospitalization, and unemployment? Federal and state governments participate in insurance programs designed to offer protection in this area. The Social Security Act of 1935 provides for old-age retirement, survivors, disability, and hospital insurance (OASDI). Employers and employees contribute under the Federal Insurance Contributions Act (FICA). Medicare is a federal health insurance program administered by the Social Security Administration for people sixty-five years of age and older and for some under sixty-five who are disabled. Under the Employee Retirement Income Security Act (ERISA) of 1974, the Labor Management Services Administration of the Department of Labor regulates operators of private pension funds (which employers are not required to establish). Employee contributions to pension plans vest immediately, and employee rights to employer contributions vest after five years of employment. Pension managers are required to invest cautiously and refrain from investing more than 10 percent of a fund in an employer's securities. Under the Federal Unemployment Tax Act of 1939, employers pay quarterly taxes to the states. The states deposit them with the federal government, which maintains an Unemployment Insurance Fund.

5. How does the law protect the privacy of employees? The Employee Polygraph Protection Act of 1988 prohibits most employers from requiring, causing, suggesting, or requesting that employees or applicants take polygraph tests; using, accepting, referring to, or asking about the results of polygraph tests taken by employees or applicants; and taking or threatening negative employment-related action against employees or applicants based on results of polygraph tests or refusal to take the tests. (Employers not covered include the government, certain security service firms, and companies making and distributing controlled substances. Others may use the tests when investigating losses from theft.) The Constitution restricts some employers—especially the government—from drug testing, but use of the tests has been upheld
when there was a reasonable basis for suspecting a government employee's use of drugs or when drug use in a government job could threaten public safety. Some state constitutions or statutes may apply to inhibit private employers' testing, a collective bargaining agreement may provide protection against testing, or in some cases, employees may bring an action for invasion of privacy. In monitoring employees' performance generally, the Omnibus Crime Control Act of 1968 or a state statute may prohibit listening to employees' telephone conversations. Otherwise, there is little regulation of electronic monitoring of employees, and an employer may be able to avoid these laws by informing employees that they are subject to monitoring. An employee may bring an action for invasion of privacy.

6. Discuss exceptions to the employment-at-will doctrine. Contract Theory Exceptions. Some courts have held that an implied employment contract exists between employer and employee under an employer's handbook, personnel bulletin, or the like if the document states that workers will be dismissed only for good cause, and an employer who fires a worker contrary to this promise is liable for breach of contract. In a few states, all employment contracts are considered to contain an implied covenant of good faith, and an employee can claim breach of this covenant, if the employee is fired arbitrarily. Public Policy Exceptions. An employer may not fire a worker in violation of a fundamental public policy (firing a worker for taking time to serve on a jury, for instance). In most states, firing workers who refuse to perform illegal acts violates public policy. Whistleblowers may be protected for public policy reasons. Tort Theory Exceptions. In a few cases, discharge may give rise to a tort cause of action (for example, an abusive discharge may result in intentional infliction of emotional distress or defamation).

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Invite a spokesperson from a local labor organization and a member of a local management organization to discuss one or more of this chapter's topics in the classroom. For example, they might be asked to talk about the effects on labor and management of the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Family and Medical Leave Act, or the Immigration Act of 1990, or to debate labor law.

2. Ask each person in the class to prepare a brief report about a famous strike or labor dispute that explains why the action was or was not successful.

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 14: Town & Country Electric, Inc., advertised for job applicants but refused to interview ten of eleven applicants who were members of the International Brotherhood of Electrical Workers. At the time, the union was paying those applicants to unionize the company's work force. The applicants filed a complaint with the National Labor Relations Board (NLRB). The NLRB ruled that the company committed an unfair labor practice by discriminating against the applicants on the basis of union membership. Town & Country appealed, and the U.S. Court of Appeals for the Eighth Circuit reversed. The applicants appealed to the United States Supreme Court. In National Labor Relations Board v. Town & Country Electric, Inc., the United States Supreme Court reversed and remanded. The “ordinary dictionary definition of ‘employee’ includes any ‘person who works for another in return for financial or other compensation.’” The NLRA states that “[t]he term ‘employee’ shall include any employee.” This interpretation is consistent with the NLRA's purposes, such as protecting “the right of employees to organize for mutual aid without employer interference.”

Over the last three decades, the number of workers who are union members has declined. Perhaps this is due partly to a popular belief that unions represent only a level of interference between a company's making money and the workers getting paid. Wages, adjusted for inflation, have also declined over the last decades.

Footnote 18: The United Steelworkers of America, AFL-CIO-CLC, filed a petition with the NLRB, seeking an election to obtain certification as the representative of workers at Associated Rubber Co.'s plants
in Georgia. During the election campaign, Leroy Brown, a union supporter, threatened Tim Spears, a union opponent. Three days before the election, Brown speeded up the rate at which scalding batches of rubber compound were mixed and sent to Spears, who told his foreman that if the union won the election, he would quit his job out of fear this would be repeated. Other employees were aware of the incident. The union won the election. Associated Rubber filed an objection on the basis of Brown’s conduct. The NLRB concluded that the election was not tainted and ordered the employer to bargain. Associated Rubber appealed. In Associated Rubber Co. v. National Labor Relations Board, the U.S. Court of Appeals for the Eleventh Circuit set aside the NLRB’s order. “When the union itself engages in objectionable misconduct,” an election will be overturned “if the conduct interfered with the employees’ exercise of free choice to such an extent that it materially affected the results of the election. *** No employee ought to be subjected to any increased danger because of his position in a union certification election, and an increased risk of injury can itself be enough to have a chilling effect on the employees’ right to freely decide whether they wish to be represented by a union.

Spears suffered no physical injury in the incident. Wasn’t this fact significant? In reviewing Associated Rubber’s objection, the NLRB relied “heavily” on the fact that “Spears had not actually sustained any physical injury as a result of the incident” and “that the risk of injury to Spears had not been severe” to rule in favor of the union. The court, however, found those statements to be “somewhat akin to civilians telling a soldier that combat could not have been too bad because he survived it. The seriousness of the risk of injury may well depend upon one’s perspective in relation to that risk. It is all too easy for Board members and judges to minimize the risk Spears was subjected to because he refused to support the union, but to one who was on that production line with 450 pounds of scorching hot rubber compound dropping down at an increased rate of speed, the risk undoubtedly and reasonably appeared serious.”

If Brown’s conduct in the “Banbury incident” had been motivated by something other than his support for the union and Spears’s refusal to accept union literature, would the result in this case have been different? Explain. Probably. The court reasoned, “Moreover—and this is important—there is no credible evidence that Brown’s misconduct towards Spears was caused by anything other than his desire to carry out the threat to make Spears pay for not supporting the union.”

Footnote 41: CITGO Petroleum Corp. (CITGO) operates more than sixty oil-refining facilities, including CITGO Asphalt Refining Co. (CARCO). Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) represents some of CITGO’s workers. Under an agreement with PACE, CITGO can “make and enforce rules for the maintenance of discipline and safety.” In December 1998, CITGO implemented a zero-tolerance substance-abuse policy. Local 2-991 of PACE challenged the policy at CARCO. Smaller facilities owned by other companies did not have zero-tolerance policies, but major companies in the industry did. An arbitrator ruled that CITGO should modify its policy to allow a rehabilitation opportunity, or “second chance.” CARCO filed a suit in a federal district court against PACE, challenging the ruling. The court enforced the award. CARCO appealed. In CITGO Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical, and Energy Workers International Union Local No. 2-99, the U.S. Court of Appeals for the Third Circuit reversed and remanded. That other, smaller companies “do not have zero tolerance policies” and that “a particular federal statute and its implementing regulations allow a second chance” are not sufficient to support a finding that CITGO’s zero-tolerance policy is unreasonable. The “safety-sensitive positions” of CITGO’s workers and the firm’s right under its agreement with PACE outweigh these facts.

What is the reason for imposing a zero-tolerance substance-abuse policy rather than giving employees a rehabilitation opportunity, or second chance? As DeLeon testified at the arbitration proceeding, “offering a second chance sends a message to employees that it’s okay to do drugs until you get caught.” Suppose that CITGO’s safety record was not the oil-refining industry’s “best,” but its “worst.” Would the result have been different? Probably not. The court considered other factors, in addition to CITGO’s relative safety record, to determine that its zero-tolerance policy was reasonable. Besides, a worse safety record might have added to the support for CITGO’s policy, particularly if the company wanted to improve.
ANSWERS TO ESSAY QUESTIONS IN
STUDY GUIDE TO ACCOMPANY BUSINESS LAW, ELEVENTH EDITION
BY HOLLOWELL & MILLER

1. What is the employment-at-will doctrine? What are its exceptions? Under the employment-at-will doctrine, either employer or employee may terminate an employment contract at any time and for any reason, unless the contract specifies a particular time period. In some states, statutes prohibit employers from discharging employees for whistleblowing. Federal statutes may provide protection for whistleblowers, as well. Some courts have held that an implied employment contract exists between employer and employee under an employer’s handbook, personnel bulletin, or the like if the document states that workers will be dismissed only for good cause. An employer who fires a worker contrary to this promise is liable for breach of contract. In a few states, all employment contracts are considered to contain an implied covenant of good faith. If an employee is fired arbitrarily or unjustifiably, he or she can claim breach of this covenant. An employer may not fire a worker in violation of a fundamental public policy. In most states, firing workers who refuse to perform illegal acts violates public policy. Whistleblowers may be protected for public policy reasons. In a few cases, discharge may give rise to a tort cause of action (for example, an abusive discharge may result in intentional infliction of emotional distress or defamation).

2. What are important federal laws concerning labor unions? What specifically does each law provide? Norris-LaGuardia Act. The Norris-LaGuardia Act (1932) protects peaceful strikes, picketing, and boycotts, and restricts federal courts enjoining unions engaged in peaceful strikes. National Labor Relations Act. The National Labor Relations Act (1935) (NLRA) established employees’ rights to organize, to engage in collective bargaining through representatives of their own choosing, and to engage in concerted activities. The NLRA created the National Labor Relations Board (NLRB) to oversee union elections and to prevent employers from engaging in unfair labor practices, which include: (1) interfering with employees’ efforts to form, join, or assist labor organizations or to engage in concerted activities; (2) dominating a labor organization or contributing support; (3) discriminating in hiring or awarding tenure to union employees; (4) discriminating against employees for filing charges or testifying under the NLRA; and (5) refusing to bargain collectively with the employees’ representative. Labor-Management Relations Act. The Labor-Management Relations Act (1947) (Taft-Hartley Act) proscribes certain union practices, including the closed shop (a firm that requires union membership as a condition of employment). The Taft-Hartley Act preserved the union shop (a firm that does not require union membership as a condition for employment but requires workers to join the union after a certain time), however, but permits states to pass right-to-work laws (laws making it illegal to require union membership for continued employment), which make union shops technically illegal. The president may seek, and a federal court may issue, an eighty-day injunction against a strike that would create a national emergency. Labor-Management Reporting and Disclosure Act. The Labor-Management Reporting and Disclosure Act (1959) (Landrum-Griffin Act) established an employee bill of rights and reporting requirements for union activities and regulates internal union business procedures (union-officer elections must occur regularly, under secret ballot, for instance, and ex-convicts and communists are prohibited from holding union office). Hot-cargo agreements (in which employers agree not to handle, use, or deal in non-union-produced goods) were outlawed.

REVIEWING—
★★☆ ★★

EMPLOYMENT AND LABOR LAW ★☆★

Rick Saldona began working as a traveling salesperson for Aimer Winery in 1977. Sales constituted 90 percent of Saldona’s work time. Saldona worked an average of fifty hours per week but received no overtime pay. In June 2007, Saldona’s new supervisor, Caesar Braxton, claimed that Saldona had been inflating his reported sales calls and required Saldona to submit to a polygraph
test. Saldona reported Braxton to the U.S. Department of Labor, which prohibited Aimer from requiring Saldona to take a polygraph test for this purpose. In August 2007, Saldona’s wife, Venita, fell from a ladder and sustained a head injury while employed as a full-time agricultural harvester. Saldona delivered to Aimer’s Human Resources Department a letter from his wife’s physician indicating that she would need daily care for several months, and Saldona took leave until December 2007. Aimer had sixty-three employees at that time. When Saldona returned to Aimer, he was informed that his position had been eliminated because his sales territory had been combined with an adjacent territory. Ask your students to answer the following questions, using the information presented in the chapter.

1. **Would Saldona have been legally entitled to receive overtime pay at a higher rate? Why or why not?**

   Over 90 percent of Saldona’s time was spent on sales. As an outside salesperson, Saldona is exempt from the overtime rules established by the Fair Labor Standards Act. Even under the rules as revised in 2004, Saldona would not qualify for overtime pay.

2. **What is the maximum length of time Saldona would have been allowed to take leave to care for his injured spouse?**

   The Family and Medical Leave Act (FMLA) applied to Saldona’s employer, Aimer Winery, because Aimer had over fifty employees. Under the FMLA, Saldona would have been entitled to up to twelve weeks of unpaid medical leave to care for his injured wife.

3. **Under what circumstances would Aimer have been allowed to require an employee to take a polygraph test?**

   The Employee Polygraph Protection Act generally prohibits employers from requiring applicants or employees to take lie-detector tests. The only time employers are permitted to use polygraph tests under the act, is when investigating losses attributable to theft, including embezzlement or theft of trade secrets. Therefore, if Aimer had suffered these types of losses, it could use polygraphs as part of its investigation.

4. **Would Aimer likely be able to avoid reinstating Saldona under the key employee exception? Why or why not?**

   It is unlikely Saldona was a “key employee” defined as those in the top ten percent of an organization. He had a sales territory and reported to a sales supervisor. Hence, he was covered by the FMLA and his position would be protected.