

Employment Law

Spring 2022

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Class Meetings

W/Th 4:30-5:55 PM
Rm. HH-180A

Office Hours

W/Th 6-6:30pm (HOL 337)
Mon 2:00-3:00pm (Zoom)

General Comments

This course is about one of the most important legal relationships in modern society. Given the centrality of work in our culture – the fact, for instance, that many people spend more hours per week at their jobs than they do with their families – workplace relationships, and the laws that govern them, play a crucial role in shaping our lives. For many people, personal happiness, financial security, sense of purpose, and sense of success all depend significantly on their experiences in their jobs. From the perspective of companies and policy-makers, workplace relationships are equally important. In our high-tech, service-oriented economy the success of a company is heavily dependent on the quality of its workforce. From a broader perspective, the health of our country's economy as a whole is inextricably linked to developments in the labor market – the cost and availability of skilled workers in times of growth and the problem of systemic unemployment in times of economic recession.

Considering the stakes, it is not surprising that the allocation of rights between companies and their workers is highly contested. In its earliest incarnation, employment was a status relationship in which the roles and obligations of the parties were prescribed by law much as they were in feudal times. In contrast, throughout modern history, employment law has been grounded in private contract under which the parties may, in theory, define for themselves their rights and mutual obligations. Despite this, the last half of the Twentieth century witnessed what some considered to be a “return to status” – the development of common law contract and tort doctrines aimed at providing greater job security for workers, as well as a watershed in federal legislation regulating discrete aspects of employment in which workers are deemed particularly vulnerable (for instance, workplace safety, retirement security, and antidiscrimination laws).

More recent accounts suggest yet another pendulum swing. Twenty-first century courts appear to be showing significant deference to employer-drafted documents that impose additional obligations on employees, seek waivers of particular employee rights, and disclaim their own liabilities (for instance, arbitration policies, non-compete, and independent contractor agreements). One of the challenges of this course will be to understand the inter-

relationship between the two impulses reflected in this history – the desire to preserve private ordering and the conception of workers as autonomous actors, while at the same time protecting workers’ physical and financial well-being in situations where they often lack bargaining power.

In other respects, this is a practical course in the craft of lawyering on behalf of differing interests. The patchwork of statutes and common law principles governing the workplace must account for both the human aspects of what is often a long-term, personal relationship and the transactional elements of what is essentially a business deal between worker and company. As a result, one of the goals of the course is to train you to assess how parties should act preventatively and argue strategically in the context of an ambiguous legal regime. We will consider the ways in which companies might structure their relationships with their workers, through hiring practices and personnel policies, to avoid the risk of legal liability, as well as how aggrieved workers can marshal an array of legal theories to succeed in redressing particular wrongs, whether through litigation or private resolution.

To that end, we will often take a problem-solving rather than case-oriented approach to the material during class, beginning with a hypothetical and working “backwards” into the cases. This process will require you not only to fully comprehend the legal doctrine, but also to identify and account for clients’ non-legal interests, render advice, plan next steps, and recognize potential conflicts and ethical issues. In the end, the goal is for you to emerge not only with a command of substantive employment law, but with a useful set of practical thinking skills and a better understanding of your role as a lawyer.

We will begin by studying the stakes of employment – what makes a person an employee and why it matters. We will then turn to the doctrine that will comprise the bulk of the course – the common law rules (and some statutes) that govern the hiring, termination and terms and conditions of employment of non-unionized domestic workers. In so doing, we will examine both limitations on the conduct of employers and legal duties imposed on employees. Finally, we will touch on a subset of employment issues that have been removed from the realm of private ordering and are governed primarily by federal and state legislation – worker health and safety, family/medical leave, law regarding plant closings and unemployment, and minimum wage and hour requirements. Throughout the course you should keep two considerations in mind, one normative and the other pragmatic – given the interests and stakes of employment, *what should the law be?* And given the law, *what should parties do*, both in the face of a particular dispute and in their future workplace relationships?

Learning Outcomes

This course has multiple goals, some related to acquiring knowledge of doctrinal law and some to acquiring professional competencies. The over-arching objectives are for you to learn/obtain the following:

- (1) An understanding of the nature of employment, its contours and implications as a legal status, and how it differs from other business relationships (independent contractor arrangements, partnerships, etc.);
- (2) A solid foundation in the common law of employment, comprised of the employment at-will doctrine and related contract and tort principles with particular attention to differences between mainstream contract law and the contract law of employment and the interaction between common law principles and state and federal statutes;
- (3) A initial exposure to the various regulatory schemes that govern discrete aspects of employment, including the Fair Labor Standards Act, the Family Medical Leave Act, the Occupational Safety and Health Act, and the unemployment and worker compensation insurance systems;
- (4) An awareness of the managerial, personal, and other non-legal considerations that motivate clients in employment disputes, including how those interests both create conflicts and influence how they are resolved.
- (5) An initial exposure to the professional skills needed to represent corporate clients, including client counseling, problem solving, compliance and risk management;
- (6) A preliminary understanding of the role and professional obligations of the employment lawyer, including how to navigate relationships with individual versus entity clients, how to obtain necessary information from opposing and third parties, how to interact with a client's coworkers and other third parties, and how to maintain personal and professional values while representing client interests.

Administrative Matters

Materials

The primary source of reading assignments for the course is Glynn, Sullivan, and Arnow-Richman, Employment Law: Private Ordering and its Limitations (4th ed. 2019). All page references in the list of reading assignments below refer to this edition of the text. (A digital version of the book is available free with your purchase through Case Connect.) We will also frequently access [Work Law Under COVID-19](#), a digital (and developing) anthology on the effects of the pandemic on existing workplace law issues.

I request that you obtain other separately listed articles or cases in the reading assignments on your own for copyright reasons. However, I will post those readings that are more difficult to find to the relevant Canvas module. From time to time I will also post materials additional to those on the syllabus. You are responsible for checking Canvas for announcements and preparing any new materials.

Given the wide availability of statutory material from online sources, I do not require students to purchase a statutory supplement. Where the text or the syllabus directs you to a particular statute, please obtain the relevant material and bring a useable version to class on

the appropriate days. To assist you, I will post links to some of the more user-friendly and reliable on-line statutory resources on the course website.

Office Hours and Access

I will hold in-person office hours after each class meeting between 6-6:30 pm and virtual office hours on Monday afternoons from 2:00-3:00 pm. You are also welcome to drop in any time my office door is open or ajar or schedule a (live or virtual) appointment with me by email. For those who prefer to meet in person, I am generally available on campus on Wednesdays, Thursdays, and Fridays. On Mondays and Tuesdays, I am available exclusively by Zoom. Please note that if you choose in-person office hours I expect you to wear a properly fitting face covering during the entirety of the meeting. If you are unable to wear a mask for any reason, you may use the Zoom office hours option.

Attendance

The ABA requires that students attend eighty percent of all class meetings. I therefore record attendance daily and consider it a component of class participation. Invariably there will come a time when you have a legitimate conflict that will prevent you from attending class. Rather than vet reasons for different conflicts, I prefer to treat students as lawyers who manage their own schedules and exercise judgment about how to balance competing personal and professional commitments. Therefore I ordinarily do not distinguish between “excused” and “unexcused” absences. The two exceptions are absences related to COVID and religious holiday observances. Such absences will be excused and not count toward your ABA attendance requirements. In addition, you should reach out to me if you will be missing more than a week of class, experience unusual circumstances, or will be absent on a day that you are assigned to participate. Please see [UF’s attendance policy](#) for more information.

Professionalism

Students should conduct themselves at all times. In the classroom, this means arriving on time, turning off sound on computers, cell phones and other devices, and avoiding distracting behavior (texting, web surfing, entering and leaving the room unnecessarily), etc. In the midst of the pandemic, it also includes accommodating the expectation that everyone in the room will wear a properly fitting mask at all times. This is an act of consideration to reduce the risk of illness and consequent loss of class time for those affected, as well as to ensure that everyone in the room can focus on the material at hand without undue concern for their safety.

Also be mindful about how you communicate outside of the classroom, both with me and other law school faculty and administrators. In the workplace, your colleagues (and especially your supervisors) will expect you to treat email and other forms of electronic communication as you would other forms of professional interaction. Always be respectful in addressing the recipient, concise in presenting your message, and circumspect about including personal information. Try to consolidate requests to reduce email traffic.

The choices you make in and out of class today, and throughout your J.D. program, are an expression of your development as a professional. Treat class as you would a meeting with law firm colleagues and consider interactions with faculty the equivalent of dealing with a supervising partner or judge. This is an important part of what you are learning in law school.

Accommodations

Many students require or can benefit from assistance or adjustments to their learning experience at some point in their careers, and I am happy to work with you to discuss pathways to success that suit your learning style. If you believe you require a more formal accommodation due to a physical or mental disability, please register with the [Disability Resource Center](#) as a first step. Once registered, students will receive an accommodation letter that must be presented to the Assistant Dean for Student Affairs when requesting accommodation. If this applies to you, please initiate this procedure as early as possible in the semester and prior to reaching out to me.

Class Recordings

In light of the current health situation, all UF law classes this semester are being video recorded. The Office of Student Affairs will determine when students may have access to these recordings, which will be password protected and available on Mediasite. If you wish to make your own audio recording may do so provided it is for your personal use only. Student-made recordings may not be published or shared with any person or entity through any medium or platform without the permission of the instructor.

Requirements & Assessment

Participation

Participating in class is a means of clarifying and reinforcing your understanding of the substantive material, as well an opportunity to develop speaking, listening and problem-solving skills. For this reason, I enlist a system of required participation under which each student is asked to sign up to be the “lead” for at least one assignment. A sign-up sheet for this purpose will be posted on Canvas. Responsibilities of the lead include producing a written answer to the practice problem in the assigned materials (discussed below) and serving as a point person for in class discussion of both the problem and the doctrinal material.

Because this is an upper-level, elective course, I expect that significant in-class participation will occur on a voluntary basis by all students every day, irrespective of who is assigned as the “lead.” However, I will also consistently, but gently, “cold call” students in order to facilitate meaningful contributions and engage all students in class discussion. I evaluate participation after every class meeting. If you wish to excel on the participation component of your final grade, aim to contribute at least one meaningful comment per class. If

you are a robust participator and have already contributed once during a class meeting, consider making space for others to contribute and take the opportunity to listen carefully to what they say. Listening to legal arguments and analyses, like articulation, takes practice. You cannot respond effectively to a client's question or an opponent's argument if you did not really hear it.

If you did not have the chance to participate on a particular day, or if you have more to say, you may obtain additional participation credit by contributing to one or more discussion threads that I will periodically initiate on the relevant Canvas module. Especially welcome in response to these prompts are posts that share news links, personal experiences, or other information about employment law and workplace trends that you encounter outside of the class. As an additional incentive, know that I often base final exam questions on scenarios or news stories posted by students, so sharing your thoughts on these items can also serve as useful review and exam practice.

Whatever form it takes, your participation is evaluated on quality and consistency. I cap participation credit so that especially zealous communicators do not receive an outsized advantage over more regulated, but equally insightful, contributors.

Written Work & Problem Solving

Developing good legal skills and good legal judgment requires execution and practice. While there is no substitute for on-the-job training, problems and written analysis are an opportunity for you to hone your skills, test your understanding of the law, and apply both skills and knowledge in a realistic context.

At the outset of the semester, you will select one topic from the syllabus for which you, along with others, will serve as "class lead." You will be tasked with completing a brief written answer to the problem(s) assigned for those topics. You will have the option of preparing this assignment on your own or in collaboration with other students who have selected the same assignment.

I will separately provide more detailed information about the written work requirement at the start of the semester. For planning purposes, however, you can expect that the written product will be short (2-3 pages), will require little to no outside research, will include the opportunity for a redraft.

Final Exam

There will be a final exam in the form of a limited open book, essay-style exam consisting of 2-3 fact-pattern and/or practice-oriented questions. There will be no multiple choice or other "objective" component to the exam. There will be no mid-term, but you will be provided with practice questions. More information about exam preparation, review, and exam

content will be provided in class and over the course of the semester. For questions about exam accommodation and delay, see the law school's policy available [here](#).

Final grades for the course will be based on the following approximate percentages: Participation (15%), written work (15%), and final (70%). Grade distribution will follow UF's [grading policy](#). All assessments are subject to UF's student [Honor Code](#).

Evaluations

Assessment is your responsibility as well as mine. Students are expected to provide feedback on the quality of instruction in this course by completing [online evaluations](#). You will receive instructions about when and how to complete course evaluations during the last two or three weeks of the semester. [Summary results](#) of these assessments are available for your review.

Reading Assignments & Class Preparation

A schedule of reading and problem assignments is provided for you below. This schedule is *tentative*. I am likely to adjust these assignments or add readings materials over the course of the semester.

In preparing for class, keep in mind will not always "recite" the assigned cases. When we do, I will expect you to do so in a self-directed, concise manner. I will expect you to come to class having read and digested the case material, prepared to use that knowledge to engage in rule application and problem solving – that is, to do the work that lawyers do every day. It is recommended that you read any assigned problems or questions once before you begin reading the assigned cases and then again after you have read the case material. It is also recommended that you draft an outline of how you would approach any assigned problem for use during class discussion (regardless of who is assigned as the student "lead" for that particular assignment).

Workplace law is a dynamic area in ordinary times, all the more so during the ongoing pandemic. I will therefore periodically post news links and other timely materials to the relevant Canvas module. You should regularly consult the site to stay aware of these materials and any schedule changes. You should also make it your practice to read and stay abreast of these issues, particularly if you envision a career in workplace law. A good resource is the Law360 Employment Law Newsletter, which is a daily digest sent by email and available through your LEXIS subscription. Additionally, I recommend (regardless of your ideological perspective) reading the Wall Street Journal, which regularly includes features about business management and human resource strategies. (If you would like a labor-leaning resource, I refer you to [The Weekly Shift](#) by Politico.)

Introduction: [The Stakes of Employment](#)

1. **W 1/19** - Issues & Interests in Workplace Disputes
pp. xxv-xxxviii

'Every Day Is Frightening': Working for the Top U.S. Employer Amid Covid, New York Times (Sept. 27, 2021)

McDonald's Settles Lawsuit With Former CEO Steve Easterbrook, Wall Street Journal (Dec. 16, 2021)

2. **Th 1/20, W 1/26 - Problem 1-1 (p.4)**: Employee or independent contractor?
pp. 4-44 (thru n.7)

FedEx Home Delivery v. NLRB

Dynamex v. Superior Court

Natkin v. Winfrey

Uber and Lyft Drivers in California Will Remain Contractors, New York Times (Nov. 4, 2020)

3. **W 1/26 (cont'd)** - Employment status and alternative work arrangements
pp. 45-48, 50-66

Ansoumana v. Gristede's

Sidley Austin Settles Age Bias Suit, Nat'l L.J. (October 8, 2007).

Part I: Employment At-Will and Employee Contract Rights

4. **Th 1/27 - Problem 2-2 (p.124)**: Employment at will and expectations of job security
pp. 81-86, 83-105

Hanson v. Central Show Printing Co., Inc.

Goff-Hamel v. Obstetricians & Gynecologists

Cocchiara v. Lithia Motors

Pugh v. See's Candies, Inc

5. **W 2/2, Th 2/3 - Problem 2-4 (p.134)**: Personnel policies and handbooks
pp. 115-24, 126-41

Guz v. Bechtel

Conner v. City of Forest Acres

Demasse v. ITT Corporation

[Additional reading TBA]

*Pay close attention to summary of *Woolley v. Hoffmann-La Roche* in text 126-29.

6. **W 2/9 - Problems 3-1 (p.164) & 3-3 (p.183):** Written contracts and the meaning of “cause”
pp. 184- 166-83

Benson v. JFR, Inc.

UBMC v. Hardy

[Why Matt Lauer’s Mega-Contract Couldn’t Save Him](#), Fortune, Nov. 30, 2017.

7. **Th 2/10 - Problems 3-4 (p.202) & 3-5 (p.203):** Contractual compensation terms
pp. 184-204

Hess v. Kanoski & Assocs.

Weiss v. DHL Express, Inc.

Geysen v. Securitas Sec. Servs. USA, Inc.

Part II: Protecting Public Policy, Worker Autonomy and Personal Dignity (~6 classes)

8. **W 2/16 - Problem 4-1 & 4-2 (p.233-34):** The public policy tort
pp. 207-34

Fitzgerald v. Salsbury Chemical, Inc.

Rackley v. Fairview

Hartley v. Ocean Reef Club, 476 So.2d 1327 (Fla. App. 1985)

Fla. Stat. § 440.205

Fla. Stat. § 440.271

9. **Th 2/17 - Posted Problem (Canvas):** Statutory whistleblower protection
pp. 249-72

Genberg v. Porter

Dept. of Homeland Security v. Maclean

Florida Whistle-blower’s Act, Fla. Stat. § 112.3187

Florida Private Sector Whistleblower Act., Fla. Stat. § 448.102

10. **W 2/23 - Problem 5-2 (p. 296):** Employer interference and reputational torts
pp. 274-81, 282-97

Kumpf v. Steinhaus

Cockram v. Genesco

Shannon v. Taylor

11. **Th 2/24, W 3/2 - Problem 6-1 (p. 320):** Employee privacy
pp. 320-52, 371-79

City of Ontario v. Quon,
Borse v. Piece Goods Shop, Inc.

Ch. 16, [COVID-19 Employee Health Checks Create New Privacy Risks](#), WLUC

[Additional reading TBA]

12. **W 3/2 (cont'd.), Th 3/3 - Problems 7-1 & 7-2 (p. 460-61):** Freedom of speech in the public sector
pp. 399-430

Connick v. Myers
Garcetti v. Ceballos

[Additional reading TBA]

13. **W 3/16 - Posted Problem (CANVAS):** Freedom of speech in the private sector
pp. 447-60

Edmondson v. Shearer Lumber Prod.

Timekeeping Systems, Inc., 323 NLRB 244 (1997)
Hispanics United of Buffalo, 359 NLRB 368 (2012)
[Advisory Memorandum in Google, Inc.](#), Case #32-CA-205351 (Jan. 16, 2018).
National Labor Relations Act, Section 7, 29 U.S.C.A. § 157

Part III: Obligations of Departing Employees

14. **Th 3/17 - Problem 8-1 (p. 474-75):** Statutory & tort duties of departing employees
pp. 465-75

Scanwell Freight Express STL, Inc. v. Chan

[Additional reading TBA]

15. **W 3/23, Th 3/24 - Problems 8-2 (p. 507):** Contractual limitations on competition
pp. 475-95, 511-20

REM Metals Corp. v. Logan
CTI, Inc. v. Software Artisans, Inc.

Hopper v. All Pet Animal Clinic, Inc.

Fla. Stat. § 542.335

[Uniform Restrictive Agreement Act](#) § 8

Part IV: Workplace Safety & Minimum Labor Standards (~7 classes)

16. **W 3/30 - Posted Problem (Canvas):** The workers' compensation system
pp. 844-62, 872-75

Kindel v. Ferco Rental

Clodgo v. Rentavision

Odessey v. Worden

Ch. 4, [Causation for Workers Compensation](#), WLUC

[Additional reading TBA]

17. **Th 3/31:** Regulation of workplace safety
pp. 876-93

Public Citizen Research Health v. Chao

Ch. 2, [OSHA](#), WLUC

[Additional reading TBA]

18. **Th 3/31 (cont'd) - Posted Problem (Canvas):** Family and medical leave
pp. 770-89 (through n.4), 812-18 (through n.7)

Goelzer v. Sheboygan Cty

Ch. 7, [Paid Leave Under the Families First Coronavirus Response Act](#), WLUC

Family Medical Leave Act, 29 U.S.C.A. §§ 2611(4), 2611(11), 2612, 2614(a), 2615
29 C.F.R. § 825.114

[Additional reading TBA]

19. **W 4/6, Th 4/7- Problem 11-1 (p. 819-20) & 11-2 (p. 830-31):** Minimum wage and overtime pay
pp. 791-94 (up to "scope of coverage"), 797-819, 821-31

Costello v. Home Depot

Pabst v. Oklahoma Gas & Electric Co.

29 U.S.C.A. §§ 206(a)(1), 207(a), 213(a)(1) (skim rest of § 213)
29 C.F.R. §§ 541.100, 541.200, 541.201, 541.300, 541.301, 541.302, 541.400, 541.700

[“Amazon Emerges as Wage and Benefits Setter,”](#) Wall Street Journal, Dec. 7, 2021.
FLSA Exemption Fact Sheet

[Additional reading TBA]

Conclusion: Planning for the End of Employment (2 classes)

20. **W 4/13 - Posted Problem (Canvas):** The unemployment insurance system

[Reading assignment TBA]

21. **Th 4/14 - Posted Problem (Canvas):** Layoffs and plant closings
pp. 929-37

Williams v. Phillips Petroleum Co.
Benson v. Enterprise (posted to Canvas)

29 U.S.C.A. §§ 2101, 2102

22. **W 4/20 - Posted Problem (Canvas):** Arbitration of employment disputes
pp. 943-58, 978 (begin w/ n.8)-80

ATT Mobility v. Concepcion
Davis v. Nordstrom (posted to Canvas)

[Additional reading TBA]

Th 4/21 – Catch up and Review