Unit VI

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Issues in Employment

Chapter 21 Establishing the Employment Relationship

In this chapter you will:

- Identify the unique characteristics and liabilities of different categories of workers.
- Understand how *respondeat superior* and negligent hiring affect an employer's liability.
- Identify major legislation that governs employment–management relations.

Chapter 22 Introduction to Antidiscrimination Law

In this chapter you will:

- Understand the Commerce Clause and the Affectation Doctrine and the role of each in enforcing antidiscrimination law.
- Understand the major components to a discrimination lawsuit, what each party needs to prove, and their respective burdens of proof.

Chapter 23 Discrimination on the Basis of Race

In this chapter you will:

- Understand the application of Title VII to race discrimination and how it impacts business.
- Identify steps that a manager can take to avoid race discrimination lawsuits.

Chapter 24 Discrimination on the Basis of Sex

In this chapter you will:

- Understand the application of Title VII to sex discrimination and how it impacts business.
- Identify other key legislation related to discrimination based on sex.

Chapter 25 Sexual Harassment

In this chapter you will:

- Distinguish between different forms of sexual harassment.
- Understand what an employer's liability is in sexual harassment cases.

Chapter 26 Other Types of Discrimination

In this chapter you will:

- Understand the application of Title VII to religious discrimination and how it impacts business.
- Understand the application of Title VII to discrimination based on national origin and how it impacts business.
- Understand the provisions of federal legislation that cover discrimination based on disability and age.
- Identify examples of discrimination against nonprotected classes.

Establishing the Employment Relationship 21

In thinking about setting up a business, you may have considered that all workers are classified as **employees**, but this is not true. There are, in fact, numerous forms that an employer–employee relationship can take or transform into. This chapter begins with those types of relationships and examines the liability that can result from each. It will then look at some of the major labor law legislation from the 20th century.

21.1 Employer–Employee Relationship

When an employer hires someone to work, the likelihood is that person will be categorized as an *employee*. Many students are unaware that the worker could actually be categorized in numerous ways: as an employee, an **agent**, or a **servant**. Some workers are not employees at all, but rather **independent contractors** (see Table 21.1). Each one of these types of workers has unique characteristics and liabilities.

What makes someone an employee? It is well settled in law that employees have distinct characteristics. Most courts consider the biggest factor in determining whether or not someone is an employee to be how much control the employer has over the details of the employee's work. For example, an employer characteristically tells the employee when to come to work, when to leave, what job he or she will be doing, how to do it, and all the other typical requirements of the workplace.

Another characteristic of an employer–employee relationship is that the employer supplies the tools, place of work, and other instrumentalities (means, agency) that make the place one of work. The employer is also engaged in a distinct occupation or business, as opposed to someone who hires a worker for only one job. In employer–employee relationships, there is continuity: An employee receives a regular paycheck and is covered by **workers' compensation**. Usually employees are engaged for a longer length of time and complete work that is the regular business of the employer. The employer is responsible for deducting taxes from the employee's check as well as for administering health insurance, pension plans, workers' compensation, and Social Security benefits for the employee. For a look at some of the distinctions between the two categories of workers, see the case *Carnation Co. v. NLRB*, 429 F.2d 1130, 1134 (9th Cir. 1970) (available at http://bulk.resource.org/courts.gov/c/F2/429/429.F2d.1130.23255.html).

If an employee commits a tort while going about the employer's business, the language in law changes from that of employer–employee to that of *master–servant*, with the employer as the **master**. In fact, the phrase *master–servant* is generally associated with employees who commit torts while on the job, although some writers use it interchangeably with *employer–employee*.

An employee might also be an *agent*. This is a special type of employee who has the power to enter into contracts that bind the employer, now called a principal, to third parties. This relationship, and the attendant duties and liabilities, will be covered in Chapter 27, Principal–Agency Law.

Finally, the employee might not actually be an employee at all but rather someone called an independent contractor, who is self-employed (see Chapter 28 for more about the sole proprietorship business model). From a legal standpoint, the greatest significance of the employer–employee relationship is that of ***respondeat superior***. This phrase means "the master responds for the torts of his servant." The translation might be "the employer pays for the torts of his employees." This means that if an employee is acting within the scope of employment and commits a tort, then the employer must pay for the damages. Consider the following hypothetical situation:

> ***USB Stores hires Alan to deliver goods to customers. In so doing, Alan gets into a car accident and seriously injures Melba. Melba isn't going to sue Alan, who has no money. Instead, Melba will sue the defendant with the most money—USB Stores—under the theory of* respondeat superior*. If Melba can prove that Alan was an employee and that he was within the scope of performing his duties when the negligent act (tort) occurred, then USB will have to pay damages to Melba. If, on the other hand, Alan was not an employee but an independent contractor, then the employer would not be liable for Alan's tort. Instead, Melba's sole recourse would be against Alan personally.***

There is another reason that being an employee is significant. If the employee is going about the master/employer's business, and the *employee* (not a third party) is injured or dies, then the employee can recover money *only* through workers' compensation.

The following attributes qualify one as an independent contractor:

- The contractor is often hired for one particular job;
- The contractor is not directly supervised by the person hiring him or her (may be working offsite for the hirer);
- The contractor is not receiving regular pay, but instead is being paid once (or in installments) for completing the work;
- The contractor supplies his or her own tools or equipment to complete the job;
- The person or company paying does not deduct Social Security or cover workers' compensation; and
- Most important, the hirer is not responsible for torts committed by the independent contractor.

In lawsuits in which the employer is sued under the theory of *respondeat superior*, the employer often will try to prove that the worker is not an employee but an independent contractor. In lawsuits where the employer is sued for injuries on the job, the worker will try to prove that he or she is an independent contractor and not an employee. In deciding such questions, courts weigh a number of factors in an attempt to determine the nature of the relationship.

Table 21.1: Legally recognized employment relationships

	How Formed	Resulting Liability
Employer–employee	Employer hires employee to carry out the business and directs the employee in all details of the work.	Employer is obligated to comply with all state and federal laws regarding taxes, workers' compensation, and the like.
Master–servant	Employer hires employee to carry out the business, as in employer–employee relationship; then employee commits a tort while so doing.	Employer is liable for torts of the servant (if the servant is within the scope of employment) under the doctrine of *respondeat superior*.
Principal–agent	Employer hires employee to carry out the business, as in employer–employee relationship; employer gives employee added responsibilities of entering into contracts for the employer.	Employer, now the principal, is bound by the contracts entered into by the agent on his or her behalf.
Employer–independent contractor	Employer hires a worker for a project only.	Employer is not liable for the torts of the worker, and the worker cannot enter into contracts on behalf of the employer.

How do the courts differentiate between an employee and an independent contractor? Consider the following case excerpts, which discuss whether or not an emergency room doctor was an employee–servant or an independent contractor:

Cases to Consider: *Williamson v. Coastal Physician Services of Southeast, Inc.*

Williamson v. Coastal Physician Services of Southeast, Inc.

251 Ga. App. 667, 554 S.E.2d 739 Ga. App. (2001)

On June 14, 1996, Joe Williamson was experiencing shortness of breath, so he went to the emergency room of Columbia Fairview Park Hospital in Dublin. In the emergency room, he was treated by Dr. Sam Johnson, who diagnosed Williamson with cellulitis, hyperglycemia, and chronic obstructive pulmonary disease. Dr. Johnson discharged Williamson, but Williamson returned to the emergency room six hours later. Dr. Johnson saw Williamson and again discharged him. On June 17 and 20, 1996, Williamson went to Dr. Andy Williamson's office, where he was treated and released. On July 1, 1996, Joe Williamson was admitted to the Carl Vinson VA Medical Center. The following day he died.

Charlotte Williamson, surviving spouse and administratrix of Williamson's estate, brought this medical malpractice lawsuit against the hospital, Dr. Johnson, Dr. Williamson, and Coastal Physician Services, which had hired Dr. Johnson to work in the emergency room pursuant to a staffing agreement with the hospital. The lawsuit claims that Coastal is vicariously liable for the actions of Dr. Johnson. Coastal moved for summary judgment, arguing that it cannot be held liable for the actions of Dr. Johnson because he is an independent contractor and not an employee. ***(continued)***

Cases to Consider: *Williamson v. Coastal Physician Services of Southeast, Inc.* ***(continued)***

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We determine whether a person is an employee or an independent contractor by examining whether the employer has assumed the right to control the time, manner, and . . . the person's actual hours of work. The right to control the manner and method means the employer has assumed the right to tell the person how to perform all details of the job, including the tools he should use and the procedures he should follow.

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In support of its motion for summary judgment, Coastal presented the affidavit of Dr. Johnson and a copy of its agreement with him. In the affidavit, Dr. Johnson stated that he would inform Coastal of the times he was available to work in the Fairview hospital emergency room, that Coastal had the right to schedule him to work only at those times, and that Coastal never attempted to schedule him for work at a time not designated by him. He further stated that Coastal had no right, and never attempted, to control the manner or method by which he diagnosed or treated patients in the emergency room.

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The contract between Dr. Johnson and Coastal, entitled Independent Contractor (Physician) Agreement, supports Dr. Johnson's affidavit. The contract specifically provides that each month Dr. Johnson shall notify Coastal of the days and hours that he is available to work in the emergency room, and that Coastal will schedule him to work based on his notification of availability. Moreover, the contract provides that Dr. Johnson shall act as an independent contractor practicing his profession of medicine, and that Coastal shall have no control over the manner or method by which he performs his professional medical practice.

Because the evidence unquestionably shows that Coastal did not control the time, manner or method of Dr. Johnson's work, the trial court correctly concluded that he is an independent contractor, and that Coastal cannot be held liable for his acts. We therefore affirm the trial court's grant of summary judgment to Coastal.

Read the full text of the case here: http://caselaw.findlaw.com/ga-court-of-appeals/1216436.html.

Questions to Consider

1. What type of employee did the court decide Dr. Johnson was?
2. What were the factors the court considered in deciding the type of employee he was?
3. What was the significance of Dr. Johnson being an independent contractor as opposed to an employee?

What would happen if an employee were asked to "switch roles" at the place of employment? Would he or she still be considered an employee in the "new role"? In the following case, the plaintiff, a secretary at Sea World, was asked to put on a bikini and ride Shamu the whale for some publicity photos. When the whale bit her, she argued that she was not an employee, thus hoping to be able to sue the employer for her injuries.

Cases to Consider: *Eckis v. Sea World*

Eckis v. Sea World, 64 Cal. App. 3d 1 (1976)

Plaintiff was trained for the ride by Sea World trainers in the tank at Sea World during normal office working hours. First she practiced riding Kilroy, a smaller, more docile whale, while wearing a bathing suit. During her one practice session on Shamu, she wore a wetsuit, fell off, but swam to the edge of the tank without incident. On April 19, plaintiff became apprehensive for the first time when one of Sea World's trainers said he was not going to watch her ride Shamu because it was "really dangerous." Plaintiff then went to Burgess and told him of her concern. He told her not to worry, said there was nothing to be concerned about, and that the ride was "as safe as it could be." He still did not tell her about the problems they had been having with Shamu or about the earlier incidents involving Richards and the swimsuit model. Thus reassured, plaintiff, wearing a bikini Sea World had paid for, then took three rides on Shamu. During the second ride one of the trainers noticed Shamu's tail was fluttering, a sign the animal was upset. During the third ride plaintiff fell off when Shamu refused to obey a signal. Shamu then bit her on her legs and hips and held her in the tank until she could be rescued.

Plaintiff suffered 18 to 20 wounds which required from 100 to 200 stitches and left permanent scars. She was hospitalized five days and out of work several weeks. She also suffered some psychological disturbance. Sea World paid all her medical expenses and continued to pay her salary as usual during this period. On advice of her counsel, she filed this civil action and a workers' compensation claim.

When an employee's injuries are compensable under the Workers' Compensation Act, the right of the employee to recover the benefits provided by the Act is his exclusive remedy against the employer, with exceptions not applicable here[. L]iability of the employer to pay compensation under the Act, "in lieu of any other liability whatsoever," attaches: "(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment," and "(c) Where the injury is proximately caused by the employment, either with or without negligence."

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The undisputed evidence shows: at the time she was injured[,] plaintiff was an employee of Sea World; she was injured on the employer's premises during what were her regular working hours; she was injured while engaging in an activity which her employer had requested her to perform and for which it had provided her with the training and the means to perform; in riding Shamu the Whale for publicity pictures, plaintiff was not engaged in an activity which was personal to her, but rather one which was related to, furthered, and benefited the business of her employer.

Where, as here, an employee is injured on the employer's premises during regular working hours, when the injury occurs while the employee is engaged in an activity which the employer has requested her to undertake, and when the injury-causing activity is of service to the employer and benefits the employer's business, the conditions imposing liability for compensation under are met as a matter of law, and it is immaterial that the activity causing the injury was not related to the employee's normal duties or that the circumstances surrounding the injury were unusual or unique.

Since the undisputed evidence established that plaintiff's injuries were compensable under the Workers' Compensation Act, the trial court should have granted Sea World's motion for judgment notwithstanding the verdict. (Thereby establishing that she was 'within the scope of employment' and that she was an employee[,] thus making the only payment available to her for her injuries that of workers' compensation.)

(continued)

Cases to Consider: *Eckis v. Sea World* ***(continued)***

Read the full text of the case here: http://www.lawlink.com/research/caselevel3/53160.

Questions to Consider

1. What was the employee attempting to argue before the court and why?
2. Did she succeed? Why or why not?

21.2 *Respondeat Superior* and Negligent Hiring

If the employee is in fact working for the employer, and is working "within the scope of employment," then the employer will be liable to third parties for the torts of his or her employee under the doctrine of *respondeat superior*. In addition, an employer may also be liable to third parties under another theory: that of **negligent hiring**. In these cases, the employee does not necessarily commit a tort, but rather may engage in activity that is tortuous or criminal. The theory of liability is based on the argument that the employer knew or should have known that the employee was somehow dangerous or incompetent when hired, and thus, the employer should be held responsible. Those concepts are illustrated in the case that follows.

Cases to Consider: *Malorney v. B&L Motor Freight, Inc.*

Malorney v. B&L Motor Freight, Inc., 146 Ill. App.3d 265, 496 N.E.2d 1086 (1986)

Edward Harbour applied for a position of over-the-road driver with defendant B&L. On the employment application, Harbour was questioned as to whether he had any vehicular offenses or other criminal convictions. His response to the vehicular question was verified by B&L; however, his negative answer regarding criminal convictions was not verified by B&L. In fact, Harbour had a history of convictions for violent sex-related crimes and had been arrested the year prior to his employment with B&L for aggravated sodomy of two teenage hitchhikers while driving an over-the-road truck for another employer. Upon being hired by B&L, Harbour was given written instructions and regulations, including a prohibition against picking up hitchhikers in a B&L truck.

Subsequently, on January 24, 1978, at an Indiana toll-road plaza, Harbour picked up plaintiff Karen Malorney, a 17-year-old hitchhiker. In the sleeping compartment of his truck, he repeatedly raped and sexually assaulted plaintiff, threatened to kill her, and viciously beat her. After being released, plaintiff notified police. Harbour was arrested, convicted, and sentenced to 50 years with no parole.

Plaintiff's complaint charges defendant B&L with recklessness and willful and wanton misconduct in negligently hiring Harbour as an over-the-road driver without adequately checking his background and providing him a vehicle with a sleeping compartment. Plaintiff seeks compensatory and punitive damages from B&L.

(continued)

Cases to Consider: *Malorney v. B&L Motor Freight, Inc.* ***(continued)***

Defendant B&L filed a motion for summary judgment contending that it had no duty to verify Harbour's negative response to the question regarding criminal convictions. In denying defendant's motion, the trial court found that (1) Harbour was hired as an over-the-road driver and furnished with a truck equipped with sleeping quarters; (2) B&L instructed Harbour not to pick up hitchhikers; and (3) it is common knowledge that hitchhikers frequent toll plazas which would show that B&L knew drivers are prone to give rides to hitchhikers. The court concluded that these facts show that B&L had a duty to check Harbour's criminal background and certified the issue for interlocutory appeal.

Defendant argues that it had no duty to investigate Harbour's nonvehicular criminal background nor to verify his denial thereof because of a lack of foreseeability that he would use the truck to pick up and sexually assault a hitchhiker. To impose such a duty would be against public policy by placing too great a burden on employers. On the other hand, plaintiff posits the argument that factual issues exist which preclude summary judgment and require a jury determination. We agree and must affirm the trial court for the following reasons. Defendant correctly argues that the existence of a duty is a question of law to be determined by the court, rather than by the factfinder. However, once a duty has been found, the question of whether the duty was properly performed is a fact question to be decided by the trier of fact, whether court or jury.

The existence of a legal duty is not dependent on foreseeability alone, but includes considerations of public policy and social requirements. In Illinois, two duties, among others not pertinent here, are imposed by law on owners of vehicles who permit or hire other persons to drive on our highways. The first duty requires that the degree of care which an owner should exercise in selecting a driver is that which a reasonable person would exercise under the circumstances. An owner or employer also owes a duty in connection with the entrustment of vehicles to others. In other words, a vehicle owner has a duty to deny the entrustment of a vehicle to a driver it knows, or by the exercise of reasonable diligence could have known, is incompetent. In addition to these duties, it is well settled in Illinois that a cause of action exists against an employer for negligently hiring a person the employer knew, or should have known, was unfit for the job.

B&L contends that a reasonable and prudent motor carrier could not foresee that one of its drivers would rape and assault a hitchhiker. The court in *Neering v. Illinois Central R.R. Co*. in discussing foreseeability stated that the ultimate injury must be the natural and probable result of the negligent act or omission such that an ordinary and prudent person ought to have foreseen as likely its occurrence as a result of the negligence. It is not essential that one should have foreseen the precise injury which resulted from the act or omission. This interpretation thus requires an employer to exercise that degree of care reasonably commensurate with the perils and hazards likely to be encountered in the performance of an employee's duty, *i.e*., such care as a reasonably prudent person would exercise in view of the consequences that might reasonably be expected to result if an incompetent, careless, or reckless agent were employed for a particular duty.

Applying these principles to the present case, it is clear that B&L had a duty to entrust its truck to a competent employee fit to drive an over-the-road truck equipped with a sleeping compartment. Lack of forethought may exist where one remains in voluntary ignorance of facts concerning the danger in a particular act or instrumentality, where a reasonably prudent person would become advised, on the theory that such ignorance is the equivalent of negligence. Bearing in mind the facts that B&L gave Harbour an over-the-road vehicle with a sleeping compartment and that B&L probably knew, or should have known, that truckers are prone to give rides to hitchhikers despite rules against such actions, the question now becomes one of fact—whether B&L breached its duty to hire a competent driver who was to be entrusted with a B&L over-the-road truck. ***(continued)***

Cases to Consider: *Malorney v. B&L Motor Freight, Inc.* ***(continued)***

Regarding defendant's public-policy argument, there is no evidence in the record to justify the contention that the cost of checking on the criminal history of all truck-driver applicants is too expensive and burdensome when measured against the potential utility of doing so. Finally, we note that a question of foreseeability is at times a question for the court and at times, if varying inferences are possible, a question for the jury. In the present case, B&L did have a duty to check into Harbour's background so as to ascertain whether he would be a fit employee. Based on the circumstances of this case, it is apparent that reasonable persons could arrive at different conclusions as to whether B&L used due care in the performance of this duty when it employed Harbour. Questions which are composed of such qualities sufficient to cause reasonable persons to arrive at different results should never be determined as matters of law. Questions of negligence, due care, and proximate cause are questions of fact to be determined by the factfinder.

In affirming the trial court's denial of summary judgment, we are not expressing any opinion as to the resolution of the facts in this case. Plaintiff has the heavy burden of proving that defendant B&L negligently performed a duty it owed her in entrusting Harbour with an over-the-road truck, and if negligence is found, that it proximately caused her injury. These questions, including the issue of whether defendant negligently hired Harbour by not checking his criminal background, are questions for the trier of fact and become a question of law only when the ultimate facts have been determined by the factfinder.

Read the full text of the case here: http://scholar.google.com/scholar_case?case=4195436759662276740&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

Questions to Consider

1. What duty did the court say B&L had with regard to checking the background of its driver?
2. What argument did the company make about not checking backgrounds? What do you think about this argument?
3. Did the plaintiff win this case? What yet needs to be determined, and how will that occur?

21.3 Rights and Responsibilities of Employers and Employees

As a manager, it is sometimes difficult to discern what law governs your relationship with employees—state law, federal law, or contract law. In this section, we explore the various laws that govern the formation of the relationship between the employer and employee, and some of the attendant rights and responsibilities that flow from that relationship.

Based on Contract Law

At common law, the precise rights and responsibilities of the employer and employee were almost exclusively dictated by general **agency law** and the employment contract (see Chapter 27, Principal–Agency Law, for a discussion of this concept). Although other factors come into play today, the **employment contract** is still of critical importance in determining the rights and responsibilities of the parties. Parties are free to define the

nature of the employment relationship through oral or written contracts as long as these do not conflict with federal or state law. The length of employment, precise duties of the employee, compensation, and benefits package are all typically defined in the employment contract. In most cases, the employer as *offeror* of the employment contract defines these terms, and the employee as *offeree* either accepts or rejects the offer on the employer's terms. Employees can, of course, bargain for better terms than those the employer is offering, but many employees in reality have little bargaining power, especially in tight job markets or in positions requiring few specialized skills.

Based on State and Federal Law

To a large extent, the efforts of both the federal and state governments to regulate labor law through legislation can be seen as an effort to level the playing field between employers and employees. These efforts have tried to set limits on the terms that employers (and, to a lesser extent, unions) may impose on employees through the employment contract. The remainder of this chapter will spotlight a cross section of salient legislative efforts in the area of business law. These will give you an overview of the limits that have been placed on employers in dictating the terms of employment for their employees. Keep in mind from this point on that employment is still **employment at will** (at least technically), which is to say that employers and employees are free to negotiate the terms of employment within the boundaries of the law. Also, the employer or employee may generally unilaterally terminate any employment contract that does not have a fixed duration at any time, with or without just cause, as long as no federal or state law is violated by the termination.

21.4 Governmental Regulation of Labor–Management Relations

From the workers' perspective, the history of labor–management relations in the United States through the first three decades of the 20th century was not auspicious. For example, there was no formal protection for workers' rights to form unions or bargain collectively with management. While these rights had been long recognized in Europe (where a greater emphasis on workers' rights had been, and remains, a focal point of industrialized democracies), in the United States, most organized labor activities were deemed to violate either criminal or civil laws. The mere act of joining a union could (and often did) result in termination of an employee. Likewise, employees who banded together and instituted boycotts or strikes against an employer could be prosecuted for criminal antitrust violations under the **1914 Clayton Act**, which made all conspiracies to restrain trade or interfere with commerce illegal. Organizers of boycotts or strikes could also be sued in many states for civil damages under a tort theory such as "willful interference with contract rights."

Most state courts readily granted injunctions at management's request preventing employees from engaging in illegal boycotts, as did the federal courts prior to the **Norris–La Guardia Act of 1932**. In addition, because a worker had no protected right to join a union or to engage in **collective bargaining**, employers were free to insist on including a clause in employment contracts that prevented employees from ever joining a union as a condition of being hired. These contractual provisions, which came to be known as **"yellow**

dog contracts" by union sympathizers, were usually enforced by the courts and served to effectively deny workers the ability to unionize or bargain collectively with employers. By 1932, the political climate had begun to change, and what had been very effective roadblocks to the labor movement were slowly removed through a series of acts passed by Congress. These acts granted some measure of protection to workers and curtailed the most egregious abuses of power by management.

Norris–La Guardia Act of 1932

The Norris–La Guardia Act of 1932 accomplished two important goals:

- Declaring agreements prohibiting workers from joining unions as a condition of being hired (yellow dog contracts) illegal, as against public policy, and unenforceable; and
- Restricting the power of federal judges to issue injunctions against union boycotts.

While the act did not prevent employers from seeking injunctive relief against employee boycotts in state courts, many states eventually also prevented their courts from issuing such injunctions.

National Labor Relations Act of 1935

The **National Labor Relations Act of 1935** (also known as the Wagner Act) granted employees several new rights: to organize, to bargain collectively through representatives of their own choosing, and to engage in activities for the purpose of collective bargaining or other mutual aid or protection. The act also prohibited five unfair labor practices by employers:

1. Interference with attempts of employees to unionize or join unions;
2. Dominating or interfering with the formation or administration of any labor union or the contribution of financial or other support to it;
3. Discriminating in hiring, tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization;
4. Discharging or discriminating against an employee for filing charges or giving testimony under the act; and
5. Refusing to bargain collectively with the chosen representatives of the employees.

The National Labor Relations Act of 1935 gave labor unions unprecedented rights to organize, bargain, and strike.

Courtesy Everett Collection

The act also made unlawful **closed shop agreements** that require employers to hire only union workers. **Union shop agreements**, whereby employees need not be union members when hired but must join the union after being hired, were not made illegal by the act, however. In addition, the act established the **National Labor Relations Board (NLRB)** to hear and adjudicate complaints from employees about employers' unfair labor practices. NLRB decisions on such matters are automatically reviewed by district courts of appeal, which issue orders of enforcement if they concur with the findings of the NLRB.

Fair Labor Standards Act of 1938

The **Fair Labor Standards Act of 1938** established for the first time minimum wage and maximum hours provisions. The act set the maximum workweek at 44 hours for the first year after its adoption, 42 hours after one year, and 40 hours per week thereafter, requiring employers to pay all hourly employees time and a half (overtime pay) for any work required beyond the stated maximum. (Executive, administrative, and professional employees are **exempt**.) The act also set minimum wage provisions on a sliding scale that were set to increase from $0.25 per hour for the first year, $0.30 per hour for the next six years, and $0.40 per hour thereafter. The minimum wage requirements have been raised periodically thereafter, starting with an increase to $0.75 per hour in 1949. As of 2012, the federal minimum wage stands at $7.25 per hour, although many states set theirs higher (e.g., Washington state, at $9.04 per hour) while some set theirs lower (e.g., Minnesota, at $5.25–$6.15 per hour). See the U.S. Department of Labor Wage and Hour Division website http://www.dol.gov/whd/minwage/america.htm for an interactive map of state rates.

There are exceptions to the minimum wage standards, however. A lower minimum wage can legally be paid to certain workers:

- Full-time students employed in retail or service stores, agriculture, or colleges and universities can be paid not less than 85% of the current minimum wage, provided that the employer obtains a certificate from the Department of Labor and the student works a maximum of eight hours per day and not more than 20 hours per week during the school year, and not more than 40 hours per week when classes are not in session;
- Workers under the age of 20 can be paid any wage above $4.25 per hour for the first 90 calendar days after they are employed; and
- Workers who work in jobs where they earn tips and make at least $30 in tips per month can also be paid less than the prevailing federal minimum wage, but not less than $2.13 per hour as of March 2011, as long as the employee earns at least the federal minimum wage when the tips are added to the sub–minimum wage hourly rate.

Therefore, an employee who works at a restaurant and earns $15 per hour in tips needs only be paid $2.13 per hour in wages by the employer, but an employee who works at a car wash 40 hours per week and earns $40 per week in tips must be paid a minimum of $6.25 in hourly wages (the hourly wage plus the tips must at least equal the minimum wage).

The Fair Labor Standards Act also requires **nonexempt** workers to be paid time and a half for overtime work after 40 hours per week. There is no maximum number of hours that an employer can ask an employee to work each week as long as time and a half is paid

after 40 hours. And employees may be asked to work more than eight hours per day without overtime as long as the weekly total does not exceed 40 hours. An employee who is required to work for 12 hours on Mondays, Wednesdays, and Thursdays and four hours on Sundays is not entitled to overtime pay under the federal law.

Labor Management Relations Act of 1947

The **Labor Management Relations Act of 1947** (also known as the Taft–Hartley Act) essentially modified the 1935 National Labor Relations Act (the Wagner Act) in a number of significant ways. Chief among these modifications is the extension of unfair labor practices to unions as well as to employers. The act makes it an unfair labor practice for unions to engage in the following three prohibited activities:

1. Coercing or restraining employees in their choice of a union to represent them, or coercing or restraining employers in the choice of their own bargaining representatives;
2. Compelling an employer to fire an employee in a union shop for other than nonpayment of dues; and
3. Refusing to bargain in good faith.

The act has also given the president the right to seek an injunction to force striking workers back to the job for a period of up to 60 days in strikes that in his or her view imperil national health or safety. If the dispute is not settled during the 60-day cooling-off period, the president can ask for a 20-day extension of the injunction if the strike threatens to become a national emergency.

Labor Management Reporting and Disclosure Act of 1959

The **Labor Management Reporting and Disclosure Act of 1959** (also known as the Landrum–Griffin Act), like the Labor Management Relations (Taft–Hartley) Act before it, further modified the National Labor Relations (Wagner) Act of 1935. It did so primarily by tightening up control of unions' internal affairs.

The act imposed *fiduciary duties* on union leadership and provided for criminal punishment of union officials who violated the trust of their office. It imposed federal monitoring of unions' financial status and, for the first time, required unions to report both to the federal government and to their members how union funds are used. The act also regulated union elections, including instituting the requirement that union elections be held through secret ballots. Further, the act extended protection to union members who state their opposition to union leadership or policies, making it illegal for the union to punish such dissenting members. Finally, the act required unions to provide members with copies of collective bargaining agreements and to make their members aware of their rights under the act.

21.5 Additional Federal Regulations Affecting Employment

Hundreds of laws pertain to how managers must treat employees—from labor laws to antidiscrimination laws (which will be discussed in detail in Chapters 22–26). In this section, we will review a few of the most significant laws governing the regulation of employees and employers by the federal and state governments.

Unemployment Benefits

The **Social Security Act of 1935** provides the framework for unemployment compensation that is funded through mandatory contributions by employers and employees. The unemployment insurance provisions of the act are administered by state agencies and coordinated by the federal government. Requirements for eligibility of benefits, duration of benefits, and the amount of benefits payable are controlled by local laws, though states tend to adopt similar regulations in these areas. Railroad workers, farm workers, domestic workers, and federal workers are not covered under the act, although railroad and federal employees have coverage under separate federal legislation.

In general, employees must work a minimum number of weeks per calendar year to be eligible for coverage, and only employees who are dismissed from their jobs without just cause are entitled to receive benefits; employees who quit a job out of choice are not eligible for unemployment insurance, nor are employees who are fired for wrongful conduct, such as embezzlement or illegal drug use on the job.

Health and Safety

Congress passed the **Occupational Safety and Health Act of 1970** to ensure employee health and safety on the job. Under the act, the secretary of labor is given responsibility for promulgating standards for ensuring workers' health and safety on the job, as well as the power to enforce these standards in the courts.

The act imposes on employers a duty to furnish a workplace to all employees free from recognized hazards that are likely to cause death or serious injury. Employers are also required to keep records of all occupational injuries or illnesses that result in death, loss of consciousness, the loss of one or more workdays, or medical treatment other than first aid.

The act created a dedicated agency within the Department of Labor, the Occupational Safety and Health Administration (OSHA), to handle matters relating to administering and enforcing the act. The agency is charged with conducting safety inspections of workplaces with a poor safety record and with forcing compliance with the act through the courts when employers do not voluntarily resolve safety or health problems it identified. OSHA also investigates allegations of safety or health violations at the request of employees. These employee "whistleblowers" are protected against reprisals for making such allegations or otherwise asserting their rights under the act. Individual state laws also protect whistleblowers to varying extents.

Illegal Immigration

The **Immigration Reform and Control Act of 1986** is one of the major pieces of legislation affecting employers. Under this federal law, employers must keep detailed records of employees (including their immigration status) or risk significant monetary sanctions. On the one hand, employers violate the act if they knowingly hire non–U.S. citizens who are not authorized to work in the United States. On the other hand, that requirement must be balanced against the requirement that employers with four or more employees cannot discriminate on the basis of citizenship status (antidiscrimination law will be covered in Chapters 22–26). For example, an employer who hires only U.S. citizens but refuses to hire green card holders could be guilty of such discrimination. Additionally, employers need to be careful about "document abuse," which can include requiring an employee or potential hire to produce more documents than the law requires.

Workers' Compensation

Every state has adopted a workers' compensation statute that provides compensation for employees for job-related injuries. (For more on this topic, go to Chapter 5, Administrative Law, section on state agencies.) Coverage varies from state to state: Some states limit coverage to employees engaged in manual labor, while others cover nearly all employees regardless of the nature of the employment. Covered employees who suffer injuries arising from the course of their employment are guaranteed compensation for their loss as well as payment of medical bills. However, they give up the right to sue the employer under a tort or contract theory for damages resulting from the illness or injury. States generally limit damages recoverable by injured employees to statutorily provided amounts that are modest when compared with jury awards for similar tort injuries.

States' workers' compensation statutes thus provide some measure of protection to employees who suffer injuries on the job by guaranteeing them prompt medical care at no cost to them (even if the injury was caused by their own negligence). At the same time, they serve to effectively limit the common law rights of employees to later sue the employer for damages arising from the same injury.

Pension and Health Plans

Employers are not generally required to provide retirement plans or health plans to employees. If they choose to do so, however, these private retirement and health plans are covered by the **Employment Retirement Income Security Act of 1974 (ERISA)**, which sets standards for most retirement and health plans that are voluntarily provided in the private sector. The act requires employers to provide basic information about health and retirement plans to employees, including a summary of benefits under these plans and information on how they operate, as well as a yearly annual report summary covering the plans' assets. The same information, along with a full annual report detailing plan assets, must also be filed with the Department of Labor. The act goes further by imposing fiduciary responsibilities on plan administrators.

The **Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)** amended ERISA. COBRA provides workers and their families who lose their health benefits (due to a **qualifying event**) the right to choose to continue group health benefits provided by their group health plan for a limited period of time. A qualifying event is defined as follows:

For an individual:

- Voluntary or involuntary termination of employment other than for gross misconduct; or
- The loss of eligibility for health coverage owing to a reduction in work hours that makes the employee ineligible for coverage (e.g., going from full-time to part-time employment status if only full-time employees are offered health coverage by the employer).

For a dependent of a covered employee:

- The divorce of a spouse;
- The death of the covered employee; or
- The loss of coverage by a dependent child who loses dependent status under the plan (e.g., because he or she turns 26, an age established by the Patient Protection and Affordable Care Act of 2010).

Qualified individuals who avail themselves of a temporary COBRA extension of coverage may be required to pay 102% of the employer's group premium for health care on a continuous basis. Thus, if the employee paid $200 per month and the employer paid $800 per month for health coverage for the employee and his family, the employee could be asked to pay $1,020 per month for COBRA coverage (102% of the employer and employee contribution). COBRA temporary coverage is generally available if the employer sponsored a health plan for 20 or more employees in the prior year. COBRA applies to private sector employers and to state and local governments that provide health insurance to their employees. COBRA continuation coverage may generally be maintained for up to 18 months.

The **Health Insurance Portability and Accountability Act of 1996 (HIPAA)** provided another significant amendment to ERISA. The act protects individuals and families covered by group health plans from being excluded from coverage for preexisting medical conditions when employees change health plans. HIPAA generally limits the maximum period for excluding preexisting conditions from coverage to 12 months from an individual's enrollment date (18 months for late enrollees). Also, HIPAA protects employees who change jobs by requiring a new employer's plan to give individuals credit for the length of time they had prior to continuous health coverage (without a break in coverage of 63 days or more) to reduce or eliminate the exclusion period. Therefore, employees who had health insurance coverage for the 12 months immediately preceding the start of a new job with no break in coverage greater than 63 days will have 12 months of credit toward the exclusionary period and will qualify for preexisting-condition coverage on the date they enroll in the new plan.

With the advent of the **Patient Protection and Affordable Care Act** (also known as the ACA, or ObamaCare), which is set to fully go into effect in 2014, insurance companies will not be able to discriminate against people with preexisting conditions; that is, they will no longer be able to deny anyone health coverage on the basis of previous medical history. Also, employers with more than 50 employees will be required to offer health insurance coverage to their full-time employees or pay a $2,000 per worker penalty (after the first 30 workers) to the government.

Key Terms

agency law The body of law governing the formation, termination, and existence of principals and agents.

agent A special type of employee, contractor, or third party who has the power to enter into contracts on behalf of the employer.

Clayton Act (1914) An act of Congress that made all conspiracies to restrain trade or interfere with commerce illegal.

closed shop agreement One that requires employers to hire only union workers for that site.

collective bargaining The negotiation of employment-related matters between employers and employees using an agent designated by the majority of employees, e.g., a union representative.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) Amended ERISA to provide workers and their families who lose their health benefits owing to a qualifying event the right to choose to continue group health benefits provided by their group health plan for a limited period of time.

employee A worker that the employer characteristically directs in terms of hours, manner of doing the job, and location of work.

employment at will A work relationship that may be terminated by either party at any time and for any reason as long as the reason is not based on a protected area of discrimination.

employment contract A document that determines the rights and responsibilities of the parties; can be oral or written and must not conflict with federal or state law.

Employment Retirement Income Security Act of 1974 (ERISA) Sets standards for most retirement and health plans voluntarily administered by employers in the private sector.

exempt employees Under the Fair Labor Standards Act, employees who do not receive overtime pay (time and a half of their hourly wage), including executive, administrative, and professional workers.

Fair Labor Standards Act of 1938 Sets minimum wage and hour standards.

Health Insurance Portability and Accountability Act of 1996 (HIPAA) Protects individuals and families covered by group health plans from the exclusion of coverage for preexisting medical conditions when employees change health plans.

Immigration Reform and Control Act of 1986 A major piece of legislation affecting employers. Under this federal law, employers must keep detailed records on employees' immigration status or risk significant monetary sanctions.

independent contractor A self-employed worker who is not an employee but who is typically hired to work one job for one-time payment, provides his or her own tools and equipment, and is not under the close supervision of the employer.

Labor Management Relations Act of 1947 Modified the National Labor Relations Act of 1935 by forbidding unions to engage in unfair labor practices.

Labor Management Reporting and Disclosure Act of 1959 (Landrum–Griffin Act) Further modified the National Labor Relations Act of 1935, primarily by tightening up control of unions' internal affairs.

master An employer who has an employee who commits a tort.

National Labor Relations Act of 1935 (Wagner Act) Granted employees the rights to organize, to bargain collectively through representatives of their own choosing, and to engage in activities for the purpose of collective bargaining or other mutual aid or protection; also prohibited five unfair labor practices by employers.

National Labor Relations Board (NLRB) A government body established by the Wagner Act to hear and adjudicate complaints from employees about employers' unfair labor practices.

negligent hiring If an employer is grossly negligent for the acts of an employee, in some states, a court might add liability for the fact that the employer hired the person in the first place.

nonexempt employees Under the Fair Labor Standards Act, those who must be paid overtime (time and a half of their hourly wage) after working 40 hours per week.

Norris–La Guardia Act of 1932 Made illegal an agreement that prohibits workers from joining unions as a condition of being hired and restricted the power of federal judges to issue injunctions against union boycotts.

Occupational Safety and Health Act of 1970 Regulates employee health and safety on the job; sets standards for worker safety.

Patient Protection and Affordable Care Act (ACA, or "ObamaCare") Sweeping health care reform law passed by Congress in 2010 that is set to fully go into effect in 2014. Under its terms, insurance companies will not be able to deny anyone health coverage on the basis of previous medical history. Also, individual citizens will be required to purchase health insurance, and employers with more than 50 employees will be required to offer health insurance coverage to their employees or face penalties.

qualifying event Under COBRA, the loss of a job or reduction of hours making an employee (or dependents) ineligible for employer group health benefits.

respondeat superior The legal theory that employers (masters) are liable for the torts committed by their employees (servants) as long as the servant is an employee and is within the scope of employment.

servant An employee who has committed a tort at work.

Social Security Act of 1935 Provided the framework for unemployment compensation funded through mandatory contributions by employers and employees.

union shop agreement One that stipulates that employees need not be union members when hired but must join the union after being hired.

workers' compensation A statewide system that oversees payments to workers for injuries and death on the job.

yellow dog contracts Agreements prohibiting workers from joining unions as a condition of being hired.

Critical Thinking and Discussion Questions

1. From which two branches of law does labor law primarily stem?
2. What are the two most significant provisions of the Norris–La Guardia Act of 1932?
3. What are the basic provisions of the National Labor Relations Act of 1935 (the Wagner Act)?
4. What are the basic provisions of the Fair Labor Standards Act of 1938?
5. What are the basic provisions of the Labor Management Relations Act of 1947 (Taft–Hartley)?
6. What are the basic provisions of the Labor Management Reporting and Disclosure Act of 1959 (Landrum–Griffin)?
7. Devon hires Rex to do odd jobs around his house on a fairly regular basis. Over the past year, Rex worked an average of six hours per week for Devon, performing a variety of tasks that included gardening, house painting, snow removal, and minor household repairs. Rex also works for a number of other homeowners in the community performing similar tasks for them on a regular basis. He is paid a flat hourly fee by Devon and uses both his own tools and tools provided by Devon in the performance of his job.
   a. During a late October afternoon while performing leaf pickup for Devon, Rex decides to gather leaves in a large steel drum and burn them without Devon's knowledge or consent. A gust of wind carries a burning leaf to Angela's house next door, starting a fire that causes extensive property damage. Is Devon responsible for the damage? What is the main issue on which this answer depends? Explain.
   b. Would it make a difference in question *a* if Rex worked 20 hours per week exclusively for Devon? Explain.
8. Emma is fired from her middle-management job at ABC Company after 10 years of employment owing to corporate restructuring. She then decides to go into business for herself as a management consultant. Her severance package provides her with one year's salary and a continuation of all health benefits for one year after her separation from the company. (The company will continue to pay $1,000 per month for her medical plan and will continue to deduct her $100 per month plan contribution from her monthly severance paychecks.)
   a. After the one-year period, will Emma be able to continue her medical coverage through COBRA? If so, for how long, and at what maximum cost?
   b. Assume Emma decides to look for employment after her ABC health care coverage ends and waives her right to a COBRA extension of her coverage because she cannot afford the cost. If she finds employment with XYZ Company and enrolls in its health plan 60 days after her health coverage through ABC expires, and XYZ has a 12-month exclusionary period for preexisting conditions in its health care plan, how long must she wait before being covered for preexisting conditions by her new plan?
   c. If Emma finds employment three months after her health coverage at ABC expires and is diagnosed with a medical condition requiring emergency surgery a month after being in her new job, will her new health insurance pay for the medical costs related to the surgery if the new coverage has a six-month waiting period before preexisting conditions are covered?