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EMPLOYMENT LAW

*Second
Edition*



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EMPLOYMENT LAW

Second Edition

Richard Carlson

South Texas College of Law



Wolters Kluwer
Law & Business

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To my wife Lena, and to my children, Helen, Elsa, Darina, Greta, and Alexander

PREFACE

There are many possible strategies for presenting the seemingly fragmented subject of employment law. One approach is to offer two separate courses addressing the deepest government interventions in employment relations: collective bargaining law (or “labor law” as it is known in many law school curriculums) and employment discrimination law. This two-part approach treats the remainder of employment law as a residue banished to the periphery. In contrast, this book is designed for a broad survey of employment law that accounts more effectively for important topics beyond collective bargaining and discrimination, including disputes over individual contract rights, statutory regulation of compensation and benefits, work-related injury and safety, conflicts between the demands of employment and the demands of family or the public interest, post-employment competition, and the resolution of disputes between employers and individual employees.

Collective bargaining and discrimination are not omitted. Both topics are themes that run substantial courses through this book. It is assumed, however, that students wishing a deeper understanding of collective bargaining or employment discrimination will take additional courses in these topics.

This survey course stands either independently or as a third pillar in the employment law curriculum. It could appeal to either of two groups of students. First, students who might never take another course in employment law will find this course provides the widest exposure to a subject that, in one way or another, can affect nearly any other area of the law. Second, for students who plan to take or have already taken more specialized courses in employment discrimination or collective bargaining, this survey will complete the employment law picture.

One may wonder whether it is possible to present employment law as a single course without a principal legal regimen such as collective bargaining or antidiscrimination law as a gravitational core. The question is no different for employment law than it is for other broad subject areas of the curriculum, such as family law or business organizations. Indeed, as a survey course, employment law bears a particularly strong resemblance to family law. Each deals with human relationships that are fundamental in modern life. Just as our families define us, we are further defined by our work and our position in the workplace. Employment offers sustenance at the very least and potentially much more, but it can also present grave risks because of frequent imbalances of power, the parties’ respective needs to rely on each other, and the difficulties of accounting for life or business-altering contingencies over the long term. A unifying theme for an employment law course is the need for legal rules that make employment a fulfilling and not unduly dangerous or unfair relationship.

Thus, this book is organized according to certain stages, contexts, and problems in the employment relationship, rather than by statutes or other sources of law. For example, after two introductory chapters about the historical development of employee relations and the distinctive characteristics of employment, Chapter Three addresses the selection and hiring of employees, and

the chapters that follow address successive aspects and stages of the relationship. From one chapter to the next, a few laws are ubiquitous.

Naturally, antidiscrimination law and the potential for collective bargaining permeate every aspect of employment with complexity that deserves the opportunity for further study in more specialized courses. But it is impossible to isolate these topics from examination of any other part of employment law, and a course that purported to do so would hardly serve as a representative survey. This book solves the problem by presenting a foundation of basic principles in antidiscrimination law and collective bargaining at the earliest appropriate stages and building on these early foundations in the various contexts and problem areas that follow. For example, employment discrimination laws make their first important appearance in Chapter Three, which presents the problem of discrimination and the basic theories of discrimination law in the context of employee selection. Students who have not studied employment discrimination law before this course will learn enough in Chapter Three to work their way through the additional contexts examined in the subsequent chapters, including compensation and benefits, work-related safety and injury, supervision (including sexual harassment), work-family conflicts, and termination. By concentrating on one context or problem area at a time, students will have an opportunity to consider the contextual goals, needs, and circumstances of the parties, and to learn the interrelationships among different employment statutes, common law rules, and constitutional rules.

Employment law continues to evolve rapidly. This Second Edition updates and expands topics raised in the First Edition, and it introduces some new ones. One expanded topic is the problem of proving discriminatory intent. The First Edition briefly referred to the “mixed motive” case as one variation of discriminatory intent; this Second Edition offers the seminal mixed motive case, *Price Waterhouse v. Hopkins*, for those who rightly suggested that mixed motive deserves closer attention. The First Edition noted the availability of the “collective action” remedy of the FLSA; this Second Edition acknowledges the increasing use and importance of this remedy by including an example, *Clausnitzer v. Federal Express Corp.* The First Edition introduced the problem of retaliation against protected employee conduct; the Second Edition expands the treatment of this problem by adding two recent Supreme Court cases, *Garcetti v. Ceballos* and *Burlington Northern & Santa Fe Ry. v. White*. Finally, this edition adds an entirely new topic in Chapter Four on Compensation and Benefits: Wages and the Labor Market. The principal case, *Todd v. Exxon Corp.*, provides a peek at employer methodology in setting wages and introduces some free market considerations with respect to the way employers and employees bargain over wages. Obviously, this topic also relates to collective bargaining, and it may be one of several occasions to generate student interest in collective bargaining or “labor” law as a further, separate course.

Richard Carlson

March 2009

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