

# **LAW OF THE WORKPLACE**

**Professor Hirsch**

Fall 2009

Phone: 974-6742

TR 1:00-2:15 p.m.

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Office Hours: Whenever my door is open or by appointment

This course will explore federal and state regulation of the employment relationship. A major focus will be state common-law doctrines, particularly the employment “at-will” doctrine and its erosion through contract, tort, and public policy claims. The course will also address various state and federal employment statutes, as well as protections that the federal constitutional provides employees.

This course will first address state regulation of employer-employee relationships, primarily developed through common-law. Covered topics include how to define an employee and duties that employees owe to their employers. It will then turn to the doctrine of employment at-will, examining its policy rationales and the evolving doctrines that have eroded the at-will rule. These doctrines include both contract-based theories, such as benefits deriving from handbooks and the implied contractual rights, and tort-based theories like the doctrines of bad faith, fraud, and intentional infliction of emotional distress. The course will also address exceptions to employment at-will based on the interests of society, including public-policy exceptions, protections for whistleblowers, antiretaliation statutes, First Amendment concerns, and privacy issues. Finally, the course will focus on several federal employment statutes that deal with issues such as overtime and minimum wage laws, family and medical leave, ERISA, and health and safety laws.

I will spend additional time on controversial issues that are now, or soon will be, in flux (for example, outsourcing and living wage laws). Thus, it is likely that I will need to notify you quickly of alterations to the reading assignments. I will rely heavily on e-mail for such changes, as well as other important information, so please check your e-mail regularly to ensure that you receive any last minute updates.

## EVALUATION

There will be two components to your final grade: (1) a three-hour, open-book final exam and (2) class participation.

### 1. Final Exam

The final, in-class, exam will be three hours and open book. My intent is for the exam to incorporate topics discussed in class as much as possible (no guarantees that I will succeed). The questions will be in essay form and will focus not only on the more traditional legal principles addressed in the readings, but also on more general policy and regulatory issues related to these principles that we have discussed in class.

### 2. Class Participation

Although I will not take attendance, I expect you to be in class and to be prepared. Intelligent participation in class discussions is important, and I will call on people without advance notice. If you are unprepared for a class, informing me *before* you are called on will generate a far more sympathetic ear. I will add or subtract points to final grades to reflect participation levels at both extremes.

## ASSIGNMENTS

### Texts:

1. Estreicher & Harper, EMPLOYMENT LAW (EH), required
2. Addendum, available on TWEN, required
3. Estreicher & Harper, EMPLOYMENT LAW STATUTORY SUPPLEMENT, optional
4. Bales, Hirsch, & Secunda, UNDERSTANDING EMPLOYMENT LAW, optional

### *Kennedy & Conkright*

- |                                  |  |
|----------------------------------|--|
| <b>Class 1</b><br><b>(08/20)</b> | <b>Who is an Employee?</b><br><b>Agency Law; Joint Employers</b><br>Restatement (Second) of Agency § 1 (cmt. b) (Addendum)<br>EH 28-35   |
| <b>Class 2</b><br><b>(08/25)</b> | <b>Who is an Employee?</b><br><b>Independent Contractors</b><br>Restatement §§ 2 & cmts.; 220 & cmts. c, d, e, h, i (Addendum)<br>EH 8-20<br><i>Dickman v. Meadow Homes</i> (Addendum) |

**Class 3**  
**(08/27)**      **Who is an Employee?**  
**Employer or Employee?; Vicarious Liability**  
EH 20-28  
*White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713 (Tenn. 2000)  
(Addendum)

**Class 4**  
**(09/01)**      **Duties of Employees:**  
**Duty of Obedience**  
Restatement §§ 376 (cmt. a); 377 (cmt. b); 379; 380 (cmt. c); 383; 385  
(cmts. a, b); 399; 418 (cmts. a) (Addendum)  
*Central Alaska Broadcasting, Inc. v. Bracale*, 637 P.2d 711 (Ala. 1981)  
(Addendum)

**Duty of Loyalty**  
EH 333-324 (note 1)  
*Efird v. The Clinic of Plastic and Reconstructive Surgery, P.A.*, 2003 WL  
23099692 (Tenn. Ct. App. 1993) (unpublished) (Addendum)

**Class 5**  
**(9/03)**      **Duties of Employees:**  
**Covenants Not To Compete**  
Restatement § 393 (cmt. e) (Addendum)  
EH 327-341  
*Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984)  
(Addendum)

**Class 6**  
**(09/08)**      **Duties of Employees:**  
**Trade Secrets and Other Confidential Information**  
EH 341-362  
*Wright Medical Technology, Inc. v. Grisoni*, 135 S.W.3d 561 (Tenn. Ct.  
App. 2001) (Addendum)  
Tennessee Uniform Trade Secrets Act (Addendum)

**Class 7**  
**(09/10)**      **Employment at Will:**  
**General Principles of the At-Will Doctrine**  
EH 39-45; 130-143; 146-148 (Model Act included)

**Class 8  
(09/15)**

**Employment at Will:  
What is “Good Cause”?**  
EH 91-99

**Exceptions to Employment at Will;  
Contract-Based Theories of Wrongful Termination:  
Express Oral Contracts**  
EH 49-50; 64-72

**Implied Contracts**  
EH 72-83

*Ball v. Overton Square, Inc.*, 731 S.W.2d 536 (Tenn. Ct. App. 1987)  
(Addendum)

**Class 9  
(09/17)**

**Exceptions to Employment at Will;  
Contract-Based Theories of Wrongful Termination:  
Employee Handbooks**  
EH 46-64

*Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981)  
(Addendum)

*Crittenden v. Memphis Housing Authority*, 1997 WL 370363 (Tenn. App. Ct. 1997) (unpublished) (Addendum)

**Class 10  
(09/22)**

**Exceptions to Employment at Will;  
Contract-Based Theories of Wrongful Termination:  
Implied Covenant of Good Faith and Fair Dealing**  
EH 86-94

*Brock v. Provident Life and Accident Insurance Co.*, 1996 WL 134943  
(Tenn. App. Ct. 1996) (unpublished) (Addendum)

**Tort-Based Theory of Wrongful Termination:  
Bad Faith Breach**  
EH 101-107

*Lawhorn & Associates, Inc. v. Patriot General Ins. Co.*, 917 F. Supp. 538  
(E.D.Tenn. 1996) (Addendum)

**09/24**            **Class Cancelled**

**Class 11**  
**(09/29)**            **Exceptions to Employment at Will;**  
**Fraud or Deceit**  
EH 107-116

**Tort-Based Theory of Wrongful Termination:**  
**Intentional Interference with Contractual Relations**  
EH 116-121  
*Forrester v. Stockstill*, 869 S.W.2d 538 (Tenn. 1994) (Addendum)

**Class 12**  
**(10/01)**            **Intentional Infliction of Emotional Distress**  
EH 121-123  
*Gantt v. Security USA, Inc.*, 125 S.Ct. 51 (2004) (Addendum)

**Defamation**  
EH 123-133

**Protection of Employees in the Public Interest:**  
**Public Policy Exception to At-Will Employment**  
EH 195-207

**Class 13**  
**(10/06)**            **Protection of Employees in the Public Interest:**  
**Public Policy Exception to At-Will Employment**  
EH 208-219  
*Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981)  
(Addendum)  
*Stein v. Davidson Hotel Co.*, 945 S W.2d 714 (Tenn. 1997) (Addendum)

**Review**  
Look over your notes to help you identify various causes of actions  
available for hypothetical that will be given

**Class 14  
(10/08)**

**Protection of Employees in the Public Interest:  
Whistleblowers**

EH 209-237

Tennessee “Whistleblower” Act, Tenn. Code Ann. § 50-1-304  
(Addendum)

*Guy v. Mutual of Omaha Insurance Co.*, 79 S.W.3d 528 (Tenn. 2002)  
(Addendum)

*Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999) (Addendum)

**Protection Against Retaliation:  
Implied Antiretaliation Protection**

EH 181-186

*Crews v. Buckman Laboratories International, Inc.*, 78 S.W.3d 852 (Tenn.  
2002) (Addendum)

**Class 15  
(10/13)**

**Protection Against Retaliation:  
Express Antiretaliation Protection**

EH 150-173

Review again, Tennessee Code § 50-1-304 (Addendum)

**10/15**

**Fall Break**

**Class 16  
(10/20)**

**Protection of Employees’ First Amendment Rights:  
Free Speech**

EH 233-254

**Class 17  
(10/22)**

**Protection of Employees’ First Amendment Rights:  
Free Speech, Cont.**

EH 254-263

**Political Freedom**

EH 227-232

**Free Association**

EH 263-267

**Class 18  
(10/27)**

**Privacy in the Workplace:  
Federal Constitutional Protections**

EH 268-291 (up to note 9), 293-294 (note 14).

- Class 19**  
**(10/29)**      **Privacy in the Workplace:**  
**Statutory, State, and Collectively Bargained Protections**  
EH 302-326  
*Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008)  
*Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002) (Addendum)
- Class 20**  
**(11/03)**      **Overtime, Minimum Wage, and State Wage Payment Laws:**  
**Minimum Wage / Living Wage**  
EH 363-376  
Estreicher & Schwab, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW 199-205 (Handout)  
Tennessee Tip Statute, § 50-2-107 (Addendum)
- Wage Payment**  
EH 404-411  
Optional (yes, optional) Reading: EH 2-7, 623-633, which gives a basic labor economics description; I'll give a very brief description at the start of class, but if you're unfamiliar with economics, this reading will be helpful)
- Class 21**  
**(11/05)**      **Overtime, Minimum Wage, and State Wage Payment Laws:**  
**Overtime: Salary Basis Test**  
EH 376-393
- Class 22**  
**(11/10)**      **Overtime, Minimum Wage, and State Wage Payment Laws:**  
**Overtime: Duties Test**  
EH 393-404  
New Exclusion Regulations (Addendum)
- Class 23**  
**(11/12)**      **FMLA**  
Rothstein & Liebman, pages 515-523 (Handout)  
*Perry v. Jaguar of Troy*, 353 F.3d 510 (6th Cir. 2003) (Addendum)
- Class 24**  
**(11/17)**      **Health and Safety Laws**  
Willborn, Schwab, & Burton: 1025-1032; 1034-1035; 1060-1074 (Handout)
- Class 25**  
**(11/19)**      **ERISA**  
EH 412-418; 465-476
- Class 26**  
**(11/24)**      **ERISA**  
EH 441-442 (fact section); 446-465
- 11/26**      **Thanksgiving**

**Class 27**  
**(12/01)**

**Recent Developments in Employment Law**

*To Be Determined*

*Conkright v. Frommert* (court deferral to ERISA plan administrator)

**12/08**

**EXAM**