

# Employment Law

Elon Law School

Winter 2021

Mondays & Wednesdays, 9:15 – 11:00 a.m.

Room 206

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## Description

This course surveys federal and state laws governing employment. Topics to be covered include establishing an employment relationship; recruitment & hiring; supervisory control and employee autonomy; confidentiality & competition; wages & hours; employee health & workplace injuries; termination of employment; and arbitration of employment disputes. Some of the issues touched on in this course are covered in further depth in other courses, such as Employment Discrimination and Labor Law.

After completing the course, you should be able to recognize and diagnose legal issues arising in the employment context, analyze those issues under the applicable law, and help clients avoid legal problems or pursue remedies when they arise. Simulation problems, including in-class discussion and take-home research and writing assignments, provide an opportunity to develop practical skills for representing clients in employment matters.

## Materials

### Required

Cases, statutes, and other assigned readings are available online via the course website, [emfink.net/EmploymentLaw](https://emfink.net/EmploymentLaw)

Rachel Arnow-Richman & Nantiya Ruan, *Developing Professional Skills: Workplace Law* (West Academic 2016)

### Suggested

Paul M. Secunda, Richard Bales, Jeffrey M. Hirsch, *Understanding Employment Law* (3d ed., Carolina Academic Press 2019)

## Policies

### Grading

Your final grade for the term will be based on four take-home research & writing problems (20% each; 80% total) and your in-class performance (20%). There will be no final exam or paper for this course.

The graded problem assignments (from the *Developing Professional Skills* workbook) and due dates are indicated in the “Schedule & Assignments” section of the syllabus.

### Attendance

Elon Law School has adopted the following attendance policy for all courses:

*The Law School administers a policy that a student maintain regular and punctual class attendance in all courses in which the student is registered, including externships, clinical courses, or simulation courses. Faculty members will give students written notice of their attendance policies before or during the first week of class. These policies may include, but are not limited to: treating late arrivals, early departures, and/or lack of preparation as absences; imposing grade or point reductions for absences, including assigning a failing grade or involuntarily withdrawing a student from the class; and any other policies that a professor deems appropriate to create a rigorous and professional classroom environment.*

*In case of illness or emergency, students may contact the Office of Student and Professional Life, which will then notify the student's instructors. A student may notify the faculty member directly of a planned absence and should refer to individual faculty members regarding any policy that may apply. In the case of prolonged illness or incapacity, the student should contact the Office of Student and Professional Life.*

Excessive absences (more than 2 classes) may result in a reduction of your grade.

### Disability Accommodations

For disability accommodation requests, contact the Elon Law Registrar's Office.

### Honor Code

The Law School honor code applies to all activities related to your law school study, including conduct during class and examinations.

## Outline & Assignments

### Introduction

#### Employment as a Socio-Legal Institution

4 January

- Karen Orren, Belated Feudalism: Labor, the Law, and Liberal Development in the United States, chap. 3 (1991)
- Elizabeth Anderson, "Lecture II: Private Government", 35 Tanner Lectures in Human Values, 94-118 (2016)

### The Employment Relationship

#### Employees

6 January

- Lemmerman v. A.T. Williams Oil Co., 350 S.E.2d 83 (N.C. 1986)
- Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903 (2018)
- California Assembly Bill No. 5 (2019)
- California Proposition 22 (2020)
- Wang v. Hearst Corp., 877 F.3d 69 (2d Cir. 2015)
- Livers v. Nat'l Collegiate Athletic Ass'n, No. 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018)
- Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019)
- Naomi B. Sunshine, Employees as Price-Takers, 22 Lewis & Clark L. Rev. 105 (2018)
- Richard R. Carlson, Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying, 22 Berkeley Journal of Employment and Labor Law 295 (2001)

#### Employers

11 January

- Amarnare v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 611 F. Supp. 344 (S.D.N.Y. 1984)
- Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003)
- Kology v. My Space NYC Corp., 177 F. Supp. 3d 778 (E.D.N.Y. 2016)
- EEOC, Enforcement Guidelines on Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, Notice No. 915.002 (Dec. 3, 1997)
- US Department of Labor, Joint Employer Status Under the Fair Labor Standards Act, Final Rule, 85 Fed. Reg. 2820 (Feb. 26, 2020)
  - Read the Executive Summary, Background, & Need for Rulemaking sections (pages 2820-24) and the rule itself (pages 2858-62). You may skip the remaining sections (2824-58).
- Browning-Ferris Industries of California, 362 NLRB No. 186 (NLRB 2015)
- Browning-Ferris Industries of California, 369 NLRB No. 139 (NLRB 2020)
- NLRB, Joint Employer Status Under the National Labor Relations Act, Final Rule, 85 Fed. Reg. 11184 (Feb. 26, 2020)
  - Read the Background, Summary, & Justification for Using Rulemaking sections (pages 11184-88) and the rule itself (pages 11235-36). You may skip the remaining sections (11188-235).

### Recruitment & Hiring

13 January

- In-Class Problem: The High-End Mechanic (Workplace Law, Chap. 3)
- Starbucks v. Superior Court, 168 Cal.App.4th 1436 (2008)
- Malorney v. B&L Motor Freight, Inc., 496 N.E.2d 1086 (Ill. App. 1986)
- Kadlec Medical Center v. Lakeview Anesthesia Associates, 527 F.3d 412 (5th Cir. 2008)
- N.C.G.S. § 1-539.12
- Civil Rights Act of 1964, Title VII
- EEOC, Race/Color Discrimination
- EEOC, Sex-Based Discrimination
- McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)
- Griggs v. Duke Power Co., 401 U.S. 424 (1971)
- Benjamin Levin, Criminal Employment Law, 39 Cardozo L. Rev. 2265 (2018)
- Seth Carnahan & Brad N. Greenwood, Managers' Political Beliefs and Gender Inequality among Subordinates: Does His Ideology Matter More Than Hers?, 63 Administrative Science Quarterly 287 (2018)
- Devah Pager, Bart Bonikowski and Bruce Western, Discrimination in a Low-Wage Labor Market: A Field Experiment, 74 American Sociological Review 777 (2009)

Problem Assignment 1: The Canine Trainer (Workplace Law, Chap. 1), due 15 January

## Supervision & Control of Employees

### Workplace Supervision & Control

20 January

- T-Mobile USA, Inc., 363 NLRB No. 171 (2016)
- Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (2004)
- Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006)
- Hernandez v. Hillsides, Inc., 211 P.3d 1063 (Cal. 2009)
- Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010)
- Bodewig v. K-Mart, Inc., 635 P.2d 657 (Or. Ct. App. 1981)
- Hall v. May Department Stores Co., 637 P.2d 126 (Ore. 1981)

### Workplace Harassment

25 January

- Civil Rights Act of 1964, Title VII
- EEOC, Harassment
- Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. App. 1986)
- Burlington Industries, Inc. v. Ellerth, 524 US 742 (1998)
- Faragher v. Boca Raton, 524 US 775 (1998)
- Ramit Mizrahi, Sexual Harassment Law After #MeToo: Looking to California as a Model, Yale Law Review Forum (June 18, 2018)

### Control Beyond the Workplace

27 January

- In-Class Problem: The Facebook Post (Workplace Law, Chap. 6)
- Rulon-Miller v. International Business Machines Corp., 162 Cal. App. 3d 241 (1984)
- Triple Play Sports Bar & Grille, 361 NLRB No. 31 (2014), *aff'd*, Threer D, LLC v. NLRB, No. 14-3284 (2d Cir. Oct. 21, 2015)
- California Labor Code § 980
- N.C.G.S. § 95-28.2
- Curay-Cramer v. Ursuline Academy, 450 F.3d 130 (2006)
- Alexander Hertel-Fernandez, How Employers Recruit Their Workers into Politics—And Why Political Scientists Should Care, 14 Perspectives on Politics 410 (2016)
- California Labor Code §§ 1101-1106

Problem Assignment 2: A Troublesome Crew (Workplace Law, Chap. 7), Due 29 January

## Confidentiality & Employee Loyalty

### Disclosure & Misuse of Confidential Information

1 February

- Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F.Supp. 1224 (M.D.N.C. 1996), *aff'd* in relevant part, 194 F. 3d 505 (4th Cir. 1999)
- Dalton v. Camp, 548 S.E.2d 704 (N.C. 2001)
- American Air Filter Co. v. Price, No. 16 CVS 13610, 2017 WL 2797794 (N.C. Super. June 26, 2017)
- NC Trade Secrets Protection Act, N.C.G.S. § 66-152 et seq.
- NC Property Protection Act, N.C.G.S. § 99A-2

### Restrictions on Future Employment

3 February

- TSG Finishing, LLC v. Bollinger, 767 S.E.2d 870 (N.C. App. 2014)
- Edwards v. Arthur Anderson, LLP, 44 Cal.4th 937 (2008)
- Conor Dougherty, How Noncompete Clauses Keep Workers Locked In, N.Y. Times (June 9, 2017)
- Conor Dougherty, Noncompete Pacts, Under Seige, Find Haven in Idaho, N.Y. Times (July 14, 2017)
- Alan B. Krueger & Eric A. Posner, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion, The Hamilton Project (Feb. 2018)

Problem Assignment 3: The Doctor Is In (Workplace Law, Chap. 5), due 5 February

## Wages & Hours

8 February

- In-Class Problem: At Your Service (Workplace Law, Chap. 11)
- Fair Labor Standards Act, 29 U.S.C. § 201 et seq.
- *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985)
- *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012)
- *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)
- N.C. Wage and Hour Act
- David Cooper and Teresa Kroeger, Employers Steal Billions from Workers' Paychecks Each Year, Economic Police Institute (May 10, 2017)

## Disabilities, Health, & Safety

FMLA & ADA

10 February

- In-Class Problem: The Sleepy Cashier (Workplace Law, Chap. 8)
- Americans with Disabilities Act, Findings & Purpose, 42 U.S. Code § 12101; Definition of Disability, 42 U.S. Code § 12102; Employment, 42 U.S. Code §§ 12111 et seq.
- Family & Medical Leave Act, Findings & Purpose, 29 U.S. Code §§ 2601; General Requirements for Leave, 29 U.S. Code §§ 2611-20; Miscellaneous Provisions, 29 U.S. Code §§ 2651-54
- *Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014)
- *Harrison v. Benchmark Electronics Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010)

Workers' Compensation & OSHA

15 February

- NC Workers' Compensation Act, N.C.G.S. §§ 97-1 et seq.
- *McGrady v. Olsten Corp.*, 583 S.E.2d 371 (N.C. App. 2003)
- *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, 543 SE 2d 209 (N.C. App. 2001)
- *Tompkins v. Morgan Stanley Dean Witter*, 766 N.Y.S.2d 923 (N.Y. App. Div. 2003)
- *Betro v. Salomon Smith Barney*, 779 N.Y.S. 2d 147 (N.Y. App. Div. 2004)
- *Durez Div. of Occidental Chemical Corp. v. OSHA*, 906 F.2d 1 (D.C. Cir. 1990)
- *Seaworld of Florida v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014)

## Terminating Employment

The At-Will Presumption

17 February

- *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872 (Minn. 1936)
- *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311 (1981)
- *Coppage v. Kansas*, 236 U.S. 1 (1915)
- Kenneth M. Casebeer, It's Not Just the Contract, It's Capitalism: Inequality and the Restatement of Employment Law Chapter on Termination, 21 Employee Rights & Employment Policy Journal 325 (2017)
- Clyde W. Summers, Employment at Will in the United States: The Divine Right of Employers, 3 U. Penn. Journal of Labor & Employment Law 65 (2000)
- Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chicago Law Review 947 (1984)

Contract & Reliance Claims for Wrongful Termination

22 February

- In-Class Problem: In-House at Big Pharm (Workplace Law, Chap. 2)
- *Woolley v. Hoffmann-La Roche, Inc.*, 491 A. 2d 1257 (N.J. 1985)
- *Harris v. Duke Power Co.*, 356 S.E.2d 357 (N.C. 1987)
- *Kurtzman v. Applied Analytical Industries, Inc.*, 493 S.E.2d 420 (N.C. 1997)

Tort Claims for Wrongful Termination

24 February

- *Fortune v. National Cash Register Co.*, 364 NE 2d 1251 (Mass. 1977)
- *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293 (1983)

- Salt v. Applied Analytical, Inc., 412 S.E.2d 97 (N.C. App. 1991)
- Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991)
- Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003)
- Garner v. Rentenbach Constructors Inc., 515 S.E.2d 438 (N.C. 1999)
- Hansen v. America Online, Inc., 96 P.3d 950 (Utah 2004)

### Statutory Claims for Wrongful Termination

#### 1 March

- Civil Rights Act of 1964, Title VII
- EEOC, Facts About Retaliation
- Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020)
- Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013)
- Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123 (Cal. 2005)
- Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980)
- Myers v. Howmedica Osteonics Corp., No. CV 14-248-M-DLC, 2016 WL 1259385 (D. Mont. 2016)

### Unemployment Compensation

#### 3 March

- NC Employment Security Law, N.C.G.S. § 96-1 et seq.
- Intercraft Industries Corp. v. Morrison, 289 S.E.2d 357 (NC 1982)
- Lindsey v. Qualex, Inc., 406 S.E.2d 609 (N.C. App. 1991)
- Lynch v. PPG Industries, 412 S.E.2d 163 (N.C. App. 1992)

Problem Assignment 4: The Smart-Tek IPO (Workplace Law, Chap. 4), due 12 March

## Employment Arbitration

#### 8 March

- In-Class Problem: The Aging Chocolatier (Workplace Law, Chap. 10)
- Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018)
- Jessica Silver-Greenberg & Michael Corkery, In Arbitration, a 'Privatization of the Justice System', N.Y. Times (Nov. 1, 2015)
- Jean Sternlight Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?, 54 Harvard Civil Rights-Civil Liberties Law Review (2019)

## Trending Topics: Local Government Protections for Precarious Employment

#### 10 March

- National Employment Law Project Fired on a Whim: The Precarious Existence of NYC Fast-Food Workers (Feb. 13, 2019)
- Keystone Research Center, Parking Industry Fuels Poverty in Philadelphia (March 2019)
- NY City Fair Work Week Law
- Julia Wolfe, Janelle Jones, & David Cooper, 'Fair Workweek' Laws Help More Than 1.8 Million Workers, Economic Policy Institute (July 19, 2018)
- Panos Mourdoukoutas, San Francisco and NYC Begin to See the Ugly Side of 'Fair Workweek' Laws, Forbes.com (Nov. 16, 2019)
- Alexia Elejalde-Ruiz, Chicago's Fair Workweek Law Takes Effect Wednesday as Businesses Grapple with Pandemic Uncertainty, Chicago Tribune (June 29, 2020)
- Juliana Feliciano Reyes, City Council Approves 'Just-Cause,' a Cutting-Edge Worker Protection Law, for the Parking Industry, Philadelphia Inquirer (May 16, 2019)
- Steven Greenhouse, Firing Workers on the Boss's Whim? New York Puts a Stop to That, The American Prospect (Dec. 24, 2020)