

CHAPTER ONE

The Regulation of Employment

Introduction to the Issue

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- Is an individual or business an employer, a principal, or some other legal entity when contracting with another for performance of work?
- Is the person hired an employee, an independent contractor, or some other legal entity?

Introduction to the Regulatory Environment

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- Freedom of market depends on freedom to contract
- Employers historically free to hire and discharge as they choose
- Rooted in Agency Law

Introduction to the Regulatory Environment

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- Origins of Agency Law
- Fundamentals of Agency Law

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- The party for whom another acts and from whom she or he derives authority is a “principal”
- The party acting on behalf of the principal is an “agent”
- An employee is the agent of the employer

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- The employee-agent is under duty to act only as authorized
- The principal is responsible for losses resulting from the agent’s unauthorized acts

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- The agent is liable to the principal for losses resulting from misconduct
- The principal has obligation to use care to prevent harm to the agent
- The relationship is based on good faith

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Who Constitutes an Employer?

- Employer – one who employs or uses others to do his or her work, or to work on his or her behalf – The Principal
- Specific statutes are more specific in defining number of employees required

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Introduction to the Regulatory Environment

- Who is Covered?
 - Employee v. Independent Contractor
- Independent Contractor
 - IRS 20-factor Analysis
 - Common-law Test
 - Economic Realities Test

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- Common-law agency test
 - Who has the right to control the manner in which the work is performed?
- IRS test
 - 20 factors to determine whether someone is an employee or an independent contractor
 - Derived from results of court judgments

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- Economic realities test
 - Considers whether the worker is economically dependent on the business
 - Looks at degree of control, worker's opportunity for profit or loss, worker's investment in the business, the permanence of the working relationship and the degree of skill required by the worker

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Why is it Important?

- Independent contractor – a person who contracts with a principal to perform a task according to her or his own methods, and who is not under the principal's control regarding the details of the work
- Distinction between independent contractors and employees significant for taxes, benefits, cost reduction plans and discrimination claims

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What is an Employee?

- “Captive” Employee
 - Employer has the *right or ability* to control the manner in which work is performed
 - Works for wages or salary
- “Contingent” Employee
 - Temporary Employee
 - On Payroll
 - Through Staffing agency

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- Contingent or temporary workers
 - Workers whose jobs are temporary, sporadic, or differ in any way from full-time employment
 - Includes workers hired through a staffing agency, seasonal and part-time workers and independent contractors
- The joint employer
 - Workers placed by staffing firms have the potential to create joint liability
 - Courts recognize joint and several liability between staffing firms and their clients

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- Employer payroll deductions
 - Employer responsible for FICA, RRTA, FUTA and IRS withholdings for employees
 - Independent contractors pay these taxes themselves
- Benefits
 - Employee benefits protected
 - Independent contractor provides his or her own benefits

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- Discrimination and affirmative action
 - Antidiscrimination statutes only protect employees
 - National Labor Relations Act only protects employees
- Cost reductions
 - Employees generally more expensive
 - Employees can generally quit at-will
 - Employers incur vicarious liability with employees but not independent contractors

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- Result of failure to appropriately categorize workers
 - IRS assesses harsh penalties for failure to pay FICA and FUTA
 - Employer may be liable under National Labor Relations Act
 - Employer may be liable under Fair Labor Standards Act
 - Employer may be liable for unpaid benefits

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- Employment probation
 - Probationary employees – individuals considered employees under the common-law test, but who still are not given full rights and benefits
 - Initial employment or rehire probation
 - Promotion or transfer probation
 - Disciplinary probation
 - Courts generally give employers broad discretion in probationary programs
 - Employers should apply rules, policies, and procedures in a fair and consistent manner

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- A Few of the Federal Laws
 - The Civil Rights Act of 1866
 - Title VII of the Civil Rights Act of 1964
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 - Age Discrimination in Employment Act of 1967
 - American with Disabilities Act
 - Fair Labor Standards Act
 - Rehabilitation Act of 1973

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- Is regulation necessary?
 - Employment laws designed to give employees equal footing
 - Economic forces may or may not protect against employment discrimination

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- Why do employers need to understand regulation?
 - Protection from legal action
 - To promote fairness, equality and opportunity
- Most employer/employee relationships are contractual
 - Noncompete agreements
 - Arbitration agreements

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The Employment-At-Will Doctrine

- Historically, both employer and employee free to leave at any time for any reason
- Equal opportunity legislation curtailed employers' rights to hire and fire
 - Legislation protected some classes
 - Other workers began to feel more empowered

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Exceptions to the At-Will Doctrine

- Courts have created exceptions to at-will doctrine
 - Employer breaches implied covenant of good faith or implied promise
 - Termination in violation of public policy
- Employees can try to sue for wrongful discharge and may receive damages or reinstatement

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- The Worker Adjustment and Retraining Notification Act (WARN)
 - Requires 60 days' notice to workers of plant closing or mass layoff for certain employers
 - Exceptions permitted in certain circumstances

Violation of Public Policy

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- Public policy determined by statutes or impact
- Employers' actions must have been motivated by bad faith, malice or retaliation
- Usually involves employee refusal to violate a law, exercising a legal right or duty, or disclosure of employer violations (whistle-blowing)

Violation of Public Policy

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- Breach of implied covenant to good faith and fair dealing implied in every contract
 - Implied contractual obligation to act in good faith in the fulfillment of each party's contractual duties
 - Recognized in some states as exception to at-will doctrine

- Breach of implied contract
 - A contract that is not expressed, but is created by other words or conduct of the parties involved
 - Employers need to be careful of pre-employment interviews
 - Employment policy manuals may form implied contract
- Promissory Estoppels
 - Promise, implied or expressed, that does not rise to the level of a contract

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- Whistle Blowing
 - Reporting an employer's wrong doings
 - Federal Whistle blowing Statute (1982) prohibits retaliation against defense contractor employees
 - Whistleblowers Protection Act (1989) extends protection to federal employees who report government fraud, waste and abuse
 - California legislation
 - Both private and public sector

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Introduction to Wrongful Discharge

- Judgments for wrongful discharge becoming more frequent
 - Compensatory damages – given to compensate party for direct losses due to injury
 - Punitive damages – given to punish wrongdoers and to deter similar conduct in the future
- Constructive discharge – employer creates environment in which employee has no option but to leave

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Other Wrongful Discharge

- Retaliatory Discharge under ADEA, ADA, EEOC, etc.
- Constitutional Protections
- Military Leave

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Other Wrongful Discharge

- Based on tort liability
 - Tort – violation of a duty other than under a contract
 - Result of intentional and outrageous behavior of employer that causes emotional distress to employee
 - May be limited by workers' compensation laws
 - May arise from defamation of employee or wrongful invasion of privacy

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- Workers' compensation
 - To protect employees from injury or illness resulting from employment
 - Contains no-fault statutes to further protect employees from claims of employee negligence by employers
 - Employers get freedom from lawsuits for workplace injuries
 - Sole remedy for workplace injuries

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Model Uniform Employment Termination Act

- An attempt to bring uniformity to state employment laws
- To promote predictability and uniformity
- Issued in 1991, but only one state (Montana) has adopted it

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Management Considerations

- Employers should strive for honesty and fairness
- Care should be taken in pre-employment interviews
- Employee appraisals should be job-related and should not contain overstatements
- Review all documentation as if it is a contract

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Management Considerations

- A written document helps identify the nature of the relationship with any worker
- Pay independent contractors by the job rather than by the hour
- Don't offer training to independent contractors
- Don't provide additional assistance to independent contractors