



### Employment Law for BUSINESS sixth edition

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<b>Evolution of the Employment Relationship</b>	<ul style="list-style-type: none"> <li>• Recruitment of appropriate candidates</li> <li>• Hiring</li> <li>• Testing</li> <li>• Performance appraisals</li> </ul>
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<b>Recruitment</b>	<ul style="list-style-type: none"> <li>• First step in the evolution of the employment relationship</li> <li>• Federal statutory regulation of recruitment</li> <li>• State employment law regulation</li> <li>• Common law             <ul style="list-style-type: none"> <li>– Fraud</li> <li>– Misrepresentation</li> <li>– Material facts</li> </ul> </li> </ul>
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### Application of Regulation to Recruitment Practices

- Advertisements
- Word-of-mouth recruiting
- Nepotism
- Promoting from within
- Venue recruiting
- Walk-in applicants
- Neutral solicitation
- Résumé collection concerns

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### Preferential Treatment and Affirmative Action

- Preferential treatment
  - A preference offered to members of a certain class that is not offered to members of other classes.
- Affirmative action
  - Provides for the most equal opportunity possible to members of various groups historically not having been provided equal opportunity, and may include preferential treatment, education programs, referral services, or preemployment preparation or training for certain groups.

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### Information Gathering and Selection

- The application process
- The interview
- Background or reference check, negligent hiring
- Reference checks: potential liability for providing references?
  - Compelled self-publication
- “After-acquired evidence” in defense in wrongful termination suits.
  - Documentation of failure to hire

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### The "Freedom" to Contract in the Regulatory Employment Environment

- Covenants not to compete ("noncompete agreements")
  - Forum selection clause
  - Uniform Trade Secrets Act
- Arbitration agreements in employment contracts
  - Binding arbitration
  - Federal Arbitration Act of 1925

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### Testing in the Employment Environment

- Preemployment testing
  - Tests to find the best individual for a position
  - Tests to ensure that the individual is free from problems that would prevent her or him from performing the position's functions
- Individual privacy
  - Testing is illegal when the invasion of privacy is "substantially and highly offensive to the reasonable person"

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### Legality of Eligibility Testing

- To be legally validated, an employer must show that the eligibility test is:
  - Job-related
  - Consistent with **business necessity**
- Job analysis data
- "Applicants-statistics" approach
- Test validity
  - Criterion-related validation
  - Content validation
  - Construct validation
  - Subgroup norming
  - Job-related requirement
  - Integrity and personality tests
  - Physical ability tests
  - Medical tests

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## Legality of Ineligibility Testing

- Why test?
  - Reduce workplace injury or to provide a safer working environment
  - Predict employee performance or deter poor performance
  - Reduce the employer's financial responsibility to the worker's compensation system
- Employee claims may be based on:
  - Constitutional or state statute requirements for workplace testing
  - Common-law invasion of privacy
  - Reckless or negligent infliction of emotional distress
  - Defamation
  - Wrongful discharge in violation of public policy

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## Polygraphs

- A polygraph measures:
  - Rate and depth of respiration
  - Cardiovascular activity
  - Perspiration
- Accuracy rates range from 90 to 50 percent
- Federal Employee Polygraph Protection Act
- Digital video functional capacity assessment

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## Drug and Alcohol Tests

- 70 percent of all illegal drug users are employed
- Drug-Free Workplace Act of 1988
  - Only applies to federal employees
  - Some private sector firms use the Act's guidelines
- Immunoassay test
- Radioimmunoassay of hair
- Drug-Free Workplace Act of 1998

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## Genetic Tests

- No **federal** legislation or regulations restrict the use of genetic testing
- Issues
  - Employers may discriminate based on the potential for a debilitating disease
  - Employees may not want to know results
  - Genetic testing is not perfect
  - Genetic irregularities may be considered protected disabilities under the Americans with Disabilities and Vocational Rehabilitation Act
- At least 26 **states** prohibit or limit genetic testing

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## Unique Considerations of HIV/AIDS Testing

- Inappropriate because:
  - For the test to be justified, it must serve a legitimate business purpose
  - The test reports only the subject's status as of several weeks or months in the past
- HIV-positive employees are protected
- Enzyme Linked Immunosorbent Assay test
- Western Blot test
- Testing of health care workers

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## Management Considerations: Testing

- A workplace substance abuse program should incorporate:
  - A written abuse policy
  - A supervisory training program
  - An employee education and awareness program
  - Access to an employee assistance program
  - A drug testing program, where appropriate
- Corporate approaches:
  - Mandatory testing
  - "Probable cause" testing
  - Random testing

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### Performance Appraisals, Evaluation, and Discipline Schemes

- The purpose of performance appraisals
- The potential for discriminatory effect
- Management by objective
- Checklist system
- Summated scale

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### Legal Implications of Performance Appraisal Systems

- Disparate impact
  - Four-fifths rule
  - Validation
- Disparate treatment
  - Employees rated subject to different criteria
- Defamation
  - False information/evaluation
- Negligent performance evaluations
  - Negligence in conducting a performance evaluation

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### Discipline

- Elements of a “fair” system:
  - Consistency in application
  - Specific guidelines for attaining the various levels of performance
  - Communicates information to employees
- Documentation
- Progressive discipline

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## Summary

- Provide all qualified employees equal employment opportunity.
- Use an ethic of nondiscrimination in the hiring process.
- Have a clear view of the job to be filled and who is the best person to fill that job.
- Conduct a job analysis and review the written job descriptions.
- Include **all essential** job functions in a job description.
- Encourage diversity in recruitment procedures.
- Establish efficient, effective hiring procedures.
- Review applications and only ask for appropriate information.

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## Summary (continued)

- Do a thorough background check on each new hire.
- Provide complete and honest references.
- Determine applicant eligibility or ineligibility using appropriate preemployment tests.
- Precisely describe what is required of each position to be evaluated; no "unwritten" qualifications should exist.
- Ensure that employees understand each of the standards pursuant to which they will be evaluated.
- Be sure that the bases for an evaluation are specific and job- or task-defined, rather than subjective, global measures of job performance.
- Request justifications of ratings wherever possible.
- Establish a formal appeals process.

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