discretion, not impulses, even with the looming threat of a legal action. The reality is that, in today's workplace, nearly every employee possesses at least one legally-protected characteristic (e.g., race, color, religion, sex, national origin, age, sexual orientation, or disability to name a few) or has engaged in at least one act of legally protected conduct (e.g., organized or participated in a union, filed for workers' compensation, complained about harassment or conduct the employee thought was unlawful or a waste of resources). An employee may brandish one of these characteristics like a shield, especially when that person's performance is being scrutinized. Employment laws do not shield workers from discipline when it is warranted, and supervisors should not be afraid to act due to a potential lawsuit. Indeed, the failure to discipline someone when it is justified creates problems as well by establishing precedent. It is better for managers to learn the law and confidently apply standards uniformly and objectively.

A final, compelling reason for administrators to delve into the law is so that they can capably assist in implementing worthy societal objectives. Equality, fairness, dignity, economic well-being, strong familial relationships, and healthfulness are all goals that employment laws impact—directly and indirectly. In notable instances, the government, the largest employer in the nation, has led the way in complying with new workplace laws and modeling desirable employer behavior, for example, by providing equal opportunities to women, minorities, and the disabled. An administrator who comprehends policy objectives as well as technicalities will reap personal satisfaction along with professional success.

Still, even leaders who diligently stay abreast of legal developments will find themselves perplexed on a regular basis. Another overarching paradox in the legal arena is this: Those in charge are expected to uphold the law, but inherent complexities and uncertainties make complying frustratingly difficult. Five commonly occurring factors explain much of this disconnect:

1. Legal requirements and interpretations of them are voluminous and dynamic, so managers sometimes have the experience that "the more you know, the less you know." A manager who seeks to review all available information on a topic before making a decision may be overwhelmed, and experience "paralysis by analysis." There is always more to know.
2. Supervisors should not hesitate to contact legal counsel for guidance, but formal opinions take time and counsel may be unwilling to stand behind initial, informal opinions.
3. Applying a statute is rarely straightforward. A law often contains a general principle, but the apparent simplicity of such a principle is usually qualified or conditioned on the intricacies and exceptions created by courts or executive agencies. For example, the Americans with Disabilities Act requires an employer to provide "reasonable accommodation" to disabled employees. But, what is *reasonable*? Must an employer pay for a sign language interpreter so a deaf employee can participate in a group meeting?
4. Basing decisions on judicial opinions is tricky because judges decide cases based on specific facts. Managers seldom have either the time or resources to research these decisions or decipher their distinctive facts; and even if they did, they rarely confront circumstances identical to those relied upon by a court,

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THE FOUNDATIONS OF EMPLOYMENT LAW

Legislation is a major source of employment law in the United States. Exhibit 2.2 lists the main *federal* laws and their purposes, but state statutes and local ordinances affect the employer–employee relationship as well. States and local governments, for example, have created civil service systems, raised the minimum wage above the national minimum, and passed anti-discrimination and anti-retaliation laws with broader protections than those found in national laws. Not surprisingly, these laws frequently conflict, and courts must decide whether one government body's law preempts another's. The term *preempt* generally refers to the displacing effect that federal law has on a conflicting or inconsistent state law under the Supremacy Clause of the U.S. Constitution (Article VI, Section 2), but it also refers to the displacing effect state laws have on conflicting local government ordinances. Confusion also occurs when Congress attempts to abrogate *sovereign immunity* by passing laws purportedly giving state employees the right to sue their state employers. The Eleventh Amendment to the U.S. Constitution creates a federal system in which each state is a sovereign entity that can be sued only if it consents to be sued. Congress can abrogate this immunity only if it unequivocally expresses its intent to do so and creates a remedy congruent and proportional to the wrong addressed. In recent years, the Supreme Court has held that Congress did not adequately abrogate this immunity in passing the Americans with Disabilities Act (Title I, Employment), the Age Discrimination in Employment Act, and the Fair Labor Standards Act of 1938; thus, state employees may not use these acts to sue their state employers for money damages. Only states, not other political subdivisions (such as cities), are immune from suits for damages under the Eleventh Amendment.

Judicial opinions are another source of employment law. The United States is a **common-law system.** Not all *rules* are written down in statutes or codes. Instead, *the law* is built up successively, case by case, in written opinions of appellate judges. As a result, to find the law on any given issue, in addition to reading any pertinent legislation, one must read court opinions on the matter. In contrast, in a **civil law system** comprehensive statutes or

Exhibit 2.1 Keeping Abreast

How do administrators stay up-to-date with legal changes? Most prefer to await policy directives from their organizations, and this works well normally, but sometimes employers are behind the curve and managers need current information. The human resource department is usually a good source to tap. Singular situations for line managers are routine events for human resource administrators, who have access to networks of specialists and subscribe to niche publications.

Still, it pays to develop an independent perspective. Professional association newsletters and conferences are ideal sources of information about the latest trends. The International Public Management Association (IPMA) publishes a manager-friendly newsletter that covers legal issues. Leading newspapers follow legal developments, and resources abound on the Internet. Of particular note is the Catherwood Library at the Cornell University School of Industrial and Labor Relations, which houses a vast collection of labor and employment law materials accessible through a user-friendly subject guide (http://www.ilr.cornell.edu/library) and the Society for Human Resource Management (SHRM) (http://www.shrm.org).

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making it difficult to determine whether minor distinctions should alter their decision making.

5. Legal requirements may be crosscutting, so that compliance with one directive conflicts with the requirements of another. For example, antidiscrimination laws require swift corrective action to stop harassment, but civil service laws require time-consuming, fairness-ensuring procedures prior to discipline.

In light of these many challenges, the prudent course for a manager would be to call a human resources professional or attorney before taking any action. While managers should consult with legal experts regularly, the reality is that they must make choices daily about how work is to be performed, often with little time for input from others. This chapter provides a basic overview of the law, which will help a manager understand the legal landscape and recognize which decisions can be made without consulting an expert and which ones cannot.

No matter how complex employment law on a particular topic appears to be, it typically is grounded in the balance of three often-competing interests: (1) the need of employers to manage their workforces and operations in efficient ways; (2) the rights that employees have to economic security, privacy, and other matters; and (3) the interest of governments to pursue social objectives through public policy. The balance struck varies from situation to situation and changes dynamically over time. Indeed, as attitudes, social norms, and economic conditions change, previously resolved issues may resurface (e.g., health insurance benefits for family members may extend to same-sex partners/spouses) and new areas of contention arise (e.g., whether veterans with posttraumatic stress disorder have a disability that must be accommodated).

In reading this chapter, note its emphasis on the rights and responsibilities of individual employees—in other words, *employment law*. Chapter 11 discusses *labor law*—the collective rights of employees to organize and bargain in public sector workplaces. Since 1960, the trend has been toward more direct government intervention into employees' individual relationships with employers, and the result has been a proliferation of employment law statutes, litigation, and court decisions. Still, in the United States union membership is higher in the public sector than in the private sector, so the *rules* applied to agency workplace issues are often found in collective bargaining agreements, not the law. In these instances, disputes are resolved through grievance procedures, not lawsuits. This chapter's focus on legal processes also means that alternative dispute resolution methods (see Chapter 10), such as arbitration and mediation, receive little attention here. Yet, more than 90 percent of employment-related disputes initiated in judicial forums settle before trial, often as a result of mediation.

The chapter begins with a review of a few foundational principles and then shifts to a discussion of specific activities. Disciplinary procedures, speech and political activity, compensation and scheduling, health and safety, and the individual liability of employees are examined. Next, searches, pre-employment investigations, and post-employment references are reviewed. The last part of the chapter explains how anti-discrimination and anti-retaliation laws affect the employment relationship. For each topic the relevant laws are identified and discussed. After studying this chapter, a student should be able to examine a policy, such as a dress code, explain the legal provisions that apply to it, and determine whether it is permissible. Checking agency decisions against current regulations to ensure they are lawful is an ongoing process. Exhibit 2.1 discusses strategies for staying up-to-date.

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Exhibit 2.2 Overview of Selected Federal Employment Laws

42 U.S.C. § 1981 (Civil Rights Act of 1866)	Prohibits intentional discrimination based on race or ethnicity in the making and enforcement of contracts (including employment).
42 U.S.C. § 1983 (Civil Rights Act of 1871)	Prohibits public sector employment discrimination based on race, color, religion, sex, or national origin. Section 1983 is the exclusive tool for bringing suit against individuals acting under "color of law" or public entities for the violation of rights guaranteed by the United States Constitution, including the free exercise of speech, religion, and expression.
42 U.S.C. § 1985	Prohibits conspiracies to deprive citizens of equal protection of the law or equal privileges and immunities under the law. Can be used to challenge public sector employment discrimination with Section 1983.
Age Discrimination in Employment Act	Protects workers age 40 and over for adverse employment actions based on age, including hiring, promotion, and termination decisions.
Americans with Disabilities Act	Prohibits discrimination against qualified individuals with disabilities. After the U.S. Supreme Court issued several decisions narrowing the ADA's scope, Congress amended the Act in 2008 and broadened its application.
Civil Rights Act of 1964, Title VII	Prohibits employers from discriminating against employees in hiring, promotion, and termination decisions based on race, color, religion, sex, or national origin.
Civil Rights Act of 1991	Amended Title VII and other employment laws to provide the right to trial by jury and the recovery of emotional distress damages.
Consolidated Omnibus Budget Reconciliation Act of 1985	Mandates an insurance program giving some employees the ability to continue employers' group health insurance coverage after leaving employment.
Consumer Credit Protection Act	Regulates the use of credit reports by employers. Limits the amount of an employee's earning that may be garnished and protects employees from being discharged because their wages have been garnished.
Electronic Communications Privacy Act	Title I, The Wiretap Act, prohibits employers from intercepting wire, oral, and electronic communications. Title II, the Stored Communications Act, prohibits employers from intentional unauthorized access to stored communications.
Employee Polygraph Protection Act	Limits the uses of lie detectors by private employers with respect to employees and job applicants. The act does not apply to governmental employers.
Employee Retirement Income Security Act	Establishes minimum standards for health and pension plans in private industry.

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(Continued)

Act	Description
Equal Pay Act	Prohibits employers from paying men and women different wage rates for equal work on jobs that require equal skill, effort, and responsibility and are performed under similar working conditions.
Fair Labor Standards Act	Sets minimum wage and overtime pay standards with notable exceptions, sets standards for record keeping, and regulates the employment of minors.
Family and Medical Leave Act	Requires employers of 50 or more employees and all public agencies to provide up to 12 weeks of unpaid leave to eligible employees for the birth and care of a child, adoption and placement of a child, or serious illness of the employee or immediate family member.
Genetic Information Nondiscrimination Act of 2008	Prohibits employers from discriminating on the basis of genetic information, requiring genetic testing, purchasing or collecting genetic information, and disclosing genetic information.
Health Insurance Portability and Accountability Act	Protects the security and privacy of health data.
Immigration Reform and Control Act	Prohibits employers from knowingly hiring or recruiting immigrants who do not possess lawful work authorization.
Occupational Safety and Health Act	Regulates safety and health conditions, including exposure to a variety of health hazards.
Patient Protection and Affordable Care Act	Requires employers with at least 50 workers to provide health insurance coverage to any employee working an average of 30 hours per week.
Pregnancy Discrimination Act	Amendment to Title VII, prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions.
Rehabilitation Act of 1973, Sections 501 and 505	The first civil rights statute for workers with disabilities; applies to entities that are recipients of federal funding.
Uniformed Services Employment and Reemployment Rights Act	Protects the employment rights of National Guard and Reserve members called up to active duty.
Whistleblower Protection Act	Protects personnel from retaliatory adverse action when, in good faith, they object to agency misconduct.

codes enacted by a legislative body cover almost every subject. Increasingly in the United States, specialized federal and state statutes do provide comprehensive legal rules on issues, but legislatures still leave gaps for courts to fill, so judicial interpretations remain important in developing and memorializing the law.

A manager seeking to apply the law expressed in a judicial opinion should be aware that only controlling court decisions must be followed. The United States adheres to the principle of **stare decisis**, which means that courts generally should abide by precedents established by superior courts. In essence, the federal and state court systems have a

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pyramid structure. In the federal system, the U.S. Supreme Court sits at the pinnacle, the 12 federal circuit courts (appellate courts) make up the middle, and the 90 federal district courts (trial courts) constitute the base. For a court's opinion to be a *controlling precedent* or *binding precedent*, it must have been written by a court directly up the pyramid from the lower court. The Supreme Court's interpretation of federal law controls all the circuit and district courts, but a circuit court's opinion binds only the few district courts located directly below it on the pyramid. Often, circuit courts disagree on a particular principle, and a district court is restrained by the ruling of its particular circuit court; however, if a circuit court has not ruled on an issue, a district court may choose to embrace a well-reasoned, nonbinding opinion of another circuit, treating it as a *persuasive precedent*.

Federal and state constitutions create legal rights as well. In the U.S. Constitution, the First, Fourth, Fifth, and Fourteenth Amendments conspicuously shape the employment relationship. Constitutional rights may be asserted both defensively and offensively. The most common defensive use is by criminal defendants. A person asserts a right offensively by bringing a civil suit. In litigation, a constitutional right frequently is paired with a statute implementing that right. For example, 42 U.S.C. § 1983 (commonly referred to as Section 1983) allows a person whose constitutional right has been violated to sue the responsible public official or governmental body for money damages, and, like many other federal laws cited above, provides attorney's fees for the prevailing party.

With all these potential sources of law, where should a manager who wants to prohibit employees from wearing sagging pants start looking? If a federal agency enforces or administers a statute, the agency's rules, regulations, compliance manuals, and guidances provide detailed explanations about how to apply it. The **Equal Employment Opportunity Commission (EEOC)** and the U.S. Department of Labor are responsible for most federal employment laws, and they publish voluminous materials on those laws. State agencies enforce and administer state employment laws and publish related materials, but they rarely provide the comprehensive assistance that federal agencies do. While an agency's interpretation of a statute is not binding on a court, courts generally defer to agencies because of their expertise.

As you read this chapter, notice the differences among criminal, civil, and administrative laws and procedures. A criminal law dispute occurs in court and involves the government on one side and a person believed to have violated the criminal code on the other. The government seeks to punish the defendant, and extensive procedures focus on protecting him or her from wrongful conviction: A defendant is entitled to a jury, is provided an attorney if unable to afford one, does not have to testify, and can be found guilty only if the government proves its case very convincingly (beyond a reasonable doubt). Civil law disputes take place in courts, usually but not always before juries, and involve private or government parties seeking to determine their rights under the civil laws; often the goal is to obtain an award of money to compensate for a physical or economic injury. Each party usually pays its own attorney or self-represents. The person bringing the claim must prove it by a comparatively low standard (a preponderance of evidence), but elaborate procedures still allow each side to vigorously present its own allegations and undermine those of the opponent. The emphasis remains on protecting the parties from an erroneous result; consequently, these cases take a long time. Exhibit 2.3 shows the progression of a basic civil lawsuit.

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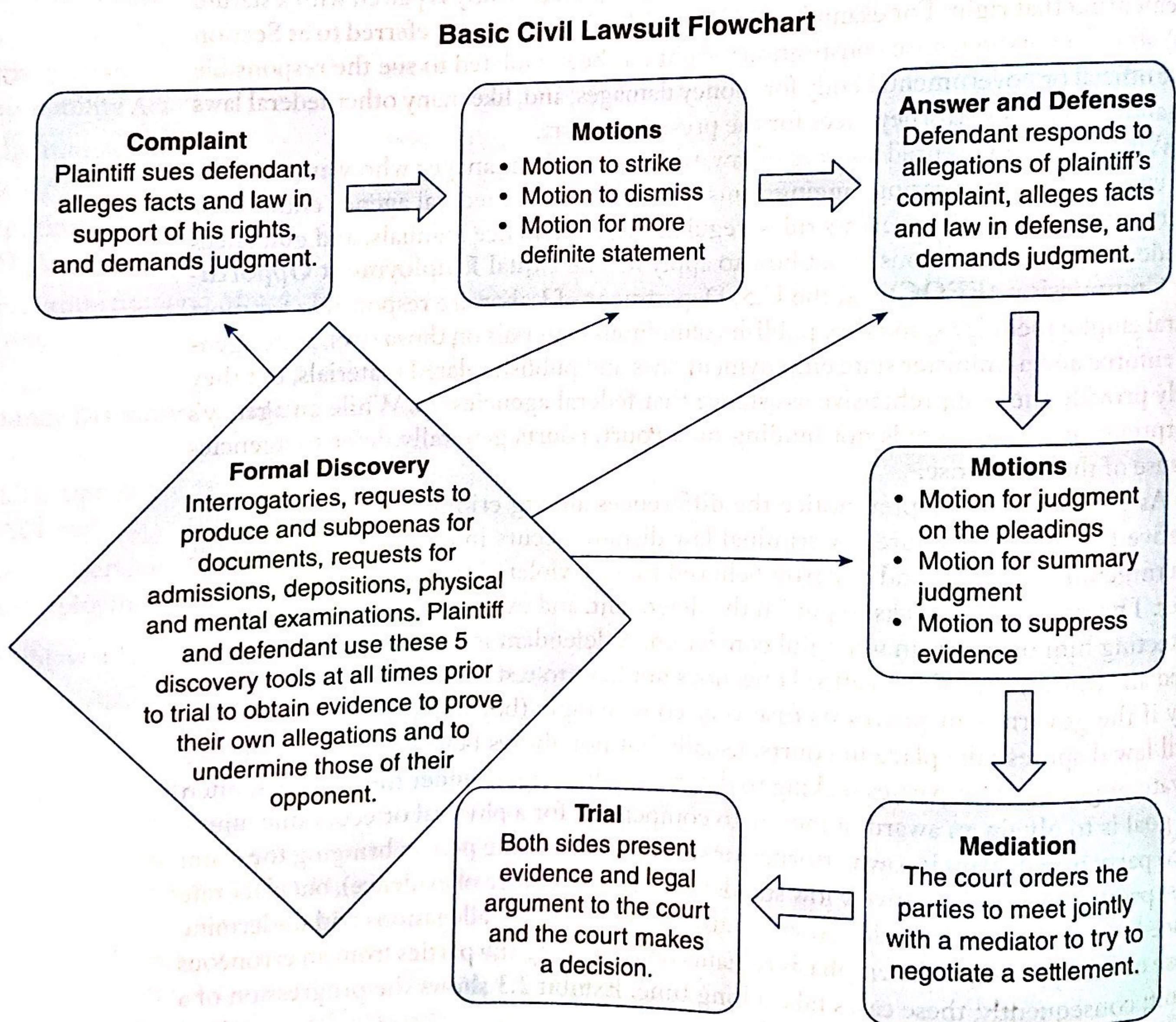
Administrative law disputes are handled by agencies. Typically, an administrative law judge holds an evidentiary hearing to determine the facts, and an agency head makes a final decision. The process permits politically selected agency leaders to influence decisions and shape policy. Disputes involve the government on one side and a person challenging a decision of the government (denying or disciplining a license, enforcing a regulation, denying a benefit) on the other. Procedural rules favor speedy resolution, with short timelines, few motions, and little discovery. Parties pay their own attorneys, and employees often self-represent because they cannot afford counsel. Keeping these three types of laws separate analytically can be difficult because an employee may violate all types in one incident. Consider the example of a police officer who unnecessarily strikes and injures a person during

Exhibit 2.3 Basic Civil Lawsuit Flowchart



Source: Adapted from a flowchart by the legal self-help company Jurisdictionary (http://www.jurisdictionary.com).

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an arrest: A prosecutor may charge the crime of battery, the victim may sue for civil money damages, and the police standards commission may discipline the officer's certification.

The last foundational principle to bear in mind throughout this chapter is the notion of a *remedy*. When evaluating alternative courses of action, for each one a manager should ask, "If a lawsuit is filed and the employer loses, what will the remedy be?" The remedy *is* the concrete risk. Directing a driver to operate a school bus with faulty brakes could be costly, but firing a habitually tardy nurse who should have been suspended probably means reinstating him. The remedy is determined by the legal claim being made and the losses suffered. Possibilities include hiring, reinstatement, retroactive seniority, reasonable accommodation, back pay, front pay, declaratory statement, injunction, court-ordered affirmative action, medical costs, emotional distress damages, punitive damages, attorney's fees, expert witness fees, and litigation costs. In addition to quantifying the risk, the remedy is illuminating for another reason: It reveals the importance that society places on the right involved. A famous legal maxim holds that "where there is no remedy, there is no right."

THE EMPLOYMENT RELATIONSHIP

An employment relationship is formed when parties exchange promises about duties, wages, hours, and benefits. Employers have policies and forms that define the arrangement, but legislatures and courts have added terms to it. **At-will employment** is the relationship predominantly used by American businesses, and governments use it as well (Bowman & West, 2007). In its pure form, it means that if the parties do not specify the duration of employment—and most do not—either party may terminate the employment *at any time, for any reason (other than an unlawful one)*. Supporters claim that the relationship upholds freedom of contract and fairly balances the interests of employers and employees because either may sever the relationship. But critics point out that many workers need their jobs more than their employers need them, so at-will employment opens the door to abuse. It permits an employer to refuse to hire members of disfavored groups, to engage in opportunistic firings, and to punish employees for behaving in socially undesirable ways. It also subjects families to uncertainty and hardship based on employers' whims. To ameliorate these effects, lawmakers and courts have carved out exceptions to at-will employment that make it unlawful for an employer to take adverse action against an employee for specific *bad* reasons. The civil rights laws are the most well-known example. As a result of these exceptions, at-will employment now means something different: If the parties do not specify the duration of employment, either party may terminate it *at any time, for any lawful reason*. From a manager's perspective, this means that even at-will employees have many rights that cannot be violated.

In the public sector, many employees do not serve *at will*. Schools and colleges use annual contracts to ensure that teachers stay for the entire academic year, and they use tenure systems to protect teachers' academic freedom. Governments use civil service systems to guard against patronage. In these relationships, employers promise employees that they will be discharged only *for cause*. Legislatures and courts have added conditions to these arrangements as well. The Supreme Court has ruled that when a law, rule, or understanding creates an expectation of continued employment in a government job, then employees possess a constitutionally protected *property interest* that cannot be taken away

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without *due process*. The Supreme Court has also ruled that when a public employer takes adverse action against an employee it is *state action*, so federal and state constitutional protections apply. As a result, employees who exercise freedom of speech or freedom of association or assert the right to privacy at work cannot be punished if their conduct falls within the ambit of one of these constitutional protections. As you read the next section, consider whether these arrangements in the public sector create a model that, compared with at-will employment, more equitably balances the interests of employees, employers, and the government, or whether they unduly limit the flexibility of government employers.

BALANCING EMPLOYER, EMPLOYEE, AND SOCIETAL INTERESTS

This section examines the law's attempt to balance employer interests, employee rights, and social objectives in six areas: furnishing due process, taking adverse personnel action, safeguarding free speech and political activity, providing compensation and work schedules, protecting health and safety, and holding employees individually liable.

Procedural Due Process and the Taking of Property and Liberty

The Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states) forbid the taking of "life, liberty, or property without due process of law." Odd as it may seem, based on the definition of the word *property* in these amendments, this includes the right to continued *public employment*, referred to as *a property interest*. When an employee has a property interest in a job, he or she also has procedural **due process rights**. As a result, the employee may not be disciplined seriously unless procedures designed to guarantee fairness are followed. Managers (and courts) grapple with two questions that flow from this proposition: (1) What guarantees create a property interest? and (2) If one exists, what procedures must be followed to give an employee a fair opportunity to affect the result?

In *Board of Regents v. Roth* (1972), the Supreme Court explained what promises raise government employment to the level of a property interest. The employee must have a legitimate claim of entitlement to continued employment based on codified rules or explicitly agreed-upon contract terms. Generally, academic employees with tenure and classified civil servants with permanent (non-probationary) status and the statutory right to be discharged only *for cause* fit this description.

As for the procedures required, prior to 1985, it was understood that a government employee with a property interest who was facing serious discipline was entitled to notice of the charges and a *post-termination hearing* in front of a neutral judge. In *Cleveland Board of Education v. Loudermill* (1985), the Supreme Court held that *due process* demanded an additional middle step—*a pre-termination hearing*. Before making a decision, the employer must give the employee notice of the charges, an explanation of the evidence, and an opportunity for the employee to present his side of the story. Only in rare situations when an employer must act quickly may a pre-termination hearing be omitted.[1]

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The Due Process Clause also prohibits governments from depriving citizens of their *liberty* without a fair process. When a public employer discharges someone for a stigmatizing reason, such as an immoral act, and the allegation becomes publicly known, the employee, on request, must be provided a hearing to have the chance to clear her name. Otherwise, her ability to obtain another job is unjustly limited. In practice, this means that sometimes a probationary or exempt civil servant still must be provided a post-termination hearing. If the employee prevails, the discipline is nullified, but she is not reinstated; her remedy is her liberty to seek other jobs with a clean record.

Adverse Action

Discipline of or the negative consequences to an employee (covered in Chapter 10) are two examples of the concept referred to as **adverse action**. This term encompasses any action which constitutes a serious and material harm to the employee, such as termination, suspension, salary reduction, and demotion. Other measures which affect employees (e.g., reprimands, transfers, alteration of duties, changes in schedule, denials of promotion), may not be serious or material enough to meet the legal definition of adverse action for anti-discrimination and other laws, but may be sufficient to trigger protections under anti-retaliation laws. The right to challenge adverse action has been created chiefly by statute. It is a critical component of civil service systems designed to ensure that discipline and hiring decisions are based on merit, not patronage. Civil servants in classified (covered) positions have this right. Probationary employees and individuals in unclassified (uncovered or exempt) positions do not, so they are truly *at will*. Staff members who initially have the right to challenge adverse action may lose it by being promoted to an exempt position or by having their positions reclassified as exempt, a practice utilized extensively by some states (Bowman & West, 2007). Adverse action rights are created by statute, but the procedures also provide the *due process* required by the U.S. Constitution. In addition, the evolving definition of what is and what is not an adverse action is largely the product of appellate court decisions.

Either unsatisfactory performance or misconduct may prompt adverse action. The process followed often differs depending on which is involved. The probationary period is the ideal time to weed out employees who are unable to do their jobs. Once they become permanent, prior to adverse action for unsatisfactory performance, an employer may be required to notify them of deficiencies, provided them with an explanation, give remedial assistance if necessary, and allow time to improve. The purpose of the process is to improve performance by reducing deficiencies. Written performance evaluations (discussed in Chapter 10) are critical for identifying initial problems as well as improvement or lack thereof. As a general matter, for private employers, this process is required by the custom and practice of the employer; that is, how has the employer dealt with this in the past?

The process used to punish misconduct often is quicker. Serious discipline usually involves the supervisor, a high-level manager, a representative from the personnel department, and one of the employer's attorneys. This group reviews the supervisor's recommendation for discipline and, if necessary, requests an investigator (within the agency or from the outside) to interview witnesses, review documents and physical evidence, and prepare a report. After reviewing the information gathered, the group determines

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whether the employee's conduct violates agency standards—the *cause* question—and, if it does, selects a penalty. If the alleged misconduct is serious, when the employee is apprised of the charges she also may be suspended and perhaps even escorted from the premises.

Typically, a civil service statute or rule lists offenses that provide cause for discipline. Florida's civil service statute, for example, prohibits "poor performance, negligence, inefficiency or inability to perform assigned duties, insubordination, violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime" (Florida Statutes, 2018). Agencies maximize their discretion by making lists of offenses open-ended (e.g., "misconduct includes, but is not limited to") and by incorporating standards located outside the statute (i.e., "violation of the provisions of law or agency rules" incorporates all rules, directives, policies, regulations, and internal operating procedures promulgated by the agency and its subdivisions). Wherever they are located, agency *cause* standards should be clear enough to apprise employees of what is prohibited and to prevent unbridled agency discretion (Gertz, 2001).

Public employees may be disciplined for off-duty conduct within limits. Usually the charge is "conduct unbecoming a public employee" or "conviction of any crime." Law enforcement officers and teachers, especially, are held to high standards, but all government leaders worry about their agencies' reputations being sullied by off-duty behavior. Generally, a *nexus*, or demonstrable connection, must exist between the off-duty misconduct and the job. A school employee, for example, likely could be terminated for any off-duty misconduct involving illegal drugs due to the government's strong interest in maintaining drug-free schools. However, a firefighter arrested for off-duty conduct which is unrelated to his duties may retain his job.

In civil service systems, the right to challenge adverse action includes the right to an administrative hearing. Governments have created quasi-judicial administrative agencies to hear these disputes, such as the U.S. Merit Systems Protection Board and state civil service commissions. An administrative law judge hears the case and determines what happened, whether those facts justify discipline, and, if they do, whether the penalty chosen is fair. An agency head or panel reviews the decision. Timelines are expedited. Unions provide attorneys for union members; nonmembers in highly compensated positions often hire private attorneys, but nonmembers in lower salary ranges often represent themselves. An employee who prevails will have the discipline nullified or reduced, and may receive back pay and attorney's fees. Sometimes an employee has the choice of challenging adverse action through an administrative hearing or through the grievance procedure in a collective bargaining agreement, but, depending on the terms of the agreement, a grievant may have to pay at least some share of the cost of arbitration.

On a related matter, a person who is terminated may seek partial, temporary replacement wages while seeking another job by filing for **unemployment compensation**. This federal–state insurance program is funded by employers through a tax on payrolls. Employers with repeated claims pay higher tax rates. An employer may prevent a former employee from obtaining benefits (and raising the employer's tax rate) by proving at a hearing that the individual voluntarily resigned or was discharged *for cause*. Accordingly, this administrative hearing often covers the same issues and involves the same parties as the adverse action hearing.

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Freedom of Speech

Citizens do not relinquish their **free speech rights** when they enter public employment, but they do accept restrictions on them, as discussed by the paradox of democracy in the introduction. The First Amendment, which prohibits the making of any law abridging freedom of speech, protects a citizen's right, in limited circumstances, to speak out on matters of public concern. In *Pickering v. Board of Education* (1968), the leading case in this area, the Supreme Court balanced employees' speech rights against the need for workplace efficiency. The case concerned a teacher who wrote a letter to a local newspaper criticizing the school board's funding priorities and subsequently was dismissed for disloyalty and insubordination. The Court found that the letter addressed a "matter of public concern" and had not unduly disrupted operation of the school district. Consequently, it held that the board could not fire Pickering. Out of this decision grew the two-part "*Pickering* balancing test." To determine whether an employer may take adverse action, a court asks (1) whether the speech was a matter of public concern and (2) whether the disruptive nature of the speech justified the adverse personnel action. To enforce his or her First Amendment rights, an employee must file an action in court.

Trying to determine what constituted a "matter of public concern" proved confusing, so in the 1983 case of *Connick v. Myers* the Supreme Court clarified that the speech must relate to a "political, social or other concern of the community." *Connick* centered on a district attorney who was dismissed from his position after he circulated a questionnaire to coworkers soliciting their opinions about office management. His *speech* did not qualify for protection, according to the Court, because it concerned primarily matters of personal grievance, not public policy. After *Connick*, courts repeatedly held that frustrated, disgruntled staff members who vented their personal disagreements were not speaking about matters of public concern.[2]

Confusion also arose about whether a comment made as part of person's job was protected. In *Garcetti v. Ceballos* (2006b), the Supreme Court ruled that an employee's expression "made pursuant to official responsibilities" is *not protected* by the First Amendment. Ceballos, a district attorney, wrote a memo to his superiors recommending that a case not be prosecuted because he suspected that the sheriff had lied in the affidavit used to secure the search warrant. Ceballos claimed that he was moved to a less desirable position, transferred to a different courthouse, and denied promotion as a result (*Garcetti v. Ceballos*, 2006a). The Court denied his claim because he made the comment as part of his job. In light of *Garcetti*, a supervisor considering disciplining an employee for an expression should ask a preliminary question before applying the *Pickering* balancing test: Was the speech made pursuant to the employee's official responsibilities? If the answer is *yes*, the First Amendment is no impediment.

Critics of *Garcetti* claim that it will deter employees from raising legitimate concerns, and that **whistleblower statutes** will not overcome this reticence (Gertz, 2007). Almost all jurisdictions have enacted legislation protecting personnel from retaliatory adverse action when, in good faith, they object to agency misconduct. But safeguards are limited. For example, the Whistleblower Protection Act of 1989 shields a federal employee's disclosure of gross mismanagement, waste of funds, illegal acts, misuse of funds, and danger to public safety or health. A victim initially must seek assistance from the U.S. Office of Special Counsel, an agency charged with stopping prohibited personnel practices.

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If unsatisfied, the whistleblower may request a hearing before the U.S. Merit Systems Protection Board, where the person must pay for an attorney and prove that the adverse action was retaliatory. An employee may not initiate a civil action for money damages in court. In 2012, a unanimous Congress passed and President Obama signed the Whistleblower Protection Enhancement Act of 2012, which closed judicially-created loopholes to and enhanced and broadened the protections afforded employees under the original Whistleblower Protection Act of 1989. Generally stated, the amendments clarified what disclosures received protection, enhanced the remedies available to a whistleblower, and provided procedural enhancements which benefit employees. State whistleblower statutes vary, and some, such as Florida's Public Whistle-blower Act, provide for temporary reinstatement, full reinstatement (or front pay alternatively), back pay, lost benefits and attorney's fees.

Political Activity and Affiliation

During the 19th century, public employees routinely campaigned and raised funds for the political parties or executives who appointed them. Now, government workers are limited in the political activity in which they may engage by the federal **Hatch Act of 1939**, as amended, and state and local *little Hatch Acts*. These laws restrict a person's First Amendment right to political expression, which courts allow because they reduce political coercion of the bureaucracy and promote a nonpartisan, efficient government workforce. Congress retreated from some initial broader restrictions because it feared that denying so many Americans their right to engage in political activity was negatively affecting the quality of democracy. The impact of this retreat—whether it is re-politicizing the bureaucracy—is unclear (Bloch, 2005; Bowman & West, 2009). In late 2012, Congress passed the Hatch Modernization Act of 2012, allowing most state and local employees to run for partisan political office. With the change, the federal Hatch Act no longer prohibits state and local government employees from running for partisan office unless the employee's salary is paid for completely by federal loans or grants.

The U.S. Office of Special Counsel publishes a guide to the Hatch Act, provides advisory opinions to government employees contemplating political activity, and prosecutes violators. In 2014, that office published a revamped guide, which can be viewed and downloaded from the office's website at: https://osc.gov/Resources/HA%20Pamphlet%20Sept%202014.pdf.

What happens when a victorious political leader takes office and wants to replace current civil servants with loyal party supporters? Classified civil servants, who may be discharged only *for cause*, are protected, but exempt civil servants, who serve *at will*, are not. Here, the First Amendment potentially bars the way because it forbids adverse action based on beliefs as well as on speech. In *Elrod v. Burns* (1976), the Supreme Court held that *patronage dismissals* are allowed only if the person being discharged occupies a policy-making or confidential position. Later, in *Branti v. Finkel* (1980), the Court refined its ruling and explained that party affiliation must be necessary for effective performance of the job. A decade later, in *Rutan v. Republican Party of Illinois* (1990), the Court extended this holding to personnel actions other than discharge—including hirings, promotions, transfers, and recalls. Now, a government leader who uses party affiliation for any of these decisions must show that it is necessary for job performance.

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Compensation and Scheduling

If a worksite is unionized, the collective bargaining agreement likely addresses the matter of wages. The primary statute covering the right to compensation is the **Fair Labor Standards Act of 1938 (FLSA)**, enforced and administered by the U.S. Department of Labor. The act prohibits child labor, mandates a minimum wage, and requires that overtime be paid, at one and one-half times the regular rate, for all hours in excess of 40 per week. State and local governments may substitute compensatory time off (referred to as *comp time*), at the rate of time and one-half, for overtime. The FLSA applies to federal, state, and local employees, but lawsuits against states by private citizens are barred by Eleventh Amendment immunity. Many states and localities mandate a minimum wage higher than that in the FLSA.

Certain FLSA provisions regularly are the foci of lawsuits—for example, the *white-collar exemptions*. These exemptions were created to excuse employers from paying overtime to highly-compensated and managerial employees. Employees engaged in an executive, administrative, or professional capacity are exempt from both minimum wage and overtime requirements. An exempt individual must be paid on a salary basis, earn at least $455 per week (just over $23,000 annually), and meet certain criteria showing supervisory duties, independent decision-making, and/or management responsibilities. In 2013, more than 7,000 FLSA lawsuits were filed, many of which claimed that an employer misclassified an employee as exempt to avoid paying overtime and minimum wages. Another way organizations sidestep FLSA requirements is by mislabeling workers as *independent contractors* or *interns* rather than as employees. The Department of Labor has definitions for each category, but the boundaries are blurry.

Conflicts also erupt over whether *idle time* is compensable work time. Waiting time, on-call time, sleep time, travel time, and rest and meal periods all raise this question and require managers to examine the precise facts and to look for specific rules and guidance from the Department of Labor. The FLSA has complicated overtime exemptions for firefighters and law enforcement officers, and agencies with these positions should designate and train personnel to master them. *Off-the-clock* time spent responding to phone calls, texts, and e-mails must generally be counted as work time and compensated.

The 1963 Equal Pay Act amended the FLSA to require employers to pay men and women equal wages for equal work, unless an employer can justify the differential by seniority, merit, piecework, or any factor other than sex. *Equal work* means that the skill, effort, responsibility, and working conditions are equal. The work need not be identical, but significant portions of it should be. A plaintiff must find one opposite-sex *comparator* who is doing equal work at a higher rate and may use statistical evidence of gender-based disparity to buttress a claim. An employer found guilty may comply with the act by raising the rate of the lower-paid employee. (Chapters 7 and 8 cover pay and benefit programs.)

Public sector pensions are prized by government employees, who see themselves as agreeing to lower wages than they could earn in the private sector in exchange for the promise of a secure retirement, but that promise may be illusory (see Chapters 10 and 11). In the past decade, state and local governments have cut pension benefits by enacting laws, using ballot initiatives, and declaring bankruptcy. The Employee Retirement Income Security Act (ERISA) is the main federal law governing private sector pensions, but no

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public sector counterpart exists. As a result, when a government reduces pension benefits, constitutional provisions, state statutes, and court decisions about contract principles and property rights determine legal outcomes. Protection varies from state to state and worker to worker.

Retirees have the greatest rights. Courts have not allowed reductions in base benefits, but Colorado and Minnesota were permitted to reduce scheduled cost-of-living adjustments, and others locales followed suit. For current employees, the situation is less clear; many cases are still wending through the courts. In Arizona, Colorado, and Oregon, courts have protected future benefits that had been promised to current employees. But in Maryland, only benefits based on past service have been protected, which means the government could cut future benefits. The state of Florida and the city of Atlanta cut benefits by increasing the percentage of current employees' contributions. Rhode Island raised the retirement age and reduced payments from 80 percent to 75 percent of salary. For new hires, governments are free to discontinue or change pension plans (Munnell & Quinby, 2012). Ultimately, the right to a pension is meaningless if there is no money, but public employees have limited ability to ensure that governments adequately fund pension plans, do not raid them, and invest the funds wisely. The Pension Protection Act of 2006 addressed problems with underfunded private pensions, but not public ones. Privatization raises complex legal issues about pension rights that are beyond the scope of this short summary (Ravitch & Lawther, 1999).

Pensions may be lost due to misconduct. Forfeiture laws in at least 13 states allow public employers to withhold pensions from employees for misbehavior. Depending on the state, misbehavior may be defined as a felony conviction, administrative misconduct, or conviction of a particular crime.

Scheduling largely is left to employers' discretion, but workers have some rights. Under the Patient Protection and Affordable Care Act (ACA, popularly known as Obamacare), employees who are nursing mothers must be provided break time and private places to express milk. Anti-discrimination statutes give those with disabilities and religious needs the right to request accommodations (discussed in the *Discrimination* section below). Many part-time workers face the trial of dealing with unpredictable schedules. A writer for the *New York Times* provoked a flurry of responses when he reported the story of Mary Coleman, who, after an hour-long bus commute, arrived for her scheduled shift at a Popeye's in Milwaukee only to be told to go home without clocking in because the store had enough people working (Greenhouse, 2014a, 2014b). A fluctuating schedule makes it impossible for a worker to juggle one job with another, to secure child or elder care, or to take classes; yet many employers demand on-call availability from part-timers. Vermont and San Francisco have adopted laws giving workers the *right to request* predictable schedules, and other locales are considering similar measures. These laws require an employer to discuss employees' situations with them and to consider scheduling requests; the employer is not obligated to grant the requests.

Health and Safety

In 2016, there were 497 fatal occupational injuries to government workers in the United States. The injuries occurred most often in the job categories of police protection, national security, construction, trade, transportation, and utilities (Bureau of Labor Statistics, 2016). The number of nonfatal public sector injuries is unavailable. People may suffer harm on

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