# Table of Contents

**About the Authors** ................................................................. vii  
**Introduction** ........................................................................... xxxi  
**Table of Chapters** ................................................................. xxxiii  

## Chapter 1  Wage-and-Hour Issues ............................................ 1  
§ 1:1  Introduction ........................................................................ 4  
§ 1:2  The Legal Framework of Wage-and-Hour Laws .................. 4  
  § 1:2.1  Minimum Wage ................................................................. 6  
  [A]  FLSA ................................................................................. 6  
  [B]  California .......................................................................... 6  
  [C]  New York ........................................................................... 8  
  § 1:2.2  Overtime Exemptions ...................................................... 8  
  [A]  FLSA ................................................................................. 8  
    [A][1]  Federal White Collar Overtime Regulations .................. 9  
    [A][1][a]  Minimum Salary Requirement .............................. 9  
    [A][1][b]  Rules for “Highly Compensated” Employees .......... 10  
    [A][1][c]  Salary Basis Requirement ....................................... 10  
    [A][1][c][i]  Permissible Deductions ...................................... 10  
    [A][1][c][ii]  Consequences of Improper Deductions ........... 12  
    [A][1][c][iii]  Safe Harbor ....................................................... 12  
    [A][1][d]  White Collar Exemption ......................................... 13  
      [A][1][d][i]  Executive Exemption ........................................ 13  
      [A][1][d][ii]  Administrative Exemption ............................... 15  
      [A][1][d][iii]  Professional Exemption ............................... 16  
      [A][1][d][iv]  Computer Employee Exemption ................... 17  
      [A][1][d][v]  Outside Sales Exemption ............................... 17  
    [A][2]  Commission Sales Exemption .................................... 18  
    [A][3]  Motor Carrier Act Exemption ................................... 19  
    [A][4]  Companionship Exemption ....................................... 19  
    [A][5]  Belo Plan ................................................................. 20  
  [B]  “White Collar” (New York) Exemptions ........................... 21  
    [C]  California Exemptions .................................................. 22  
      [C][1]  Executive Exemption ................................................ 22  
      [C][2]  Administrative Exemption ....................................... 22  
      [C][3]  Professional Exemption .......................................... 23  
      [C][4]  Outside Sales Exemption ....................................... 24  
      [C][5]  Other Exemptions ..................................................... 25  
    [C][5][a]  Computer Professionals ......................................... 25  
    [C][5][b]  Certain Medical Professionals .............................. 26  
    [C][5][c]  Comissioned Employees ....................................... 27  
    [C][6]  Salary Basis Test ....................................................... 28
## Extraterritorial Application of the Labor Code—

### The Sullivan v. Oracle Decision
- Page 29

## § 1:2.3 Independent Contractors and Temporary Workers
- Page 30
  
  **[A]** Independent Contractors
  - Page 31
  
  **[B]** Temporary Workers and Joint Employment
  - Page 33

  **[B][1]** Determining Employer Status
  - Page 33

  **[B][2]** Wage-and-Hour Issues
  - Page 34

## § 1:2.4 Interns
- Page 35

## § 1:2.5 Tip Pooling and California Labor Code Section 351
- Page 37

## § 1:2.6 Reimbursement of Expenses
- Page 39

  **[A]** California
  - Page 39

  **[B]** New York
  - Page 40

## § 1:2.7 Wage Deductions (New York)
- Page 41

## § 1:2.8 Hours Worked
- Page 43

  **[A]** "Hours Worked" Defined
  - Page 43

  **[B]** Meal Breaks
  - Page 44

  **[B][1]** FLSA
  - Page 44

  **[B][2]** California
  - Page 44

  **[B][3]** New York
  - Page 47

  **[C]** On-Call and Waiting Time Under the FLSA
  - Page 47

  **[D]** "De Minimis" Activities
  - Page 47

  **[E]** Travel Time
  - Page 49

## § 1:2.9 Calculating Overtime Premiums: Determining the Regular Rate
- Page 50

  **[A]** Premium Pay
  - Page 51

  **[B]** Per Diem
  - Page 51

  **[C]** Sick Leave Buy-Backs
  - Page 51

  **[D]** "Blended" Pay Rates
  - Page 52

  **[E]** California Regular Rate
  - Page 52

## § 1:2.10 Implementing "Flextime" Schedules
- Page 52

## § 1:2.11 Workweek Designation
- Page 54

## § 1:2.12 Employee Notice
- Page 54

  **[A]** California
  - Page 54

  **[B]** New York
  - Page 55

## § 1:2.13 Fluctuating Workweeks
- Page 57

  **[A]** The FWW Method of Calculating Overtime
  - Page 57

  **[B]** Preconditions on Using the FWW Method
  - Page 58

  **[C]** Using the FWW Method to Calculate Damages in Misclassification Cases
  - Page 59

## § 1:2.14 Commissions/Bonuses/Incentive Compensation Plans
- Page 60

  **[A]** California
  - Page 60

  **[B]** New York
  - Page 61

## § 1:2.15 Individual Liability
- Page 62

  **[A]** FLSA
  - Page 62

  **[B]** California
  - Page 63

## § 1:2.16 Spread-of-Hours Pay (New York)
- Page 63

## § 1:2.17 Payment of Final Wages
- Page 64

  **[A]** New York
  - Page 64
Table of Contents

[B] California .................................................................64

§ 1:3 Wage-and-Hour Collective Class Action Process and Procedures .................................................................65

§ 1:3.1 Collective Actions Under the FLSA .................................................................66

[A] Potential Members Must Expressly “Opt In” to the Class .................................................................66

[B] Applicability of Requirements of Rule 23 to FLSA Collective Actions .................................................................67

[C] Class Certification Under the FLSA .................................................................68

[C][1] Overview ..................................................................68

[C][2] The Notice Stage: Plaintiffs Request Class Certification/Authorization to Send Notice to Putative Class Members; Courts Authorize Notice When Putative Members Are “Similarly Situated” ........................................................................69

[C][3] Stage Two—Defendant’s Motion to Decertify ..................................................................................71

[D] FLSA Statute of Limitations .................................................................72

[E] Waiver of FLSA Claims ........................................................................72

[F] Litigation Issues ........................................................................73

[F][1] Burdens of Proof ........................................................................73

[F][2] Interaction of State and Federal Actions—Hybrid Actions ........................................................................74

[G] Rule 68—Offers of Judgment ........................................................................75

§ 1:3.2 California Class Actions .................................................................75

[A] Governing Authority ........................................................................76

[B] Requirements for Establishment of California Class Actions ........................................................................76

[C] California Wage-and-Hour Class Actions ........................................................................77

[D] Procedural Issues in Class Action Lawsuits ........................................................................78

[D][1] Opt-Out Requirement ........................................................................78

[D][2] Class Certification’s Preclusive Effects ........................................................................78

[D][3] Statute of Limitations ........................................................................79

[D][4] Settlement of California Class Actions ........................................................................79

§ 1:3.3 Representative Actions Under Business and Professions Code Section 17200 ........................................................................80

[A] Applicability to Wage-and-Hour Law ........................................................................80

[B] Equitable Relief Versus Damages ........................................................................81

[C] Statute of Limitations ........................................................................81

§ 1:3.4 California Labor Code Private Attorney General Act ........................................................................82

§ 1:3.5 Shady Grove: Federal Preemption of State Law Limits on Certification ........................................................................84

§ 1:4 Conclusion ........................................................................85

Chapter 2 OFCCP Developments ........................................................................87

§ 2:1 Introduction ........................................................................88

§ 2:2 Overview of the OFCCP ........................................................................88
### § 2:2.1 Organizational Responsibilities, Structure, and Jurisdiction

88

### § 2:2.2 Enforcement

89

### § 2:3 Covered Government Contractors and Subcontractors

90

### § 2:4 Recent Developments

91

- **§ 2:4.1 Tackling Equal Pay**
  - 91
- **§ 2:4.2 Regulatory Initiatives**
  - **[A] Final Rules Regarding Hiring Veterans and Individuals with Disabilities**
    - 95
    - 97
  - **[C] Executive Orders and Subsequent Rules**
    - **[C][1] Minimum Wage**
      - 98
    - **[C][2] Non-Retaliation Protection for Disclosing Compensation Information**
      - 98
    - **[C][3] Sexual Orientation and Gender Identity As Protected Classes**
      - 98
    - **[C][4] Disclosure of Recent Labor Violations and Dispute Transparency**
      - 99
- **§ 2:4.3 Compliance Initiatives**
  - 99
  - **[A] Compliance Review Scheduling Letter**
    - 100
  - **[B] Telephone Interviews**
    - 101
- **§ 2:4.4 Recent Case Law**
  - 102
  - **[A] Accessing Data**
    - 102
  - **[B] Jurisdiction**
    - 102
- **§ 2:4.5 Settlements**
  - 104
  - **[A] Discriminatory Hiring Procedures**
    - 104
  - **[B] Steering**
    - 104

### Chapter 3 Gender and Sexual Orientation Discrimination and Sexual Harassment

107

- **§ 3:1 Introduction**
  - 109
- **§ 3:2 Discrimination Based on Gender and Related Characteristics**
  - 109
  - **§ 3:2.1 Gender Discrimination**
    - 110
    - **[A] Class Action Certification**
      - 110
    - **[B] Evidence**
      - 114
    - **[C] Mixed-Motive Discrimination**
      - 116
    - **[D] Reverse Bias Sex Discrimination**
      - 117
    - **[E] Consensual Relationships in the Workplace**
      - 119
    - **[F] Damages Limitation**
      - 120
  - **§ 3:2.2 Sexual Orientation and Gender Stereotyping**
    - 121
  - **§ 3:2.3 Benefits for Same-Sex Partners**
    - 124
  - **§ 3:2.4 Pregnancy Discrimination and Nursing Mother Laws**
    - 125
    - **[A] Pregnancy Discrimination Act**
      - 125
    - **[B] Protections for Nursing Mothers**
      - 131
  - **§ 3:2.5 Physical and Testing Requirements**
    - 134
Table of Contents

§ 3:2.6 Health Plan Coverage Issues ............................................. 137
  [A] Prescription Contraceptive Coverage ................................ 137
§ 3:3 Equal Pay Act ........................................................................ 139
  § 3:3.1 Establishing a Prima Facie Case .................................... 140
  § 3:3.2 Employer Defenses ....................................................... 141
  § 3:3.3 Statute of Limitations ................................................... 142
  § 3:3.4 EEOC Guidance .......................................................... 144
  § 3:3.5 Legislation and Administrative Developments ............. 145
§ 3:4 Sexual Harassment .............................................................. 146
  § 3:4.1 Discrimination Because of Sex ....................................... 146
  § 3:4.2 Explicit Alteration of Fundamental Conditions of
    Employment: Tangible Employment Action ..................... 149
    [B] EEOC Enforcement Guidance on
        “Tangible Employment Action” ................................ 150
  § 3:4.3 Constructive Alteration of Conditions of Employment or
        a Hostile Work Environment ....................................... 151
    [A] Welcomeness ............................................................... 151
    [B] Cases Finding Severe or Pervasive Requirement Met ..... 152
    [C] Cases Finding Severe or Pervasive Requirement
        Not Met .................................................................. 153
  § 3:4.4 Affirmative Defenses ..................................................... 155
    [A] Employer’s Duty to Exercise Reasonable Care to
        Prevent Harassing Behavior ....................................... 155
    [B] Employer’s Duty to Exercise Reasonable Care to
        Correct Harassing Behavior Promptly ......................... 157
    [B][1] Employer Response Found to Be Inadequate .......... 158
    [B][2] Employer Response Found to Be Appropriate .......... 159
    [B][3] Employer Liable for Retaliation by Other
        Non-Supervisor ......................................................... 160
    [B][4] Acts of Non-Employees ............................................ 161
    [C] Employee Unreasonably Failed to Take Advantage
        of Opportunities to Avoid Harm ............................... 162
    [C][1] Plaintiff’s Failure to Complain ............................... 163
    [C][2] Timeliness of Plaintiff’s Complaint ....................... 165
    [D] EEOC Enforcement Guidance on Employer Liability
        for Harassment by Supervisors ................................ 167
  § 3:4.5 Evidentiary Issues in Sex Harassment Cases: Effect of
        Statute of Limitations on Evidence of Acts Occurring
        Before Limitations Period ........................................... 167
  § 3:4.6 Application of Legal Standards: Summary Judgment
        Versus Jury Trials ..................................................... 171
  § 3:4.7 Punitive Damages ....................................................... 171
  § 3:4.8 Principles of Vicarious Employer Liability and
        Concepts of Agency: When Is an Individual Considered
        a “Supervisor”? ....................................................... 173
  § 3:4.9 Individual Supervisor Liability .................................. 175
    [A] Federal Law .............................................................. 175
EMPLOYMENT LAW YEARBOOK 2015

[B] State Law ................................................................. 175
[B][1] California .............................................................. 175
[B][2] New York .............................................................. 175
§ 3:4.10 Other Procedural Issues ........................................ 176
[A] “Pattern-or-Practice” Cases ........................................ 176
[B] EEOC “Waiting Period” .............................................. 177
§ 3:4.11 Theories Used by Accused Sexual Harassers Who Have
 Been Disciplined or Terminated ..................................... 179
§ 3:4.12 Attorney Fees Where Plaintiff’s Lawsuit Is Frivolous,
 Unreasonable, or Without Foundation ......................... 180

Chapter 4  Race, Religion, and National Origin
Discrimination .................................................................. 183
§ 4:1 Race ......................................................................... 183
§ 4:1.1 Subordinate Bias, “Cat’s Paw,” “Rubber Stamp”
 Theory ........................................................................... 185
§ 4:1.2 “Me Too” Evidence ................................................ 188
§ 4:1.3 Summary Judgment Test in “Mixed-Motive” Cases .... 190
§ 4:1.4 Section 1981 Claims .............................................. 191
§ 4:1.5 “Class-of-One” Claims in Public Employment............. 194
§ 4:1.6 Adverse Employment Action ................................. 195
§ 4:1.7 Reverse Bias in Promotional Examinations ............... 198
§ 4:1.8 Other Promotional Issues: Lists and Affirmative Action.. 201
§ 4:1.9 Tests and Selection Procedures—EEOC Guidance
 Fact Sheet....................................................................... 205
§ 4:1.10 “Associated with” Claims ....................................... 207
§ 4:1.11 EEOC Procedural and Compliance Issues ................. 208
§ 4:1.12 Insufficient Evidence of Race Discrimination/Bias .... 214
§ 4:1.13 Sufficient Evidence of Race Discrimination/Bias ...... 218
§ 4:1.14 Title VII Class Action Issues ................................. 220
§ 4:1.15 Title VII Standing ............................................... 224
§ 4:2 Religious Discrimination ........................................... 226
§ 4:3 National Origin Discrimination ................................. 235

Chapter 5  Age Discrimination ............................................. 245
§ 5:1 Introduction ........................................................... 246
§ 5:2 Procedural Requirements ........................................... 248
§ 5:2.1 A “Charge” with the EEOC ................................. 248
§ 5:2.2 Timeliness and Equitable Tolling ......................... 250
§ 5:2.3 ADEA Safe Harbor—Retiree Benefit Plans .............. 251
§ 5:3 Who Is an Employer for Purposes of the ADEA? ........... 254
§ 5:4 Who Is an Employee for Purposes of the ADEA? ......... 256
§ 5:4.1 The Law Enforcement Exception ......................... 257
§ 5:5 Plaintiff’s Burden to Prove a Prima Facie Case ............. 258
§ 5:5.1 Employer’s Legitimate Expectations ....................... 262
Table of Contents

§ 5:5.2 Stray Remarks ............................................................. 263
§ 5:5.3 Similarly Situated ....................................................... 264
§ 5:6 Employer’s Legitimate Nondiscriminatory Business Reason .... 265
§ 5:7 Plaintiff’s Burden to Prove Employer’s Lawful Reason
   Is Pretext for Age Discrimination ...................................... 266
§ 5:7.1 Insufficient Evidence of Pretext .................................... 266
§ 5:7.2 Sufficient Evidence of Pretext ...................................... 269
§ 5:8 Retaliation Against Protected Activity .................................. 272
§ 5:9 Methods of Proof: Mixed Motives, Direct and Circumstantial,
   Pattern or Practice, and Disparate Treatment or Impact .......... 275
§ 5:9.1 Mixed Motives .......................................................... 275
§ 5:9.2 Direct and Circumstantial Evidence ................................ 278
§ 5:9.3 Pattern or Practice ..................................................... 280
§ 5:9.4 Disparate-Impact Theory .............................................. 281
§ 5:9.5 Other Methods of Proof ............................................. 283
§ 5:10 Releases and Waivers .................................................. 285
§ 5:10.1 The Requirements of the OWBPA ............................ 285
§ 5:10.2 Case Law Regarding OWBPA Releases ....................... 287
   [A] Ratification and Tender Back Under the OWBPA ........... 287
   [B] Cure of the Defective Release .................................... 288
   [C] Invalid Waiver As a Separate Cause of Action ............. 289
   [D] OWBPA Requirements Not Applied to Non-Age
       Claims ................................................................. 290
§ 5:10.3 EEOC Regulations Regarding OWBPA Releases .......... 290
   [A] Wording of Waiver Agreements ................................. 291
   [B] Waiver of Future Rights .......................................... 292
   [C] Consideration ...................................................... 293
   [D] Consultation ........................................................ 293
   [E] Time Periods ......................................................... 293
   [F] Informational Requirements .................................... 294
   [F][1] To Whom the Information Must Be Given .................. 295
   [F][2] Mandatory Information .................................... 295
   [H] EEOC’s Enforcement Powers .................................... 298
      [H][1] Tender Back .................................................. 298
      [H][2] Covenants Not to Challenge Waiver .................... 298
      [H][3] Abrogation .................................................... 299
      [H][4] Burden .......................................................... 299
§ 5:11 Other Issues ............................................................. 299
§ 5:11.1 Arbitration of ADEA Claims ................................. 299
§ 5:11.2 Remedies ............................................................ 300
§ 5:11.3 Harassment Based on Age ........................................ 302

Chapter 6   EEO Class Actions ........................................... 305
§ 6:1 Introduction ............................................................ 306
§ 6:2 Recent Developments ................................................ 307
§ 6:3 Litigating Class Action Certification ...........................................314
§ 6:3.1 Certification Elements of a Class Action .............................314
[A] Numerosity ........................................................................315
[B] Commonality ....................................................................316
[B][1] Need for Reasonable Connection Between the
Claims of the Named Plaintiffs and the Alleged Class
Within the Class ......................................................................316
[B][1][a] Commonality Based on Decentralized, Subjective
Decision-Making and *Dukes v. Wal-Mart* .........................317
[B][2] Commonality in Harassment Cases .................................324
[C] Typicality ..........................................................................324
[D] Adequacy of Representation ............................................325
[D][1] Adequacy of Counsel ....................................................325
[D][2] Relation Between Class Representatives and Class .......326
§ 6:3.2 Maintainability of the Class Action Suit—Fulfillment of Rule 23(b) Generally .............................................326
[A] Opting Out .........................................................................328
[B] Rule 23 Notice Amendments .............................................328
§ 6:3.3 Fulfillment of Rule 23(b) in Employment Discrimination Class Actions .........................................................329
[A] Certification Under Rule 23(b)(2) in Actions That
Involve Compensatory and Punitive Damages .................330
[B] Discrimination Class Actions Under Rule 23(b)(3) .........331
[C] WARN Act Cases ..........................................................332
§ 6:3.4 Appellate Review of Class Certification Decisions ..............333
[A] Interlocutory Review .........................................................333
[B] Review After Named Plaintiff’s Claim Has Become
Moot ..................................................................................333
[C] Interlocutory Appeal of Conditional FLSA Collective Actions .................................................................334
§ 6:3.5 Other Class Action Issues ..............................................335
§ 6:4 Disparate-Treatment and Disparate-Impact Cases .................336
§ 6:4.1 Disparate-Treatment Class Actions .................................336
§ 6:4.2 Disparate-Impact Class Actions ....................................338
§ 6:4.3 Special Problems in Multi-Facility Cases .........................340
§ 6:5 Punitive Damages in Disparate-Treatment Pattern-or-Practice Cases ...............................................................340
§ 6:6 Opt-In Class Actions ..........................................................342
§ 6:7 Class Action Fairness Act of 2005 ........................................343
§ 6:7.1 The Purpose and Intent of the Law ................................344
§ 6:7.2 Basis for Federal Court Jurisdiction ..............................344
§ 6:7.3 What is a Covered Class Action? .................................347
§ 6:8 EEOC Litigation ............................................................347
§ 6:8.1 Pursuing Pattern-or-Practice Claims Under
Section 706 of Title VII ..........................................................347
§ 6:8.2 Statutes of Limitation Under Section 707 .......................353
§ 6:8.3 Rule 23’s Inapplicability to Pattern-or-Practice Claims ....355
§ 6:8.4 Attorney-Client Privilege .............................................357
Table of Contents

§ 6:9 Statistical Evidence ................................................................. 358
  § 6:9.1 Need for Appropriate, Probative Statistical Comparisons ... 360
  § 6:9.2 Regression Analyses .......................................................... 364
  § 6:9.3 Statistical Significance ....................................................... 367
  § 6:9.4 Attacking Plaintiffs’ Statistics ............................................. 370
  § 6:9.5 Summary ........................................................................ 372
§ 6:10 Settlement of Class Actions ...................................................... 373
  § 6:10.1 Rule 23 Amendments ....................................................... 373
  § 6:10.2 Class Certification for Settlement ....................................... 374

Chapter 7  Americans with Disabilities Act ............................................. 377
§ 7:1 Introduction ............................................................................ 379
§ 7:2 The EEOC Experience to Date ............................................... 380
§ 7:3 Basic Issues Under the ADA .................................................... 381
  § 7:3.1 EEOC Regulations Implementing the ADAAA ................ 381
    [A] Revisions to “actual disability” Prong .............................. 382
    [B] Revisions to “record of” Prong ......................................... 384
    [C] Revisions to “regarded as” Prong .................................... 384
  § 7:3.2 Who Is a “Qualified Individual”? ...................................... 385
    [A] Physical or Mental Impairment ........................................ 386
    [B] Temporary or Intermittent, Episodic Impairments ......... 389
    [C] Substantial Limitation ................................................... 391
    [D] Major Life Activities ................................................... 395
    [E] Perceived Impairments .................................................. 397
    [F] Association with a Disabled Person .............................. 398
    [G] Exclusions from the Definition of Disability ................. 398
    [G][1] Excluded Matters ..................................................... 398
    [G][2] Drugs and Alcohol—Specific Provisions .................... 399
  § 7:3.3 Who Is Disabled? ............................................................. 400
    [A] Essential Functions of the Job ....................................... 400
    [B] Estoppel from Claiming Ability to Perform Essential Job Functions ........................................ 402
    [C] Direct Threat ................................................................ 402
    [D] Causation .................................................................... 403
  § 7:3.5 Ministerial Exception ....................................................... 404
§ 7:4 The Duty to Provide Reasonable Accommodation .................. 406
  § 7:4.1 EEOC Reasonable Accommodation Enforcement Guidance ................................................ 406
  § 7:4.2 Statutory and Regulatory Examples of Reasonable Accommodation ........................................ 408
  § 7:4.3 When Is an Employer Obligated to Make a Reasonable Accommodation? ................................. 409
  § 7:4.4 The Process for Identifying Reasonable Accommodations .................................................. 410
§ 7:5 What Is Reasonable Accommodation? ................................. 413
**Chapter 8  Employee Privacy Law**

§ 8:1  Introduction ................................................................. 449
§ 8:2  Pre-Employment Inquiries ............................................... 449
  § 8:2.1  A Framework for the Interview Process ....................... 449
  § 8:2.2  Prohibited Subjects.................................................... 451
    [A]  Name/Marital Status................................................. 451
    [B]  Age/Birthdate......................................................... 451
    [C]  Health and Physical Condition.............................. 452
    [D]  AIDS................................................................. 452
    [E]  Arrest Records ..................................................... 453
    [F]  Convictions .......................................................... 454
    [H]  Religion .............................................................. 456
    [I]  Sex and Marital Status........................................... 457
    [J]  Past Drug Use ...................................................... 457
    [K]  Genetic Information .............................................. 458
    [L]  Facially Neutral Criteria........................................ 458
  § 8:2.3  Using the Internet to Research Applicant’s Background .... 459
  § 8:2.4  Best Practices for the Interview Process..................... 460
    [A]  Brief the Recruiters and Interviewers ....................... 460
    [B]  Adopt a Checklist ................................................ 460
    [C]  Allocate Interview Responsibility ......................... 460
    [D]  Provide Examples of Permissible Questions ............... 460
    [E]  Use Evaluation Forms ........................................... 460
    [F]  Guidelines Based on ADA Provisions ....................... 460
§ 8:3  The Employer’s Need to Know Versus the Employee’s Right to Privacy—The Bases of the Right to Privacy .......... 461
  § 8:3.1  Constitutional ........................................................ 461
    [A]  Federal ................................................................. 461
    [A][1]  Searches by Public Employers ............................. 462
    [A][2]  Investigations of Applicants and Employees by Public Employers .............................................. 464
    [B]  New York ............................................................. 465
    [C]  California ............................................................ 465
    [C][1]  Hill v. NCAA ..................................................... 466
    [C][2]  Analyzing Privacy Interests in the Employment Context ........................................................... 467
    [C][3]  Hill’s Progeny ..................................................... 467
  § 8:3.2  Statutory ................................................................. 469
    [A]  Federal ................................................................. 469
    [A][1]  Electronic Communications Privacy Act of 1986 ...... 469
    [B]  States ................................................................. 471
    [B][1]  New York ........................................................ 471
    [B][2]  California ......................................................... 473
§ 8:3.3  Common-Law Privacy Protections for Private Employees ............................................................. 474
    [A]  California ........................................................... 475
EMPLOYMENT LAW YEARBOOK 2015

[B] New York ................................................................. 475
§ 8:3.4 Application of Privacy Laws to Technology ............... 476
[A] Email ................................................................. 476
[B] Blogs and Social Media ........................................... 479
[C] GPS Tracking ....................................................... 481
§ 8:3.5 Reasons to Monitor Employees’ Use of Electronic Media ..................................................... 482
§ 8:3.6 Third-Party Discovery of Employee Information ........ 483
§ 8:3.7 NLRA Implications for Employee Privacy Policies ....... 484
§ 8:3.8 Tort Liability .................................................... 485
[A] Claims Not Barred by California’s Workers’ Compensation Law .................................................. 486
§ 8:3.9 Application of the Right to Privacy ......................... 486
[A] Whether an Employee’s Expectation of Privacy Is Reasonable ..................................................... 487
[B] Analyzing the Employer’s and the Employee’s Competing Interests .......................................... 488
[B][1] Federal Cases .................................................... 488
[B][2] New York ......................................................... 489
[B][3] California .......................................................... 489
§ 8:3.10 Practical Guidelines for Employee Searches ............ 491
§ 8:4 Substance Abuse .................................................. 492
§ 8:4.1 In General ....................................................... 492
§ 8:4.2 Determining the Appropriate Type of Drug and Alcohol Policy .................................................. 492
[A] Determine the Extent and Risk of Drug and Alcohol Use by Employees ........................................ 492
[B] Determine Whether Federal or State Law Requires or Prohibits Any Particular Drug or Alcohol Policy in Your Workplace ................................................. 493
[B][1] Legal Requirements for Federal Contractors and Grantees .................................................... 493
[B][1][a] The Drug-Free Workplace Act ............................. 493
[B][1][b] Defense, Transportation, and Nuclear Regulatory Commission Regulations ...................... 493
[B][1][c] State Requirements ............................................ 494
[B][2] Legal Restrictions on Drug Testing ......................... 494
[B][2][a] U.S. Supreme Court Cases .................................. 494
[B][2][b] Lessons of the Customs and Railway Cases ......... 495
[B][2][c] Random Drug Testing Addressed by U.S. Supreme Court .................................................... 496
[B][2][d] California Cases ................................................. 497
[B][2][e] California and Ninth Circuit Decisions Regarding the Constitutionality of Drug Tests .......... 498
[B][3] Civil Rights Statutes .............................................. 499
[B][4][a] Defamation and Invasion of Privacy ..................... 499
[B][4][b] Negligent Hiring and/or Retention of Employees .... 500
Table of Contents

[B][4][c] False Imprisonment .................................................... 501
[B][4][d] False Arrest ................................................................. 501
§ 8:4.3 Considerations When Adopting a Drug or Alcohol Policy ................................................................. 501
[A] Any Drug and Alcohol Policy Should Be Communicated in Writing ............................................ 502
[B] Considering a Rehabilitative Option ........................................ 502
[C] A Supervisor’s Role Should Be Determined and Communicated .................................................. 502
[D] Consider Other Preventive Measures and Investigative Techniques ........................................... 503
[E] Consider Negative Implications Before Adopting a Drug-Testing Program ........................................ 504
§ 8:4.4 Developing a Drug-Testing Policy .................................................................................. 505
§ 8:4.5 Implementing Drug-Testing Policies ........................................................................ 508
§ 8:4.6 Drug-Testing and the Legalization of Marijuana .............................................................. 508
§ 8:5 Investigations and Testing on Prospective and Current Employees .............................................. 509
§ 8:5.1 Conducting Background Investigations on Prospective and Current Employees Through a Consumer Reporting Agency .......................................................... 509
[A] Initial Issues to Address Before Conducting Background Investigations .......................................... 511
[A][1] Determining the Applicants on Whom to Perform Background Checks .......................................... 511
[A][2] Information to Be Obtained from Background Checks .................................................................. 512
[A][3] Who Should Perform Background Checks .................................................................................. 512
[A][4] Information Employers Should Obtain from Applicants to Perform Background Checks ................. 513
[B] The Fair Credit Reporting Act and Its Amendments ................................................................ 513
[B][3] Inquiries Should Be Job-Related ......................................................................................... 514
[B][4] Obsolete Information ........................................................................................................... 515
[B][5] Penalties for Noncompliance ................................................................................................. 515
[C] Supplemental California Laws .................................................................................................. 515
[C][1] California’s Consumer Credit Reporting Agencies Act ................................................................ 515
[C][2] California’s Investigative Consumer Reporting Agencies Act .................................................. 516
[D] Supplemental New York Laws .................................................................................................. 516
[E] Summary of Steps an Employer Should Take When Requesting Consumer Reports ...................... 517
[E][1] Provide Initial Notice and Obtain Written Authorization ............................................................... 517
[E][1][a] Additional Initial Disclosure Requirements for Consumer Credit Reports Under the CCRAA ........ 517

xlvii
EMPLOYMENT LAW YEARBOOK 2015

[E][1][b] Additional Requirements for Investigative Consumer Reports ................................................................. 517
[E][2] Provide Certification of Compliance to the CRA ............ 519
[E][2][a] Additional Certification That an Employer Should Make to the CRA When Requesting an Investigative Consumer Report ................................................................. 519
[E][3] Provide the Consumer with Information ......................... 520
[E][4] Provide Adverse Action Notice After Adverse Employment Action Has Been Taken ......................................... 520
[E][5] Under the ICRAA, Investigative Information May Be Disclosed in All Cases ...................................................... 521

§ 8:5.2 Compiling Background Information Without Utilizing the Services of a CRS and Conducting Internal Investigations ................................................................. 521
[A] When an Employer Uses an Outside Entity for an Internal Investigation ................................................................. 521
[B] When an Employer Does Not Use an Outside Entity to Compile Investigative Information or Conduct an Investigation ................................................................. 523
[B][1] Investigative Consumer Reports That an Employer Compiles in Connection with Its Application Process ................................................................. 524
[B][1][a] References .................................................................... 524
[B][1][b] Prior Employers ............................................................... 524
[B][2] Internal Investigations That an Employer Conducts in Response to an Allegation or Suspicion of Employee Misconduct or Wrongdoing ........................................... 525
[B][2][a] Attorney-Client Privilege/Attorney Work Product ....... 525

§ 8:5.3 Polygraph Examinations .......................................................... 527
[A] In General ........................................................................ 527
[B] Record Keeping ................................................................ 528
[C] Rights of the Examinee ....................................................... 528

§ 8:5.4 Honesty Testing ................................................................. 529
§ 8:5.5 Tests of Skills and Abilities ............................................. 530
§ 8:5.6 Psychological and Psychiatric Testing ......................... 530
§ 8:5.7 Personality Testing ........................................................... 531
§ 8:5.8 Fingerprints and Photographs ........................................... 532
§ 8:5.9 Genetic Testing ............................................................... 532

Chapter 9 Guarding Trade Secrets .................................................. 535
§ 9:1 Introduction ....................................................................... 539
§ 9:2 What Is a Trade Secret? ..................................................... 540
§ 9:2.1 Uniform Trade Secrets Act and the California Definition ................................................................. 540
[A] Secrecy ............................................................................. 543
[A][1] Publicly Known Through Internet Disclosure ............... 545
Table of Contents

[B] Reasonable Efforts to Preserve Secrecy ......................... 546
[B][1] Require That Employees (and Third Parties) Who Are Given Access to Trade Secrets Sign Confidentiality Agreements ........................................... 547
[B][2] Alert Employees (and Third Parties) with Access to Trade Secrets Regarding Their Confidential Nature ...................................................... 547
[B][3] Limit Access to Only Those Employees (and Third Parties) Who “Need to Know” Trade Secrets to Perform Their Jobs ...................... 548
[C] Value Derived from Secrecy ......................................... 548
§ 9:2.2 Restatement of Torts and the New York Definition ...... 549
§ 9:2.3 Trade Secret Protection Checklist..................................... 552
§ 9:3 Keeping Employees from Competing or Working for Competitors upon Their Departure ........................................... 553
§ 9:3.1 Background ...................................................................... 553
§ 9:3.2 In Most States, Covenants Not to Compete Will Be Enforced If They Are Necessary to Protect a Legitimate Interest of the Employer ........................................................................... 556
[A] What Is a “Legitimate Employer Interest”? ..................... 559
[A][1] Trade Secrets As a “Legitimate Employer Interest” ..... 560
[A][2] Customer Lists As a “Legitimate Employer Interest”..... 560
[A][3] Customer Solicitation As a “Legitimate Employer Interest” ....................................................... 562
[A][4] An Employee’s Unique Services As a “Legitimate Employer Interest” ........................................... 562
[B] Reasonableness Standard for Enforcement of Covenants Not to Compete ........................................................... 564
[C] Other Factors Affecting the Reasonableness of Covenants Not to Compete ........................................................... 565
§ 9:3.3 Garden Leave and Notice Provisions................................. 567
§ 9:3.4 The Employee Choice Doctrine ....................................... 567
§ 9:3.5 Under California Law, Employee Covenants Not to Compete upon Termination of Employment Are Void ...... 569
[A] The California Rule and Its Application ................................ 569
[A][1] The Policy Behind the California Rule ......................... 570
[A][2] Choice-of-Law Provisions Cannot Be Used to Avoid the California Rule ...................................................... 570
[A][3] California Courts Will Not Rewrite an Overly Broad Non-Compete Provision to Make It Valid ............. 571
[B] California Courts May Enforce Certain Types of Non-Compete Clauses That Limit, but Do Not Prohibit, Competition ................................................................. 571
[B][1] Covenants by Employees Not to Use or Disclose Their Employers’ Trade Secrets Are Enforceable in California ......................................................... 571
EMPLOYMENT LAW YEARBOOK 2015

[B][2] Prohibition Against a Limited Subset of Activities............572
[B][3] The Trade Secrets Exception........................................572
[B][4] Other Statutory Exceptions Allowing Restraints on
Competition........................................................................573
[C] Enforcement of Non-Solicitation Clauses..........................574
[C][1] What Is “Solicitation”.................................................574
[C][2] Customer Solicitation................................................575
[C][3] Competitor Employee Raiding Absent a
Non-Solicitation Clause....................................................575
[C][4] No-Hire Agreements..................................................576

§ 9:4 Preventing Departing Employees from Using or Disclosing
Trade Secrets.....................................................................577
§ 9:4.1 Background.............................................................577
§ 9:4.2 Sources of Protection for Employers..........................577
[A] Civil Remedies for Trade Secret Misappropriation............577
[A][1] Basis for Liability..................................................577
[A][2] Available Remedies..................................................579
[A][3] Limitations Periods..................................................579
[A][4] Risks Associated with Civil Discovery........................580
[B] The Inevitable Disclosure Doctrine May Be Used to
Prevent Misappropriation of Trade Secrets.........................581
[B][1] New York and Most Other States Have Adopted the
Inevitable Disclosure Doctrine............................................582
[B][2] California Has Rejected the Inevitable Disclosure
Doctrine............................................................................585
[C] Other Potential Remedies Available to the Employer......585
Competition.........................................................................585
[C][2] Tortious Interference with Contractual Relations............586
[C][3] Computer Fraud and Abuse Act................................587
[C][3][a] Broad View .......................................................588
[C][3][b] Narrow View........................................................590
[C][3][c] Recent Trends.......................................................594
[C][3][d] Future Outlook.....................................................599
[C][4] Racketeer Influenced and Corrupt Organizations
Act....................................................................................599
[D] Effect of Trade Secret Preemption.................................600
[E] Criminal Statutes...........................................................601
[E][1] Federal Statutes.........................................................601
[E][2] California Statutes......................................................606
[E][3] New York Statutes......................................................607

§ 9:5 Protection of Trade Secrets Abroad..............................608
§ 9:5.1 Trade Secrets Under German Law.............................608
[A][1] Secrecy Obligations of Employees..............................609
[A][1][a] Protection of Trade Secrets During Employment......609
[A][1][b] Protection of Trade Secrets After Employment...........610
# Table of Contents

[B] The Protection of Trade Secrets Under the Act Against Unfair Competition ...................................................... 611
[C] The Protection of Trade Secrets Under the German Criminal Code ............................................................. 612
[D] Violations of Secrecy Obligations During Employment ................................................................................. 612
[D][1] Measures of Labor Law .................................................. 613
[D][2] Further Legal Action .................................................. 614
[E] Violations of Secrecy Obligations After the End of Employment ................................................................. 615
[F] Cross-Border Protection of Trade Secrets ...................... 616
[G] Recommendations ........................................................ 616

§ 9:5.2 Trade Secrets Under British Law .................................................. 617
[A] Choice of Law ................................................................ 617
[B] The Duarte Danger ....................................................... 618
[C] Samengo-Turner ............................................................. 619
[D] European Safeguards ..................................................... 620

[E] Lawful Protections and Public Policy Considerations in the United Kingdom ................................................ 622
[E][1] Implied Duties ................................................................ 622
[E][1][a] Fiduciary Duties ....................................................... 622
[E][1][b] Duty of Fidelity ....................................................... 623
[E][1][c] Duty of Confidentiality ........................................... 624
[E][2] Express Duties .............................................................. 625
[E][2][a] Confidentiality ........................................................... 625
[E][2][b] Intellectual Property .................................................. 626
[E][2][c] Duty Not to Compete During Employment ............... 627
[E][2][d] Post-Termination Restrictive Covenants .................... 627

[E][3] Enforceability of Restrictive Covenants ....................... 627
[E][3][a] Public Policy .............................................................. 627
[E][3][b] Reasonableness ......................................................... 628
[E][3][c] Legitimate Interests .................................................... 628
[E][3][c][i] Trade Connections or Goodwill ........................... 628
[E][3][c][ii] Trade Secrets and Confidential Information .......... 628
[E][3][c][iii] The Stability of the Workforce, in Terms of Retention of Employees .................................................. 629
[E][3][d] Scope ........................................................................... 629
[E][3][d][i] Length ................................................................. 629
[E][3][d][ii] Area ..................................................................... 630
[E][3][d][iii] Consideration ..................................................... 630
[E][3][d][iv] Group Companies .................................................. 630
[E][3][d][v] Tailoring to Circumstances ................................... 631
[E][3][e] Severability .............................................................. 632

[E][4] Examples of Post-Termination Restrictive Covenants ........................................................................... 633
[E][4][a] Post-Termination Non-Compete ................................ 633
[E][4][b] Non-Solicitation of Customers/ Clients ....................... 634
[E][4][c] Non-Dealing with Customers/ Clients ............................ 636
Chapter 10  Reductions in Force ............................... 677

§ 10:1  Introduction ......................................................... 680

§ 10:2  Discrimination and Common-Law Causes of Action ........ 680

  § 10:2.1  Potential Discrimination Claims ......................... 680

    [A]  In General .................................................. 680

    [B]  Disparate-Treatment Theory .............................. 681

    [C]  Disparate-Impact Theory ................................ 682

  § 10:2.2  Common-Law Claims ........................................ 685

  § 10:2.3  Evidentiary Considerations .............................. 686

    [A]  Impermissible Statements ................................ 686

    [B]  Reorganized Job Responsibilities ....................... 687

    [C]  Statistics .................................................. 687

    [D]  Competence and Performance ........................... 688

    [E]  Cost Factor ............................................... 689

    [F]  “Me Too” Evidence ....................................... 689

  § 10:2.4  Potential Liability and Damages ......................... 690

§ 10:3  Planning for a Reduction in Force ......................... 691

  § 10:3.1  Establish Corporate Justification for RIF ................ 691

  § 10:3.2  Practical Considerations for Implementing a Reduction
            in Force .................................................... 692

    [A]  Workforce Analysis and Demographics .................. 693

    [B]  Management Training .................................... 694

    [C]  Communication with Employees ......................... 694

    [D]  Selection of Employees for Retention ................. 695

    [D][1]  Generally ............................................. 695

    [D][2]  Jobs and Their Relative Value ....................... 695

    [D][3]  Evaluation and Relative Ranking of Employees .... 696

    [D][3][a]  Performance Evaluations Generally ............. 696

    [D][3][b]  Evaluation Criteria .............................. 697

    [D][3][c]  Existing Versus New Evaluations .............. 698

    [D][3][d]  Comparative Employee Ranking .................. 699

    [E]  Oversight .................................................. 700

    [E][1]  Workforce Analysis ................................... 700

    [E][2]  Evaluation of Jobs/Employees ....................... 701

    [E][3]  Thorough Review of Individual Problems ........... 702

    [E][4]  Exit Interview ....................................... 702

    [F]  Post-RIF Considerations ................................ 702

  § 10:3.3  Obtaining Releases .................................... 703

  § 10:3.4  Obtaining ADEA Releases ............................. 705

    [A]  General Waiver Requirements Under the OWBPA .... 705

    [B]  “Knowing and Voluntary” Requirement ............... 706
EMPLOYMENT LAW YEARBOOK 2015

[C] Wording of Waiver Agreement .....................................707
[D] Specific Referral to Rights or Claims .............................708
[E] Waiver of Future Rights ...............................................708
[F] Consideration ................................................................709
[G] Consultation with Attorney ...........................................709
[H] Time Periods ................................................................710
[H][1] Time to Consider Agreement ........................................710
[H][2] Time to Revoke Release ..............................................711
[I] Special Informational Requirements for Group Termination “Programs”..................................................711
[I][1] Exit Incentive or Other Employment Termination Programs .............................................................712
[I][2] Organizational Unit Defined .........................................713
[I][3] Eligibility Factors .......................................................715
[I][4] Presentation of Information ..........................................715
[I][4][a] Categorization of Employees .....................................715
[I][4][b] Scope of Disclosure ................................................717
[J] Other Requirements Under OWBPA ............................717
[J][1] Waivers Settling Charges or Lawsuits ..........................717
[J][2] Burden of Proof .........................................................718
[J][3] EEOC’s Enforcement Power .......................................718
[K] EEOC Regulations on ADEA Waivers .............................718
[K][1] No Ratification of Waiver by Employee’s Retention of Severance Payments ........................................719
[K][2] “Tender Back” ................................................................719
[K][3] Restitution/Set-Off ....................................................720
[K][4] Covenants Not to Challenge Waiver ............................720
[K][5] Abrogation ..................................................................720
[K][7] Invalid Waiver As a Separate Cause of Action ..............722
[K][8] Effect of Invalid Waiver on Timeliness of ADEA Suit ...722
[L] OWBPA Requirements Not Applied to Non-Age Claims ............................................................................723
[M] Admissibility of Unsigned Agreement in ADEA Action .............................................................................724

§ 10:4 Worker Adjustment and Retraining Notification (WARN) Act .................................................................724

§ 10:4.1 Who Must Give Notice .................................................725
§ 10:4.2 Mass Layoffs and Plant Closings Under WARN ..........727
[A] “Plant Closing” Defined ....................................................727
[B] “Mass Layoff” Defined ....................................................727
[C] “Reduction in Force” Defined ..........................................727
[D] “Single Site of Employment” Defined ..............................728
[E] “Part-Time Employee” Defined ......................................729
[F] “Employment Loss” Defined ............................................730
[F][1] Qualifications ...............................................................730
[F][2] Durational Issues ........................................................732
[G] Losses Must Be Aggregated .............................................733
§ 11:2.1 The Retaliation Analysis ................................................... 760
§ 11:2.2 The Prima Facie Case ....................................................... 762
[A] Element 1: Protected Activity ............................................ 762
[A][1] The Opposition Clause ..................................................... 764
[A][1][a] Examples of Protected Opposition Activity ..................... 766
[A][1][b] Examples of Unprotected Opposition Activity ................. 767
[A][1][c] Reasonable and Non-Disruptive Requirement ................. 768
[A][1][d] Reasonable, Good-Faith Belief Requirement ................. 769
[A][2] The Participation Clause ................................................... 772
[A][2][a] Participation in Litigation Process ................................ 772
[A][2][a][i] Examples of Protected Participation Activity ............... 772
[A][2][a][ii] Examples of Non-Protected Participation Activity ......... 773
[A][2][b] Lying During an Investigation ....................................... 775
[B] Element 2: Adverse Employment Action ......................... 775
[B][1] Standard for Evaluating Whether an Employer’s Action Is Retaliatory .............................................................. 777
[B][1][a] Burlington Northern & Santa Fe Railway Co. v. White ................................................................. 777
[B][1][b] Cases Interpreting Burlington ......................................... 778
[B][2] Retaliation Based on Use of Judicial Process ...................... 783
[B][3] Retaliatory Hostile Work Environment .......................... 785
[B][4] Third-Party Retaliation .................................................... 786
[B][4][a] Retaliation Against “Closely Related” Individuals and Associational Retaliation .................................................. 786
[B][4][b] Retaliation by Different Entities ...................................... 789
[C] Element 3: Proof of Causal Connection ............................ 790
[C][1] Direct Evidence of Retaliation ........................................... 790
[C][2] Circumstantial Evidence of Retaliation .......................... 794
[C][2][a] Proving Causation with Circumstantial Evidence of Retaliation ......................................................... 795
[C][2][b] Temporal Proximity ....................................................... 796
[C][2][b][i] Cases Holding Inference of Causation Exists ............... 797
[C][2][b][ii] Cases Holding Inference of Causation Does Not Exist.......................... 799
[C][3] Retaliatory Action Imputable to Employer ....................... 800
[C][3][a] “Cat’s Paw” Theory of Liability ................................ 801
[C][3][b] Retaliatory Harassment ............................................... 803
[C][3][b][i] Retaliatory Acts Will Be Imputed to Employer Where Employer Orchestrated Harassment .......... 804
[C][3][b][ii] Retaliatory Acts Will Be Imputed to Employer Where Employer Orchestrated Harassment, Knew About Harassment, or Failed to Stop It .................. 804
[C][4] Prior Criticism of Performance ........................................ 807
§ 11:2.3 Rebutting the Prima Facie Case—Legitimate Business Reasons and the Employer’s Lack of Retaliatory Intent .......................................................... 808
§ 11:2.4 Pretext ............................................................................. 811
Table of Contents

§ 11:3  The Whistleblower Protection Act................................. 812
§ 11:4  First Amendment Retaliation Claims.............................. 815
  § 11:4.1  Pickering v. Board of Education and the Development of
           First Amendment Retaliation Claims .......................... 815
  § 11:4.2  Garcetti v. Ceballos and Speech Pursuant to
           Employees’ Official Duties ................................ .... 818
§ 11:4.3  First Amendment Claims by Employees in
           Policy-Making Roles ............................................. 824
§ 11:4.4  First Amendment Claims Arising Out of Political
           Activity ............................................................. 825
  § 11:4.5  Retaliation Claims Based on the First Amendment’s
           Petition Clause ................................................... 827
  § 11:4.6  Retaliation Claims Based on the Free Exercise Clause ... 828
§ 11:5  Title IX Retaliation .................................................... 829
§ 11:6  Sarbanes-Oxley and Whistleblower Law......................... 830
  § 11:6.1  Recent Amendments to the Sarbanes-Oxley Act ......... 831
  § 11:6.2  Recent Case Law Developments ............................. 832
§ 11:7  Dodd-Frank Wall Street Reform and Consumer Protection
       Act of 2010 .......................................................... 841
  § 11:7.1  Dodd-Frank Act Whistleblower Incentives ................. 842
  § 11:7.2  Dodd-Frank Whistleblower Protections .................... 843
         [A]  Retroactivity ...................................................... 844
         [B]  Reconciling Whistleblower Definition and
            Anti-Retaliation Protections .................................. 845
         [C]  Extraterritoriality ............................................. 849
         [D]  Pre-Dispute Arbitration Agreements/Waivers
            of Claims ....................................................... 850
  § 11:7.3  New Consumer Financial Whistleblower Protections ...... 851

Chapter 12  Employee Blogging and Social Media .......... 853
§ 12:1  Introduction .......................................................... 854
§ 12:2  General Concerns with Employee Blogging and
       Social Networking .................................................. 855
§ 12:3  Ownership of Business-Related Blogs and Social Media
       Content ............................................................. 856
§ 12:4  Laws and Regulations Governing Employee and Employer
       Liability .............................................................. 859
  § 12:4.1  National Labor Relations Act ................................. 859
         [A]  Scope of Protected “Concerted Activity” .............. 859
         [B]  Lawful Social Media Policies ............................. 860
         [B][1]  Recent NLRB Decisions ............................... 860
                Counsel ....................................................... 862
         [C]  Lawful Discipline for Violations of Social Media
            Policies ......................................................... 865

lvii
## § 12:4.2 Federal Trade Commission Guidelines for Employee Reviews of Company Products ............................................... 868

## § 12:4.3 Negligent Supervision Liability for Employee Online Activity ................................................................. 869

## § 12:4.4 Whistleblowing, the First Amendment, and Retaliation

- [A] Whistleblower and Retaliation Laws .................................. 869
- [B] The First Amendment and Retaliation Jurisprudence .............. 871

## § 12:4.5 Equal Employment Opportunity Laws

- [A] Social Media and Hiring Decisions ....................................... 875
- [B] Discovery of Current Employees’ Protected Status or Protected Activity Through Social Media ..................... 877
- [C] Obligation to Rectify Complaints of Unlawful Conduct ............ 878
- [D] Nondiscriminatory Investigation and Enforcement of Social Media Policies ..................................................... 879

## § 12:4.6 Restrictive Covenants

## § 12:4.7 State Laws Pertaining to Off-Duty Conduct

- [A] New York Labor Law ................................................... 881
- [B] California Labor Law .................................................... 882

## § 12:4.8 The Right to Privacy and the Stored Communications Act

## § 12:4.9 New Laws Prohibiting Employers’ Access to Employees’ Social Media Accounts ...................................................... 885

## § 12:5 Utilizing Social Media in Investigations and Litigation

- [A] Social Media Considerations in Workplace Investigations ................................................................. 888
- [B] Scope of Discoverability of Blogs and Social Media .................. 889
- [C] Methods of Discovering Blogs and Social Media .................... 892
- [D] The Importance of Prompt Discovery Notices ....................... 894
- [E] Limitations on Attorney Research Using Blogs and Social Networking Sites .................................................... 895
- [F] Publicizing Litigation Proceedings via Blogs and Social Networks ............................................................... 897

### Chapter 13 Family, Medical, and Military Leave: Recent Developments Under the FMLA and USERRA

- [A] Introduction ............................................................................ 901
- [B] FMLA and Interpreting Regulations ......................................... 902
- [C] Basic Requirements .................................................................. 902

---

### Index

- [A] Whistleblower and Retaliation Laws .................................. 869
- [B] The First Amendment and Retaliation Jurisprudence .............. 871
- [C] Obligation to Rectify Complaints of Unlawful Conduct ............ 878
- [D] Nondiscriminatory Investigation and Enforcement of Social Media Policies ..................................................... 879
- [E] Restrictive Covenants ............................................................. 880
- [F] State Laws Pertaining to Off-Duty Conduct ......................... 881
- [G] New York Labor Law ................................................... 881
- [H] California Labor Law .................................................... 882
- [I] The Right to Privacy and the Stored Communications Act ......... 883
- [J] New Laws Prohibiting Employers’ Access to Employees’ Social Media Accounts ...................................................... 885
- [K] Social Media Considerations in Workplace Investigations ................................................................. 888
- [L] Scope of Discoverability of Blogs and Social Media ............... 889
- [M] Methods of Discovering Blogs and Social Media ................... 892
- [N] The Importance of Prompt Discovery Notices ....................... 894
- [O] Limitations on Attorney Research Using Blogs and Social Networking Sites .................................................... 895
- [P] Publicizing Litigation Proceedings via Blogs and Social Networks ............................................................... 897
- [Q] Introduction ............................................................................ 901
- [R] FMLA and Interpreting Regulations ......................................... 902
- [S] Basic Requirements .................................................................. 902
- [T] “Covered Employer” ............................................................. 902
- [U] Applicable Regulations ........................................................ 902
- [V] Selected Cases .................................................................... 903
- [W] “Successor in Interest” ......................................................... 904
Table of Contents

[B][1] Applicable Regulations ................................................. 904
[B][2] Selected Cases........................................................... 905
[C] “Eligible Employee” ..................................................... 905
[C][1] Applicable Regulations ................................................. 905
[C][2] Selected Cases........................................................... 907
[D] Reasons for Leave ......................................................... 907
[D][1] Applicable Regulations ................................................. 907
[D][2] Selected Cases........................................................... 910
[E] Amount of Leave Entitlement ........................................ 911
[E][1] Applicable Regulations ................................................. 911
[E][2] Selected Cases........................................................... 912
[F] Serious Health Condition .............................................. 913
[F][1] Applicable Regulations ................................................. 913
[F][2] Selected Cases........................................................... 914
§ 13:2.2 Employee’s Obligation to Provide Notice of Need for Leave .......................................................................... 914
[A] Applicable Regulations .................................................. 914
[B] Selected Cases............................................................... 916
§ 13:2.3 Employer’s Obligation to Designate Leave and to Provide Notice of Rights ......................................................... 917
[A] Applicable Regulations .................................................. 917
[B] Selected Cases............................................................... 919
§ 13:2.4 Healthcare Provider’s Certification .................................. 919
[A] Applicable Regulations .................................................. 919
[B] Selected Cases............................................................... 922
§ 13:2.5 Substitution of Paid Leave ............................................. 923
[A] Applicable Regulations .................................................. 923
§ 13:2.6 Continuation of Health Insurance .................................. 924
§ 13:2.7 Intermittent and Reduced Leave Schedules Under the FMLA ........................................................................... 925
§ 13:2.8 Right to Reinstatement ............................................... 926
[A] Applicable Regulations .................................................. 926
[B] Selected Cases............................................................... 927
§ 13:2.9 Prohibition of Interference, Discrimination, or Retaliation ........................................................................ 928
[A] Applicable Regulations .................................................. 928
[B] Selected Cases: Discrimination and Retaliation .................. 930
[C] Selected Cases: Interference ........................................... 931
§ 13:2.10 Eleventh Amendment Sovereign Immunity .................... 934
§ 13:2.11 Statute of Limitations ................................................... 935
§ 13:2.12 Personal Liability ...................................................... 935
§ 13:2.13 Relief Available Under the FMLA ............................. 935
[A] Applicable Statute ......................................................... 935
[B] Selected Cases............................................................... 936
§ 13:2.14 Waiver of Rights Under the FMLA ............................ 937
§ 13:2.15 Miscellaneous Issues .................................................. 937
[A] Arbitration of FMLA Claims ........................................... 937
[B] FMLA Preemption .......................................................... 937
EMPLOYMENT LAW YEARBOOK 2015

[C] Bankruptcy Estoppel .....................................................938
[D] Exacerbation Claims Under the FMLA..........................939

§ 13:3 Military Leave ...............................................................939

§ 13:3.1 Uniformed Services Employment and Reemployment
   Rights Act of 1994 ...........................................................939
   [A] Important Concepts Under USERRA .......................941
   [B] Reemployment Rights ...............................................941
       [B][1] Employee’s Responsibility to Provide Documentation
            of Service ................................................................942
       [B][2] Returning Employees’ Employment Rights ..........943
       [B][3] Disabled Employees’ Rights Under USERRA ......944
       [B][4] Selected Cases .....................................................944
   [C] Changed Circumstances ..............................................946
   [D] Compensation and Benefits .......................................946
   [E] Prohibition on Discrimination and Acts of Reprisal ......948
       [E][1] Important Concepts ..............................................948
       [E][2] Selected Cases .....................................................949
   [F] Release of USERRA Claims .......................................950
   [G] Arbitration of USERRA Claims ................................951
   [H] Eleventh Amendment Sovereign Immunity and
       State Law Preemption—Selected Cases .....................951

Chapter 14 Arbitration ..........................................................953

§ 14:1 Introduction ................................................................954

§ 14:2 Class Action Arbitration and Waivers .........................956
   § 14:2.1 Whether Arbitration of Class Claims Is Permissible ...956
   § 14:2.2 The Enforceability of Class Action Waivers .........960
       [A] General Principles and Concepcion ......................960
       [B] The Impact of Concepcion in California ...............965
       [C] Impact of Concepcion Outside of California .........969
       [D] Concepcion and the National Labor Relations Act ...972
   § 14:2.3 Whether Federal Statutory and State Law Employment
       Claims Are Arbitrable ..................................................977
       [A] Title VII .................................................................977
       [B] Age Discrimination in Employment Act and the
           Waiver Restrictions of the Older Workers Benefit
           Protection Act ..........................................................978
       [C] Fair Labor Standards Act .......................................980
       [D] Sarbanes-Oxley ......................................................981
       [E] USERRA Claims .....................................................983
       [F] State Law Claims .....................................................984

§ 14:3 Whether an Arbitration Agreement Will Be Given Full Effect
   If It Does Not Provide All Available Statutory Remedies ....985
   § 14:3.1 Background .........................................................985
   § 14:3.2 Punitive Damages ...............................................986
   § 14:3.3 Attorney Fees ......................................................989
Table of Contents

§ 14:3.4 Equitable Relief ............................................................... 990
§ 14:4 Enforceability of Arbitration Agreements.......................... 990
 § 14:4.1 Whether Arbitration Agreements in Employment
    Documents, Contracts, Partnership Agreements,
    and Employee Handbooks Are Enforceable ....................... 990
 § 14:4.2 Whether the Agreement to Arbitrate Must Be Knowing
    and Voluntary ............................................................. 993
 § 14:4.3 Whether an Agreement to Arbitrate Is an Unconscionable
    Contract of Adhesion ................................................... 995
    [A] Procedural Unconscionability .................................... 996
    [B] Substantive Unconscionability.................................... 998
 § 14:4.4 Whether the Employer Must Pay All Arbitration Costs ... 1000
 § 14:4.5 Whether Arbitration Agreements Are Enforceable by
    Third Parties .................................................................. 1003
§ 14:5 EEOC Litigation on Behalf of Employee Subject to an
    Agreement to Arbitrate .................................................... 1004
§ 14:7 The Scope of Judicial Review of Arbitration Awards .......... 1010
 § 14:7.1 Limited Grounds for Vacating an Arbitration Award ..... 1010
 § 14:7.2 “Manifest Disregard of the Law” .............................. 1011
 § 14:7.3 Other Grounds for Judicial Review ........................... 1013
§ 14:8 Whether the Right to Compel Arbitration Can Be Waived .... 1017
§ 14:9 Conclusion ..................................................................... 1019

Table of Cases ................................................................. 1021

Index .................................................................................. 1065