

Employment Law
Texas Tech University School of Law
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SYLLABUS

1. LEARNING OUTCOMES: I intend for this class to provide meaningful training for the practice of law relating to the employment relation. Our benchmark will be to try to get to the level of understanding that a company's general counsel ought to have or that a beginning employment-law specialist should have. By the end of the course, you should have a command of the principal federal statutes, typical state statutory regimes, and the key common-law concepts applicable to the employment relation. Labor law (the law concerning unions and collective bargaining) and employment discrimination (which is the subject of its own course at the School of Law), will receive less detailed treatment, and thus, for these subjects, I intend for you to gain a solid framework, although not a detailed understanding.

The following is a non-exclusive list of particular learning outcomes for this course:

1. Broadly know and be able to apply the principal doctrines of federal and state law relating to the employment relation, including, specifically, those listed in the course outline at the end of this syllabus.
2. Have a basic level of literacy with employment law such that, with regard to employment law issues, you could productively and immediately step into a role as the general counsel of a small firm or an attorney supporting the general counsel of a firm of any size.
3. Have the requisite level of knowledge such that you could immediately play the role of a productive and knowledgeable junior associate to an experienced outside counsel who practices primarily in the employment-law context.
4. Have the requisite level of knowledge such that you could, with some outside mentoring and reference to treatises, take on small, routine employment-related disputes as a solo practitioner.

5. Be able to fashion persuasive appellate-level or scholarly arguments, grounded in theoretical and policy perspectives as well as historical context, both for and against propositions involving employment law.

2. SUBJECT MATTER AND COURSE DESIGN: Unlike torts, antitrust, income taxation, or many other law-school subjects, “employment law” is not a unified body of law. Instead, it is a professor- or lawyer-crafted grab bag that draws together various statutes and doctrines that apply in various ways to the employment relation.

Being what it is, there are two basic ways to organize an employment law course. One way is to go **law-by-law**, taking one statute or doctrine at a time, and discussing the myriad applications of each to various situations that arise in the employment context. The other way of organizing is to go **situation-by-situation**, looking at topics such as hiring, supervision, and firing, and then learning the various laws applicable to each situation. With such an organizational scheme, certain laws and doctrines may come up multiple times, since they apply to multiple situation. Each method of organizing, unfortunately, has its trade-offs. To get the best of both worlds, we will tackle this course using *both* methods of organization. In the process, we will learn employment law *twice*.

After the course’s introduction, we will go law-by-law. In this part, the “Blackletter Overview,” we will move very quickly, learning blackletter legal principles, but not reading any cases. After finishing this phase, you should have a solid framework of understanding in the basic doctrine of the entire field.

Then, in the next phase, we will go situation-by-situation. In this part, the “Detailed Examination of the Employment Relation,” drill down to a deeper level of understanding as we will move through a series of topics that represent particular decision points in the employment relation. This we will do in rough chronological order of the stages of an employment relationship.

At the end of this syllabus, you will find the general course outline. An evolving Chart of Assignments may be found on the course website.

3. ONLINE SITES:

Class website: The main repository for class information is the class website. It is not password protected. Go to [ericejohnson.com](http://www.ericejohnson.com) and find the link on the upper left. The direct URL is: http://www.ericejohnson.com/courses/emp_13/

MyTechLaw site: Many materials will be made available through the MyTechLaw site for the course, including slides.

4. MATERIALS:

Required text: There is one required text for this course that is sold as a printed book:

Employment Law (2d Edition). Richard Carlson. Published by Aspen Publishers, 2009 ISBN: 9780735578036

Other assigned materials: For the beginning of the course, you will utilize a commercial outline I have written. I published this as *Lindstrom’s Summary of Employment Law* about 12 years ago under my own imprint. Do not buy a copy. I will make available to you’re an updated version of the book for free as a series of files that may be downloaded from the class’s MyTechLaw site. The electronic availability will

mean that you will be free to cut and paste the material into your own outline, if you wish.

In addition, you may be required, for time to time, to access statutes or other materials. I will provide you with links or post materials on the MyTechLaw site.

Study aids: Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting, including, for instance, treatises and commercial outlines. I mention this explicitly because some professors discourage outside sources. I do not. As far as I am concerned, the more you learn about employment law, the better. I personally have found that study aids can be a great way of gaining a basic understanding of the blackletter law in a subject. One word of caution, however: You may find that such study aids will not function well as exam preparation. In my view, the best way to make use of study aids, if you are going to, is to use them *before* we cover the coordinate subject matter in class. That way, the study aid can help you learn the course content, which is your ultimate goal. (Which is why I have organized the course as I have. See Section 2.) Heavy use of a study aid at the end of the semester may not be the best use of your study time. Of course, it's up to you to decide for yourself. (And keep in mind that you are getting my commercial outline as a series of pdf files from the MyTechLaw site.)

There are various hornbooks, treatises, and nutshells concerning the subject matter of this course. I do not have any specific recommendations among them, but to the extent you do use outside study aids, I would appreciate your letting me know your experience with them – whether good or bad.

5. ASSIGNED READING: In each class I will announce the reading assignment for the next class meeting, and I will post reading assignments on the Chart of Assignments online (linked to from the class webpage). I take care to craft reading assignments so that they are not unduly burdensome. In return, I ask that you do the reading conscientiously. How should you tackle the reading? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. “With interest” means you should be having thoughts going through your head such as, “Mmmm, interesting!” “Ah ha! That makes sense!” “What is wrong with this judge?!?!?” or, especially in this class, “I can’t believe people would treat each other that way.”

One way to approach the reading, suggested by Professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ...” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, unbiased, beneficial for society, and true to statute and precedent. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

6. ADDITIONAL OPTIONAL READING: In addition to the assigned reading for class, you might find it interesting to do some optional extra reading from blogs and online news sources. Doing so will allow you to engage with the material in a way that is highly relevant and topical, leveraging your imagination to solidify what you have

learned and prime you for what comes next. I may post some links to such sources on the class webpage.

7. GRADING:

7-1. Your grade will primarily be based on your exam performance. The exam is discussed below. Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading her or his exam. You may not waive anonymity. Self-identification on the exam or otherwise culpably destroying anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action under the Honor Code.

7-2. Within the parameters of the law school’s policy, I will factor classroom performance and attendance into final grades. Law school policy allows adding or subtracting one letter-grade increment to or from the otherwise-calculated final grades. By my use of this method, I anticipate that some students’ exam grades will be increased upward, many will remain unchanged, and others may end up being adjusted downward.

Reasons for a positive effect of class participation on the overall course grade may include habitual preparedness and engagement, volunteering in discussions, advance volunteering to be called on, and otherwise making a substantial contribution to the class and the learning enterprise. Reasons for a negative effect of class participation on the overall course grade will include exhibiting poor performance or visible disengagement in the classroom, excessive absence, tardiness, and being unprepared for class.

You should not worry unduly about the quality of your responses to questions in class. As long as you do the reading and give it honest effort when speaking in class, you will not be marked down. Law school, like all other educational environments, is a place to learn, and that necessarily implies that it is a place to fumble and make mistakes. I do not ask questions and conduct discussion as a way of judging you, I do it as a way of challenging you and helping everyone to learn. So put aside your fears and engage in the conversation. (More is said about expectations for class participation and classroom conduct in Section 9, below.)

8. COMMUNICATIONS AND OFFICE HOURS:

8-1. You may e-mail me at eric.e.johnson@ttu.edu. I will get back to you, but note that I do not read e-mail on an hour-by-hour basis, nor am I always able to do so a day-by-day basis either. Substantive questions about the law are far more efficiently handled verbally, so instead of e-mailing, please save those questions for chatting with me in person, such as after class or in my office. And before you ask a procedural question, I would be appreciative if you would check first to see if the answer is in this syllabus. Please note that if you miss class, you should ask other students for information you may have missed, such as reading assignments. Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line. Doing so is, after all, good practice for real-world lawyering.

8-2. If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

8-3. My office is 318E. My office number is 806-742-3990 x226.

8-4. Dedicated office hours:

11:00–11:30 a.m. Wednesday through Friday

8-5. Open door policy:

I invite you to feel free to visit outside of office hours on an impromptu basis. You will usually find me in my office on class days between 11:00 a.m. and 2:00 p.m., as well as after 3:00 p.m. If for some reason I can't talk, I'll let you know. (There's no harm in dropping by to ask.)

8-6. Appointments:

I am very happy to make appointments. To make an appointment please send me an e-mail with some suggested times.

8-7. At least once during the semester, I hope you will come by my office to introduce yourself, even if you have no questions and nothing to discuss. That's not a requirement, just a request. But it would be nice to be able to chat informally with everyone at least once. So please consider making time at some point during the semester.

9. IN THE CLASSROOM:

9-1. Classroom Conduct Rules:

- (a) Do nothing that might disrupt class or distract your fellow students.
- (b) Refrain from eating in class. Also refrain from chewing gum audibly or with your mouth open.
- (c) Refrain from any use of a digital device that could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, distracting images, moving images (video), animation or flashing graphics, or any kind of indecent content.
- (d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to e-mail and text messaging. (2) You may not engage in any web publication or any live-updating/realtime digitally enabled network communications with anyone at all, including, but not limited to, live chat, IM, Facebook (including, but not limited to, Facebook groups), Twitter, and Google Plus. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a lowered course grade and may be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with University information-technology staff for technical support purposes. Bottom line: Keep the discussion in class, where it is productive and benefits all.

9-2. Your participation in classroom discussion should be meaningful and appropriate. Raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. Your classroom participation should be appropriate – not too little, not too much. On occasion, there are students who raise their hand too often and take up too much of the class’s time. And in nearly every class, there are people who sit passively and rarely, if ever, contribute to classroom discussion. Try not to fall into either extreme.

9-3. I am grateful for students to volunteer in advance for class discussion. If you volunteer in advance, I’ll assume that you are game for particularly challenging questions. If you would like to volunteer in advance for the entire semester, please send me an e-mail (to eric.e.johnson@ttu.edu) with the subject line “Employment Law Volunteer for Semester”. If you do that, you can then opt-out on specific days if you would like. If you would like to volunteer in advance for a particular class, you can let me know in person before class begins, or you could e-mail me at eric.e.johnson@ttu.edu, with “Employment Law Volunteer” in the subject line. I can’t guarantee that I will call on you in such an event, but I will appreciate your offer nonetheless.

9-4. Even if you don’t volunteer in advance, I’ll expect you to be ready to participate meaningfully if called on. If you cannot participate in this way for a particular class, for whatever reason (and there’s no need to tell me why), please tell me before class, in person, so that I can avoid calling on you. Reasonable requests of this sort are entirely understandable and will not adversely affect your grade.

9-5. Be aware that I plan to make an audio recording of each class meeting. These recordings are for my use, and, unfortunately, I will not be making them available during the semester for absent students. No one is permitted to make an audio or video recording of class without my express, written permission.

10. ABSENCES AND TARDINESS:

10-1. Attendance in class is an essential component of the educational experience, and the accreditation standards of the American Bar Association mandate that schools “require regular and punctual class attendance” and enforce attendance policies.

10-2. Attendance will be taken by means of a grid sheet with boxes to initial for individual days. It will be your responsibility to make sure you have initialed in the box for the day. You may not mark the sheet on behalf of another person, even if that person is in attendance. You may not permit another person to mark the sheet on your behalf. Also, you may initial the box for the instant date – that is, you may not make a mark indicating your attendance for any other date, even if you were in attendance on that date. Such forgery would be in violation of the law school’s Honor Code and will be dealt with accordingly.

10-3. In accordance with the policy reflected in the Student Handbook, Part II.I., I intend presumptively to exclude from the course and final exam any student accumulating nine absences or more, whether for illness, interviews, activities, etc. If an extreme situation for which you are not at fault takes you over that limit, we can talk to the Dean or the Associate Dean of Academic Affairs about whether the circumstances warrant your staying enrolled. Note that coming to class late may be counted as an

absence for purposes of course and exam exclusion, as may leaving early. This syllabus constitutes your warning that you are subject to exclusion on this basis. Keep track of your own absences. Do not expect to receive an independent warning from me if you draw close to your allowed absences.

10-4. If extended illness or a personal situation requires missing more than a few classes, I encourage you to talk to me so that we can try to work through the situation.

10-5. If you are concerned about your attendance record, please talk to me. Of course, none of the foregoing supersedes the law school's or university's policies.

11. ACCOMODATIONS:

11-1. Disability: Any student who, because of a disability, may require special arrangements in order to meet course requirements should contact the Associate Dean for Academic Affairs Jarod Gonzales as soon as possible to make any necessary arrangements. Students should present appropriate verification from Student Disability Services during the Associate Dean's office hours. Please note that classroom accommodations cannot be provided until verification from Student Disability Services has been submitted. For additional information, you may contact the Student Disability Services office in 335 West Hall or 806-742-2405.

11-2. Observance of a Religious Holy Day: Texas House Bill 256 requires institutions of higher education to excuse a student from attending classes or other required activities, including examinations, for the observance of a religious holy day. The student shall also be excused for necessary time to travel. An institution may not penalize the student for the absence and must allow for the student to take an exam or complete an assignment from which the student is excused. No prior notification of the instructor is required.

12. EXAMINATION:

12-1. I will not discuss the exam on an *ex parte* basis. (See Section 8-2.)

12-2. Exam format:

(a) This class will have a final exam requiring a written response, and four hours in which to write it. Despite the four-hour duration of the exam session, I plan to write a "three-hour" exam, that is, an exam that could, in my judgment, be thoroughly and competently answered in three hours. Thus, you should have some breathing room. Note that I will not use any questions on the written portion that have been used on any other prior exam.

(b) The exam will be administered on an open-book basis. You may bring with you any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session.

(c) Your response on the exam will be limited by word count. There may be one general word limit, or particular word limits for particular portions of the exam. You will be responsible for constraining your response to the applicable word limit, even if you are providing a handwritten exam. All word limits are "hard" and will be strictly enforced. No overage at all is permissible.

(d) I may provide a more specific description of the examination at a later time.

12-3. I recommend using old exams for studying. I have not taught Employment Law, as such, before, so you will not have access to an old exam written by me for this particular course, but exams I have written for other courses embrace facts that can be used as a basis for applying law learned in this course, and looking at those exams will give you a sense of what my exams tend to look like. You will find my old exams in my Exam Archive, which is publicly accessible online. You will find a link on [ericejohnson.com](http://www.ericejohnson.com/exam_archive.html) (http://www.ericejohnson.com/exam_archive.html). Also, of course, you can and should look at past Employment Law exams from other instructors. Later in the semester I will have more to say about how I recommend preparing.

13. COURSE OUTLINE: The planned organization of the course is below. The structure is subject to minor adjustment, including the possible omitting of some topics, if time constraints demand. Note that the numbered topics do not correspond to class days, nor do they constitute units of equivalent size. Some topics will take multiple days and will involve considerable reading. Other topics will be covered quickly, with little or no reading. For a day-to-day chart of assignments, see the evolving Chart of Assignments, available from the course webpage.

Part 1: Introduction

Part 2: Blackletter Overview

Part 3: Detailed Examination of the Employment Relation

1. The Employee / Independent Contractor Problem (Carlson: 2.A.)
2. Who Can Be Employed? Children (Carlson: 2.B.1.)
3. Who Can Be Employed? Aliens (Carlson: 2.B.2.)
4. Who is the Employer? (Carlson: 2.C.)
5. Duties to Third Parties in the Selection of Employees (Carlson: 3.A.-B.)
6. Statutory Prohibitions Against Discrimination (Carlson: 3.C.)
7. Inaccuracy and Intrusion in Selecting Employees (Carlson: 3.D.)
8. Wages and the Labor Market (Carlson: 4.A.)
9. Contractual Rights: Individual Bargaining (Carlson: 4.B.1.)
10. Contractual Rights: Collective Bargaining (Carlson: 4.B.2.)
11. Statutory Minimums and Remedies for Compensation (Carlson: 4.C.)
12. Deferred and Contingent Compensation (Carlson: 4.D.)
13. Historical Perspective on Workplace Health and Safety (Carlson: 5.A.)
14. Compensation for Work-Related Injuries (Carlson: 5.B.)
15. Preventative Regulation: Occupational Safety and Health Law (Carlson: 5.C.)
16. Rights and Duties of Supervision (Carlson: 6.A.)
17. Investigation of Employees (Carlson: 6.B.-C.)
18. Accommodating Personal and Family Needs (Carlson: 7.A.-C)

19. Accommodating Civic Duties (Carlson: 7.D.)
20. At-Will Employment and its Subversion (Carlson: 8.A.-B.)
21. Alternative Job Security Schemes (Carlson: 8.C.)
22. Mitigations of Termination (Carlson: 8.D.)
23. Implied Employer Rights and Employee Duties (Carlson: 9.A.1.)
24. Contractual Limits on Resignation and Competition (Carlson: 9.B.)
25. Interstate Enforcement Problems (Carlson: 9.C.)
26. Resolution of Employment Disputes (Carlson: 10.)

14. FEEDBACK: If you have feedback for me – suggestions, ideas, commendations, or criticisms, please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that.

Good luck. I hope you enjoy the course.

– EEJ

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