CONTENTS

Preface	X	vi
Acknowledgments	x	ix
Chapter 1 An Overview of Employment and t	the Law	1
A. The Changing Nature of Work in America		1
1. The Changing Workforce		1
2. The Changing Workplace		4
3. Changing Employee Expectations		ç
a. Compensation and Fringe Benefits		Ĉ
b. Tenure and Career Advancement		11
B. Alternative Legal Systems for Regulating Emp	ployment Relations	13
1. Individual Contract		13
2. Collective Bargaining		15
3. Statutory Protection of Employees		16
4. The Law of the Public Workplace		17
C. Complications Created by Employment for a	n Indefinite Duration	18
Chapter 2 Who Is an Employee and Who Is th	he Employer?	2 5
A. The Employee/Independent Contractor Pro	blem	25
B. Who Is the Employer?		53
C. Who Can Be Employed?		76
1. Children		76
2. Aliens		83
Chapter 3 Selection of Employees	1	0 3
A. Overview	1	03
B. Duties to Third Parties in the Selection of En	mployees 1	04
C. Statutory Prohibitions Against Employment I		15
1. Background	1	15
2. Proving Discriminatory Intent	1	18
3. Discriminatory Inquiries	1	41

хi

xii	Contents
4. Disparate Impact	146
5. Affirmative Action	153
6. Reasonable Accommodation	165
D. Beyond Discrimination: Inaccuracy and Intrusion	171
1. Overview	171
a. Inaccuracy	172
b. Intrusion	180
i. Constitutional Rights of Privacy in Public Sector Employme	ent 187
ii. Private Sector Employees: Common Law and Other State I Privacy Rights	Law 189
2. Background Investigations	190
3. Drug Testing	203
4. Polygraph Examinations and Other Tests of Honesty and Charac	eter 214
5. Genetic Screening: Is the Future Now?	224
Chapter 4 Compensation and Benefits	225
A. Wages and the Labor Market	225
B. Contractual Rights	234
1. Individual Bargaining	234
2. Collective Bargaining	249
C. Statutory Minimums and Remedies	262
1. Minimum Wage and Overtime Laws: Basic Requirements	262
a. The Rates	262
b. Exempt vs. Nonexempt	269
2. What Compensation Counts?	277
3. What Hours Count? Allocating the Cost of Unproductive Time	283
4. Allocating Expenses and Losses	294
a. The Employment Contract and the FLSA	294
b. State Wage Payment and Deduction Laws	301
5. Enforcement and Remedies	303
a. FLSA	304
b. State Wage Payment Laws	305
c. Class and Collective Wage Actions	306
D. Deferred and Contingent Compensation	315
1. The Risk of Forfeiture	315
2. Retirement and Welfare Benefits: ERISA and Related Federal Laws	322

Cor	ntents	xiii
	a. Securing the Right to Benefits	322
	i. Securing Benefits Against the Risk of Employment Termination	330
	ii. Securing Benefits Against the Risk of Insolvency	333
	iii. Securing Benefits Against Alienation	334
	b. Deciding Benefit Claims: Ensuring Fairness and Accountability	335
	c. Fiduciaries and Fiduciary Duties	345
	d. Interference and Retaliation	356
	e. Discrimination in Benefits	365
	i. ERISA's Nondiscrimination Rules	365
	ii. The Other Employment Discrimination Laws	367
	3. Retirement and Welfare Benefits: State Law Rights and Remedies	370
Ch	apter 5 Workplace Safety and Health	379
A.	Workplace Safety and Health at the Beginning of the Modern	
	Regulatory Era	379
В.	Compensation for Work-Related Injuries	381
	1. Introduction: The Workers' Compensation System	381
	2. Arising Out of and In the Course of Employment	390
	3. Occupational Disease and Other Progressive Injuries	401
	4. Disqualification	411
	5. Employer Interference with Access to Benefits	416
	6. Preserved Tort Claims	421
	a. Third-Party Liability: Who's an Employee and Who's the Employer?	421
	b. Employer Liability	423
C.	Preventive Regulation: Occupational Safety and Health Law	429
	1. Overview	429
	2. Establishing Employer Duties	435
	a. The General Duty Clause	436
	b. Standards	443
	3. Employee Self-Help	456
	a. Individual Employee Action	456
	b. Concerted Employee Action	463
	4. Employer Rights	468
	5. Employee Selection and Occupational Safety	474
	a. The Accident-Prone Employee	474
	b. The Injury/Illness-Prone Employee	475

XIV		Contents
Ch	pter 6 Management and Supervision of the Workforce	481
A.	Rights and Duties of Supervision	481
	1. Employer Control and Employee Autonomy	481
	a. Contract Law	481
	 b. Appearance & Grooming: Introduction to Constitutional Rights & Discrimination Statutes 	483
	c. Social, Family, or Sexual Relations & Other Fundamental Libertie	s 486
	d. Free Speech and Expression	487
	e. Statutory Protection for "Off-Duty" Conduct	493
	f. "Concerted" Employee Activity to Address Terms and Conditions of Employment	497
	2. Duties of Supervision	502
	a. Negligent Supervision and Third Parties	502
	b. Abusive Supervision	506
	c. Discriminatory Harassment	515
В.	Intrusive Investigation of Employees	532
	1. Interrogation	532
	2. Interrogation and the Law of Collective Bargaining	539
	3. Investigatory Polygraph Examinations	545
	4. Investigatory Searches	548
	5. Surveillance	580
	6. Third-Party Investigations of Alleged Wrongdoing: The Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act	600
C		601
C.	Negligent Investigation	001
Ch	pter 7 Accommodating Personal, Family, and Civic Needs	609
A.	Introduction	609
B.	Personal Needs	610
C.	Family Obligations	622
	1. Sick Child Leave	623
	2. Leave to Care for Adult Family Members	626
	3. Is Leave Needed for Care?	628
	4. Leave for Newborn or Newly Placed Children	633
	5. Discrimination on the Basis of Pregnancy or Childbirth	633
	6. Time Off for Breastfeeding	634
	7. Leave When Family Members Are Called to Active Duty	634

Contents	
D. Restoration, Noninterference, and Nondiscrimination	635
E. Civic Duties	643
1. Military Service	643
a. Overview	643
b. Rights and Benefits of Employment: How Does	
Military Leave "Count"?	644
2. Jury Duty	654
Chapter 8 Employment Security	655
A. Introduction	655
B. Overcoming the Presumption	659
1. Employer Promises of Job Security	659
2. Employer Countermeasures	688
a. Disclaimers	688
b. Modification or Revocation	693
3. Should Job Security Depend on Express Agreement of the Parties?	701
4. Extracontractual Remedies	716
a. Promissory Estoppel	716
b. Fraudulent Inducement	720
c. Third-Party Tortious Interference	725
d. Discharge for an Illegal Reason	734
i. Overview	734
ii. Discharge Undermining Public Policy	735
iii. Employee Action Pursuant to Employment Duty	753
iv. Employee Good Faith	760
v. The Employee's Prima Facie Case and the Problem	= 0.4
of Employer Knowledge	764
vi. Adverse Retaliatory Action	765
e. Other Employer Torts in the Course of Discharge	773
C. Job Security in the Public Sector	774
D. Mitigating the Impact of Termination of Employment	777
1. The Employee's Reputation: Defamation and Stigmatization	777
a. Common Law Defamation	777
b. Stigmatization by a Public Entity	787
2. Unemployment Compensation	789
a. An Overview of the Unemployment Compensation System	789
b. Disqualification by Misconduct	791
c. Disqualification Because of Resignation	797

xvi	Contents
3. Collective Terminations	801
a. Overview	801
b. The Worker Adjustment and Retraining Notification Act	802
Chapter 9 Protecting the Employer's Interests	813
A. Implied Employer Rights and Employee Duties	813
1. The Employee's Implied Duty of Loyalty	813
2. Inventions, Trade Secrets, and Other Property Interests	821
a. The Employer's Shop Right	821
b. The Employer's Trade Secrets	827
c. Ownership of Social Media	838
B. Express Contractual Limits on Resignation	
and Competition	839
1. Express Limits on Resignation	840
2. Express Agreements Restricting Competition	845
a. Legitimate Justifications for an Agreement Not to Compete	845
b. Problems in Formation	851
C. Interstate Enforcement Problems	861
Chapter 10 Resolving Employment Disputes	865
A. Informal Adjustment of Rights and Claims	865
B. Overlapping Remedies and Proceedings	876
1. Time Limits for Formal Action	876
2. Duplicative Remedies	881
a. Federal Preemption of State Law	881
b. Statutory Preemption of Common Law Remedies	888
c. Multiple Forums and the Problem of Issue Preclusion	894
C. Arbitration as a Final Resolution of Statutory Claims	896
Table of Principal Cases and Authorities	907
Index	911