Employment Law in Michigan
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Employment Law in Michigan

- **Today’s Mission . . .**
  - [Yes, you have to introduce yourself . . . ]
  - Importance of Employment Law
  - Historical framework for employment law
    - A little education never hurt anyone
  - Modern employment law environment
    - Quick definitions
    - Modern constitutional/statutory protections for employees
    - Modern common law protections for employees
- Employment at WMU
- Q&A
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But first, a disclaimer . . .

- This is general advice. Each specific employment situation must be addressed based on the specific facts. In the event you contemplate some specific action based on the advice in this presentation you must first consult with your Human Resources Representative.
Importance of Employment Law

- As a public/governmental agency we enjoy fairly broad governmental immunity
  - A few very important exceptions:
    - Gross Negligence
    - Public Buildings
    - Automobile liability
    - Contracts
    - Constitutional Violations, and …
    - Employment Decisions
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**Historical Framework**

- Employment law emerged from the law of Master and Servant
  - Does not bode well for the servant, and it wasn’t:
    - At-will employment was assumed
    - No minimum wage/hour limitation
    - No working condition protections
    - No protection in the event of OTJ injuries
    - No ability to collectively bargain
  - Based on an agrarian society with no mega-employers
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- Historical Framework cont...
  - “Industrial Revolution” changed all that
    - High concentration of workers geographically and functionally
      - Coal miners (UMWA 1890)
      - Drivers/transportation workers (Teamsters 1903)
      - Auto workers (UAW 1933)
  - Abuse of worker became a concern
    - Turn of the 20th Century statutory restrictions began
      - Age limitations, hour limitations, wage requirements, working conditions, OTJ injuries
      - Courts were torn in interpretation (common law) and enforcement, for a while, but not very long
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• Historical Framework cont . . .
  • Then came the big organized labor push of the 30’s and 40’s: Norris-LaGuardia Act, NLRA, LMRA
    • Right to unionize, rights to collectively bargain, and right to strike statutorily preserved
    • Ushered in the modern era of Labor Management and Employment Law
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• Modern Employment Law Environment
  ◦ Q: Who is an employee? For what purpose? When does it matter?
    • Most times it’s easy to identify: Regular, full-time, benefits eligible continuing employee
    • But, it can get tricky:
      • A full time student is hired by DOSA to be a DJ at an event in the Bernhard Center
        • Employee? What would you want to know?
          • Independent Contractor Agreement signed?
          • Whose equipment is used?
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- Modern Employment Law Environment cont . . .
  - Who tells her what to do?
  - How is she paid and what is withheld?
  - How frequently does she perform this service?
  - Where we rely on the skill of another person/entity to perform a specialized service they are generally an IC if:
    - We treat them like one:
      - They use their own equipment
      - They decide how the job is to be done
      - We do not withhold taxes, medical insurance payments, etc.
Modern Employment Law Environment cont.

- Keep in mind, an employee for one purpose does not mean an employee for all purposes...
  - Retirement contributions – pretty narrow definition
  - Employment discrimination – pretty broad definition

What kind of employee are they?
- Staff compensation
- Unionized
- Contract
Modern Employment Law Environment cont . . .

- Modern environment is generally divided into two:
  - Unionized
  - Non-Unionized

- Non-Union
  - Three sources – constitutions, statutes and common law
    - Constitution – the university is a public employer – its actions are “state action” for constitutional purposes
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- Modern Employment Law Environment cont...
  - A few key clauses
    - Due process clause of the 5<sup>th</sup> Amendment (let’s save this one for later)
    - Equal protection clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendment (let’s save this one for later)
    - Free speech/exercise clause of 1<sup>st</sup> Amendment – can be tricky issue – especially with “social media” – facebook, blogs, etc.
      - Certain speech is never protected: threats, harassment, pornography, slander, libel
Modern Employment Law Environment cont . . .

- Assuming it is not prohibited speech, we may not take action against an employee for statements made in their personal capacity on matters of public concern – we can take action for statements made in their capacity as employees.
- So, for example, if an employee manages a blog and, in his own name with no implication of speaking for the university, criticizes Obama or Romney, we cannot try to silence him;
- If I send an email to the president and describe an administrator with whom I work as an “over-the-hill butt head who I would like to punch in the face” that is not protected speech and I can be disciplined;
- Always keep in mind, that the media in which a statement is made (letter, email, blog post, facebook post) does not matter – what matters is content. We always focus on content.
Modern Employment Law Environment cont. . .

- However, we also must be “content neutral” – we have to treat similar content in a similar fashion:
  - For example, if we ban email tag lines in support of Obama, we have to ban all politically based email tag lines – the university can’t pick and choose the type of content it supports
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- Modern Employment Law Environment cont . . .
  - Statutory Protections for employees
    - Elliott-Larsen Civil Rights Act (state)/Titles VII and IX of CRA of 1964 (federal) + Age Discrimination in Employment Act (ADEA) (federal)
      - Anti-discrimination statute
        - Race
        - Sex
        - Age
        - National origin
        - Religion
        - Marital status
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• Modern Employment Law Environment cont . . .
  • Included by University policy
    • Sexual orientation and gender identity
    • Beyond the minimum protection provided by law
  • Independent obligation regardless of CBA language
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- Modern Employment Law Environment cont...
  - Some cases very clear – “we don’t think women should drive trucks” – some less clear – “we don’t think men should be locker room attendants for female locker rooms” – class membership can be a bona fide occupational qualification, but it is very rare and should be considered only when approved by Human Resources
  - Religion (like disability) is two pronged
    - We can’t discriminate
    - We must make reasonable accommodations for the practice of religion
    - Very fact specific – the key is including essential job duties in all postings and descriptions – if being available to work Sunday is important, say it early, say it often
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- Modern Employment Law Environment cont . . .
  - Michigan Person’s with Disabilities Civil Rights Act/American with Disabilities Act – like religion is two pronged:
    - Can’t discriminate
    - Must make reasonable accommodation
  - Office of Institutional Equity is in charge of compliance with employment anti-discrimination laws
  - All statutes have anti-retaliation clauses as well
  - When we comply with these statutes and follow our policies we comply with the Equal Protection requirement of the 5th and 14th Amendments (see slide 11)
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- Modern Employment Law Environment cont . . .
  - Whistler Blowers Protection Act (state)
    - Cannot take adverse employment action against someone because they report or threaten to report illegal activity to an external enforcement agency
    - Encouraging disclosure of unethical behavior
  - Unemployment and Workers Comp
    - UA – wage insurance for terminated employee
    - WC – wage and health coverage for employees injured OTJ
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- Modern Employment Law Environment cont.
  - Bullard-Plawecki Right to Know Act (state)
    - Employees are entitled to review their employment file and to submit rebuttals to materials they disagree with
    - May request a copy
    - Have to give notice to employee if disciplinary reports are released to outside entities
  - Family Medical and Leave Act (FMLA) (federal)
    - Administered by Human Resources
    - Honor the leave approved by HR
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- Modern Employment Law Environment cont . . .
  - Unionized environment
    - Public Employment Relations Act (PERA) (state) authorizes the right of public employees to organize and bargain collectively
  - Two important aspects of unionized environment
    - Obviously, the Collective Bargaining Agreement (CBA) is the key
      - Know it well
      - Failure to follow results in a grievance
        - Internal process that ultimately leads to arbitration
    - §210 of PERA defines Unfair Labor Practices (ULP’s)
      - Regardless of CBA, management may not interfere, coerce, discriminate, or retaliate against union members for union activities
      - ULP’s are heard by Michigan Employment Relations Commission (MERC) – external review from the start
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• Modern Employment Law Environment cont . . .
  • ULP’s frequently involve a unilateral change in the terms and conditions of employment without engaging in bargaining
  • Generally, ULP’s involve issues that affect the whole union
    • Example: the University changes retirement contributions without agreement
  • Generally, Grievances involve the interpretation of the CBA as to a specific employee
    • Example: an employee is denied a preferential shift based on mis-application of seniority
  • University HR Handbook also contains rules and processes for non-unionized employees
Modern Employment Law Environment cont . . .

- The CBA and the HR Handbook outline the procedures we follow in making employment decisions. When we follow them we provide due process to employees – 5th Amendment process requirement is fulfilled (see slide 11);
- How many unions do we have?
  - AAUP
  - AFSCME
  - POA
  - PIO
  - TAU
  - MSEA
Modern Employment Law Environment cont... 

- Common law (judge made decisions) endorses a second source of union law – past practices
- When the parties act in certain fashion in interpreting a clause in a CBA it can become part of the CBA as “past practices”
- So be very mindful of how we enforce CBA clauses because those practices can take the force of a CBA clause.
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- Modern Employment Law Environment cont . . .
  - Common Law Employment Law – 2 major issues: What limits on “at-will” employment? What constitutes “just cause” for employees who can only be fired for just cause?
    - What limits on “at-will” employment
      - Certain employees are still at-will - can be terminated at the will of the employer
      - Good reason, bad reason, or no reason at all, but not for an illegal reason
    - So, even at-will employees cannot be fired for the reasons cited above (race, age, religion, sex, etc.)
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- Modern Employment Law Environment cont...
  - Major common law exception: termination in violation of public policy:
    - Termination for refusal to engage in illegal or unethical activity – even if I don’t threaten to report it (no WB protection)
    - Termination in retaliation for some legitimate activity even if it is not statutorily protected
    - Termination based on non prohibited affiliation with other employees
Modern Employment Law Environment cont. . .

- What constitutes just cause? Very fact specific
  - Some are clear: assault, theft, abandonment, insubordination, drug use, OTJ intoxication
  - Some are tougher: inadequate performance, interpersonal communication, attitude – those involving more subjective judgment in which there are many comparable employees
    - Disqualification for unemployment benefits is even tougher
    - Two keys: Consistency and documentation
      - Treat similarly situated employees in a similar fashion
      - Document performance inadequacies
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- Modern Employment Law Environment cont . . .
  - Emerging trends:
    - Employers win most cases
    - Most people are not intolerant
    - Employers have much better processes in place
    - Criminal background checks/credit checks
    - False statements in the application interview process
  - Retaliation is always a concern
    - Do not have to prove the truth of the underlying complaint (race, whistleblower, etc.)
  - Whistleblowing/reporting unethical behavior
    - Continues to be a difficult area for employers
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- The new Right to Work Law
  - Right to Work legislation forbids "closed shops." A closed shop is a workplace where a union has negotiated a collective bargaining agreement that makes union membership a condition of employment. Employees must either remain union members or pay their representative share of dues to the union in order to keep their jobs. As of the March 2013 effective date, such a requirement will be illegal, and employees in union workplaces will have the right to decide whether to be members of the union or pay dues to the union.
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- RTW continued . . .
  - This means that as each collective bargaining agreement expires (AFSCME 8/2015) after the March effective date, employees who have been forced to pay union dues in order to keep their jobs will no longer be required to do so. These employees will enjoy all of the same wages, benefits and working conditions provided for in the applicable collective bargaining agreement. The only impact to an employee declining to pay dues is governed by the union's bylaws or constitution. Generally what this means is that individuals who opt out of the union cannot hold a leadership position in the union and may not be able to vote on any union matters, including on ratification votes.
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• RTW continued . . .
  ◦ It is also important to note that this legislation does not change an employer's collective bargaining obligations or its relationship to its union. The union remains the collective bargaining representative for the entire bargaining unit (including employees that now choose not to be members) and the employer must continue to meet and bargain with the union over wages, hours, and other terms and conditions of employment.
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- RTW continued...
  - Legal challenges
    - Focusing on process – rushed through in the lame duck session
    - Even if that challenge prevails, the legislature would probably just fix the procedural defect and re-enact
  - Substantive challenges will be tough
    - Current Michigan Supreme court 4 – 2 Republican majority with one vacancy (Diane Hathaway (D)) resigned and is awaiting sentencing for felony bank fraud.
    - Young (CJ), Markman, Zahra – very Republican – Good Luck!
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- Employment at WMU
  - Other session will cover in greater depth
    - Very deliberate policies and procedures, CBA’s in place
      - Know and follow the ones that govern your employees
      - Seek advice up front from relevant offices
    - The University exceeds legal minimums and provides a safe and productive employment environment
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- Q&A ...