

EMPLOYMENT LAW 737/512
SPRING 2020

Professor Hayes

Syllabus and Reading Assignments

First week's assignments: For the first week, please read *Mid-Atlantic Installation Services, Vizcaino*; and explore the Maryland labor department's webpage on Worker Misclassification, all posted on the course TWEN site.

Course Description: Analysis of statutory and common law principles arising in the workplace: the employer's obligations and the employees' rights. Topics covered include wrongful discharge and other employment torts, employment contracts, workplace privacy issues including drug testing, individual employee rights, and federal and Maryland wage and hour & employee benefits laws. The course briefly covers anti-discrimination laws and labor laws, but is not a substitute for either Employment Discrimination Law or Labor Law.

Learning outcomes: An understanding of fundamental rules of employment law as established by most states, and where distinctive the State of Maryland and, where applicable, the federal government. In addition, an understanding of how employment law can be applied to real world issues and disputes.

All assigned readings are posted in the "Course Materials" section of the TWEN website for the course.

Course Outline and Assigned Readings:

I. The Employment Relationship: "Employees" and "Independent Contractors"

Read: *Mid-Atlantic Installation Services; Vizcaino*; Please explore Maryland labor department's webpage on Worker Misclassification.

II. Employment Termination, and Related Issues

A. The Employment at Will Doctrine

Read: *Lubore*.

B. Contractual Modifications to Employment at Will

(1) Written Employment Contracts **Read:** *Spacesaver Systems*.

(2) Employment Manuals and Policies as Contracts **Read:** *MacGill; Tucker*.

(3) Oral Contracts **Read:** *Collection and Investigation Bureau; Spacesaver Systems* (pp. 22-23)

(4) Reliance and Implied Contracts

Read: *Grouse; Ciardi; Fortune; Dwiggin.*

C. Negligent Misrepresentation in Employment **Read:** *Griesi; Goldstein.*

D. Terminations in Violation of Public Policy

(1) Introduction

Read: Maryland Statutes on Employment Rights of Jurors and Witnesses.

(2) The Tort of Wrongful Discharge in Maryland

Read: *Yuan; Porterfield.*

(3) Focus on Whistleblowing

Read: Maryland Health Care Worker Whistleblower Protection Act;
Balla.

E. Employment Actions Related to Termination **Read:** *Beye; WARN Act Overview*

F. Arbitration of Employment Termination Claims **Read:** *Epic Systems*

III. Employee Duties and Promises

A. The Duty of Loyalty and Trade Secrets **Read:** *Maryland Metals; EDI Precast; LeJeune.*

B. Noncompetition Agreements **Read:** *Ellis; Deutsche Post.*

C. Confidentiality Agreements **Read:** *Coady.*

IV. Employment Torts

A. Intentional Infliction of Emotional Distress

Read: Restatement of Torts §46; *Kentucky Fried Chicken; Smallzman.*

B. Other Intentional Torts **Read:** *Marrs*.

C. Defamation in the Employment Context

(1) Introduction **Read:** Restatement of Torts §558.

(2) Employment References **Read:** Maryland Reference Immunity statute; *Spence*.

D. Negligent Hiring and Retention

Read: *Henley*.

V. Privacy Issues in Employment

A. Searches and Surveillance of Employees

Read: *Walker; Smyth*; NWI Memo on Electronic Monitoring in the Workplace; *Demo*

B. Regulation of Outside Activities of Employees

Read: Statute on Off-Work Activities; Statute on Volunteer Activities; *Patton*.

C. Drug Testing **Read:** *VonRaab; Lewis*; Statute on Drug Testing.

D. Testing and Screening of Employees and Applicants

(1) Polygraph Testing

Read: Federal polygraph protection act; Maryland statute on polygraphs.

(2) Other Tests and Screening

Read: *Soroka*; Maryland statutes on Credit Records, Medical Questions, Expunged Criminal Charges, and Social Security Numbers; EEOC Background Information on federal Genetic Non-discrimination regulations

VI. Wages and Hours Legislation

A. The Fair Labor Standards Act (FLSA) and Related State Laws

(1) Overview of the FLSA

Read: Dept. of Labor “Handy Reference Guide” on FLSA

(2) Implementation Issues

(3) Coverage: The Exemptions

(4) Enforcement

B. Wage Payment Laws

Read: Maryland Wage Payment and Collection statute; *Medex*.

C. Leave Statutes

(1) The Family and Medical Leave Act (FMLA) and related laws

Read: The FMLA; *Smith v. Caesars Entertainment*; *Miller v. AT&T*; MD Paid Leave Law (2018).

(2) Maryland Leave Statutes

Read: Maryland statutes on Day of Rest, Time Off for Voting, and Breaks for Retail Employees.

VII. Employee Benefits

A. Regulation of Pension Plans

Read: Frequently Asked Questions about Pension Plans; Handout on Vesting.

B. Regulations Applicable to Both Pension and Welfare Plans

(1) Protecting Employees from Discrimination **Read:** *Conkwright*.

(2) Reporting and Disclosure Requirements **Read:** Handout on ERISA Reporting & Disclosure

(3) Fiduciary Duties

a. Introduction **Read:** ERISA Sections: Section 1002 (21)(A)(definition of “fiduciary”) Section 1104 (Fiduciary Duties); Section 1109 (Liability for breach of fiduciary duty); Section 1132 (Civil Enforcement); and Section 1133 (Claims Procedure).

b. Denials of Benefits **Read:** *Williams*.

c. Other Acts of Fiduciaries **Read:** *Soland*; *DAK Americas*; *LaRue*.

D. Employer-Provided Health Insurance

- (1) ERISA and State Regulation of Employee Benefits
- (2) Portability

Materials on Reserve in the Law Library

- (1) Rothstein, et. al. Employment Law (5th ed. 2015).
- (2) Covington & Seiner, Employment Law in a Nutshell (4th ed. 2017).
- (3) Strandberg, MSBA Maryland Employment Law Deskbook (2014 with 2019 supplement available online).
- (4) Mazaroff & Horn, Maryland Employment Law (2d ed. 2001)(supplements, including for 2018, available online).
- (5) Murphy, Maryland Employment Law: Forms and Practice Manual (2006)(on CD-ROM, with online updates available).
- (6) Modesitt, Schulman & Westman, Whistleblowing (3d ed. 2015).

Information and Rules for the Course

A. Information:

1) My office number is Room 1113 on the 11th floor of the law school, and my office telephone number is 837-4604. My assistant is Gloria Joy, who is in Room 518 of the law school, whose number is 837-4631, and whose e-mail address is gpjoy@ubalt.edu. My e-mail address is mjhayes@ubalt.edu

2) Office hours: Tuesdays & Thursdays 10:30 a.m.-Noon and 1:30-2:30 p.m. Students may also make appointments (with at least 48 hours notice) to meet with me at other times. If I am out of my office or unable to meet with you at a time when you visit, you can schedule an appointment with me or my assistant to visit at another time. Also, you are certainly welcome to contact me by e-mail or by phone at any time.

3) All the assigned readings for the course are posted on the TWEN website, so you are not required to purchase any materials for the course. As for hornbooks and study aids for this course, some are listed on the last page of this document, and all those listed are available on reserve in the law library.

B. Rules for the Class:

1) Bases for Grades:

a. **Final exam (70% of each student's grade):** The final examination this semester will be similar in format to past exams. Copies of my two most recent Employment Law exams can be accessed in the Course Materials section of the TWEN website for the course. Like those exams, the Spring 2020 Employment Law final exam will be open book and open notes. I will provide you with additional information on the format and content of the final examination later on in the course.

b. **Multistate Performance Test Bar question-like written assignment (15% of each student's grade):** By the end of January, the instructor will share with you an Employment Law question that's similar to a Multistate Performance Test Bar exam question (similar, but not identical, so don't bother searching for it online). Your assignment will be to write a brief "closed memo" (for which no legal research will be required), of no more than 5 double-spaced pages, to answer the question. The deadline for e-mailing your answer to the instructor will be 5 p.m. on Monday March 30.

c. **Other class participation (15% of each student's grade):** Every student's performance in class participation other than the student's in-class presentation and facilitating discussion resulting from that presentation will comprise 15% of that student's grade. As explained more fully below, in the section on the method of calling on students, every student will be called on by name, most likely twice or more, to answer questions about a particular case (or portion of a case) or other reading assignment. With regard to the class participation grade, the instructor will give particular weight to the student's performance when called on by name and not as a volunteer. However, the instructor will keep track at every class session of the contributions made to class discussion by volunteers.

Also, to provide another opportunity for students who don't like to volunteer during class sessions (and for all other students as well) also counting toward the class participation grade will be student contributions to the Forum section of the TWEN site. Frequently I will post in the Forums section questions that I'd like students to think about in preparation for the next class session. And students can respond to those questions between class sessions by posting answers and comments to my questions. Students are also welcome to initiate their own posts on the Forums section, which could be their own questions or inviting discussion on some idea or item relating to Torts. All student contributions in the TWEN Forums will be considered in determining the class participation grade. Through contributions to the TWEN Forums section, and when called on by name as discussed in the 1st paragraph of this subsection, students who are relatively "quiet" can receive the same top grades for class participation as students who volunteer more frequently.

2) Assignments: I will tell you in class the assignments that you will be responsible for in the next few classes. We will proceed in the order on the syllabus, if you want to read ahead.

3) Calling on students, and student responsibility for assigned material:

a. Initially, and I hope throughout the semester, I will call on students in the following way:

1. For each class I will designate 1 or 2 students, in alphabetical order, whom I will call on. I will try to give these students a few days advance notice of when they will be called on, so that they can read the assigned material with particular care and also give it careful thought. I will call on these designated students to answer questions about the facts, reasoning and conclusions of the assigned cases, or about other specific issues from the assigned reading.

2. All other students will be expected to have read the material assigned for each class. And I will rely on the rest of the class, through volunteers, to answer questions about basic principles in the material, to make arguments for positions, and so on. If I do not get volunteers, I reserve the right to call on non-designated students, at random, by name.

3. If I call on a student, either designated or at random, who is unprepared to discuss the assignment, I will call on that student at the next class. If the student is unprepared at that class, I will count that as one absence against the student, and also call on that student at the next class.

b. The above-described approach to calling on students has been mostly successful in the past, but in some classes it has nearly reduced the amount of class participation by non-designated students to a lower level than I believe appropriate. Consequently, if the level of class participation becomes too low, I reserve the right to switch to the following method: announcing in advance several students (e.g. an entire row) who will be responsible for answering questions about material at a future class session, and then calling on those students by name (not as volunteers) at that class session.

4) Attendance policy:

a. Class attendance is a primary obligation of each student whose right to continued enrollment in the course and to receipt of a grade for the course is conditioned upon a record of attendance satisfactory to the professor. Students who are forced to withdraw for exceeding the allowed absences may receive a grade of FA (failure due to excessive absence). This policy is consistent with American Bar Association Standards for Law Schools.

b. For this class, which meets twice a week, students are permitted a maximum of five absences. My general approach is that I don't differentiate between excused or unexcused absences. If a student reaches five absences (other than for religious holidays, discussed below)

I will contact that student to discuss how many absences that student will be permitted for the remainder of the semester.

c. Religious holidays are handled somewhat differently. If a student exceeds the five allowed absences because of absences due to religious holiday(s), I won't impose the penalties described below, but instead the student will be required to do some kind "makeup work" to compensate for exceeding the allowed number of absences.

d. If a student exceeds the number of absences that, based on the discussion between professor and student have been established, there will be a grade sanction for exceeding that limit. The grade sanction means a deduction of a step in a grade, such as a deduction from a B+ to a B.

e. If after imposition of such a grade sanction, the student has an additional absence, I reserve the right to withdraw the student from the course, which would result in a course grade of "FA" referenced above.

f. I understand that there can be special circumstances, like serious health problems or family issues, that cause frequent absences. That is why I have arranged my attendance policy so that the sanctions are not automatic, but are worked out with the student. But I would emphasize that, whenever possible, this be worked out in advance. I will be more understanding with students who do that than students who bring excuses to me at the end of the semester, or after I have notified them that I intend to impose a grade sanction on them.

I strongly recommend that you attend as many class sessions as you can. In this course, considerable material will be covered only in the lectures and not in the assigned readings. It is likely that much of the material covered exclusively in lecture will be tested on the final examination.

5) Lateness: Over the years, I have sometimes received complaints from students that classmates who come to class five or more minutes late are extremely disruptive. I think these complaints are legitimate, and therefore urge all students to come to class on time. If disruption by late-arriving students becomes a problem, I reserve the right to establish a policy barring students from attending class sessions to which they arrive late by 10 minutes or more.

C. Disability Policy

If you are a student with a documented disability who requires an academic accommodation for academic programs, exams, or access to the University's facilities please contact the Office of Academic Affairs, at ublawacadaff@ubalt.edu or (410) 837-4468.

D. Academic Integrity

Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or School of Law. Violations of academic integrity include, but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter, including attendance, and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at http://law.ubalt.edu/academics/policiesandprocedures/honor_code/index.cfm.

E. Title IX Sexual Misconduct and Nondiscrimination Policy

The University of Baltimore's Sexual Misconduct and Nondiscrimination policy is compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the university any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

F. Computers: Students may use laptop computers for class related purposes only.

G. Class Cancellation:

If the instructor must cancel a class, notices will be sent to students via email and posted on the classroom door. If there is inclement weather, students should visit the University of Baltimore web site or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should presume that classes are running on the normal schedule.

H. Course Evaluations

It is a requirement of this course that students complete a course evaluation. The evaluation will be available later in the semester and is entirely anonymous. Faculty members will not have access to the feedback provided on course evaluations until after all grades are submitted.