# Table of Contents

## Chapter 1

**Employment Relationship Defined**

1:1. **Scope of Chapter and Introduction**
   - A. Overview
   - B. Common Thread: The Common Law Control Test

1:2. **Counting Who Counts**
   - A. Payroll Test Method
   - B. Damages
   - C. Aggregating Employees
   - D. Other Issues

1:3. **Formation of the Employment Relationship**
   - A. Texas Presumption of Employment At-Will
   - B. Employment Relationship Modified by Contract
     1. Express Written Contract
     2. Offer Letters of Employment
     3. Employee Handbooks and Implied Contracts
     4. Oral Promises
     5. Promissory Estoppel
   - C. Employment Relationship Modified by Statute
     1. Title VII of the Civil Rights Act of 1964
     2. The Texas Commission on Human Rights Act
     3. The Texas Labor Code
     5. Americans With Disabilities Act of 1990
     6. Genetic Information Nondiscrimination Act
     7. Rehabilitation Act of 1973
     8. Family and Medical Leave Act of 1993
     9. The National Labor Relations Act
     10. The Texas Right to Work Law
     12. Reconstruction Era Civil Rights Act (Section 1981)
     14. The Fair Labor Standards Act
     15. The Equal Pay Act
     16. The Sarbanes-Oxley Act
     17. Bankruptcy and Indebtedness
     18. Jury Service and Political Activity
     19. Military Service
     20. The Texas Whistleblower Statute
CHAPTER 1  TEXAS EMPLOYMENT LAW

1:4. RIGHTS AND DUTIES IN THE EMPLOYMENT RELATIONSHIP
   A. Generally
   B. Employee’s Duties to Employer
   C. Employer’s Duties to Employee

1:5. EMPLOYMENT IS AN ISSUE RELATED TO THE MERITS OF THE CLAIM, NOT A JURISDICTIONAL ISSUE

1:6. DETERMINING EMPLOYMENT STATUS—INDEPENDENT CONTRACTOR OR EMPLOYEE?
   A. In General
   B. Determining Employment Status Between Employees and Independent Contractors Under Federal Law
      1. The Internal Revenue Services Test
      2. The Fair Labor Standards Act Test
      3. The ERISA Test
      4. Tests Under Title VII, the ADEA, and Section 1981
   C. Distinguishing Independent Contractors From “Employees” Under Texas Law
      1. The Employee vs. Independent Contractor Test Under Texas Common Law—the “Right to Control” Test
      2. The Employee vs. Independent Contractor Test Under the Texas Unemployment Compensation Act (TUCA)
      3. The Employee vs. Independent Contractor Test Under the Texas Workforce Commission Act
      4. The Employee vs. Independent Contractor Test Under the Texas Commission on Human Rights Act
      5. The Employee vs. Independent Contractor Test Under Other Texas Laws
   D. Vicarious Liability for Employees and Independent Contractors
      1. Liability for Negligent Acts Generally
      2. Distinguishing Between Employees and Independent Contractors for Purposes of Liability for Negligent Acts

1:7. DETERMINING EMPLOYMENT STATUS FOR PARTNERS, SHAREHOLDERS, AND DIRECTORS
   A. Generally
   B. The Clackamas Case
   C. Cases Following Clackamas
      1. Implications for Shareholder/Directors/Executives
         a. Professional Corporations
         b. Ordinary Corporations
      2. Implications for Partners
         a. Brief Background on Law Concerning Partners as “Employees”
         b. Treatment of Partners as “Employees” in Clackamas
      3. Implications on Future Law
   D. Impact of Clackamas on Employment Status Tests Generally
      1. Factors Suggesting That Clackamas Will Replace Competing Tests With the “Control Test”
      2. Factors Suggesting That Clackamas Will Leave Alternative Tests Untouched

1:8. MULTIPLE “EMPLOYERS”
   A. Borrowed Servant Doctrine
   B. “Single Employer” or “Integrated Enterprise” Doctrine
      1. NLRB Test Has Traditionally Been Applied
      2. Trend Towards a Fresh Approach to “Single Employer” or “Integrated Enterprise” Analysis?
   C. Joint Employer Analysis
      1. Texas Decisions Recognizing Joint Employment Doctrine
CHAPTER 2
WRITTEN EMPLOYMENT CONTRACTS

2.1. SCOPE OF CHAPTER

2.2. GOVERNING PRINCIPLES
A. Default Rule: Employment At-Will
B. Statutory Restrictions on Employment Contracts
   1. Federal Statutes
   2. Texas Statutes
C. Advantages and Disadvantages of Written Employment Contracts
   1. Employer’s Perspective
   2. Employee’s Perspective
D. Negotiating and Drafting—Preliminary Considerations
   1. Parties’ Bargaining Power
   2. Limits on Prospective Employee’s Ability to Contract

2.3. ELEMENTS OF WRITTEN EMPLOYMENT CONTRACTS
A. Position and Job Duties
CHAPTER 2
TEXAS EMPLOYMENT LAW

B. Compensation
1. Base Wage
2. Incentive Compensation
   a. Criteria
   b. Form, Amount, Calculation
   c. Timing
   d. Termination
3. Employee Benefits
4. Severance Benefits
   a. Purpose
   b. Amount and Method of Payment
   c. Severance Not Payable
   d. ERISA Considerations
   e. Change in Control
5. Regulatory Considerations Related to Executive Compensation

C. Duration
1. Fixed-Term Agreement
   a. Termination and Renewal
   b. Good Cause Limitation on At-Will Employment
2. Indefinite-Term Agreement
3. Condition Subsequent Agreement
4. Renewable Agreement

D. Termination
1. Termination At-Will
2. Termination for Good Cause
3. Satisfaction Clauses
4. Termination Upon Notice
5. Non-Durational Agreements

E. Protection of Trade Secrets

F. Rules of Construction
1. Choice of Law
2. Choice of Forum
3. Successors and Assigns
4. Modification
5. Severability
6. Waiver
7. Arbitration
8. Notices
9. Indemnification
10. Attorneys’ Fees

APPENDICES
Appendix 2-1 Sample Employment Agreement for an Executive Employee
Appendix 2-2 Sample Employment Agreement for an Account Executive or Sales Employee
CHAPTER 3
WRONGFUL DISCHARGE

3:1. INTRODUCTION
A. Scope of Chapter
B. Overview of “Employment At-Will” Doctrine in Texas

3:2. WRITTEN CONTRACTS
A. Written Contracts
   1. Generally
   2. Contract Formation
B. Contract Based on Written Term of Salary—The “English Rule”
C. Special Contract Terms
   1. Good Cause for Discharge
   2. Satisfaction Clauses
D. The Parol Evidence Rule

3:3. ORAL CONTRACTS—CONTRACT FORMATION
A. Generally
B. Oral Statement of Offer Must Be Clear and Definite
C. Indicating an Intent to Be Bound to a Specific Term of Contract
D. Limiting the Right to Terminate At-Will
E. Attributable to Employer
F. Accepted by Employee
G. With Consideration

3:4. AFFIRMATIVE DEFENSE TO ORAL CONTRACT CLAIM: THE STATUTE OF FRAUDS
A. Generally
B. Applying Statute of Frauds to Promise of Employment Until Retirement Age
C. Applying Statute of Frauds to Promise of Lifetime Employment
D. Applying Statute of Frauds to Promise of Employment so Long as Work Is Satisfactory
E. Applying Statute of Frauds to Promise of Discharge for Cause Only

3:5. IMPLIED CONTRACTS OF EMPLOYMENT
A. Contract Formation Required
B. Handbooks or Policy Manuals
   1. Generally
   2. Employment Policies
   3. General Rule: Handbooks Are Not Contracts
   4. Cases Where an Exception to General Rule Was Found
   5. Effect of Disclaimer
C. Implied Contracts Based on Other Sources
   1. Implied Promise of Prospective Employment
   2. Employer Practices, Context, or a Combination of Factors
3:6. BREACHES OF EMPLOYMENT CONTRACT
A. Overview
B. Employer Breach
C. Employee Breach

3:7. THIRD PARTY INTERFERENCE WITH EMPLOYMENT CONTRACTS

3:8. REMEDIES IN CONTRACT CLAIMS
A. Overview
B. Reinstatement
C. Past Lost Wages (Back Pay)
D. Future Lost Wages (Front Pay)
E. Loss of Earning Capacity/Mental Anguish
F. Duty to Mitigate Lost Wages
G. Punitive/Exemplary Damages

3:9. QUASI-CONTRACT CLAIMS: PROMISSORY ESTOPPEL
A. Elements of Claim
B. Statute of Frauds and Promissory Estoppel
C. Independent Action vs. Defensive Plea
   1. Estoppel as Defensive Plea
   2. Estoppel as Independent Action
D. Estoppel in Public Employer Context
E. Damages Available in Promissory Estoppel Claims

3:10. DISCHARGE IN VIOLATION OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

3:11. DISCHARGE IN VIOLATION OF COMMON LAW PUBLIC POLICY—SABINE PILOT
A. Overview
B. Elements of a Sabine Pilot Claim
   1. Discharge or Adverse Employment Action
   2. “For the Sole Reason”
   3. Refusal to Commit Illegal Act
      a. Refusal to Commit
      b. An Act Illegal Under Criminal Law
      c. Requested by the Employer
C. Cases Where Sabine Pilot Doctrine Held to Apply
   1. Refusing to Violate Environmental Laws
   2. Refusing to Falsify Records
   3. Refusal to Refrain From Reporting Misconduct
   4. Refusal to Commit Act of Mispriion or Make Criminal Misrepresentations
   5. Investigating or Questioning the Legality of Employer Instructions
D. Cases Where the Sabine Pilot Doctrine Was Found Not to Apply
   1. Reporting an Illegal Act (Whistleblowing)
   2. Being Asked Not to Report a Crime
   3. Exercising a Civil Right
   4. Covered Under a Contract
E. Investigating the Legality of a Requested Action
F. No Individual Liability
G. Sabine Pilot Claims Are Subject to Arbitration
H. Public Policy Cases in Other States

3:12. REMEDIES AVAILABLE IN COMMON LAW PUBLIC POLICY CLAIMS
A. Overview
B. Past Lost Wages (Back Pay)
C. Reinstatement/Future Lost Wages (Front Pay)
D. Mental Anguish
E. Punitive/Exemplary Damages
F. Duty to Mitigate
G. No Attorneys’ Fees for Sabine Pilot Claim

3:13. SELECTED DEFENSES TO PUBLIC POLICY CLAIMS
A. Business Reason Defense
B. Statute of Limitations
C. Federal Labor Laws Preemption
   1. LMRA Preemption
   2. RLA Preemption
   3. Employee Retirement Income Security Act
   4. Airline Deregulation Act
D. After-Acquired Evidence

3:14. STATUTORY PUBLIC POLICY RESTRICTIONS ON EMPLOYMENT AT-WILL
A. Discrimination Claims Under Article 451
B. Whistleblower Protection for Public Employees
C. Public Employees’ Right to Due Process
D. Other Limits on Employment At-Will
   1. Agricultural Hazard Communications Protection
   2. Voting
   3. Jury Service
   4. Attendance at Political Conventions
   5. Military Duty
   6. Hazard Communication Act
   7. Refusal to Administer Abortion
   8. Union Membership
   9. Company Store
   10. Subpoenas
   11. Texas Commission on Human Rights Act
   12. Mental Retardation
   13. Registered Nurses
   14. Hospital Employee Whistleblower
   15. Nursing Homes
   16. Child Support
   17. AIDS Testing
   18. Genetic Testing
   19. Abortion Procedures
   20. County Employees
Chapter 4

Con constructive Discharge

4:1. DEFINING “CONSTRUCTIVE DISCHARGE”

4:2. PROVING CONSTRUCTIVE DISCHARGE
   A. Reasonable Person v. Subjective Intent Test
      1. Objectively Intolerable Working Conditions
         a. Aggravating Circumstances
         b. No Aggravating Circumstances
      2. Reasonableness of Resignation
   B. Expansion of Sabine Pilot Doctrine
   C. Constructive Discharge in Sexual Harassment Context

4:3. REMEDIES
   A. Monetary Damages
   B. Limits on Recovery of Back Pay and Front Pay
      1. Voluntary Quit
      2. Unconditional Offer of Reinstatement
         a. Overview
         b. Comparable Position
         c. Unconditional Offer
         d. Refusal of Unconditional Offer

4:4. EARLY RETIREMENT OFFERS
   A. Not Prima Facie Evidence of Constructive Discharge
   B. Circumstances Surrounding Offer

Chapter 5
[RESERVED]

Chapter 6

The Hiring Process

6:1. RECRUITING
   A. Goals of Recruiting
   B. Recruiting Methods
      1. “Word-of-Mouth” Advertising
      2. Published Advertisements
6:2. APPLICATIONS AND INTERVIEWS
   A. The Application Form
   B. Pre-Employment Inquiries Under the ADA
      1. General Rule: No Disability-Related Questions
      2. Exception to General Rule: Limited Questions Regarding Reasonable Accommodation
   C. Questions Regarding Workers’ Compensation
   D. Other Pre-Employment Inquiries
      1. Age
      2. Race
      3. Religion
      4. Education
      5. Marital and Family Status
      6. Arrest, Conviction, Deferred Adjudication
         a. Arrest Record
         b. Conviction Record
         c. Deferred Adjudication
      7. Financial Condition
         a. Garnishment
         b. Bankruptcy
         c. Credit References
            (1) Credit Reports
            (2) Investigative Consumer Reports
      8. Citizenship
         a. Employment Eligibility Verification
         b. Non-Discrimination in Hiring
      9. Sexual Orientation or Preference

6:3. PRE-EMPLOYMENT TESTING
   A. Drug Testing
   B. Physical Examinations and Other Medical Tests
   C. Alcohol Testing
   D. Genetic Testing

6:4. NEGLIGENT HIRING
   A. Overview
   B. Elements
   C. Damages
   D. Defenses
      1. Thorough Background Check of Applicants
      2. Preemption
         a. Workers’ Compensation
         b. TCHRA

6:5. RECORDKEEPING REQUIREMENTS
   A. Personnel Records
   B. Medical Records
6:6. NEW HIRE REPORTING REQUIREMENTS
   A. Federal Reporting Requirements
   B. New Hire Reporting in Texas
   C. Purpose of New Hire Reporting Requirements

CHAPTER 7
IMMIGRATION-RELATED EMPLOYMENT PRACTICES

7:1. GOVERNING STATUTES

7:2. EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS
   A. Overview
   B. Persons and Entities Liable for Compliance
      1. Employers
      2. Employers’ Agents
      3. Successors-in-Interest
      4. Recruiters
      5. Independent Contractors
   C. Form I-9 Paperwork Requirements
      1. Verify Identity and Employment Eligibility
         a. Documents That Establish Employment Eligibility and Identity
         b. Documents That Establish Identity Only
         c. Documents That Establish Employment Authorization Only
      2. Proposed Regulations to Streamline Verification Process
      3. Exception for Employer Associations
      4. Verification Pilot Programs
   D. Recordkeeping
   E. Re-Verification
   F. Administration and Enforcement
      1. ICE Investigations
      2. Contesting a Notice of Intent to Fine
      3. Defenses
         a. Good Faith Compliance
            (1) Form I-9: Section 1
            (2) Form I-9: Section 2
            (3) Form I-9: Section 3
            (4) Good Faith Exception Unavailable
            (5) Error Cannot Be Corrected
         b. Grandfathered Employees
         c. Continuing Employment
         d. Casual Employment
         e. Contract Labor
         f. Reliance on State Agency Documentation
      4. Penalties
7:3. IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION
A. Governing Law
B. Protected Individuals
C. Prohibited Discriminatory Practices
   1. Hiring, Firing, Recruiting, Referring for a Fee
   2. National Origin Discrimination
   3. Citizenship Discrimination
   4. Retaliation/Intimidation
   5. Excessive Documentation
D. Proving Discrimination
E. Defenses
   1. Title VII Preemption
   2. Discrimination Required by Law
   3. Right to Prefer Equally Qualified Citizens
   4. Contract Workers

APPENDICES
Appendix 7-1 Tips for Employers: Balancing the Act’s Verification and Anti-Discrimination Provisions in the Hiring Process
Appendix 7-2 Summary of E-Verify State Legislation
Appendix 7-3 Summary of ICE Worksite Enforcement Actions

CHAPTER 8
[RESERVED]

CHAPTER 9
WAGES, HOURS AND OVERTIME

9:1. FEDERAL FAIR LABOR STANDARDS ACT
A. Historical Context
B. Coverage
   1. Employer-Employee Relationship
      a. Employer Defined
      b. “Suffer or Permit to Work”
      c. Economic Realities Test
      d. Joint Employers
      e. State and Other Public Employees
      f. Volunteers
      g. Trainees
      h. Prisoners
   2. Engaged in Commerce
3. Enterprise
   a. “Related” Activities
   b. Unified Operations or Common Control
   c. For a Common Business Purpose
4. Relationship to Collective Bargaining Agreements
5. Statutory Exemptions From FLSA Coverage
   a. Domestic Services Exemption
   b. Fishing Operations Exemption
   c. Agriculture

C. Actions Under the FLSA
   1. Forum
   2. Limitations
   3. Arbitration
   4. Collective Actions
   5. Compromise Settlement Agreements

D. Damages and Penalties
   1. Back Wages and Liquidated Damages
   2. Prejudgment Interest
   3. Civil Penalties
   4. Attorneys’ Fees

E. Retaliation
   1. Protected Activity
   2. Adverse Employment Action
   3. Available Damages

F. Recordkeeping
G. DOL Investigative Powers
H. Relationship to State Law

9:2. MINIMUM WAGE
A. Federal Minimum Wage
   1. “Opportunity” Wage for Youth
   2. Trainees
   3. Tipped Employees
   4. Deductions for Meals
B. Texas Minimum Wage Act
   1. Deductions for Cost of Meals/Lodging
   2. Subminimum Wage
   3. Tipped Employees
   4. Penalties
   5. Action to Recover Unpaid Wages
   6. Exemptions
C. Texas Prevailing Wage Rates on Public Contracts

9:3. OVERTIME
A. General Rule
B. Public Employees
C. Exempt Employees
   1. Executive Exemption
      a. General Rule
      b. Business Owner
   2. Administrative Exemption
      a. General Rule
      b. Educational Establishments
   3. Professional Exemption
      a. Learned Professional
      b. Creative Professional
      c. Teachers
      d. Practice of Law or Medicine
   4. Computer Employees
   5. Outside Sales Exemption
   6. Combination Exemptions
   7. Highly Compensated Employees
   8. Permissible Deductions From Salary
D. Irregular Hours
   1. Belo Contracts
   2. Fluctuating Workweek Contracts
E. Exemptions From Overtime
   1. Seaman Exemption
   2. Motor Carrier Exemption
   3. Emergency Response Personnel Exemption
   4. Car Salesperson Exemption
   5. Railway Labor Act Exemption
   6. Retail or Service Establishment Exemption

9:4 COMPENSABLE TIME
A. General Rule
   1. The De Minimis Doctrine
   2. Preliminary/Postliminary Activities
   3. Collective Bargaining Agreements
B. Meal Periods
C. On-Call Time
D. Travel Time
E. Training Classes
F. Vacation and Sick Time
G. “Civic Duty” Time

9:5. PAYMENT OF WAGES: TEXAS PAYDAY LAW
A. Overview
   1. All Private Employers Covered
   2. Public Employers Not Covered
B. Payment of Wages
   1. Wages Defined
   2. Time of Payment
   3. Manner of Payment
C. Wage Claims Under Payday Law
   1. Choice of Remedies
   2. Texas Workforce Commission Wage Claim
      a. File Wage Claim
      b. Preliminary Wage Determination Order
      c. Hearing on Preliminary Wage Determination Order
      d. Payment of Claims
      e. Judicial Review
      f. Enforcement

9:6. DEDUCTIONS FROM WAGES
   A. Overview
   B. Family Law Wage Withholding Orders
      1. Sources of Wage Withholding Orders
      2. Employer’s Responsibility
      3. Penalties
      4. Discrimination Prohibited
   C. Wage Garnishment

9:7. CHILD LABOR
   A. Texas Child Labor Law
      1. General Rule
      2. Restricted Hours of Work
      3. Hazardous and Special Occupations
   B. Federal Child Labor Law

CHAPTER 10
EMPLOYEE SAFETY AND HEALTH

10:1. INTRODUCTION
   A. Purpose and Scope of OSH Act
   B. Compliance Obligations
      1. Health and Safety Standards
      2. General Duty Clause
      3. Multi-Employer Worksites
   C. Enforcement Procedure

10:2. OSHA ENFORCEMENT PROCEDURES
   A. Selection of Employers for Inspections
      1. Programmed Inspections
      2. Non-Programmed Inspections
      3. Other Targeting Programs
      4. Exemptions From OSHA Inspection
   B. Inspection of Work Site
      1. Compliance Officer Announces Presence
      2. Opening Conference
3. Walkaround
   a. Employer Representative May Accompany Compliance Officer
   b. Employee Representative May Accompany Compliance Officer
4. Employee Interviews
5. Records Review
6. Closing Conference

C. Issuance of Citations
1. Types of Citations
2. Posting Requirement
3. Informal Conference

D. Uncontested Citation
1. Abatement of Violations and Payment of Penalties
2. Follow-Up Inspections

E. Contested Citation
1. Notice of Contest
   a. Properly Filed
   b. Improperly Filed
2. Penalty Criteria
3. Simplified Proceedings
4. Opportunity to Settle
5. Appeal
6. Penalties
   a. Violations
   b. Egregious-Case (Instance-by-Instance)
7. Admissibility of Citations in Subsequent Actions
8. Defending Against OSHA Citation
   a. Challenge Prima Facie Case
   b. Statute of Limitations
   c. Citation Not Issued With Reasonable Promptness
   d. Unpreventable Employee Misconduct
   e. Compliance Infeasible
   f. Greater Hazard
   g. Fair Notice Complaint
9. Recovering Costs of Contest

F. Use of Section 11(b) Enforcement Procedures

G. Criminal Penalties

H. Texas Workplace Safety and Health Laws
1. Common Law Duty to Provide Safe Workplace
2. Texas Statutes Governing Occupational Safety and Health
   a. Texas Occupational Safety Act
   b. Agricultural Hazard Communication Act
   c. Hazard Communication Act
   d. High Voltage Overhead Lines
   e. Standards for Boilers
   f. Trench Safety
CHAPTER 13
TEXAS EMPLOYMENT LAW

13:1. REASONS FOR INTERNAL INVESTIGATIONS
   A. Discrimination Claims
   B. Harassment Claims
   C. Corporate Fraud Claims
   D. Violations of Company Policy
   E. Workplace Violence
   F. Theft/Embezzlement
   G. Violation of Statutory Obligations
   H. Drugs
   I. Pre-Employment Investigations
      1. Criminal Background
      2. Credit History
      3. Employee Testing
         a. Personality and Job Skills Testing
         b. Medical Testing
         c. Drug Testing

13:2. SPECIAL TORT LIABILITY ISSUES IN CONDUCTING INVESTIGATIONS
   A. Public Disclosure of Private Facts
   B. Placing Applicant/Employee in False Light
   C. Intrusion Into Applicant/Employee’s Seclusion
   D. Negligent Investigation
   E. Intentional Infliction of Emotional Distress
   F. Defamation
   G. Wrongful Discharge
   H. Other Torts Resulting From Internal Investigations

13:3. EFFECTIVE INVESTIGATIONS
   A. Determine Issues at Stake
   B. Review Internal Policies and Procedures
C. Interview Complainant
   1. Practical Considerations
   2. Suggested Interview Questions
D. Determine Whether Formal Investigation Is Warranted
   1. If No Formal Investigation Is Warranted
   2. If Formal Investigation Is Warranted
E. Determine Who Should Investigate
   1. Human Resources
   2. In-House Counsel
   3. Outside Counsel
F. Interview Accused and Third Parties
   1. Practical Considerations
   2. Interview Accused
      a. The Basics
      b. Sample Questions
      c. Weingarten Rights
      d. Protecting the Accused
   3. Interview Third Parties
      a. Determine Who to Interview
      b. Practical Considerations
      c. Dealing With Uncooperative Witnesses
      d. Sample Questions
G. Resolve Credibility Issues
H. Documentation of Investigation
   1. Employee-Generated Documentation
   2. Employer-Generated Documentation
   3. Maintain Confidentiality
   4. Create Final Investigation File

13:4. SEXUAL HARASSMENT INVESTIGATIONS
A. Faragher and Ellerth
B. Harassment by Co-Workers
C. Harassment by Supervisors
   1. Resulting in Tangible Job Action
   2. No Tangible Job Action
D. Affirmative Defense
   1. Reasonable Care to Prevent and Remedy
      a. Example: Reasonable Care
      b. Example: Unreasonable Response
   2. Plaintiff’s Unreasonable Failure to Use Available Protections

13:5. CORPORATE FRAUD INVESTIGATIONS
A. Investigations of Employee Reporters of Fraud Covered by Sarbanes-Oxley [Whistleblower Reports]
B. Independent Investigation
C. Recovery and Analysis of Computer Data
   1. Retrieval
   2. Retention
13:6. PRIVILEGE ISSUES
   A. Attorney-Client Privilege
      1. Generally
      2. When Does Privilege Attach?
      3. Waiver Potential
      4. Department of Justice Opinions
   B. Strategies for Protecting Communications and Documents
      1. Keep Communication With Counsel Confidential
      2. Give “Legal Advice” Not “Business Advice”
      3. Carefully Manage Non-Attorney Resources
      4. Only Communications With “Client” Protected
   C. Work Product Doctrine
      1. Statement of Doctrine
      2. Investigation Materials as Work Product
   D. Self-Evaluation/Self-Critical Privilege
   E. In-House Counsel
      1. Dual-Capacity Role
      2. In Practice: Clearly Identify Role Being Played

13:7. PROCEDURAL REQUIREMENTS FOR INTERNAL INVESTIGATIONS CONDUCTED BY OUTSIDE INVESTIGATOR

13:8. EMPLOYEE REPRESENTATION RIGHTS
   A. Weingarten Rights Defined
   B. Nonunion Employees
   C. Scope of Weingarten Rights
      1. To Whom Does Right Belong?
      2. Must Employer Advise Employee of Right?
      3. What Is an Investigatory Interview?
      4. What Is Standard for “Reasonably Believes”?
      5. Who May Represent Employee?
      6. What Is Representative’s Role at Meeting?
      7. May Employer Cancel Meeting if Employee Requests Representation?
      8. Does Right Attach Post-Discipline?

13:9. CHECKLIST FOR EFFECTIVE INVESTIGATIONS

CHAPTER 14
ARBITRATION OF EMPLOYMENT CLAIMS

14:1. INTRODUCTION

14:2. STATUTORY AUTHORITY FOR ARBITRATION
   A. Federal Arbitration Act
   B. Texas General Arbitration Act
   C. Applicability of Federal or State Statutes
14.3. THE WAFFLE HOUSE DECISION: THE EEOC’S RIGHT TO PURSUE LAWSUITS

14.4. FREQUENTLY LITIGATED ISSUES
   A. Consent
   B. Consideration
      1. Reciprocal Promises to Arbitrate
      2. Reservation of Rights to Amend or Terminate Arbitration Agreement
   C. Scope of Arbitration Agreement
      1. Broad Language Will Usually Cover Most Employment Claims
      2. Coverage of Class or Collective Action Claims
      3. Coverage of Disputes Distinct From Employment Relationship
   D. Unconscionability
      1. Deciding Questions of Unconscionability—Arbitrator of Courts
      2. Procedural Unconscionability
      3. Substantive Unconscionability
   E. Repudiation or Breach of Contract

14.5. JUDICIAL REVIEW OF ARBITRATION DECISIONS
   A. Statutory Grounds for Vacating Award
   B. Preservation of Appeal Issues
   C. “Manifest Disregard of the Law” Standard
   D. Contractual Modifications of Standard of Review

14.6. ARBITRATION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

14.7. JURY WAIVERS AS AN ALTERNATIVE TO MANDATORY ARBITRATION

CHAPTER 15
EMPLOYEE RECORDS

15.1. INTRODUCTION

15.2. FEDERAL RECORDKEEPING AND REPORTING REQUIREMENTS
   A. The Fair Labor Standards Act
      1. Coverage
      2. Payroll Records
         a. Non-Exempt Employees
         b. Executive, Administrative, Professional, or Outside Sales Employees
         c. Additional Recordkeeping Categories for Certain Exempt Employees
      3. Wage and Hour Records
      4. Retention Periods
         a. Three Years
         b. Two Years
      5. Form of Retention
      6. Location and Inspection
      7. Posting and Notice Requirements
      8. Penalties for Noncompliance
      9. Resources for Employers
CHAPTER 15  TEXAS EMPLOYMENT LAW  F-76

B. The Equal Pay Act
   1. Coverage
   2. Records to Retain
   3. Retention Period
   4. Location and Inspection

C. The Immigration Reform and Control Act
   1. Coverage
      a. Covered Employers
      b. Covered Employees
   2. Form I-9, Employment Eligibility Verification
   3. Rehired Employees
   4. Record Retention
   5. Form of Retention
   6. Location and Inspection
   7. Penalties for Noncompliance
      a. Illegal Document Abuse
      b. Penalties for Failure to Comply With Form I-9 Requirements
   8. Resources for Employers
      a. Hotlines
      b. Handbook for Employers
      c. USCIS Website

D. The Occupational Safety and Health Act of 1970
   1. Overview
   2. Records of Occupational Injuries and Illnesses
      a. New 2002 Recordkeeping Requirements
      b. Coverage
      c. Records to Retain
         (1) Changes to Annual Summary Requirements
         (2) Changes to the Definition of “Recordable Occupational Injuries and Illnesses”
         (3) Improved Definitions of “Medical Treatment” and “First Aid”
         (4) The New Test to Determine Whether an Injury Is Recordable
      d. Retention Period
      e. Reporting Requirements
      f. Annual OSHA Injury and Illness Survey of Ten or More Employers
      g. Access to Records
   3. Employee Medical and Exposure Records
      a. Coverage
      b. Employee Medical Records
         (1) Retention Period
         (2) Employee Access
      c. Employee Exposure Records
         (1) Retention Period
         (2) Employee Access
      d. Form of Retention
      e. Agency Access/Posting Requirement
4. OSHA Hazard Communication Standard
   a. Coverage
   b. Records to Retain
      (1) Written Hazard Communication Program
      (2) Material Safety Data Sheets
5. Posting and Notice Requirements
6. Penalties for Noncompliance
7. Resources for Employers

E. Title VII of the Civil Rights Act of 1964
   1. Coverage
   2. Reporting Requirements
      a. Employer Information Reports (EEO-1 Reports/Standard Form 100)
         (1) Who Must File
         (2) How to File
         (3) When to File
         (4) Required Information
      b. Apprenticeship Information Reports (EEO-2 Reports)
   3. Record Retention
      a. Employer Information Reports (EEO-1 Reports)
      b. Apprenticeship Information Reports (EEO-2 Reports)
      c. Personnel and Employment Records
      d. Charge of Discrimination
      e. Employee Selection Procedures
      f. Apprenticeship Records
   4. Posting and Notice Requirements
   5. Penalties and Enforcement Proceedings

F. The Age Discrimination in Employment Act
   1. Coverage
   2. Records to Retain/Retention Period
      a. Regular Employment Records
      b. Personnel Action Records
      c. Benefit Plan Records
      d. Records Relevant to EEOC Enforcement Action
      e. Alternate Retention Periods
   3. Form of Retention
      a. Place of Retention
      b. EEOC Access to Records
   4. Posting and Notice Requirements

G. The Americans With Disabilities Act
   1. Coverage
   2. Record Retention and Reporting Requirements
   3. Posting and Notice Requirements
   4. Penalties and Enforcement Proceedings
   5. Confidentiality Requirements Enforced by Private Actions
H. The Family and Medical Leave Act
   1. Coverage
   2. Records to Retain
   3. Form of Retention
   4. Retention Period
   5. Posting and Notice Requirements
      a. Posting Requirements
      b. Notice Requirements
   6. Penalties and Enforcement Proceedings
   7. Confidentiality Requirements and Enforcement Proceedings
I. The Uniformed Services Employment and Re-Employment Rights Act
   1. Coverage
   2. Records to Retain
   3. Notice Requirements
J. The Drug-Free Workplace Act
   1. Coverage
   2. Records to Retain
   3. Posting and Notice Requirements
   4. Resources for Employers
K. Executive Order 11246
   1. Coverage
   2. Standard Form 100 (EEO-1 Report)
   3. Written Affirmative Action Compliance Program
   4. Records to Retain/Retention Period
      a. Personnel and Employment Records
      b. Internet Applicant Records
      c. Records re Complaints and Compliance Evaluations and Actions
      d. Written Affirmative Action Plans
      e. Standard Form 100/EEO-1 Reports
   5. Posting and Notice Requirements
      a. EEO Poster
      b. Solicitations and Advertisements
      c. Notification to Union
   6. Access to Records
L. The Labor-Management Reporting and Disclosure Act
   1. Coverage
   2. Employer Reporting Requirements
   3. Records to Retain
   4. Form of Retention
   5. Retention Period
   6. Posting and Notice Requirements
   7. Resources for Employers
   8. Penalties for Noncompliance
M. Executive Order 13496 (Notification of Employee Rights Under Federal Labor Laws)
N. The Employee Polygraph Protection Act
   1. Coverage
2. Records to Obtain
   a. Pre-Test Records
   b. Post-Test Records
3. Retention Period
4. Location and Inspection
5. Posting and Notice Requirements

O. Vietnam Era Veterans’ Readjustment Act of 1974
   1. Coverage
   2. Veterans’ Employment Report (VETS-100)
      a. Count of Veterans Employed and Hired
      b. Resources for Employers
   3. Written Affirmative Action Program
   4. Records to Retain/Retention Period
      a. Personnel and Employment Records
      b. Records Re: Complaints and Compliance Evaluations and Actions
      c. VETS-100 Reports
      d. Records of Self-Identified Veterans
      e. VEVRAA Affirmative Action Plans
   5. Posting & Notice Requirements
      a. EEO Poster
      b. Notification to Unions
      c. Access to Records

P. The Lily Ledbetter Fair Pay Act of 2009
   1. Coverage
   2. Recordkeeping Requirements

Q. The Genetic Information Nondiscrimination Act of 2008
   1. Coverage
   2. Recordkeeping and Confidentiality Requirements
   3. Posting Requirements
   4. Penalties and Enforcement Proceedings

15:3. TEXAS RECORDKEEPING AND REPORTING REQUIREMENTS
A. The Texas Unemployment Compensation Act
   1. Coverage
   2. Records to Retain
   3. Form of Retention
   4. Retention Period
   5. Reporting Requirements
   6. Posting Requirements
B. The Texas Hazard Communication Act
   1. Coverage
   2. Records to Maintain
      a. Workplace Chemical List
      b. Material Safety Data Sheets
      c. Employee Education Program Records
   3. Posting and Notice Requirements
   4. Reporting Requirements

(Rev. 12, 11/10)
C. The Texas Workers’ Compensation Act
   1. Coverage
   2. Covered Employers (Subscribing and Certified Self-Insured Employers)
      a. Form DWC-1, Employer’s First Report of Injury
      b. Notice to Injured Employee
      c. Form DWC-6, Supplemental Report of Injury
      d. Retention Period
      e. Inspection and Location
      f. Self-Insurer Annual Report
   3. Non-Subscribing Employers
      a. DWC-5, Employer Notice of No Coverage or Termination of Coverage
      b. DWC-7 and DWC-7 Supplemental, Non-Covered Employer’s Report of Occupational Injury or Illness
      c. Retention Period
   4. Workers’ Compensation Health Care Networks
   5. Posting and Notice Requirements
   6. Resources for Employers

D. The Texas Commission on Human Rights Act
   1. Coverage
   2. Records to Retain
   3. Form of Retention
   4. Retention Period

E. State Directory of New Hires
   1. Coverage
   2. Reporting Requirements
   3. Form of Report
   4. Record Retention Requirements
   5. Resources for Employers

15:4. ACCESS AND DISCLOSURE OF EMPLOYEE RECORDS

A. Personnel Files and Records
   1. Employee Access
   2. Third-Party Access
   3. Responding to an Employee Records Subpoena
      a. General Guidelines
      b. Responding to an Employee Records Subpoena in Texas State Court
         (1) Employer’s Response to Subpoena
         (2) Resisting Discovery
         (3) Subpoena Enforcement
      c. Responding to an Employee Records Subpoena in Federal Court
         (1) Employer’s Response to Subpoena
         (2) Resisting Discovery
         (3) Subpoena Enforcement

B. Confidentiality of Medical Records
   1. Americans With Disabilities Act
   2. Family and Medical Leave Act
   3. EEOC Guidelines
C. Confidential Genetic Information
   2. Texas Genetic Discrimination Law

D. Confidentiality of Consumer Information
   1. Coverage
   2. Disposal of Consumer Information
   3. Penalties for Noncompliance

E. Texas Identity Theft Enforcement and Protection Act
   1. Overview
   2. Implications for Employers
   3. Penalties and Enforcement

F. Invasion of Privacy Claims
   1. Claims Against the Employer
   2. Claims By the Employer

15:5. RECORDKEEPING POLICIES AND MANAGERIAL TRAINING
A. Implementing a Record Retention Policy
   1. Preliminary Considerations
   2. Drafting and Implementing the Policy
   3. Defending Your Company’s Policy

APPENDICES
   Appendix 15-1 Table: Federal and Texas Labor and Employment Law Recordkeeping Requirements
   Appendix 15-2 Checklist: Federal and Texas Posting Requirements

CHAPTER 16
EMPLOYMENT RULES AND POLICIES

16:1. INTRODUCTION

16:2. EMPLOYMENT AT-WILL
A. Overview of Texas Employment At-Will Jurisprudence
   1. Salary or Term Statements
      a. Employment for a Term
      b. Annual Salary
   2. Promises of Job Security
   3. Dismissal “For Cause” Language
   4. Conduct Inconsistent With Policies
   5. Promissory Estoppel

B. Safeguarding the Employment At-Will Relationship
   1. Disclaimers
      a. Employment Relationship Is At-Will
      b. Only Company President Can Change Employment At-Will Relationship
      c. Integration Clauses
      d. Handbook Acknowledgment Forms
      e. Employer’s Unilateral Authority to Modify Handbook or Manual
2. Offer Letters
3. Potentially Ambiguous Terms
4. Disciplinary Procedures
5. Enforcement of Rules

16:3. HIRING POLICIES
A. Interviews and Applications
B. Application Fraud and the After-Acquired Evidence Doctrine
C. Hiring Issues Involving the Americans With Disabilities Act
D. Background Checks
   1. Overview of Legal Issues
   2. Criminal Records
      a. Arrest Records
      b. Conviction Records
   3. Credit History
      a. The Fair Credit Reporting Act
      b. Title VII Issues
      c. Bankruptcy Code
      d. Disposal of Consumer Information
E. Medical Examinations and Inquiries
   1. Americans With Disabilities Act
   2. Genetic Information Nondiscrimination Act
F. Job Orientation and Employment Forms
G. Hiring Issues Under the National Labor Relations Act
H. Pre-Employment Fitness for Duty Tests

16:4. EMPLOYMENT REFERENCES
A. Overview
B. Responding to Reference Inquiries
C. Obtaining References for Applicants

16:5. EQUAL EMPLOYMENT OPPORTUNITY POLICIES
A. Overview
B. Posting Requirements
C. Equal Employment Opportunity Policy
D. Sexual Harassment Policy

16:6. WAGE AND HOUR POLICIES
A. Overview
B. Notice Requirements
   1. Fair Labor Standards Act
   2. Texas Payday Law
C. Common Wage and Hour Policies
   1. Timekeeping
   2. Break Periods
   3. Work Week and Overtime
   4. Paydays
   5. Deductions From Pay
   6. Sales Commissions and Bonuses
16:7. EMPLOYEE MEDICAL INFORMATION POLICIES
   A. Confidentiality Requirements of the Americans With Disabilities Act
   B. Genetic Information
   C. HIV and AIDS Testing
   D. Fair Credit Reporting Act Requirements

16:8. MOTHER-FRIENDLY POLICIES
   A. FLSA
   B. Texas Law

16:9. EMPLOYEE LEAVE POLICIES
   A. Overview
   B. The Family and Medical Leave Act of 1993
   C. Military Leave
      1. The Uniformed Services Employment and Reemployment Rights Act of 1994
         a. Coverage
         b. Reemployment Rights
         c. Benefits
      2. Texas Law
         a. Public Employers
         b. Private Employers
   D. Pregnancy-Related Leave
   E. Election Leave
      1. Attendance at Political Conventions
      2. Voting
      3. Choice in Voting
   F. Jury or Witness Duty
      1. Federal Law
      2. Texas Law
   G. Personal Leaves of Absence
   H. Miscellaneous Issues and Drafting Suggestions
      1. Definitions
      2. Insurance Coverage
      3. Documentation of Leave Requests

16:10. EMPLOYEE CONDUCT
   A. Employment of Relatives
   B. Dating or Fraternization
   C. Appearance Policies
      1. Overview
      2. Hair Style
      3. Beards
      4. Dress Codes
      5. Weight
      6. Drafting Considerations
   D. Drugs and Alcohol
      1. Overview
      2. Drug-Free Workplace Act
3. Texas Workers’ Compensation Act
4. Drug and Alcohol Testing

E. Smoking in the Workplace
   1. Overview
   2. Workplace Smoking Policy
   3. Off-Duty Smoking

F. Use of Company Communication Systems
G. Blogging
H. Offensive Conduct in the Workplace

16:11. EMPLOYEE SURVEILLANCE
A. Overview
B. Electronic Monitoring Policy
   1. Overview
   2. Notify Employees
   3. Identify the Legitimate Business Reasons
   4. Enforcement
   5. Privacy Issues

16:12. CONCERTED ACTIVITIES AND THE NATIONAL LABOR RELATIONS ACT
A. No-Solicitation and No-Distribution Rules
   1. No-Distribution Rules
      a. Work Time
      b. Work Areas
   2. No-Solicitation Rules
      a. Work Time
      b. Work Areas
   3. Draft Rules to Comply With Law
   4. Uniform Enforcement of Rules
   5. Special Rules for Certain Industries
B. Company Bulletin Boards
C. Access to Non-Employees
D. Union Insignia
E. Social Media Policies
F. Weingarten Rights
G. Use of Employer’s Electronic Communication Systems

16:13. INVESTIGATION PROCEDURES AND POLICIES
A. Applicability of Fair Credit Reporting Act
B. Investigation Procedure
C. Weingarten Rights of Unionized Employees

16:14. DISPUTE RESOLUTION
A. Internal Grievance and Complaint Procedure
B. Arbitration
C. Jury Waivers
16:15. PERFORMANCE EVALUATIONS

16:16. NO-VIOLENCE AND NO-WEAPONS POLICIES
   A. Violence in the Workplace
   B. Weapons in the Workplace
      1. Texas Concealed Handgun Law
         a. Prohibiting Persons From Carrying Concealed Handguns
         b. Publication of Policy Prohibiting Concealed Handguns
      2. No-Weapons Policy

16:17. TERMINATION POLICIES
   A. Overview
   B. Involuntary Terminations
   C. Voluntary Terminations
   D. Payment of Employees Upon Termination of Employment

16:18. ENGLISH-ONLY RULES

APPENDIX
   Appendix 16-1 Pre-Employment Inquiries

CHAPTER 17

EMPLOYMENT DISCRIMINATION LAW—OVERVIEW & HISTORY

17:1. HISTORICAL OVERVIEW

17:2. GENERAL RULE: EMPLOYMENT AT-WILL

17:3. DISCRIMINATION DEFINED

17:4. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
   A. Coverage
   B. Employment Status
   C. No Individual Liability
   D. An Individual Can Have More Than One Employer for Title VII Purposes
      1. Single Integrated Enterprise
      2. Joint Employers
   E. Necessity of Filing a Charge of Discrimination Before Going to Court
      1. Generally, 300-Day Limit in Texas for Filing EEOC Charge
      2. Elements of Charge
      3. The EEOC Charge Defines/Limits the Scope of Any Subsequent Lawsuit
      4. Post-Filing Procedures and the Importance of Conciliation
   F. Methods of Proving Intentional Discrimination
      1. Circumstantial Evidence Pursuant to the Modified McDonnell Douglas Approach
      2. Direct Evidence
      3. Pattern and Practice
   G. Disparate Impact
H. Remedies
   1. Back Pay
   2. Reinstatement
   3. Front Pay
   4. Compensatory Damages
   5. Punitive Damages
   6. Cap on Compensatory and Punitive Damages
   7. Attorneys’ Fees, Expert Fees, Interest and Costs

17.5. RECONSTRUCTION-ERA LEGISLATION
   A. Civil Rights Act of 1866, a/k/a “Section 1981”
      1. Section 1981’s Definition of “Race”
      2. Method of Proving Discrimination Under Section 1981 Is the Same as for Title VII
      3. Notable Advantages of Section 1981 Over Title VII
         a. No Requirement to File EEOC Charge of Discrimination
         b. No Damage Caps
         c. Longer Limitations Period
         d. No Need for “Employee” Status
      4. Notable Disadvantages of Section 1981
         a. Private Entities Only; No Government Employees
         b. Intentional Discrimination Only
         c. Section 1981 Does Not Cover All Categories Protected by Title VII
   B. Civil Rights Act of 1871
      1. Section 1983
      2. Section 1985(3)

17.6. OTHER FEDERALLY-PROTECTED CATEGORIES
   A. Age
   B. Disability
      1. The Statute as Originally Enacted Proved Ineffective
      2. The ADA as Amended
   C. Serious Health Condition

CHAPTER 18
TEXAS COMMISSION ON HUMAN RIGHTS ACT:
PROCEDURES AND REMEDIES

18:1. INTRODUCTION

18:2. RELATIONSHIP WITH FEDERAL LAW
   A. TCHRA Correlates State Law With Federal Law
   B. Impact on Commission

18:3. COMMISSION’S STATUS AND AUTHORITY UNDER TCHRA
   A. Mission and Philosophy
   B. Organization
C. Powers and Duties
   1. General Powers
   2. Duties

18:4. COMMISSION’S RELATIONSHIP WITH EEOC
   A. Statutory Relationship
   B. Contractual Relationship
      1. Charge Filing Arrangements
         a. Dual Filing
         b. Agency Jurisdiction
         c. Assistance to Complainants
         d. Transfer of Charges
         e. Charge Form
         f. Notification to Parties
      2. Division of Charge Processing Responsibilities
         a. Charges Initially Processed by Commission
         b. Charges Initially Processed by EEOC
         c. Commission’s Waiver of Exclusive Jurisdiction
      3. Exchange of Information
      4. Resolution of Charges
         a. Federal Funding
         b. EEOC Review and Acceptance
      5. Implementation of Work Sharing Agreement

18:5. LOCAL ENFORCEMENT
   A. Overview
   B. Powers and Duties of Local Commissions
      1. General Powers and Duties
      2. Powers of Investigation and Conciliation
      3. Authority to File Civil Actions
   C. Relationship of Texas Commission to Local Commissions
      1. Referral to Local Commission
      2. Action on Complaints
      3. Local Commission Referral to Texas Commission

18:6. ADMINISTRATIVE PROCEDURES
   A. Overview
   B. Statute of Limitations
      1. Occurrence of Unlawful Employment Practice
      2. Timeliness Under Deferral Procedures
      3. Relation Back Rule
      4. Continuing Violation Doctrine
   C. Complaint
      1. Filing Requirement
      2. Requisites
      3. Covered Entities
      4. Single Filing Rule
      5. Initial Processing
   D. Voluntary Resolution
CHAPTER 18  TEXAS EMPLOYMENT LAW  F-88

E. Investigation
   1. Procedures
   2. Maintenance of Records
   3. Confidentiality
   4. Termination of Authority
F. Reasonable Cause Determination
G. Notice of Right to File Suit

18:7. JUDICIAL ENFORCEMENT
A. Actions Authorized by TCHRA
   1. Civil Action by Texas Commission
      a. Temporary Injunctive Relief
      b. Permanent Relief
   2. Civil Action by Local Commission
   3. Civil Action by Complainant
   4. Intervention
      a. Complainant
      b. Commission
B. Limitation of Actions
   1. Commencement
   2. Equitable Tolling
   3. Summary Judgment
C. Parties
   1. Parties Plaintiff
      a. Personal Cause of Action
      b. Survival of Cause of Action
      c. Union Members
   2. Parties Defendant
   3. Joinder of Commission
D. Scope of Civil Action
E. Venue
F. Removal of Action
G. Res Judicata and Collateral Estoppel
H. Proof of Discrimination
   1. Disparate Treatment Cases
      a. Individual Disparate Treatment
      b. Cat’s Paw Doctrine
      c. Mixed Motives Doctrine
      d. Systemic Disparate Treatment
   2. Disparate Impact Cases
   3. Retaliation Cases
   4. Causation Standard in TCHRA Cases
I. Trial
   1. Expedited Trial Setting
   2. Trial De Novo
   3. Jury Trial
J. Compliance
18.8. REMEDIES

A. Overview
B. Declaratory Relief
C. Injunctive and Other Nonmonetary Relief
D. Back Pay
   1. Offsets
   2. Mitigation
E. Front Pay
F. Damages
   1. Compensatory Damages
      a. Pecuniary Losses
      b. Nonpecuniary Losses
         (1) Injury to Reputation
         (2) Mental Anguish
   2. Exemplary Damages
      a. Standards for Awards of Exemplary Damages
         (1) Application of the Cap
      b. Substantive Due Process
      c. Huerta Analysis
         (1) Facts
         (2) Findings on Appeal
   3. Statutory Caps
G. Judgment Interest
   1. Prejudgment Interest
   2. Post-Judgment Interest
H. Attorney Fees and Costs
   1. Prevailing Party
      a. Prevailing Party Determination
      b. Unsuccessful Claims
      c. Fee Applications
   2. Reasonableness
   3. Jury Determination
   4. Lodestar Method
   5. Paralegals and Law Clerks
I. Limitations on Remedies
   1. One Satisfaction Rule
   2. Mixed Motive Cases
   3. After-Acquired Evidence Doctrine
   4. Exclusivity of Remedies
      a. TCHRA Preempts Tort Remedies
      b. Retaliation in Public Employment
CHAPTER 19
SEX DISCRIMINATION

19:1. SCOPE OF CHAPTER

19:2. TITLE VII AND TEXAS LABOR CODE GENDER DISCRIMINATION PROHIBITIONS
   A. Title VII
   B. Chapter 21 of the Texas Labor Code
   C. Statute of Limitations
   D. Theories of Proof
      1. Disparate Treatment
         a. Generally
         b. Elements and Burdens of Proof
         c. Pattern or Practice
      2. Disparate or Adverse Impact
         a. General
         b. Elements and Burdens of Proof
         c. Application to Sex-Based Compensation Plan
      3. Retaliation
   E. The Bona Fide Occupational Qualification Defense
   F. Remedies

19:3. THE EQUAL PAY ACT OF 1963
   A. Coverage
   B. Elements of an EPA Claim
   C. Affirmative Defenses

19:4. PREGNANCY DISCRIMINATION
   A. The Pregnancy Discrimination Act of 1978
   B. Texas Labor Code Prohibition Against Pregnancy Discrimination
   C. Proving Discrimination
   D. Disability and Return to Work Issues
      1. Medical Leave and the PDA
      2. Relationship Between the PDA and the Americans With Disabilities Act
   E. Parental Leave: The Relationship Between the PDA and the FMLA
      1. Coverage
      2. Leave From Work
      3. Returning to Work
      4. Nursing Mothers
   F. Fetal Protection Issues
   G. Reproductive Discrimination

19:5. OTHER SPECIFIC TYPES OF SEX DISCRIMINATION
   A. “Sex Plus” Policies
      1. Sex Plus Marriage
      2. Sex Plus Parenthood
      3. Sex Plus Grooming and Appearance Policies
      4. Sex Plus Race or Other Protected Classification
B. “No Fraternization” or “No-Spouse” Policies
C. Gender Concerns in Pre-Employment Interviews
D. Sex Discrimination Against Males
E. Sexual Preference Discrimination
F. Section 1981 of the Civil Rights Act of 1866
G. Special Industry “Glass Ceiling” Issues

19:6. SEXUAL STEREOTYPING
A. Common Sexual Stereotypes
B. Proving Sexual Stereotyping
   1. Indirect Evidence
   2. Direct Evidence
   3. Expert Testimony
   4. Issue Preclusion
C. Examples of Sexual Stereotyping
   1. Pre-Employment Interviews
   2. Appearance/Grooming Standards
   3. Glass Ceiling Cases

19:7. DAMAGES ISSUES IN INDIVIDUAL SEX DISCRIMINATION CASES
A. Compensatory Damages
B. Mental Anguish Damages
C. Punitive Damages
D. Mitigation of Damages
E. Limits on Damages Awards
   1. Deductions From Back Pay
   2. After-Acquired Evidence

19:8. GENDER CLASS ACTION ISSUES
A. Historical Overview: Sex Segregation in Employment
   1. Substantially Equal
   2. Comparable Worth
   3. Funneling
   4. Shift Toward Plaintiffs
B. Lack of Interest Defense

APPENDIX
Appendix 19-1 Special Government Contractor Issues—DOL’s Glass Ceiling Initiative
CHAPTER 20
SEXUAL HARASSMENT

20:1. INTRODUCTION

20:2. GOVERNING STATUTES, REGULATIONS & GUIDELINES
   A. Title VII of the Civil Rights Act of 1964
   B. Chapter 21 of the Texas Labor Code
   C. EEOC Guidelines

20:3. SUPREME COURT RULINGS ON SEXUAL HARASSMENT IN THE WORKPLACE
   A. Meritor Savings Bank, FSB v. Vinson
   B. Harris v. Forklift Systems, Inc.
   C. Oncale v. Sundowner Offshore Services, Inc.
   D. Faragher v. City of Boca Raton
   E. Burlington Industries, Inc. v. Ellerth
   F. Clark County School District v. Breeden
   G. National Railroad Passenger Corporation v. Morgan
   H. Pennsylvania State Police v. Suders
   I. Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee

20:4. THEORIES OF LIABILITY UNDER TITLE VII AND CHAPTER 21 OF THE TEXAS LABOR CODE
   A. Hostile Environment Sexual Harassment
      1. Elements—Overview
      2. Protected Class
      3. Unwelcome Conduct
      4. Harassment Based Upon Sex or Gender
      5. Harassment Sufficiently Severe or Pervasive to Affect Job Performance or Alter Working Conditions
         a. Reasonable Person v. Reasonable Woman
         b. Weighing the Severity and Pervasiveness of Conduct
         c. Distinguishing Sexual Harassment From Boorishness
      6. Employer Knew or Should Have Known
         a. Overview
         b. Harassment by Supervisors and Agents
         c. Harassment By Co-Workers
         d. Harassment by Non-Employees
         e. Harassment of Third Parties by an Employee
   B. Quid Pro Quo Sexual Harassment
      1. Elements
      2. Employer Liability (Respondeat Superior)
   C. Individual Supervisor Liability
   D. Retaliation
   E. Constructive Discharge
   F. Same-Sex Sexual Harassment
   G. Sexual Favoritism
### Chapter 20: Sexual Harassment and Workplace Technology

#### H. Sexual Harassment and Workplace Technology

1. E-Mail Harassment
2. Internet Harassment
3. Social Media Harassment
4. Textual Harassment

#### 20:5. DAMAGES AND REMEDIES

A. Available Damages and Equitable Relief
B. Emotional Distress Damages

#### 20:6. DEFENSES

A. Challenge Plaintiff’s Prima Facie Case
   1. Conduct Not Because of Sex or Gender
   2. Conduct Not Severe or Pervasive
B. Plaintiff Failed to Use Internal Complaint Procedure
C. Employer Took Prompt and Appropriate Remedial Action
   1. Prompt Response
   2. Appropriate Remedial Action
D. Employer Not Responsible for Harasser’s Conduct

#### 20:7. RIGHTS OF THE ACCUSED

A. Defamation
B. Intentional Interference With Contract
C. Wrongful Discharge
D. Invasion of Privacy

#### 20:8. DISCOVERY AND EVIDENTIARY ISSUES

A. Plaintiff’s Past Sexual Behavior and Alleged Sexual Predisposition
   1. Generally Inadmissible
   2. Federal Rule of Evidence 412
B. Plaintiff’s Workplace Conduct
C. Plaintiff’s Mental Condition and Psychological History
   1. Plaintiff’s Mental Condition in Controversy
   2. Plaintiff’s Mental State Relevant to Character Defense
   3. Restricted Examination Allowed
D. Evidence Concerning Alleged Harasser
E. Harassment Against Other Employees
F. After-Acquired Evidence

### APPENDICES

- Appendix 20-1: Survey of Recent Jury Verdicts in Sexual Harassment Cases
- Appendix 20-2: Equal Employment Opportunity Policy
- Appendix 20-3: Internal Complaint Review Procedure
- Appendix 20-4: Avoiding Sexual Harassment in the Workplace—Policies, Procedures and Remedial Issues
- Appendix 20-5: Electronic Policy Checklist
- Appendix 20-6: Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors
- Appendix 20-7: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors
CHAPTER 21
DISABILITY DISCRIMINATION

21:1. GOVERNING STATUTES, REGULATIONS, AGENCY INTERPRETATIONS
   A. Applicable Statutes
      1. Americans With Disabilities Act of 1990
      2. Rehabilitation Act of 1973
      3. Chapter 21 of Texas Labor Code
   B. Administrative Regulations and Agency Interpretations
      1. EEOC Regulations
      2. EEOC Interpretive Guidance Accompanying Regulations
      3. EEOC Compliance Manual and Other Guidance
      4. EEOC Technical Assistance Manual
      5. Chapter 21 Regulations

21:2. COVERAGE ISSUES
   A. Covered Entities
   B. Individual Liability
   C. Covered Employees

21:3. ENFORCEMENT PROCEDURES

21:4. EXISTENCE OF DISABILITY
   A. “Disability” Defined
   B. “Actual Disability”
      1. Physical or Mental Impairment
      2. Major Life Activities
      3. “Substantially Limits” Major Life Activity
         a. Individualized Inquiry Required
         b. Substantial Limitation of Major Life Activity Other Than Working
            (1) Significant Effect
            (2) Subset of Major Life Activity
            (3) Temporary Limitation
         c. Substantial Limitation in Major Life Activity of Working
            (1) Single Job Restriction
            (2) Class of Jobs
            (3) Range of Jobs in Various Classes
            (4) Evidentiary Issues
         d. Medication and Other Mitigating Factors
      4. Use of Experts
   C. “Record-of” Disability
   D. “Regarded-as” Disability
      1. “Actual Disability” Standards Apply
      2. Employer’s Conduct at Issue
   E. Exclusions From Definition of Disability
      1. ADA
      2. Chapter 21
21:5. QUALIFIED INDIVIDUAL
   A. Basic Standards Defined
   B. Essential Functions
      1. Determining What Is Essential
      2. Attendance and Work Location
   C. Safety Issues/Direct Threat
      1. Burden of Proof
      2. Assessing Direct Threat
      3. Risk to Disabled Employee
   D. Effect of Applications for Social Security or Other Disability Benefits
   E. Refusing Reasonable Accommodation

21:6. REASONABLE ACCOMMODATION
   A. Definition
   B. Burden of Proof
   C. Duty Does Not Apply to Regarded-As Disabilities
   D. Knowledge of Limitation From Disability Required
   E. The Accommodation Process
      1. Employee’s Burden to Request
      2. Selection of Particular Accommodation
      3. Changing Accommodations
   F. Particular Accommodations
      1. Job Restructuring
      2. Transfers to Other Positions and Light Duty
         a. ADA
         b. Chapter 21/Rehabilitation Act
      3. Leaves of Absence
   G. Accommodations That Conflict With Collective Bargaining Agreements
   H. Accommodations That Conflict With Non-Collectively Bargained Seniority Systems
   I. Effect of Employer Exceeding Reasonable Accommodation Requirement
   J. Undue Hardship Defense

21:7. OTHER TYPES OF UNLAWFUL DISABILITY DISCRIMINATION
   A. Disparate Treatment
      1. Elements and Methods of Proof
      2. Causation Standard
         a. ADA
         b. Chapter 21
      3. Mixed-Motive Analysis
      4. Adverse Action Related to But Not “Because of” a Disability
   B. Disparate Impact and Qualification Standards
      1. ADA
      2. Chapter 21
   C. Harassment
   D. Association With Individual With a Disability
   E. Employer Qualification Testing
F. Medical Examinations and Inquiries
   1. Limitations Apply Only to Qualified Individuals With Disabilities
   2. Post-Hiring Medical Examinations and Inquiries
   3. Confidentiality
   4. Drug Testing
   5. Requirement of Harm

G. Discrimination Through Contractual Arrangements

H. Discrimination in Employee Benefits
   1. Health Insurance Benefits
   2. Disability Insurance Benefit Plans
      a. Benefit Parity
      b. Qualified Individual Requirement
   3. ADA Title III Issues
   4. Special Insurance Protections

I. Retaliation
   1. Elements and Burdens of Proof
   2. Protected Activity
   3. Adverse Employment Action
   4. Causal Connection

J. Interference, Coercion, or Intimidation

21:8. REMEDIES

CHAPTER 22
RACE DISCRIMINATION

22:1. SCOPE OF CHAPTER

22:2. TEXAS PROHIBITIONS AGAINST RACE DISCRIMINATION
   A. Equal Rights Clause of the Texas Constitution
      1. Government Action Required
      2. Strict Scrutiny Review
   B. Chapter 21 of the Texas Labor Code
      1. Purpose and Scope
      2. Enforcement

22:3. PROVING RACE-BASED DISCRIMINATION UNDER CHAPTER 21
   A. Disparate Treatment Discrimination
      1. Shifting Burdens of Proof
      2. Available Defenses
         a. Federal Preemption
         b. Employer or Employee Not Covered by Chapter 21
         c. Nondiscriminatory Motive
         d. Affirmative Action Program
         e. Bona Fide Seniority or Merit System
      3. BFOQ Defense Not Available
B. Adverse Impact Discrimination
   1. Plaintiff’s Prima Facie Case
   2. Business Necessity Defense
   3. Overcoming Business Necessity Defense
C. Retaliation
D. Remedies

22:4. RELATED FEDERAL CAUSES OF ACTION
   A. Reconstruction Statutes
   B. Executive Order 11246

22:5. LOCAL ORDINANCES PROHIBITING RACE DISCRIMINATION
   A. Local Powers and Duties
   B. Scope of Local Prohibitions
      1. Fort Worth City Code
      2. Dallas, Houston and San Antonio City Codes
      3. Austin City Code
      4. Corpus Christi City Code

22:6. AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION
   A. Executive and Legislative History
   B. Framing the Debate: United Steelworkers of America v. Weber
      1. Arguments in Favor of Affirmative Action
      2. Arguments in Opposition to Affirmative Action
   C. Judicial Response to Affirmative Action
      1. Standard of Review
      2. Expanding Affirmative Action
      3. Restricting Affirmative Action
      4. Contract Set-Asides

CHAPTER 23
AGE DISCRIMINATION

23:1. FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)
   A. Purpose and Scope
   B. Covered Persons and Entities
      1. Employers
         a. Parent Corporation as Employer
         b. Individual Supervisor as Employer
         c. Immunity Under 11th Amendment
      2. Covered Employees
         a. Employees Over the Age of 40
         b. Americans Working Abroad
c. The Bona Fide Executive or High Policy-Making Position Exemption
d. Coverage for Retiree Benefits

3. The ADEA Does Not Prohibit Reverse Discrimination

C. Administrative Procedures
1. Comparison to Title VII
2. Exhaustion of Remedies

23:2. TEXAS COMMISSION ON HUMAN RIGHTS ACT
A. Prohibited Conduct
B. Covered Persons and Entities
   1. Employers
   2. Exempt Employees
C. Administrative Procedures
D. Relationship Between TCHRA and ADEA

23:3. PROVING AN AGE DISCRIMINATION CLAIM
A. Disparate Treatment Prima Facie Case
   1. Shifting Burdens of Proof
   2. Employer’s Burden of Production
   3. Proving Pretext
      a. Proving Pretext Generally
      b. Employer’s Stated Reason Is Demonstrably False or Employer Has Given Inconsistent Reasons for Discharge
      c. Nonsensical, Arbitrary, Inconsistent or Capricious Employment Decisions
      d. Age-Related Remarks
   4. Evidence Sufficient to Defeat Claim of Age Bias
      a. Reasonable Business Decision
      b. “Same Actor Defense”
B. Disparate Impact Prima Facie Case
C. Reduction in Force Cases
D. Class Action Age Discrimination Claims

23:4. AVAILABLE REMEDIES
A. ADEA Claims
   1. Back Pay
   2. Reinstatement v. Front Pay
   3. Liquidated Damages
      a. Willful Violation
      b. Relationship to Punitive Damages
   4. Attorneys’ Fees
B. TCHRA Claims
C. Offsets and Deductions
D. Mitigation of Damages

23:5. DEFENSES TO AGE DISCRIMINATION CLAIMS
A. ADEA Statutory Defenses
   1. Defenses to Claim of Intentional Discrimination
   2. Defenses to Claim of Disparate Impact Discrimination Under the ADEA
B. TCHRA Defenses
CHAPTER 24
DISCRIMINATION BASED ON NATIONAL ORIGIN, RELIGION, AND OTHER GROUNDS

24:1. INTRODUCTION

24:2. OVERVIEW OF TCHRA
A. Scope
B. Jurisdiction and Coverage
C. Relationship with Federal Law
D. Federal Burden of Proof Standard
E. Defenses
F. Remedies

24:3. DISCRIMINATION MODELS
A. Disparate Treatment
   1. Individual Disparate Treatment
   2. Cat’s Paw Doctrine
   3. Mixed Motives Cases
   4. Systemic Disparate Treatment
B. Disparate Impact

24:4. DISCRIMINATION BASED ON NATIONAL ORIGIN
A. Unlawful Employment Practices
B. Meaning of National Origin
   1. National Origin of Ancestors
      a. Birthplace and Language
      b. Unique Considerations
      c. Protected Subclasses
   2. Employer Perceptions
   3. Employee Relationships and Associations
C. National Origin Guidelines

D. Proving National Origin Discrimination
   1. Disparate Treatment
      a. Alienage and Citizenship Requirements
      b. Linguistic Characteristics
      c. Discrimination by Foreign Companies or Against Foreign Citizens
   2. Disparate Impact
      a. Language Requirements
         (1) English-Only Rules
         (2) Fluency Requirements
      b. Height and Weight Standards
      c. Foreign Education
   3. Hostile Environment
      a. Elements of Claim
      b. Nature of Conduct
      c. Employer Liability
      d. Constructive Discharge

E. Defenses
   1. Business Necessity
      a. Scope of Defense
      b. Disparate Impact Cases
   2. Bona Fide Occupational Qualification
   3. Reliance on Commission Interpretations
   4. Mixed Motives Cases
   5. Harassment Cases

F. Other Sources of Protection
   1. Texas Constitution
   2. Governor’s Equal Employment Opportunity Office
   3. County and Municipal Ordinances

24:5. DISCRIMINATION BASED ON RELIGION

A. Coverage
   1. Determination of Status
   2. Covered Activities
   3. Scope of Religious Organization Exemption

B. Unlawful Employment Practices

C. Protected Activity
   1. Religious Beliefs
   2. Religious Practices
   3. Ministerial Duties

D. Reasonable Accommodation
   1. Overview
   2. Scope of Duty
      a. Selection of Accommodation
      b. Employee Suggestions
      c. Duty of Cooperation
3. Types of Accommodations  
   a. Work Schedules  
   b. Religious Dress and Grooming Practices  
   c. Testing and Screening  
   d. Other Accommodations  
4. Undue Hardship  
   a. Genuine and Immediate Hardship  
   b. Cost Considerations  
   c. Impact on Other Employees  
   d. Collective Bargaining Agreements  
   e. Religious Activities in the Workplace  
   f. Illegality of Accommodation  
E. Proving Discrimination—Failure to Accommodate  
   1. Sincerity of Beliefs  
   2. Nature of Beliefs  
   3. Notice to Employer  
F. Other Causes of Action  
   1. Disparate Treatment  
   2. Religious Harassment  
      a. Quid Pro Quo Harassment  
      b. Hostile Environment Harassment  
G. Defenses  
   1. Undue Hardship  
   2. Business Necessity  
   3. Bona Fide Occupational Qualification  
   4. Reliance on Commission Interpretations  
H. Other Sources of Protection Against Religious Discrimination  
   1. Texas Constitution  
   2. Governor’s Equal Employment Opportunity Office  
   3. County and Municipal Ordinances  
   4. Religious Holy Days  

24.6. OTHER BASES FOR DISCRIMINATION CLAIMS  
A. Discrimination Based on Marital Status  
B. Discrimination Based on Sexual Orientation  
C. Discrimination Based on Off Duty Conduct  
D. Discrimination Based on Criminal Record  
E. Discrimination Based on Union Membership or Non-Membership  
F. Discrimination Based on Jury Service  
G. Discrimination Based on Subpoena Compliance  
H. Discrimination Based on Emergency Evacuation  
I. Discrimination Based on Child Support Orders  
J. Discrimination Based on Breast Feeding  
K. Discrimination Based on Use of Genetic Information  
L. Discrimination Based on Military Service  
(Rev. 13, 12/11)
CHAPTER 25
TEXAS EMPLOYMENT LAW

M. Restrictions on Blacklisting
N. Retaliation Claims Under TCHRA
   1. Burden of Proof
   2. Protected Activity
      a. Participation Activities
      b. Opposition Activities
      c. Good Faith Belief
   3. Unprotected Conduct
   4. Third-Party Conduct
   5. Retaliation
      a. Adverse Employment Actions
      b. Retaliatory Legal Actions
   6. Causation
O. Retaliation Based on Reports of Health or Safety Violations
   1. Workers’ Compensation Act
   2. Hazard Communication Act
   3. Private Nursing Homes
   4. Assisted Living Facilities
   5. Health Care Facilities
   6. Physicians
   7. Registered Nurses
P. Retaliation Based on Involvement in Arbitration
Q. Retaliation Based on Political Affiliations or Choices
R. Retaliation Based on Political Participation
S. Retaliation Based on Participation or Nonparticipation in Abortion Procedures

CHAPTER 25
THE FAMILY AND MEDICAL LEAVE ACT

25:1. PURPOSE AND SCOPE

25:2. COVERAGE
   A. Effective Date
   B. Covered Employers
      1. Private Sector Employers
         a. Counting Employees
         b. Single or “Integrated” Employer
         c. Joint Employers
         d. Successor Employers
      2. Public Sector Employers
      3. Immunity of State Employers
   C. Eligible Employees
      1. Employed for at Least 12 Months
      2. Employed for at Least 1,250 Hours of Service
      3. 50 Employees Within 75 Miles of Worksite
25:3. LEAVE ENTITLEMENT
   A. Birth of and Care for Newborn
   B. Placement for Adoption or Foster Care
   C. To Care for a Family Member
   D. Needed to Care for
   E. Employee Unable to Perform
   F. Serious Health Condition
      1. Incapacity
      2. Treatment
      3. Chronic Serious Health Condition
      4. Cosmetic/Restorative Treatments
      5. Substance Abuse as a Serious Health Condition
   G. To Care for a Service Member

25:4. TYPE OF AND MEASURING THE LEAVE
   A. Intermittent and Reduced Leave Schedule
      1. Medically Necessary
      2. Duties of Employee/Transfer to Alternative Position
   B. Paid vs. Unpaid Leave
   C. Measuring the Leave
   D. Light Duty

25:5. EMPLOYER POSTING AND NOTICE REQUIREMENTS
   A. FMLA Poster
   B. Penalties for Violation of Posting Requirement
   C. Written Guidance to Employees
   D. Eligibility Notice Requirement
   E. Rights and Responsibilities Notice

25:6. MECHANICS OF LEAVE
   A. Requesting Leave
      1. Sufficiency of Employee’s Notice
      2. Foreseeable Leave
      3. Unforeseeable Leave
   B. Employer’s Response
      1. Confirmation of Eligibility
      2. Designation of Leave
      3. Contents of Designation
   C. Medical Certification
      1. Employer’s Option
      2. Health Care Provider
      3. Recertification
      4. Impact of GINA (Genetic Information Nondiscrimination Act)
      5. Impact of HIPAA (Health Insurance Portability and Accountability Act)
      6. Impact of ADAAA Amendments
   D. Maintenance of Benefits
      1. Health Benefits
2. Other Benefits

E. Key Employees

F. Returning From Leave
   1. Notice
   2. Certification

G. Job Restoration
   1. Exceptions
   2. Equivalent Position
   3. Joint Employment

25:7. PROHIBITED ACTS
   A. Interference With Rights
   B. Interference With Proceedings or Inquiries
   C. Investigative Authority

25:8. ENFORCEMENT
   A. Action by DOL
   B. Civil Action by Employees
      1. Individual Liability
      2. Prospective or Former Employees
   C. Limitations
   D. Relief/Defenses/Jury Trial
      1. Damages
      2. Defense to Liquidated Damages
      3. Equitable Relief
      4. Jury Trial
   E. Burdens of Proof

25:9. RECORDKEEPING

25:10. OVERLAP AMONG ADA, FMLA AND WORKERS’ COMPENSATION
   A. Contrast Between Purposes of ADA, FMLA, and Workers’ Compensation
   B. Are These Claims Mutually Exclusive?
   C. Impact of State Agency Claims, CBAs and Releases
   D. Other Differences

APPENDICES

Appendix 25-1 FMLA Opinion Letters
Appendix 25-2 FMLA Digest of Cases
Appendix 25-3 Certification of Health Provider (DOL Form)
Appendix 25-4 Employer Response to Employee Request for FMLA Leave (DOL Form)
Appendix 25-5 DOL Questions and Answers
Appendix 25-6 Selected FMLA Regulations
Appendix 25-7 2008 Proposed Changes to FMLA Regulations
Appendix 25-8 Summary of 2009 Changes to FMLA Regulations
Appendix 25-9 Summary of Final Rules Changes (2009)
Appendix 25-10 FMLA Regulation Regarding in Loco Parentis
Appendix 25-11 DOL FMLA Q&A Booklet
CHAPTER 26
RETAIATION

26:1. INTRODUCTION
A. Nature of Retaliation Claim
B. Underlying Basis for Retaliation Claim
C. Who May Bring Retaliation Claim?
D. Exhausting Administrative Requirements
E. Trend: Growth in Number of Retaliation Claims Filed
   1. Less Likely Dismissed on Summary Judgment
   2. Potentially More Lucrative for Plaintiffs
   3. Not Contingent on Success of Underlying Claim
   4. Potential for Punitive Damages

26:2. LEGAL ELEMENTS OF RETALIATION CLAIM
A. Prima Facie Case
B. Is Activity Protected?
   1. Bad Faith Activity
   2. Unreasonable Conduct or Manner of Opposition
   3. Conduct Out of Proportion to Discrimination Protested
   4. Conduct in Breach of Duty Owed Employer
   5. Conduct Is Part of Job Duties
C. Is Defendant’s Response an “Adverse Employment Action?”
   2. Fifth Circuit
   3. Material Changes to Job Functions
   4. Interference With Employment Prospects
D. Causation: Did "A" Cause "B"?
   1. Timing of Adverse Action
      a. Proximity to Protected Activity
      b. As Culminating Event in Process That Predates Protected Activity
   2. Employer’s Consciousness of Potential for Litigation
   3. Mindset of Decision-Maker
   4. Intervening “Nice” Treatment of Plaintiff

26:3. RETALIATION CLAIMS BY HUMAN RESOURCES PROFESSIONALS AND IN-HOUSE COUNSEL
A. Claims by Human Resources Professionals
   1. Job Duty
      a. Informing of Violations of Law
      b. Investigating Discrimination
      c. Job Performance
         (1) Valid Terminations
         (2) Invalid Terminations
   2. Breach of Loyalty
B. Claims by In-House Counsel
   1. Protecting Client Confidences
   2. Standard of Proof
26:4. LAWSUITS OR COUNTERCLAIMS AS RETALIATION

26:5. ACCUSED DISCRIMINATOR CLAIMS RETALIATION

26:6. RETALIATION UNDER SARBANES-OXLEY
   A. Covered Employees
   B. Protected Activities
   C. Administrative Complaints Procedure
   D. Remedies Available to Whistleblowers

CHAPTER 27
[RESERVED]

CHAPTER 28
PRIVACY ISSUES IN THE WORKPLACE

28:1. OVERVIEW

28:2. SOURCES OF PRIVACY LAW
   A. Common Law Invasion of Privacy
      1. Historical Overview
      2. Texas Common Law Recognition of Privacy Protection
      3. Four Invasion of Privacy Torts Under the Restatement
         a. Intrusion Into Seclusion or Private Affairs of Another
         b. Public Disclosure of Private Facts
         c. False Light Invasion of Privacy
         d. Appropriation of Name or Likeness
   B. Constitutional Sources of the Right of Privacy—Public Employers
      1. Privacy Under the United States Constitution
         a. Fourth Amendment Search and Seizure
         b. Fourteenth Amendment Penumbras
      2. Privacy Under the Texas State Constitution
   C. Statutory Sources of Privacy Rights
      1. Federal Statutes
         a. Federal Privacy Act
         b. Title VII of the Civil Rights Act of 1964
         c. Americans With Disabilities Act
         d. OSHA
         e. Fair Credit Reporting Act
         f. Bankruptcy Code
         g. Immigration Reform And Control Act
         h. Health Insurance Portability and Accountability Act and the HIPAA Privacy Rule
      2. State Statutes
28.3. DEFENDING PRIVACY CLAIMS
   A. No Protected Privacy Interest
   B. Consent/Waiver
   C. Privilege
      1. Absolute Privilege
      2. Qualified Privilege

28.4. EMPLOYER SEARCHES
   A. Searches in the Public Sector
   B. Searches in the Private Sector
   C. Searches Involving Unionized Employees

28.5. INTERNAL INVESTIGATIONS AND EMPLOYEE TESTING
   A. Overview
   B. Employer’s Affirmative Obligation to Investigate
      1. Discrimination Laws
      2. Health and Safety Laws
      3. Drugs in the Workplace
   C. Types of Investigations
      1. Pre-Employment Investigations
         a. Criminal Background
            i. Arrest Records
            ii. Conviction Records
         b. Credit History
      2. Employee Testing
         a. Psychological/Honesty Testing
         b. Polygraph Testing
            i. Employee Polygraph Protection Act
            ii. State Regulation of Polygraph Testing
         c. Drug Use and Testing
            i. Federal and State Statutes
            ii. Consent
            iii. Random Testing
            iv. Reasonable Suspicion Testing
            v. Post-Incident or Accident Testing
         d. Alcohol Use and Testing
         e. Health Examinations
         f. AIDS/HIV Testing
            i. Federal Statutory and Constitutional Law
            ii. State Law
         g. Genetic Testing
         h. Other Testing

28.6. PRIVACY-RELATED CLAIMS RESULTING FROM SEARCHES AND INVESTIGATIONS
   A. False Imprisonment
   B. Intentional Infliction of Emotional Distress
   C. Assault and Battery
   D. Malicious Prosecution and Abuse of Process
CHAPTER 28  TEXAS EMPLOYMENT LAW  F-108

28:7. ELECTRONIC SURVEILLANCE
A. Balancing Test
B. Telephone/Voice Mail Surveillance
   1. Electronic Communications Privacy Act
   2. ECPA Business Use Exception
   3. Texas Law and Telephone Monitoring
   4. Texas Wiretapping Law
   5. Cordless Telephones
   6. Tape Recording
C. E-Mail Surveillance
   1. The Developing Common Law
   2. The ECPA as Applied to E-Mail Communications
      a. Internal E-Mail Systems
      b. Business Use Exemption
      c. Prior Consent
      d. “Interception” of Stored E-Mail Messages
   3. Proposed Privacy for Consumers and Workers Act
D. Caller ID
E. Video Camera Surveillance
F. Computer Surveillance
G. Facsimile Surveillance

28:8. INTRUSION INTO PRIVATE DOCUMENTS AND RECORDS
A. U.S. Mail
B. Employee Records
   1. Personnel Records
   2. Medical Records

28:9. OFF-DUTY CONDUCT AND LIFESTYLE DECISIONS
A. Employer Liability for Employees’ Off-Duty Conduct
B. Smoking
   1. Statutory Protections for Smokers
   2. Constitutional Protections for Smokers
C. Lawful but Dangerous Activities and Consumable Products
D. Moonlighting
E. Off-Duty Conduct in the Union Arbitration Context
F. Dating and Marriage
   1. Constitutional Concerns—Public Employees
   2. Dating Co-Workers and/or Subordinate Employees
   3. Dating Competitors
   4. Extramarital Affairs
   5. Marital Status
G. Sexual Orientation
H. Employer Interest In Employees’ Weight
I. Physical Appearance

28:10. REMEDIES
APPENDICES
Appendix 28-1  Employer Checklist for Conducting Internal Investigations
Appendix 28-2  Disclosure of Medical Information—Sample Policy Language
Appendix 28-3  E-Mail Policy—Sample Language
Appendix 28-4  Authorization for Prior Employer to Release Information

CHAPTER 29
DEFAMATION IN THE WORKPLACE

29:1. INTRODUCTION

29:2. ELEMENTS OF A DEFAMATION CLAIM
   A. Overview
      1. Injury by Libel
      2. Injury by Slander
      3. Defamation of a Corporation
      4. Statute of Limitations
   B. Defamatory Statement
      1. Injurious Words Required
      2. Defamation Per Se
         a. Words Injuring Employee in Occupation
         b. Words Imputing a Crime
      3. Defamation Per Quod
         a. Overview
         b. Defamation in Context
         c. Innuendo
         d. Fact v. Opinion
   C. Publication
      1. Publication Defined
      2. Communication That Is Not a “Publication”
         a. Intra-Corporate Communications
         b. Consent/Invitation
         c. Absolute Privilege
         d. Ambiguous Statements
         e. Nonverbal Communication
         f. Rumors and Gossip
      3. Self-Publication
         a. Self-Publication Defined
         b. Texas Courts Recognizing Self-Publication
         c. Texas Courts Rejecting Self-Publication
         d. Proving Self-Publication
   D. Injury to Plaintiff’s Reputation
      1. Presumed Damages
      2. Special Damages
      3. Exemplary Damages
4. Damages Under Section 73.001
5. Measuring Damages

29:3. EMPLOYER LIABILITY
A. Statements of Vice Principals
B. Statements of Non-Managerial Employees

29:4. DEFENSES TO DEFAMATION CLAIM
A. Truth
B. Consent/Invitation
   1. Overview
   2. Bar to Publication or Affirmative Defense
   3. Determining Whether Employee Consented
      a. Written Consent Form
      b. Knowledge or Reason to Know
C. Absolute Privilege
   1. Judicial Proceedings
   2. Quasi-Judicial Proceedings
D. Qualified Privilege
   1. Overview
   2. Investigations of Employee Misconduct
   3. Internal Communications to Employees
   4. Reports of Drug Test Results
   5. Communication to Prospective Employers
   6. Performance Appraisals
   7. Communications to Customers
   8. Statements in Criminal Complaint
   9. Qualified Immunity for Labor Dispute
   10. Public Figures and Union Activity
E. Duty to Provide Information
   1. Texas Service Letters Act
   2. Report to Labor Union
   3. Professional Reporting of Misconduct
F. Preemption and Deferred to Arbitration

29:5. MALICE
A. Defining Malice
B. Proving Malice
C. Summary Judgment
D. Punitive Damages

APPENDICES
Appendix 29-1 Preventing Defamation Claims in the Workplace
CHAPTER 30
OTHER WORKPLACE TORTS

30:1. INTRODUCTION

30:2. INDIRECT EMPLOYER NEGLIGENCE: RESPONDEAT SUPERIOR
   A. Overview
   B. Employer-Employee Relationship
   C. Course and Scope of Employment
      1. Course and Scope Defined
      2. Intentional Torts Generally Not Within Course and Scope

30:3. DIRECT NEGLIGENCE
   A. Overview
   B. Elements of Direct Negligence Claim
      1. Duty/Breach
      2. Proximate Cause and Injury
         a. Cause-In-Fact
         b. Foreseeability
   C. Direct Negligence Theories Recognized in Texas
      1. Negligent Hiring
         a. Duty
         b. Breach
         c. Causation
            i. Cause-In-Fact
            ii. Proximate Cause
      2. Negligent Retention
      3. Negligent Training and Supervision
      4. Negligent Entrustment
      5. Negligent Misrepresentation
      6. Negligent Credentialing
   D. Direct Negligence Theories Not Recognized in Texas
      1. Negligent Interference With Familial Relations
      2. Negligent Termination
      3. Negligent Investigation
      4. Negligent Drug Testing
      5. Negligent Infliction of Emotional Distress
   E. Common Law Defenses to Negligence Claims

30:4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
   A. Overview
   B. Elements
      1. Availability of Alternative Statutory Cause of Action
      2. Extreme and Outrageous Conduct
         a. Termination
         b. Harassing and Retaliatory Conduct
c. Assault, Humiliation, Ostracism
d. Questioning Employees

3. Severe Emotional Distress
4. Intent or Recklessness
5. Causation

30:5. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

A. Overview
B. Tortious Interference With Existing Contract
   1. Existing Contract
   2. Intentional and Willful Interference
   3. Proximate Cause
   4. Actual Damages or Loss
C. Tortious Interference With Prospective Contract (Business Relationship)
   1. Reasonable Probability of Business Relationship
   2. Defendant Acted With Malice
   3. Causation
   4. Actual Damages or Loss
D. Defenses to Tortious Interference Claims
   1. Privilege
   2. No Third-Party Interference

30:6. ASSAULT AND BATTERY

A. Elements
B. Respondeat Superior Issues

30:7. FRAUD AND NEGLIGENT MISREPRESENTATION

A. Fraud
   1. Material Misrepresentation
   2. Knowledge of Falsity or Reckless Disregard of Truth
   3. Intent to Induce Action
   4. Detrimental Reliance
B. Negligent Misrepresentation
   1. Negligent and False Representation in Course of Business
   2. Pecuniary Loss Because of Justifiable Reliance

30:8. FALSE IMPRISONMENT

A. Elements
B. Employer Responsibility for False Imprisonment of Customers
C. Employer Responsibility for False Imprisonment of Employees

30:9. MALICIOUS PROSECUTION

A. Elements
B. Burdens of Proof
C. Unlawful Retaliation

30:10. DRUG AND ALCOHOL ISSUES

A. Employer Liability for Employee Negligence
B. Employee Testing
30:11. SPECIAL PRECLUSION AND PREEMPTION DEFENSES

A. Overview
B. Workers’ Compensation Preclusion—Exclusive Remedy Clause
   1. General Effect of Exclusivity Provision
   2. Exclusive Remedy Provision Does Not Apply to Third Parties
   3. Employer’s Intentional Torts Are Not Within Exclusive Remedy Clause
   4. Other Limits on Exclusive Remedy Clause
   5. The Personal Animosity Proviso
C. Federal Labor Law Preemption
D. Employee Retirement Income Security Act Preemption

30:12. REMEDIES

A. Compensatory Damages
B. Punitive or Exemplary Damages
   1. Malice or Gross Negligence
   2. Standard for Corporate (Respondeat Superior) Liability
   3. Determining Proper Amount
   4. Statutory Caps on Punitive Damages
   5. Bifurcation of Trial
C. Prejudgment Interest
D. Attorneys’ Fees
E. Duty to Mitigate
F. Collateral Source Doctrine

APPENDIX
Appendix 30-1 Avoiding Workplace Tort Claims—Practical Tips for Employers

CHAPTER 31
DISCRIMINATION CLAIMS UNDER
LABOR CODE CHAPTER 451

31:1. INTRODUCTION

31:2. COVERED EMPLOYEES AND EMPLOYERS

A. Only “Employees” Are Protected Under Chapter 451
B. Employers Subject to Chapter 451 Claims
   1. Current Law Exempts Non-Subscribers From Chapter 451 Claims
   2. State and Local Government Entities as Employers Under Chapter 451
      a. Waiver Under the State Applications Act
      b. Chapter 501 of the Labor Code
      c. Damages Against a State Agency
   3. Individuals Are Not Employers Subject to Chapter 451
C. Multiple Employers for Purposes of Chapter 451
31:3. Litigating Chapter 451 Claims—Elements of Cause of Action

A. Employee’s Prima Facie Case
   1. Employee Engaged in Protected Activity
      a. Filing or Instituting a Claim
      b. Testifying in a Proceeding Under the Act
   2. Employee Acted in Good Faith
   3. Non-Discharge Discrimination Against Employee
   4. Causal Link and Standard of Causation
      a. Direct Evidence of Causation
      b. Circumstantial Evidence of Causation

B. Burden Shifts to Employer to State Legitimate Reason for Discharge or Other Adverse Act
   1. Neutral Enforcement of Leave Policy
   2. Discharge Pursuant to Other Employer Policies
   3. Discharge Based on Inability to Perform Job
   4. Replacing Employee Who Fails to Return to Work
   5. Discharge for Economic Reasons
   6. No Light Duty Jobs Available

31:4. Affirmative Defenses to Chapter 451 Claims

A. Statute of Limitations
B. Waiver
C. Claims Must Be Compelled to Arbitration
D. Election of Remedies
E. Preemption and Collective Bargaining Agreements
F. Failure to Exhaust Administrative Remedies
G. After-Acquired Evidence
H. Sovereign Immunity
   1. Municipalities
   2. Agencies of the State
   3. Counties
   4. School Districts
   5. Non-Subscribing Government Entities
I. Effects of Claimant’s Settlement on Related Disability Claim

31:5. Remedies

A. Overview
B. Reinstatement
C. Lost Wages and Benefits
   1. Paid Lost Wages (Back Pay)
   2. Future Lost Wages (Front Pay)
   3. Fringe Benefits
D. Mental Anguish
E. Exemplary Damages
   1. Elements of Proof Supporting an Exemplary Damage Claim
      a. Plaintiff Must Show “Actual Malice”
      b. Plaintiff May Introduce Evidence of Defendant’s Net Worth
   2. Standard of Review on Appeal Is Elevated
3. Limits on Amount of Exemplary Damages
   a. Statutory Caps
   b. Common Law Limits on Punitive Damages

F. Prejudgment Interest
G. Attorneys’ Fees
H. Duty to Mitigate

31:6. PROCEDURAL AND RELATED ISSUES
A. Pleading Requirements
B. Removal of Chapter 451 to Federal Court Generally Not Permitted
   1. Chapter 451 Claim Is Not Preempted by the LMRA
   2. Can Courts Exercise Supplemental Jurisdiction Over Chapter 451 Claims?
C. Discovery Issues
D. Bifurcation of Trial
E. Jury Instructions

31:7. SPECIAL ISSUES RELEVANT TO NON-SUBSCRIBERS
A. Defenses to Personal Injury Claims
B. Waiver
C. Removal

31:8. TIPS FOR EMPLOYEES ON COMPLIANCE WITH CHAPTER 451
A. The Need for Leave of Absence Policies
B. Contents of a Good Leave Policy
C. Restricted Duty Policies
D. Other Helpful Policies and Documentation
E. Training of Supervisors in Handling of Workplace Injuries
F. Conclusion

CHAPTER 32
PROTECTION OF BUSINESS INTERESTS

32:1. COMPARISON OF STATUTORY AND COMMON LAW PROTECTIONS

32:2. STATUTORY PROTECTIONS—COVENANTS NOT TO COMPETE ACT
A. Development of Noncompete Act
B. Elements of Enforceable Noncompetition Agreement
   1. Ancillary to Otherwise Enforceable Agreement When Made
   2. Legitimate Business Interest
   3. Scope of Activity Restrained
   4. Geographic Scope
   5. Duration
C. Supported by Adequate Consideration
D. Enforcement and Remedies
   1. Burden of Proof on Employer
   2. Injunctive Relief
   3. Damages
   4. Reformation
CHAPTER 33

TEXAS EMPLOYMENT LAW

5. Attorneys’ Fees and Costs
6. Venue Considerations
7. The Role of Texas Rule 202
8. Arbitration
9. Discovery and the Use of Social Media Evidence
E. Alternatives to Non-Compete Agreements

32:3. COMMON LAW PROTECTION OF TRADE SECRETS AND GOODWILL
A. Confidential Information and Trade Secrets
   1. Definitions
   2. Protecting Confidential Information and Trade Secrets
   3. Remedies for Disclosure
B. Inventions and Creative Works
   1. Protecting Inventions and Creative Works
   2. Remedies for Unauthorized Use
C. The Duty of Loyalty and Employees’ Preparation for Post-Employment Business

CHAPTER 33

WHISTLEBLOWER PROTECTION UNDER SARBANES-OXLEY

33:1. INTRODUCTION AND OVERVIEW

33:2. COVERED EMPLOYERS—WHO HAS OBLIGATIONS UNDER THE ACT?
   A. Covered Employers
   B. Subsidiaries of Covered Employers
   C. Non-Public Companies
   D. Individuals Subject to Liability
   E. Obligations of In-House Attorneys
   F. Extraterritorial Application

33:3. COVERED EMPLOYEES

33:4. COVERED DISCLOSURES AND PROTECTED ACTIVITIES
   A. Civil Provisions
      1. Reports
      2. Or Assists in an Investigation Thereof or Any Proceeding Relating To
      3. Concerning Fraud Against Shareholders
      4. With Reasonable Belief that Reported Acts Were Illegal
      5. Other Protected Activity
      6. Reports Not Covered Under the Act
   B. Criminal Provisions
      1. Make Truthful Reports to a Law Enforcement Officer

33:5. CONDUCT PROHIBITED
   A. Burden of Proof
   B. Causation
33:6. REMEDIES FOR THE WHISTLEBLOWER
   A. Reinstatement
   B. Damages
   C. Additional Penalties
      1. Civil
      2. Criminal
      3. RICO

33:7. ADMINISTRATIVE COMPLAINT PROCEDURE

33:8. EMPLOYER INVESTIGATIONS
   A. Procedures for Investigation of Whistleblower Complaints
   B. Independence of Investigation
   C. Confidentiality and Privilege
   D. Documentation of Investigation
   E. Handling Documents and Electronic Data
      1. Retrieval
      2. Retention

33:9. LITIGATION ISSUES
   A. Early Claims and Decisions
   B. Mood of the Times
   C. No Right to Jury Trial
   D. Special Settlement Procedures
   E. Burden of Proof

33:10. ARBITRATION AGREEMENTS

33:11. CORPORATE POLICIES
   A. Audit Committee Complaint Procedures
   B. Code of Ethics Requirement for Senior Financial Officers
   C. Document Retention Policy Mandates
      1. Generally
      2. Criminal Provisions Related to Document Retention
   D. Suggestions for Modifying Company Policy and Practice

APPENDICES
   Appendix 33-1 Whistleblower Discrimination Provision
   Appendix 33-2 Sample Employer Posting
   Appendix 33-3 Sample Sarbanes-Oxley-Compliant Whistleblower Policy

CHAPTER 34
TEXAS WHISTLEBLOWER ACT

34:1. OVERVIEW
   A. Purpose and Scope
      1. Goals of the Whistleblower Act
      2. Scope of Coverage
B. Venue
C. Posting Requirement

34:2. ELEMENTS OF WHISTLEBLOWER ACTION
A. Good Faith Report of Violation of Law
   1. Report of Violation of Law
      a. What Constitutes a “Report”? 
      b. Has a “Law” Been Violated? 
   2. By the Employing Governmental Entity or Another Public Employee 
   3. Good Faith 
B. Appropriate Law Enforcement Agency 
C. Adverse Action and Causation 

34:3. DEFENSES
A. Failure to Prove “But For” Causation 
B. Statute of Limitations/Internal Grievance Procedures 
C. Sovereign Immunity 

34:4. DAMAGES AND LIABILITY
A. Damages Available 
B. Exemplary Damages Not Available 
C. Civil Penalties 

CHAPTER 35
AFFIRMATIVE ACTION OBLIGATIONS FOR GOVERNMENT CONTRACTORS

35:1. OVERVIEW OF AFFIRMATIVE ACTION OBLIGATIONS FOR FEDERAL CONTRACTORS 

35:2. EXECUTIVE ORDER 11246
A. Coverage 
B. EEO Clause in Prime and Subcontracts 
C. Solicitations and Advertising 
D. Written Affirmative Action Plan for Minorities and Women 
   1. What Is Affirmative Action? 
   2. Required Contents of Written AAP 
   3. Support Data 
E. Equal Opportunity Survey 
F. Standard Form 100 / EEO-1 Report 
   1. How to File 
   2. When to File 
   3. Required Information 
   4. 1997 Revisions to Standards for Classification of Federal Data on Race and Ethnicity 
G. Recordkeeping Requirements 
   1. Personnel and Employment Records 
   2. Who Is an Applicant
3. Records Relating to Complaints and Compliance Evaluations and Actions
4. Written Affirmative Action Plans
5. Standard Form 100 / EEO-1 Reports

H. Posting and Notice Requirements
   1. EEO Poster
   2. Notification to Union

I. Provision of Non-Segregated Facilities

35:3. REHABILITATION ACT OF 1973

A. Coverage
B. EEO Clause in Subcontracts
C. Complaints of Discrimination
D. Written Affirmative Action Plan for Individuals With Disabilities
   1. Required Contents of Written AAP
   2. Applicant and Employee Access to Written AAP
E. Invitation to Self-Identify
F. Recordkeeping Requirements
   1. Records of Self-Identified Individuals With Disabilities
   2. Separate Confidential Files for Medical Records
   3. AAP Recordkeeping Requirements for Individuals With Disabilities
G. Posting and Notice Requirements
   1. EEO Poster
   2. Location and Hours for Employee Access to AAP for Individuals With Disabilities
   3. Notification to Union

35:4. VIETNAM ERA VETERANS’ READJUSTMENT ASSISTANCE ACT

A. Coverage
B. EEO Clause in Subcontracts
C. Written Affirmative Action Plan for Veterans
   1. Required Contents of Written AAP
   2. Applicant and Employee Access to Written AAP
D. Invitation to Self-Identify
E. Listing Available Jobs With State Employment Agency
F. VETS-100 Report
G. Recordkeeping Requirements
   1. Records of Self-Identified Disabled Veterans
   2. VETS-100 Reports
   3. Written AAPs for Veterans
H. Posting and Notice Requirements
   1. EEO Poster
   2. Location and Hours for Employee Access to AAP for Veterans
   3. Notification to Union

35:5. EXECUTIVE ORDER 13201 (“BECK” POSTER)
CHAPTER 37  TEXAS EMPLOYMENT LAW

35:6. COMPLIANCE EVALUATIONS AND ENFORCEMENT

A. Types of Evaluations
   1. Compliance Check
   2. Compliance Review
   3. Pre-Award Review
   4. Corporate Management Review or “Glass Ceiling” Review
B. The Selection Process
C. Confidentiality
D. Enforcement Proceedings
E. Conciliation Agreement

APPENDIX

Appendix 35-1  Equal Employment Opportunity Data Voluntary Information Form

CHAPTER 36
[RESERVED]

CHAPTER 37  ETHICAL DILEMMAS

37:1. CHAPTER HIGHLIGHTS

37:2. ATTORNEY-CCLIENT PRIVILEGE

A. Timeliness of Plaintiff’s Charge of Discrimination
B. Organizational Clients
   1. Federal Rule of Evidence 501 and Upjohn Test
   2. Texas Rule of Evidence 503
      a. “Control Group” Test
      b. “Subject Matter” Test
   3. Organization as Client
C. Lawyer as Business Advisor

37:3. JOINT REPRESENTATION

A. Basic Points
   1. General Rule
   2. Advantages of Joint Representation
   3. Disadvantages of Joint Representation
B. Relevant Authority
   1. ABA Model Rules
   2. ABA Model Code
   3. Texas Disciplinary Rules of Professional Conduct
   4. Duty to Provide Defense
C. Privilege Issues in Joint Representation
   1. Joint Defense Doctrine
   2. Attorney-Client Privilege After Termination of Joint Representation
3. Waiver of Attorney-Client Privilege
4. Work Product Doctrine
D. Accepting Joint Representation
   1. Evaluate Actual vs. Potential Conflicts
      a. General Rule
      b. Examples of Potential Conflicts
         (1) Sexual Harassment Affirmative Defense
         (2) Employee Acted Contrary to Employer’s Efforts
         (3) Outside Scope of Employment
         (4) Attorney Ownership Interest In Corporate Defendant
         (5) Class Actions
      c. Determine Whether Conflict Exists
   2. Obtain Written Consent
   3. Deal Effectively With Conflicts as They Arise
   4. Continuing Representation vs. Withdrawal

37:4. WHEN A WITNESS COMMITS PERJURY
   A. Lawyer Knows Evidence to Be False
   B. Lawyer Reasonably Believes Evidence to Be False

37:5. LAWYER AS WITNESS

37:6. COMMUNICATIONS WITH CURRENT AND FORMER EMPLOYEES
   A. Relevant Authority
      1. ABA Model Rule 4.2
      2. ABA Model Code
      3. Texas Disciplinary Rules of Professional Conduct
   B. Ex Parte Contact With Current Employees
      1. ABA Model Rule
      2. Texas Rule
      3. Class Members
   C. Ex Parte Contact With Former Employees
      1. ABA Rule
      2. Texas Rule

37:7. INADVERTENT DISCLOSURE OF DOCUMENTS
   A. Waiver of Privilege for Producing Privileged Documents
      1. Texas Rules
      2. Federal Rules
      3. Returning Privileged Documents
      4. Use of Inadvertently Produced Documents and Disqualification of Counsel
      5. Metadata

APPENDIX
   Appendix 37-1 Corporate Ethics Policies
CHAPTER 38
TAKING THE CASE

38:1. INITIAL TELEPHONE SCREENING INTERVIEW
   A. Purpose
   B. Interview Process
      1. Use Checklist
      2. Different Callers Will Require Different Interview Strategies
      3. Avoid Interview Traps
   C. Conclude Telephone Interview
      1. Request Documents
         a. Verbal Request
         b. Provide Written List by Mail
         c. Sample List of Documents
      2. Advise of Consultation Fee
      3. Advise Client of Fee Before Initial Meeting

38:2. FACE-TO-FACE MEETING
   A. Purpose and Strategy
      1. Interview With Employee
      2. Interview With Employer
   B. Preliminaries
   C. Interview Process
      1. Getting Started
      2. Listen First, Then Question and Take Notes
      3. Developing a Witness List
      4. Review Documents
         a. Quick Initial Review
         b. Personnel Policies
            i. Critical to Evaluation of Case
            ii. What to Look For
         c. Discharge Letter
         d. Disciplinary Actions
         e. Commendations
         f. Performance Evaluations

38:3. MAKE A DECISION: SHOULD PROSPECTIVE CLIENT BECOME CLIENT?
   A. Create Temporary File
   B. Assess Client
   C. Decline Representation in Writing
   D. Obtain Signed Retainer Agreement and Retainer (Closing)
      1. Form of Compensation
      2. The "Instant" Agreement for Solos and Small Firms
      3. Two-Step Process for Larger Firms
      4. Terms of Retainer Agreement
38:4. CONFLICTS CHECK
   A. When and Why?
   B. Small Firms
      1. Use Alphabetical List
      2. Have Routine System for Checking Conflicts
   C. Large Firms

38:5. PRELIMINARY INVESTIGATION
   A. Criminal Record
      1. When and Why to Investigate
      2. How to Conduct a Criminal Background Check
         a. Ask the Prospective Client
         b. Contact Clerk’s Office
         c. Conduct Online Investigation
         d. Private Investigator
         e. Law Enforcement Agencies
   B. Relatives, Friends and Former Employees
      1. When
      2. How
   C. Corporate and Employer Profile
      1. Status of Employer
      2. Contact Secretary of State
      3. Contact County Recorder for Assumed Names
      4. Research Individual Officers, Directors and Shareholders
      5. Conduct “Plaintiff/Defendant” Searches at Courthouse

CHAPTER 39
[RESERVED]

CHAPTER 40
DISCOVERY

40:1. GET THE BIG PICTURE
   A. Create Discovery Plan
      1. What and Why
      2. Identify Elements
         a. Review Jury Charges
         b. Review Summary Judgment Standard
      3. Lay Out Proof to Establish Legal Elements
         a. Fact Witnesses
         b. Expert Witnesses
         c. Sources of Documents
4. Create Chart
5. Consider Timing Issues

B. Summaries and Chronologies
C. Budgeting
   1. Purpose
   2. Elements to Consider in Estimating Costs
   3. Tasks to Include in Budget

40:2. THE SCOPE OF DISCOVERY
A. General Rule: Relevant, Not Privileged, Calculated to Lead to Admissible Evidence
B. Plaintiffs Require Liberal Discovery
C. Categories of Generally Discoverable Information
   1. Documents and Tangible Things
   2. Persons With Knowledge of Relevant Facts
   3. Trial Witnesses
   4. Testifying and Consulting Experts
   5. Indemnity and Insuring Agreements
   6. Settlement Agreements
   7. Witness Statements
   8. Potential Parties
   9. Contentions
D. Substantive Limits on Scope of Discovery
   1. No Fishing Allowed
   2. Unit-Level Discovery
      a. Discovery Limited to Employing Unit
      b. “Committee Exception” Allows Broader Discovery
   3. Proportionality
   4. Work Product
      a. Generally Not Discoverable
      b. Exceptions: Discoverable Work Product
   5. Privileged Information
      a. Common Privileges in Employment Litigation
      b. Preserving Privileges
         (1) Statement of Withholding
         (2) Creation of Privilege Log
         (3) Objections May Be Supplemented
         (4) Burdens of Proof
E. Procedural Limits on Scope of Discovery
   1. Discovery Control Plans
      a. What and Why
      b. Level 1 Discovery Plans
      c. Level 2 Discovery Plans
      d. Level 3 Discovery Plans
      e. Modification of Discovery Plans
2. Federal Procedural Limits on Discovery
   a. Discovery Conference
   b. Rule 16 Scheduling Orders and Pretrial Conferences
   c. Mandatory Disclosures

F. Discovery From Non-Parties

40:3. COMMON PROCEDURAL ISSUES
   A. Method of Service Affects Response Time
   B. Written Discovery Not Filed With Court
   C. Supplementation of Responses and Objections
      1. Supplemental Responses
      2. Supplemental Objections

40:4. REQUEST FOR DISCLOSURE
   A. Purpose: Exchange Basic Information
   B. Format
   C. Timing
   D. Responding to Request for Disclosure
      1. No Objections
      2. Format and Timing
      3. Production of Documents
   E. Use at Trial
   F. Compare: Federal Disclosures

40:5. INTERROGATORIES
   A. Scope
   B. Contention Interrogatories
   C. Procedure
      1. Timing
      2. Format
      3. Number of Interrogatories
   D. Responding to Interrogatories
      1. Form of Response
         a. Written
         b. Verified
      2. Timing
      3. Objections
         a. Form
         b. Specific Objections
            (1) Excessive Number
            (2) Information Regarding Testifying Experts
            (3) Marshaling Available Proof
            (4) Requests for Production of Documents
      4. Use of Responses at Trial
E. Key Areas of Inquiry
   1. Prior Suits, Claims and Complaints
   2. Criminal Record
   3. Identification of Medical Providers
   4. Other Employment
   5. Identification of Key Witnesses
   6. Other Income
   7. Damages and Attorney’s Fees
   8. Trial Witnesses and Impeachment Information
   9. Bias of Experts
   10. Other Employees
   11. Corporate Structure and Hierarchy

40:6. REQUESTS FOR ADMISSION

A. Scope and Purpose
B. Procedural Issues
   1. Timing
   2. Quantity of Requests
C. Drafting Tips and Tools
   1. Narrow and Specific
   2. Positive and Negative Assertions
   3. Combine With Interrogatories and Requests for Production
   4. Admissions Regarding Documents
   5. Admissions Regarding Discovery
   6. Admissions Regarding Ultimate Issues
D. Responding to Requests for Admission
   1. Procedural Issues
      a. Timing
      b. Caution: Failure to Timely Respond Results in Deemed Admissions
      c. Signed, Not Verified
      d. Sanctions
   2. Permissible Responses
   3. Impermissible Responses May Be Deemed Admissions
      a. Qualified Admissions
      b. Bad Faith
      c. Evasive Answers
      d. Frivolous Objections or Quibbling
      e. Preliminary Statements
   4. Objections
      a. Valid Objections
         (1) Privilege or Immunity
         (2) Request Seeks Admission of Law
         (3) Premature
         (4) State of Mind
         (5) Vague, Ambiguous or Overly Broad
         (6) Irrelevance
      b. Invalid Objections
5. In Practice: Strategy in Responding to Admissions

E. Amend or Withdraw Admission

F. Admissions May Not Be Controverted at Trial

40:7. REQUEST FOR PRODUCTION

A. Scope

B. Procedural Issues
   1. In Writing
   2. Timing
   3. Number
   4. Time and Place of Production
   5. Expenses Related to Production
   6. Retention of Information

C. Drafting Requests for Production
   1. Identify Items With Reasonable Particularity
   2. Specify Electronic or Magnetic Data
   3. Categories of Documents to Request in Employment Suit
      a. Vital Statistical Information
      b. Personnel Files
      c. Records Pertaining to Other Employees
      d. Manuals, Handbooks, Policies and Procedures
      e. Training Documents
      f. Prior Suits, Claims and Complaints
      g. Personal Files and Documents
      h. Criminal Records
      i. Medical Records
      j. Employment Records
      k. Investigative Records
      l. Expert Reports and Work Product
      m. Reduction in Force Documents
      n. Resumes and Applications
      o. Financial Information
      p. Fee Agreements
      q. Impeachment Information
      r. Corporate Structure Documents

D. Responding to Request for Production
   1. Procedural Issues
      a. Format
      b. Timing
      c. Timing and Manner of Production
   2. Content of Response
   3. Objections to Request for Production
      a. Overly Broad
      b. Calls for Documents Not in Existence
      c. Failure to Serve Non-Party With Request for Medical Records
   4. Effect of Producing Documents
   5. Remedy for Inadvertent Production: Snap Back Provision
40:8. DEPOSITIONS

A. Purpose

B. Procedural Issues
   1. Length and Number of Depositions
   2. Timing
   3. Who Pays for the Deposition

C. Notice of Deposition
   1. Identity of Witness
   2. Strategy Point: Order of Depositions
      a. Defendant’s (Employer’s) Strategy
      b. Plaintiff’s (Employee’s) Strategy
   3. Place of Deposition
   4. Reasonable Time of Deposition
      a. Deposition of Party With Documents
      b. Deposition of Non-Party With Documents
      c. Depositions Not Including Document Request
      d. Testifying Expert
      e. Deposition by Nonstenographic Means
   5. Objecting to Deposition Notice

D. Preparing for a Deposition
   1. Goal: Focused Examination
   2. Prepare Outline
   3. Get Client’s Input
   4. Get Your Expert’s Input

E. Conduct of Deposition
   1. Questioning the Witness
   2. Objecting at Deposition
   3. Defending the Deponent
   4. Suspending the Deposition

F. Deposing the Plaintiff-Employee
   1. Background Information and Vital Statistics
   2. Plaintiff’s Version of the Facts
   3. Identify Potential Witnesses
   4. Knowledge and Adherence to Company Policy
   5. Eliminate Potential Claims
   6. Lay the Foundation for Summary Judgment
   7. Nail Down Damages
   8. Mental or Physical Injuries

G. Deposing the Defendant-Employer and its Witnesses
   1. Corporate Structure or Business Organization
   2. Management Structure
   4. Plaintiff’s Job History
   5. Replacement and Restructuring Issues
   6. Company Investigations
H. Deposing Medical Providers and Mental Health Professionals
   1. Education, Training and Experience
   2. The Expert’s Involvement
   3. What the Expert Relied Upon
   4. Junk Science
   5. Testing
   6. Alternative Causation
   7. Common Ground
   8. Bias
I. Deposing the Economist
J. Compare: Depositions upon Written Questions
   1. Cost-Effective Substitute for Oral Deposition
   2. Deposition Notice
   3. Timing
   4. Responses and Cross-Questions
K. Depositions Before Suit
   1. Strategic Uses
   2. Procedure: Filing a Petition
   3. Contents of Petition
   4. Anticipated Lawsuit
      a. Subject Matter
      b. Interested Persons
   5. Investigation of Potential Claim or Defense
   6. Identification of Deponent
   7. Hearing and Order
   8. Venue of Petition
   9. Service of Petition
   10. Notice by Publication
   11. Objecting to Deposition
   12. Legal Standard
   13. The Order

40:9. PHYSICAL AND MENTAL EXAMINATIONS OF A PARTY
A. Strategic Reasons for Examination
B. Upon Written Motion for Good Cause Shown
   1. Good Cause
   2. Mental or Physical Condition “In Controversy”
   3. Federal Standard
C. Court Must Issue Written Order
D. Exchange of Reports

40:10. COMPELLING DISCOVERY
A. Prior Complaints and Lawsuits
   1. Plaintiff’s Perspective: Probative of Pattern of Discrimination
      a. Federal Courts Allow Discovery
      b. Texas Courts Allow Discovery
   2. Employer’s Perspective
B. Settlement Agreements Concerning Similar Lawsuits

C. Information Re: Similarly Situated Employees
   1. General Rule: Discoverable Subject to Privacy Concerns
      a. Balancing Test
      b. In Camera Review
   2. Identity of Other Employees
   3. Payroll and Promotion Records
   4. Personnel Files of Similarly Situated Employees
   5. Performance Review Records
   6. Termination Records

D. Information Re: Investigations
   1. Generally Discoverable
   2. Attorney-Client Privilege Exception

E. Employer Policies and Procedures

F. Internal Studies

G. Employer’s Financial Information

H. Sources of Plaintiff’s Income

I. Attorneys’ Fees and Fee Agreements

J. Plaintiff’s Medical and Psychiatric Records

40:11. DISCOVERY OF ELECTRONICALLY STORED INFORMATION

A. What Is Electronic Information?

B. Where Is Electronic Information Stored?

C. Importance of Discovering Electronic Communications

D. Discoverable to Same Extent as Other Information

E. Formulate Discovery Plan
   1. Data Retention Policy
   2. Litigation Hold
   3. Hire Expert
   4. Depose Information Services Representative
   5. Obtain Agreement to Preserve Information
   6. Request Production of “Documents”
   7. Obtain Documents Through Electronic Means

F. Respond to Discovery Requests
   1. Always Consider Whether Electronic Information Is Responsive
   2. Increased Costs May Foster Settlement

G. Caution: Destroying Electronic Evidence Can Constitute Spoliation

H. 2006 Amendments to the Federal Rules of Civil Procedure

I. Data Recovery Services

APPENDIX

Appendix 40-1 Discovery Plan
CHAPTER 41
SUMMARY JUDGMENT PRACTICE

41:1. INTRODUCTION

41:2. LEGAL PRINCIPLES UNDERLYING SUMMARY JUDGMENT
   A. Burden of Proof on Motion
      1. State Standard
         a. Plaintiff as Movant
         b. Defendant as Movant
         c. No-Evidence Motion
      2. Federal Standard
   B. Response to Summary Judgment Motion
      1. Necessity and Contents
      2. Standard of Review
   C. Summary Judgment Reply

41:3. SUMMARY JUDGMENT PROCEDURE
   A. Motion Papers to File
      1. State Court
      2. Federal Court
   B. Filing Deadlines
      1. State Court
         a. Summary Judgment Motion
         b. Response to Motion
         c. Summary Judgment Reply
      2. Federal Court
         a. Summary Judgment Motion
         b. Response to Motion
         c. Summary Judgment Reply
   C. Hearings
      1. State Standard
      2. Federal Standard
   D. Continuances

41:4. SUMMARY JUDGMENT EVIDENCE
   A. Pleadings
   B. Discovery Responses
   C. Deposition Testimony
   D. Documents
   E. Affidavits/Declarations
   F. Objections to Evidence

41:5. SUMMARY JUDGMENT IN TITLE VII/TCHRA CASES
   A. Texas Commission on Human Rights Act
   B. Title VII and ADEA
C. Disparate Treatment Discrimination
   1. Indirect Evidence of Discrimination
      a. Prima Facie Case
      b. Legitimate Non-Discriminatory Employment Decision
      c. Pretext
   2. Direct Evidence of Discrimination
D. Retaliation
   1. Protected Activity
   2. Adverse Employment Action
E. Disparate Impact

41:6. SUMMARY JUDGMENT IN EQUAL PAY ACT CASES

41:7. SUMMARY JUDGMENT IN WORKPLACE HARASSMENT CASES
   A. Supervisor Harassment
      1. Lack of Evidence to Support Prima Facie Case
      2. Ellerth/Faragher Affirmative Defense
      3. Constructive Discharge as Tangible Employment Action
   B. Co-Worker Harassment

41:8. SUMMARY JUDGMENT IN ADA CASES
   A. Disability
   B. Qualified Individual
      1. Essential Functions
      2. Reasonable Accommodation
      3. Qualification Standards
   C. Plaintiff Seeking or Receiving Disability Benefits

41:9. SUMMARY JUDGMENT IN FAMILY MEDICAL LEAVE ACT CASES
   A. Plaintiff-Employee as Movant
   B. Defendant-Employer as Movant

41:10. SUMMARY JUDGMENT ON STATE AND COMMON LAW CLAIMS
   A. Workers’ Compensation Retaliation
   B. Intentional Infliction of Emotional Distress
      1. Extreme and Outrageous Conduct
      2. Severe Emotional Distress
   C. Breach of Contract
   D. Sabine Pilot Exception

41:11. INITIAL SUMMARY JUDGMENT CONSIDERATIONS
   A. Individual Liability
   B. Scope of Administrative Charge of Discrimination
   C. Administrative Limitations Period
   D. Statute of Limitations—Filing a Lawsuit

41:12. OTHER SUMMARY JUDGMENT CONSIDERATIONS
   A. Same Actor Inference
   B. After-Acquired Evidence Doctrine
APPENDICES

Appendix 41-1  Chart: Comparison of State and Federal Summary Judgment Procedures
Appendix 41-2  Chart: Summary Judgment Evidence
Appendix 41-3  Flowchart: Supervisor Sexual Harassment Roadmap

[CHAPTERS RESERVED]

TABLE OF CASES

INDEX