



A Manager's Guide to Employment Law

How to Protect Your
Company and Yourself

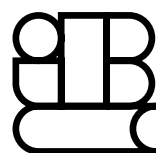
Dana M. Muir



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PRESSING PROBLEMS OF BUSINESS

The mission of the University of Michigan Business School Management Series is to provide accessible, practical, and cutting-edge solutions to the most critical challenges facing businesspeople today. The UMBS Management Series provides concepts and tools for people who seek to make a significant difference in their organizations. Drawing on the research and experience of faculty at the University of Michigan Business School, the books are written to stretch thinking while providing practical, focused, and innovative solutions to the pressing problems of business.

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Executive Summary



This book will help managers make day-to-day decisions on how best to manage their employees while also protecting their companies and themselves from legal liability. Most managers in executive education programs are surprised at the breadth of discretion the law often gives them. They also tend to be surprised, though, at some of the subtle and unnecessary mistakes managers make that cause legal headaches for themselves and for their companies. Becoming familiar with basic principles of employment law will enable managers to develop an internal compass on workforce issues.

Unlike most employment law books for managers, which contain lists of laws and an abundance of legalese, this book is organized around the types of issues managers face in the workplace:

- Understanding the basic principles of U.S. employment law and how it compares with other countries (Chapter One)
- Hiring and promoting employees (Chapter Two)
- Evaluating your current employees, checking the work history of applicants, and providing references for former employees (Chapter Three)
- Avoiding illegal discrimination in your workforce and minimizing liability if discrimination does occur (Chapter Four)

- Managing employees with disabilities and issues of lost work time (Chapter Five)
- Terminating employees (Chapter Six)

Each chapter focuses on legal concepts of broad application in today's workplace, providing real examples of problems faced by managers and explaining strategies for managers dealing with similar issues. Each chapter contains "Fact or Fallacy?" boxes that prompt readers to test their understanding of legal principles. The ensuing discussion explains why each item is a fact or a fallacy. This book does not, however, give specific legal advice or eliminate the need for managers to seek advice from human resources professionals and employment law attorneys. Instead, it helps managers develop a toolkit for assessing the need to seek advice and for working with advisers to achieve the best result for the company.

In short, this book gives managers practical information on how to minimize legal problems when hiring, promoting, supervising, evaluating, and terminating employees. It also shows how the legal principles frequently help managers reach workforce decisions that are carefully considered and fundamentally fair, *and* that reflect good management practices. Managers can use the strategies and information in this book to select, motivate, and lead their employees with greater confidence and effectiveness.



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Series Foreword



Welcome to the University of Michigan Business School Management Series. The books in this series address the most urgent problems facing business today. The series is part of a larger initiative at the University of Michigan Business School (UMBS) that ties together a range of efforts to create and share knowledge through conferences, survey research, interactive and distance training, print publications, and news media.

It is just this type of broad-based initiative that sparked my love affair with UMBS in 1984. From the day I arrived I was enamored with the quality of the research, the quality of the MBA program, and the quality of the Executive Education Center. Here was a business school committed to new lines of research, new ways of teaching, and the practical application of ideas. It was a place where innovative thinking could result in tangible outcomes.

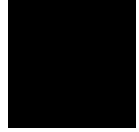
The UMBS Management Series is one very important outcome, and it has an interesting history. It turns out that every year five thousand participants in our executive program fill out a marketing survey in which they write statements indicating

the most important problems they face. One day Lucy Chin, one of our administrators, handed me a document containing all these statements. A content analysis of the data resulted in a list of forty-five pressing problems. The topics ranged from growing a company to managing personal stress. The list covered a wide territory, and I started to see its potential. People in organizations tend to be driven by a very traditional set of problems, but the solutions evolve. I went to my friends at Jossey-Bass to discuss a publishing project. The discussion eventually grew into the University of Michigan Business School Management Series—Innovative Solutions to the Pressing Problems of Business.

The books are independent of each other, but collectively they create a comprehensive set of management tools that cut across all the functional areas of business—from strategy to human resources to finance, accounting, and operations. They draw on the interdisciplinary research of the Michigan faculty. Yet each book is written so a serious manager can read it quickly and act immediately. I think you will find that they are books that will make a significant difference to you and your organization.

Robert E. Quinn, Consulting Editor
M.E. Tracy Distinguished Professor
University of Michigan Business School

Preface



Managers are constantly challenged in today's business environment to do more with fewer employees, to motivate diverse groups of employees, and to face up to tough people problems in their workforce. One key to your success is accomplishing those goals while protecting yourself and your company from legal liability. Human resources departments, management consultants, and even lawyers all claim to help managers select, motivate, and winnow out their employees. I have spent most of the last twenty-five years in those roles—as a human resources executive, as a practicing lawyer, and as a leader of management education sessions.

I often find that managers are frustrated with the legal system. Their interactions with human resources professionals, management consultants, and attorneys have convinced them that those people are more likely to put roadblocks in the way of progress than to help managers solve problems. Managers tend to blame legal requirements for the roadblocks. U.S. law, however, provides managers with broad discretion in many employment-related situations. In fact, in most instances, the law helps ensure that managers perform their essential functions in

a way that is fundamentally fair and that respects important societal values while still supporting the managers' goal of meeting the challenges of the current business environment.

I have written this book to correct many of the fallacies about employment law that have become ingrained in managers' beliefs and to help managers confront the people problems they face with their employees. Employment law books tend to be organized according to the many laws that govern workplace decisions. In my experience, though, most managers do not want or need lengthy technical discussions of the myriad of federal and state employment laws. If you have an employee who misses a great deal of work due to illness, you usually do not want to read a chapter on the Americans With Disabilities Act, another chapter on the Family Medical Leave Act, and yet another chapter on Workers' Compensation. Worse yet, in books organized on those principles you are left figuring out which of the laws applies to your situation and how those laws might fit together. Then, finally, you are left to seek the details relevant to the resolution of your problem. Instead of all the legalese, most managers with that type of problem want to know the basic concepts that govern absence from work and how the concepts interrelate. Given that information, managers have the basis of knowledge to make decisions or seek additional advice.

This book departs from other employment law books by being organized around topics of interest to managers. This enables you to identify the type of workplace problem you are interested in and to go to the correct chapter for practical insights and examples. Here I have taken the usual employment legal issues and organized them according to the following challenges faced by managers:

- Chapter Two: How to select the best employee for a job, whether you are promoting from within or hiring from outside the company.



- Chapter Three: How to avoid current and future employment law issues when doing performance evaluations of existing employees and when providing references for former employees.
- Chapter Four: How to avoid situations of discrimination and harassment in the workplace and what to do if complaints occur. This is the most general chapter in the book, and the same concepts come up in hiring, evaluating, disciplining, and firing employees.
- Chapter Five: How to deal with disabled employees and employees who miss excessive amounts of work. This is the most complex chapter in the book and includes a variety of examples to illustrate how the laws interact.
- Chapter Six: How to terminate employees for poor performance, in times of downsizing, and in reorganizations.

These chapters provide managers with the tools to consider the legal implications of their workplace decisions. Chapter One lays the groundwork by providing a general overview of the U.S. legal system as it relates to employment. Nonetheless, what this book does not do is substitute for the three years of law school, the years of legal practice, and the detailed research in your state that enable good employment law attorneys to address legal questions specifically and in depth. Nor does this book provide specific legal advice about actual situations you will encounter. Finally, it makes no attempt to cover the myriad of state-specific laws that govern the workplace. Instead, I intend the book to add a basic understanding of employment law concepts to your managerial toolkit. My goal is to help you establish an internal compass to assist you in making day-to-day decisions in real time. You will also be better able to apply the advice you receive from human resources professionals, management consultants, and lawyers. You should be confident in your ability to engage those advisers in conversation, and you

should be better able to determine when you need to seek professional legal advice and counsel.

■ Acknowledgments

I have many people to thank for their help with this book. First and foremost, Jack Simonetti welcomed me into the Basic Management executive education course that he has taught here at the University of Michigan Business School for more than two decades. My experience with the many business managers who have passed through that course in recent years serves as the foundation for this book. Jack is a master at helping business managers reach their potential, has been a marvelous mentor to me, and never stopped pestering me—in a positive way—about when this book would be complete.

Bob Quinn, who conceived the series, provided important ideas for the development of this book's focus. My colleagues George Cameron, Cindy Schipani, and George Siedel have given me numerous opportunities over the past ten years to pursue my interest in employment law, served as sounding boards, and supported my work on this book. I appreciate the careful reviews done by Susan Call and Terry Dworkin. John Bergez provided invaluable encouragement and editorial assistance with good humor, a manager's eye for what would be important to my readers, and infinite patience.

Finally, this title would not exist without the input and support of my brother, Darryl Muir, but I still am not giving him any share in the royalties!

February 2003
Ann Arbor, Michigan

Dana M. Muir

Employment Law from a Manager's Perspective

Put yourself in the shoes of Wendy's employer. When Wendy caught her husband looking at an adult Internet site, she convinced him that it would spice up their marriage if they set up a similar site. Wendy posed for provocative photographs, which her husband took and posted to their site. To access the site, a viewer had to claim to be an adult. Professionally, Wendy worked as a counselor to troubled youths. One of the youth's parents told Wendy's manager about the Web site and demanded that Wendy be fired.

As Wendy's manager, what would you do? More important, what factors would you consider in making your decision? Would it matter if Wendy had a long history of excellent

performance appraisals? What if Wendy had done all the work for the Web site on her own time and with her own computer equipment?

Certainly, one of the factors in your thinking would need to be potential legal issues. As a manager, you don't want to cause your company or yourself unnecessary legal complications, such as lawsuits for wrongful termination. More positively, you need to know what latitude the law does and does not give you in your efforts to build and manage the best possible workforce.

All too often I have seen managers who are frustrated with the legal system. After frequent interactions with human resources professionals, management consultants, and attorneys, managers end up believing that the law requires them to hire a certain job candidate even though another candidate is far more qualified, that they cannot discipline the employee who spends more time out of work because of illness than at work, or that the law prevents them from firing an employee whose performance is lousy. All of these beliefs are fallacies. With a proper understanding of the law, managers can hire the most qualified workers. Managers can discipline employees for unreasonable absences. And managers can fire employees who cannot or will not perform the critical functions of their jobs.

As a manager, you can always get specific legal advice for some issue that confronts you, and often you should. On the other hand, you don't want to run up the cost, whether in time or money, of seeking professional counsel every time an employment question arises that might have legal implications. To manage efficiently, you need an internal compass that can guide much of your everyday decision making and let you know when you really need to get expert advice. Developing that internal compass is the purpose of this book.

This first chapter provides the basic road map for considering the legal implications of almost any employment-related de-



cision you might make. In the pages that follow, I first explain the primary concept underlying U.S. employment law, *employment-at-will*. Next I summarize some key exceptions to the basic rule. To provide some perspective, I then briefly compare the U.S. system and the approach taken by many other developed countries.

The discussion of employment-at-will shows that as a manager you have significant flexibility in dealing with workforce issues in the United States. However, the nature of our legal system has some implications that can be at least as important as the substantive legal rules when you are evaluating a potential employment decision. Therefore, I also address some unique features of the U.S. legal system.

Finally, it's important to understand that managing legal risk and opportunity in employment decisions is just a special case of what you already do as a manager. Accordingly, I end the chapter by integrating the discussion of U.S. employment law with the basic concepts of managerial risk taking.

■ Employment-at-Will

The underlying concept governing the legal relationship between employer and employee in the United States is known as *employment-at-will*. The concept itself is surprisingly simple to understand. It becomes complex only because of the exceptions that have developed over time. Before reading on, though, try your hand at the following Fact or Fallacy? questions.

■ Fact or Fallacy? ■

1. You don't need good cause to legally fire an employee. Fact Fallacy
2. Unless you put a promise to an employee in writing, the promise will not be enforceable. Fact Fallacy