

## Introduction to the 2025-2026 Edition

*Litigating Wrongful Discharge Claims*, written by Paul H. Tobais, addresses the law surrounding employee claims of wrongful termination. The book concentrates on federal law, with various state information included throughout, and on the practical aspect of wrongful termination litigation.

The 2025-2026 edition of *Litigating Wrongful Discharge Claims* was prepared by Andrew P. Morriss. Among the updates in the 2025-2026 edition of *Litigating Wrongful Discharge Claims* are:

- **§ 1:2. Overview of wrongful discharge litigation:** Although in April 2023, the FTC, the Civil Rights Division of the DOJ, and the EEOC issued a joint statement warning that automated systems, including AI, created risks of harmful outcomes such as unlawful discrimination, the Trump administration has reversed course on many of these initiatives, removing guidance documents from agency websites and revoking Biden administration Executive Orders.
- **§ 2:1. Scope of chapter:** One of the major changes in how the courts deal with agency regulations and rulings came in 2024, when the U.S. Supreme Court abandoned the “Chevron doctrine.”
- **§ 2:9. Title VII—Mandating alternative dispute resolution:** The U.S. Supreme Court unanimously held that where a party has requested a stay pending arbitration and the dispute is subject to arbitration, the FAA compels the district court to stay the proceeding.
- **§ 2:29. Title VII—Sex discrimination—Adverse employment actions:** President Trump’s Executive Order “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government” has refocused the agency on “its mission of protecting women from sexual harassment and sex-based discrimination in the workplace” and ending “the Biden administration’s gender identity agenda.”
- **§ 2:91. Federal prohibition on retaliation—Americans with Disabilities Act:** Claims can be brought for interference with ADA protected rights,

which is broader than retaliation and “captures ‘all practices which have the effect of interfering with the exercise of rights under the ADA.’”

- **§ 2:102. Federal prohibition on retaliation—Other federal anti-retaliation statutes:** President Trump issued an Executive Order, “Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security” in February 2025, and paused enforcement of the FCPA for 180 days (with additional extensions possible), ceasing initiation of new cases, reviewing existing policy and guidance, reviewing existing cases, and authorizing the issuance of new guidance.
- **§ 3:1. Suits for wrongful discharge in breach of a labor agreement:** Courts generally take a broad view of what is arbitrable under a CBA.
- **§ 3:6. Unjust discharge and union procedures—Arbitration procedure [Retitled]:** The courts have been unsympathetic to efforts to leverage technicalities in arbitration procedures.
- **§ 4:33. Disclaimers—Clarity and conspicuousness:** Where disclaimers are clear, however, courts have relied upon them to exclude implied contract claims.
- **§ 5:4. Sufficiency of public policy basis:** The Iowa Supreme Court has emphasized the importance of relying on specific statutory provisions in providing notice to employers and employees of behaviors covered and not covered by the public policy exception.
- **§ 5:5. Whistleblowing:** The Mississippi Supreme Court held that its judicially created “narrow” public policy exception was not overridden by a whistleblower provision in the Mississippi Vulnerable Adults Act.
- **§ 5:7. Whistleblowing—Sufficiency of employee’s reasonable belief that violation occurred:** The genuineness of the employee’s belief that the disclosures concern unlawful conduct can be evaluated based on the employee’s conduct.
- **§ 5:8. Whistleblowing—Preemption and exclusivity of statutory remedies:** The Michigan Supreme Court held that where there is a statutory remedy, its exclusivity is determined by the adequacy of the remedies provided by the statute.
- **§ 6:18. Fraud:** There are difficulties where the employment contract contains language contradicting statements in other documents on which the employee alleges he or she relied.

- **§ 6:23. Defamation—Elements of defamation:** In general, defamatory statements are those which harm the reputation of another so as to lower the person in the estimation of the community or to deter third persons from associating or dealing with the person.
- **§ 6:33. Invasion of privacy—Public disclosure of private facts:** In some states, negligence is not enough to sustain a tort claim for invasion of privacy and there is an element of intention included.
- **§ 7:19. Introduction to drug testing:** Care must be used in asserting claims under so-called “legal products” laws to ensure that the actual substance in question is legal in the relevant state.
- **§ 7:31. Res judicata and collateral estoppel—Defined [Retitled]:** Where a court had found a restrictive covenant unenforceable in one lawsuit by an employer against a former employee, that finding barred a second lawsuit over the ex-employee’s consulting work for a different competitor of the former employer.
- **§ 7:36. Res judicata and collateral estoppel—Effect of court actions [Retitled]:** Where a Title VII plaintiff sued individual members of a school board in one suit and the school board in a second suit, his loss in the first suit was res judicata for the second suit.
- **§ 7:56. Plant closings—WARN Act:** WARN Act damages can be offset by voluntary payments made to the employees.
- **§ 7:57. Restrictive covenants and covenants not to compete:** Careful attention must be paid to the specific language of the relevant agreements.
- **§ 7:62. Constructive discharge:** The Eighth Circuit described these conditions for constructive discharge as “something more” than what is necessary to establish a hostile work environment claim.
- **§ 7:63. Constructive discharge—State court issues:** Montana does not allow constructive discharge claims under the Wrongful Discharge from Employment Act for employees covered by a CBA.
- **§ 7:69. Epidemic and pandemic illnesses—COVID-19:** Workplaces with particularly high risks of COVID-19 could lead to workers’ compensation claims for industrial disease where the employee contracted the disease at work.
- **§ 8:5. Emotional distress damages:** The Second Circuit distinguishes between “garden variety” and

“significant” or “egregious” claims for emotional distress.

- **§ 8:8. Introduction to back pay:** NLRB General Counsel Jennifer Abruzzo’s memorandum requiring stricter terms for settlement of ULP charges was rescinded by the acting General Counsel in February 2025 under the Trump administration.
- **§ 8:25. Nature and characteristics of punitive damages—In federal statutory actions:** Where an employer abdicated its responsibilities under the ADA to assess whether attendance problems were due to the employee’s disability and whether an accommodation was possible and a national manager suggested the local management had been too lenient with the employee, a jury could infer “callous indifference” to the employee’s situation.
- **§ 8:36. History of tax consequences of damage awards:** The characterization of money paid in settlement of an employment claim matters, both with respect to how it is reported to the IRS and how it is treated under an employment contract.
- **§ 9:7. Statute of Frauds:** The tricky cases involving the Statute of Frauds are those where there are separate documents containing different portions of the terms of employment.
- **§ 9:24. Statute of limitations:** Where statutes do not explicitly incorporate a statute of limitations, the courts will ascertain which statute of limitations applies by examining the purpose of the statutory remedy and other factors.

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