

Introduction to the 2026 Edition

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

- **§ 2:2. NLRA—Substantive provisions:** The NLRA protects even an inquiry by an employee directed to a single co-worker, requesting information.
- **§ 2:32. Title VII—Sexual harassment:** The Sixth Circuit has held that where there is any claim constituting a “sexual harassment suit” within the statute’s meaning, arbitration clauses are unenforceable with respect to the entire lawsuit.
- **§ 2:33. Title VII—Sexual harassment—Quid pro quo harassment:** Quid pro quo claims need not include explicit sexual advances.
- **§ 2:36. Title VII—Religious discrimination—Adverse employment actions and duty to accommodate:** Vaccine requirements during the COVID-19 pandemic prompted multiple religious discrimination claims, brought by those objecting to vaccination and testing requirements on religious grounds, though courts were generally unsympathetic to requests for accommodation of these beliefs, on grounds they imposed too great a burden on employers.
- **§ 2:75. Uniformed Services Employment and Reemployment Rights Act:** When there are benefits available only to members of the military, the claimants do not need to show that their military service was a substantial or motivating factor.
- **§ 3:2. Standards used and factors considered by arbitrators:** Where labor agreements do not define key terms, arbitrators have greater freedom to determine the meaning of such terms.

- **§ 3:2. Standards used and factors considered by arbitrators:** In evaluating an arbitration agreement for unconscionability, courts may evaluate it together with other employment agreements.
- **§ 3:3. Vacating arbitration award:** The degree of judicial review of an arbitration award may vary with the basis for seeking review.
- **§ 3:8. Unfair representation by the union:** A union's conduct generally is not arbitrary when the union exercises its judgment.
- **§ 3:17. Fixed-term contracts:** Where an employee was hired under a fixed-term contract by a company to work at its subsidiary, the financial failure of the subsidiary did not relieve the parent of its obligation to employ the individual for the term.
- **§ 4:9. Elements of contract formation—Acceptance:** The specific document that serves as the acceptance of an offer can be critical.
- **§ 4:11. Elements of contract formation—Meeting of the minds:** In a case applying New Jersey law, a federal district court rejected an employee's argument that there was no meeting of the minds where an arbitration clause was "buried" in the 19th paragraph of an eight-page document.
- **§ 4:12. Elements of contract formation—Consideration:** Some jurisdictions require independent consideration to support arbitration agreements entered into after employment has begun or even within the employment contract.
- **§ 4:14. Express requirement of good cause for discharge:** Many courts insist on an express guarantee of a requirement of good cause for dismissal.
- **§ 4:30. Independent consideration—Noncompetition covenants and other restrictions:** Delaware takes a particularly hard look at the consideration received by employees who sign restrictive covenants outside of the context of the sale of a business.
- **§ 4:37. After-acquired evidence of misconduct:** Courts occasionally address after-acquired evidence as a complete defense in breach of contract claims, treating after-acquired evidence as an equitable doctrine whose rationale is that the discharged employee, who was not entitled to employment to begin with, should not be able to claim economic damages from the loss of the employment.

- **§ 6:6. Emotional distress—Definition of intentional infliction of emotional distress:** Courts play “a significant gatekeeping role in order ‘to prevent claims for intentional infliction of emotional distress from becoming a panacea for wounded feelings rather than reprehensible conduct.’”
- **§ 6:6. Emotional distress—Definition of intentional infliction of emotional distress:** The fact that an employee views job assignments as “humiliating, demeaning, or otherwise inappropriate” is not sufficient.
- **§ 6:14. Emotional distress—Sexual harassment:** A supervisor or co-worker may be sued directly for harassing conduct.
- **§ 6:29. Covenant of good faith and fair dealing—Massachusetts rule:** This approach is also adopted by other states, even when they restrict it to cases involving explicit employment agreements.
- **§ 7:7. Issues involving public employees—Federal and state civil service protection for public employees [Retitled]:** The constitutionality of statutory limits on the President’s ability to remove members of the MSPB was rejected by the federal courts.
- **§ 7:15. Issues involving public employees—First Amendment rights of public employees [Retitled]:** There is some question about whether public employees are protected from retaliation for the protected First Amendment activity of family members.
- **§ 7:36. Res judicata and collateral estoppel—Effect of court actions:** Where an individual could have asserted diversity jurisdiction to bring state law claims in a federal lawsuit based on federal statutes but did not, claim preclusion applied.
- **§ 7:56. Plant closings—WARN Act:** The WARN Act does apply to employees working from home where the headquarters for whom they provided services had more than 50 employees.
- **§ 7:57. Restrictive covenants and covenants not to compete:** Typically, restrictive covenants are enforceable only to the extent necessary to protect the employer’s legitimate interests by being no more restrictive than necessary to do so, not imposing undue hardship on the ex-employee, and not being injurious to the public.
- **§ 7:69. Epidemic and pandemic illnesses—COVID-19:** One federal district court permitted a religious

discrimination claim to proceed over retaliation for making a religious objection to a vaccination mandate while rejecting the religious discrimination claim itself, while another permitted a failure-to-accommodate religious discrimination claim when the religious exemption request was denied, as well as a state public policy claim.

- **§ 8:1. Overview of remedies for wrongful termination:** Although employers often oppose reinstatement of successful employee plaintiffs, they must generally reinstate the employee unless extreme hostility exists.
- **§ 8:7. Remedies for wrongful termination—Equitable relief [Retitled]:** Front pay is warranted only by egregious circumstances.
- **§ 8:16. Introduction to front pay and prospective damages:** Where an employee locates comparable employment, front pay is not available.
- **§ 9:1. Introduction to wrongful discharge defenses:** One district court was willing to dismiss a case under the ministerial exception where its factual predicates “clearly appear on the face of the complaint.”
- **§ 9:10. Defenses to alternate tort claims—Defamation [Retitled]:** Emails from a supervisor to relevant parties explaining the investigation and discharge of an employee were subject to qualified privilege despite including statements that other employees were to call 911 if they saw the employee on the premises or at their homes.
- **§ 9:11. Defenses to alternate tort claims—Invasion of privacy [Retitled]:** At least one court has rejected invasion of privacy claims based on data breaches at an employer involving employee data, finding that a data breach does not meet the requirement of a “serious mental or physical injury or humiliation” under the relevant state law
- **§ 9:17. Preemption—Section 301 of Labor Management Relations Act:** When a complaint raises claims preempted by Section 301, there is a federal question that supports removal to federal court.
- **Chapters 10 to 17:** Litigation strategy and forms materials have been updated
- **Appendix A through Appendix L** have been updated.

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