ORIGINS OF EMPLOYMENT LAW: UNITED STATES, STATE AND LOCAL JURISDICTIONS AN OVERVIEW

by Karen Sutherland

A. Introduction.

Employment law in the United States of America originates from several sources. Generally speaking, there are three jurisdictional levels of employment law in the United States – Federal, state and local. Within each of these jurisdictions, the laws may originate from the following sources: common law, the constitution or charter for the jurisdiction, statutes or ordinances, and administrative law. The following is a rough, generalized chart of U.S. employment law:

FEDERAL LAW	STATE LAW	LOCAL LAW
U.S. Constitution	State Constitution	Local Charter
Statutes (originate with Congress)	Statutes (originate with state legislatures)	County, City or Parish Code
Regulations (originate with agencies)	Regulations (originate with agencies)	Regulations (originate with agencies)
Regulatory decisions (agencies' interpretation of their regulations)	Regulatory decisions (agencies' interpretation of their regulations)	Regulatory decisions (by each agency)
Cases from U.S. Supreme Court (apply to whole country)	Cases from state high court (apply to whole state)	Disputes generally handled through agency process or by same court system as state cases
Cases from Circuit Courts (apply to group of states in that circuit, but may be cited as guidance anywhere)	Cases from regional courts of appeals (apply to that region or to whole state, depending on the state)	
Cases from district courts (apply only to the parties, but may be cited as guidance anywhere)	Cases from superior, district and small claims courts (apply only to the parties)	

B. Applicability of Various Sources of U.S. Law.

There is considerable overlapping between various Federal, state and local laws in the United States. Many laws cover the same subjects, but apply to different employers or have different remedies. Local laws can be more onerous than state laws, but cannot interfere with state or Federal laws. Likewise, state laws can be more onerous than federal laws, but cannot interfere with federal laws. Congress can pass laws, but the U.S. and state court systems interpret them, and not always in ways that Congress likes. The same is true on the state and local level. A legislative body passes the laws, and a judicial body interprets them. At the agency level, the agency has different branches – legislative and judicial – or in small agencies, it may have the same people fulfilling both functions, but with a different set of administrative rules that apply, depending on which function they are fulfilling.

Regulatory actions are subject to review by the courts, though the courts give the regulatory agencies considerable discretion in interpreting their own rules. The scope of a regulatory agency's authority is limited by the legislation that established it, and it or its authority can be repealed by the legislative body that established it.

1. Applicability of the U.S. Constitution.

The U.S. Constitution applies to employees of the federal, state and local governments. Examples of constitutional claims in employment include:

- Deprivation of an employee's rights without due process, such as terminating employment of an employee who has a contract without giving the employee a hearing first (violates 14th Amendment Due Process rights)

- Treating a class of employees differently because of their status in the class without sufficient justification for treating them differently (violates 14th Amendment Equal Protection rights).

- Deprivation of an employee's right to free speech or free exercise of religion (if it exceeds certain limits, it violates employee's First Amendment right to free speech or separation of church and state).

- Subjecting employees to drug testing or other invasions of their privacy (if it exceeds certain limits, it violates a right of privacy that is not directly stated in the Constitution, but has been found in the "penumbra" of the U.S. Constitution's amendments by the U.S. Supreme Court)

2. Applicability of Federal Statutes.

Federal statutes apply to all employers who are involved in "interstate commerce." Usually, the statute itself will state which employers it applies to, and it is unusual these days for the courts to find that an employer is not involved in interstate commerce (one big exception is Major League Baseball under a very old U.S. Supreme Court case that is still in effect, despite many changes in baseball since its issuance). Most statutes specify which employers are covered, usually in the definition of "employer" in the statute. Examples of federal employment statutes include:

- The Family Medical Leave Act (FMLA) allowing certain employees to take unpaid leave

- Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §2000e (Title VII), which protects against harassment and discrimination based on factors such as sex

- The Fair Labor Standards Act (FLSA) governing payment of wages and setting minimum wage and overtime requirements

- The Age Discrimination in Employment Act (ADEA) protecting workers over the age of 40 from discrimination in employment

- The Americans with Disabilities Act (ADA) protecting workers with disabilities

- The National Labor Relations Act (NLRA) governing labor unions and the right to collective bargaining

- The Occupational Safety and Health Act (OSHA) governing workplace safety standards.

3. Applicability of Federal Regulations and Federal Agencies.

Federal regulations are made by the federal agencies that have been created by Congress to implement Federal laws. For example, the FMLA and the FLSA are regulated by the Department of Labor (DOL), www.dol.gov; the ADA, the ADEA and Title VII are regulated by the Equal Employment Opportunity Commission (EEOC), www.EEOC.gov; the National Labor Relations Act is regulated by the National Labor Relations Board (NLRB), www.NLRB.gov; and OSHA is regulated by the Occupational Safety and Health Administration (OSHA), www.OSHA.gov. Their Web sites are quite helpful in that they include many of their regulations and offer answers to some common questions.

When Congress passes a law, the law is often lacking in detail. The Federal regulations implementing the law offer more detail on what the law covers and how it will be interpreted by the agency, and about any process that an employee or applicant for a position would need to follow to seek relief through the agency. With some laws, such as Title VII and the ADA, an employee cannot sue the employer without going through an agency process first. However, if an agency such as the EEOC finds against the employee, the employee may still be able to pursue his or her claims in court.

4. Applicability of the Federal Court System.

If a Federal law is violated, the employee or applicant can bring suit in Federal court. Sometimes, the employee or applicant must exhaust agency administrative remedies first, before filing suit. The employee does not need to be a U.S. citizen to use the federal court system. The federal courts will also take non-federal cases such as cases under state law if there is diversity jurisdiction, meaning that the amount in controversy exceeds $75,000 in value and the controversy is between citizens of different states or between citizens of a state and subjects of a foreign state, or between citizens of different states in which citizens or subjects of a foreign state are additional parties. 28 U.S.C. § 1332. Other claims that could not be brought in Federal court on their own merits that arise out of the same transaction or occurrence can be brought with claims over which the federal court already has jurisdiction.

Federal cases start in district court. They can be appealed to the Court of Appeals or to the U.S. Supreme Court after they have been through the district court level. In most cases, the higher court levels can decline to review the case.

Federal courts can apply the law of another jurisdiction, such as a state or a foreign country, if the Federal court finds that such law is applicable. Sometimes, the Federal court will certify a

question about another jurisdiction's laws and send that question (but not the whole case) to the other jurisdiction for an answer.

5. Applicability of State Constitutions.

The applicability of the state constitution to employment issues depends on the state because each state's constitution is unique. Washington State's constitution, for example, has a stronger right of privacy than the U.S. Constitution. If a state court has a choice between deciding an issue based on the state constitution or the U.S. Constitution, the state court will usually decide it based on the state constitution. Otherwise, the federal court system could overturn the state court's decision.

6. Applicability of State Statutes.

Most state statutes provide the employee with greater protection than federal statutes. For example, Washington State has a law that prohibits discrimination based on marital status, which Federal law does not have. California law limits an employer's ability to enforce a noncompetition agreement, where such agreements are not prohibited under Federal law (or the laws of many other states). State law also tends to apply to smaller employers than Federal law. For example, Federal anti-discrimination laws usually apply to employers with more than fifteen employees, but Washington State's discrimination statutes apply to employers of eight or more employees. State law may provide for personal liability for an individual supervisor or manager, where Federal law generally does not do so.

The following are some examples of areas of employment law covered by state statutes:

- Immunity under worker's compensation insurance
- Health and safety laws that are more restrictive than federal laws
- Theft of trade secrets
- Employee ownership of intellectual property
- Wage and hour laws that are more restrictive than federal law
- Discrimination laws that are more restrictive than federal law
- Statutes limiting the application of common law or limiting the ability of local jurisdictions to pass certain laws (such as Washington State's prohibition on affirmative action).

Employees can bring claims under both state and federal laws if both apply. They can only recover their damages once, though, and they can only bring their claims in one court, not in two courts simultaneously.

There are often issues called "choice of law" that arise where there is a conflict between the laws of two states, or the laws of a state and a foreign jurisdiction. Each state has its own rules for resolving these conflicts. Any state can apply the law of some other jurisdiction if the state court determines under a choice of law analysis that the other jurisdiction's law should be applied.

7. Applicability of State Courts.

State courts interpret and apply the laws of their own state and the Federal employment laws. They will also apply the laws of another state or country if a party can convince the court that the court has jurisdiction to do so. For example, an employee who works in Washington State under an employment contract executed in England with an English choice of law clause in it could convince a Washington court to apply English law to interpret the contract.

In addition to applying and interpreting statutes and regulations, state courts create "common law," which is a body of law that runs parallel to or complements statutory or regulatory law. It may also predate statutory law. Common law develops over time as the courts apply old doctrines and ideas to new fact patterns. The following are some examples of common law:

- Public policy prohibiting termination of an employee who has left his post in violation of a work rule in order to save someone's life

- Public policy applying certain parts of the state anti-discrimination statutes to employers who are too small to be covered by state law

- Common law regarding enforceability of noncompete agreements and nonsolicitation agreements

- Negligent hiring and negligent retention of employees

- Negligent infliction of emotional distress and intentional infliction of emotional distress (also known as the tort of outrage)

- Tortious interference with a contract or business expectancy.

The state courts also interpret employment contracts, unless they are union contracts, in which case they are interpreted by the NLRB or the state equivalent for an employee of a state or municipality.

8. Applicability of State Regulations and State Agencies.

Like their federal counterparts, state agencies are established by a legislative body to implement and interpret state statutes. They often have their own procedures for investigating and resolving issues. Depending on the state and on the regulation, employees may to have to use the regulatory system to seek relief, or they may be able to choose between the agency and the courts. For example, in Washington State, the state discrimination laws (RCW Ch. 49.60 *et seq.*) are interpreted by both the state courts and the Human Rights Commission (HRC), and

employees can go to either the HRC or the state court to seek relief. However, if the HRC finds against the employee, the employee can still pursue his or her claims in court.

9. Applicability of Local Law.

Local law may be more restrictive than state or federal law in terms of the number of employees the employer needs to employ in order to qualify as an employer, and in terms of what is covered. For example, the City of Seattle has an anti-discrimination ordinance that protects sexual orientation and political beliefs and transgendered status, which are not protected by state or federal law. Cities or counties or their equivalent may also have laws specific to certain industries, such as telecommunications, that they regulate. They may also have specific requirements for employers that want to do business with the city or county, such as a domestic partner insurance benefit ordinance.

Many local laws are not clear how broadly they apply – for example, to all of the employer's operations, or only to the employer's operations in that jurisdiction.

Local laws are enforceable either through local agencies as administrative proceedings, or occasionally though the state court system. The law normally specifies what the remedy is for a violation. Some laws do not have a private right of action, meaning that they can only be enforced by the entity that passed the law, not by the employee or employer.

C. Development of Uniform Policies.

Even employers who do business in different localities within the same state of the United States have to face this issue. For example, a law firm in Seattle with a branch office in Wenatchee (a city in Central Washington State) has to deal with different employment laws relating to the treatment of employees based on their sexual orientation and relating to medical leave. The complexity intensifies with multiple offices in different states and countries.

The following are some general considerations regarding the adoption of a global code of conduct. They do not apply to any specific employer, nor are they universally applicable, but are offered as points for discussion purposes only, and do not reflect the viewpoint of the author:

- Some employers from the U.S. have adopted uniform policies regarding fair treatment of employees in the workplace that give all employees the treatment afforded by the law in the jurisdiction that is most favorable to the employees. They may make exceptions occasionally where local norms and customs would make adoption of such a policy very difficult.

- With respect to the standardization of ethics policies, employers may treat gifts or other things that may benefit the employee but have a negative effect on the employer differently from gifts or other things that benefit the employer's customers, regulators or vendors. It may be easier to set a uniform standard with respect to the former. With respect to the latter, the standardization of ethics policies may depend on the nature of the employer's work. For example, different jurisdictions have different ethics rules for doing business with that jurisdictional authority (*i.e.* performing a contract for a government entity or seeking permits

from that entity). An employer could adopt an ethics code that is uniform in content with respect to government contacts for all work locations or a policy regarding interactions with the government that is uniform in application (*i.e.*, follow the ethics code adopted by each government, whatever it may be). An employer could have a separate ethics code for dealing with private businesses. For example, in the United States, many governmental agencies prohibit giving anything of value to a government employee, or put a small monetary limit on the value of gifts, which the employer will follow, but there are no such restrictions on private contracts. As a result, the employer's policy may prohibit gifts, etc. to governmental contacts but allow its employees to buy meals, drinks or gifts for private customers.

- Many employers do not adopt uniform policies regarding wages, paying instead either what is required by the laws of the jurisdiction where the employee is employed, or paying the going rate for the position if it is higher. They point out that the cost of living varies from location to location, and should be taken into account in setting wages.

- Employers may believe that uniform safety standards would be difficult to implement in locations where safety equipment is not readily available, or not readily adaptable to the location (*e.g.*, safety suits that do not fit or are too hot, lack of plywood for barriers, lack of running water for decontamination showers or handwashing sinks). Local culture and norms may make employees reluctant to using certain safety features such as goggles, respirators, and equipment and tool guards, particularly if they slow down the employee's work.

- For many employers, maintaining flexibility in matters such as the ability to terminate employees at-will and the ability to use noncompete agreements means that the employer will not be interested in adopting severance pay, notice of termination, termination for cause only, or foregoing restrictions on competition, unless the jurisdiction requires them.

- Standardization of policies may be more important for some positions than others, such as where the employee will be transferred frequently or works in more than one jurisdiction.

E. Conclusion.

Uniformity of employee policies can be advantageous because of the difficulty in administering different policies in different locations, and because of the mobility of employees and the issues arising out of the potential for multiple jurisdictions' laws applying to each employee. However, the wide variety of laws makes standardization difficult for many areas of employment law. Additionally, standardization may not be appropriate due to availability, cost and local customs and norms. Therefore, consideration of each policy for possible globalization in light of the employer's type of work and the jurisdictions in which the employer does business is warranted.

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