

Contents

Introduction	Intro-1
CHAPTER 1. THE EMPLOYMENT CONTRACT	1-1
1.1 Contract: The Basis of the Employment Relationship	1-1
1.2 Distinguishing Employment from Independent Contractor Status	1-2
1.3 Formation of the Employment Contract	1-6
1.4 Terminability at Will in Contracts of Indefinite Term	1-7
1.5 Agreements for Definite Duration of Employment	1-8.2
1.6 Agreements to “For Cause” Termination Limitations	1-10.1
1.7 Covenants Not to Compete	1-11
1.7a Trade Secrets	1-14.1
1.8 The Implied Terms of Reasonableness and Fair Dealing	1-14.3
1.9 Statutorily Prohibited Terms	1-15
1.10 Policies and Employee Handbooks; Probationary Periods	1-16.2
1.11 Rules of Interpretation	1-18.1
1.12 The Role of the Jury	1-18.2
1.13 Reliance and Equitable Theories	1-19
1.14 Limitations for Actions Based on Employment Contract	1-20
1.15 Causes of Action and Remedies	1-20
1.16 “Cause” for Termination Where the Employment Is Not at-Will	1-21
1.17 Remedies and Relief	1-22
CHAPTER 2. TORT THEORIES AND STATUTES RELATED TO TORT	2-1
2.1 Tort and Tort-Like Duties	2-1
2.2 The Wrongful Discharge “Limited Exception” to Terminability at Will; <i>Firestone</i>	2-1
2.3 The Legislative Confirmation in Workers’ Compensation: KRS 342.197	2-7
2.4 The Requirement of Retaliatory Intent	2-9
2.5 Policies Other than the Workers’ Compensation Act; Case Law	2-10.2
2.5a No Cause of Action for Retaliatory Failure to Hire	2-10.7
2.6 Special Statutes: Whistleblower, Retaliation for Suits Against Employer	2-11
<i>Overview</i>	2-11
<i>Covered “employees”</i>	2-14

CONTENTS

Covered “disclosures” 2-14

Burdens and standards of proof 2-16.2

The limitations period. 2-16.5

Other issues. 2-16.5

2.7 Special Statutes: Voting 2-16.6

2.8 Special Statutes: Summons and Jury Duty 2-16.7

2.9 Special Statutes: Garnishment 2-16.7

2.9a Special Statutes: KOSHA 2-16.7

2.9b Special Statutes: Protection for Volunteer Firemen and
Emergency Personnel 2-16.9

2.10 Special Statutes: Others 2-16.10

2.11 Remedies in Wrongful Discharge Cases. 2-16.12

2.12 Remedies: Retaliation for Pursuit of Workers’ Compensation . . . 2-16.12

2.13 Remedies: Whistleblower’s Claims 2-16.13

2.14 Remedies: Summons and Jury Duty Retaliation 2-16.13

2.15 Remedies: “Actual” Damages, Punitive Damages,
and Equitable Relief 2-16.14

2.16 Other Torts in the Employment Setting 2-18

2.17 Other Torts: Defamation and Intentional Interference 2-18

2.18 Other Torts: Invasion of Privacy 2-23

2.19 Other Torts: Outrage, or Intentional Infliction of
Emotional Distress 2-23

2.20 Other Torts: Battery and False Imprisonment. 2-27

2.21 Procedural Matters in Wrongful Discharge Cases:
Limitations Periods 2-28

2.22 Procedural Matters: Issues of Law and Issues of Fact 2-29

2.23 Procedural Matters: Evidentiary Issues 2-30

2.24 Procedural Matters: The Significance of Intent 2-31

2.25 Procedural Matters: Collateral Cases and Issue Preclusion 2-31

2.26 Preclusion by Virtue of Receipt of Workers’ Compensation 2-32

CHAPTER 3. PUBLIC SECTOR EMPLOYMENT 3-1

3.1 Distinctive Features of Public Employment Law 3-1

3.2 Variations of the Common Law in Public
Employment — Contract 3-2

3.3 Sovereign Immunity for Units of State Government 3-4

3.4 Tort: State-Law Immunities for Municipal Governments. 3-7

3.5 Tort: “Qualified” and “Absolute” Immunities for Individual
Government Officials 3-8

3.6 Tort: Indemnification of Individual Government Employees 3-12

3.7 Terminability-at-Will 3-14

3.8 Statutory Protections for Public Employees, Generally 3-14

3.9 Statutory Protections: Coverage and Appeal Procedures;
Appealable Actions 3-15

3.10 Statutory Protections: Applicants, Promotions,
and Probationary Employees 3-17

3.11 Statutory Protections: Just Cause Requirements
and Hearings 3-19

3.12 Statutory Protections: The Effect of Parallel Criminal
Proceedings 3-22.2

3.13 Statutory Protections: Judicial Review 3-25

3.14 The Police Bill of Rights Statute 3-28.1
Application of the statute 3-28.2

3.14a Louisville–Metro–Only version of the Bill of Rights Statute
KRS 67C.326 3-28.5
Complaints 3-28.5
Investigation and “coercion” 3-28.6
“Interrogation” 3-28.7
Sixty-day limit for hearings. 3-28.9
Consequences of failure to comply 3-28.10
Judicial review. 3-28.11

3.14b The Bill of Rights Statute as Amended in 2015 3-28.11
Overview 3-28.11
Application of the statute 3-28.12
Other hearing procedures superseded 3-28.13
Initiation of the disciplinary process. 3-28.13
The investigative stage 3-28.14
Disciplinary charges 3-28.15
Hearing on the charges 3-28.15
Consequences of failure to comply with KRS 15.520 . 3-28.17
*Reinstatement with back pay and
benefits if found not guilty of charger* 3-28.18
Appeal to court 3-28.18
Special provisions 3-28.18
*The Impact of Peace Officer Professional
Standards Requirements* 3-28.19

3.15 Civil Service and Merit Systems, Generally 3-28.19

3.15a Special Hires of Retirees on One-Year Renewable Contracts . . . 3-28.20

3.15b Merit Appeals Involving Claims of Discrimination 3-28.23

3.16 Civil Service for Cities of the First Class 3-29

3.16a The Louisville Metro Police Merit Board. 3-32

3.17 Civil Service and Merit Systems for Urban County
Governments and Cities with Population between
1,000 and 6,999. 3-34

3.17a Fire Fighters Employed by Fire Protection Districts 3-36

CONTENTS

3.18	Civil Service and Merit Systems for County Police and Fire Departments and County Corrections Departments	3-38.1
3.18a	Deputy Sheriff Merit Boards.	3-38.4
3.18b	Deputy Jailers in County Jails.	3-39
3.19	The State Personnel Board	3-39
	<i>Legislative purpose; overview.</i>	3-39
	<i>Hiring process.</i>	3-40
	<i>Coverage.</i>	3-40
	<i>Composition of the Board.</i>	3-41
	<i>Duties of the Board.</i>	3-42
	<i>Disciplinary action.</i>	3-43
	<i>Time and manner of employee appeals.</i>	3-44
	<i>Hearings.</i>	3-45
	<i>Remedies.</i>	3-46
	<i>Board investigations.</i>	3-46
	<i>Judicial review.</i>	3-46.1
3.20	The State Police Merit System	3-46.2
3.21	Tenure Statutes for Teachers and Public School Employees	3-48
	<i>Overview.</i>	3-48
	<i>Political affiliation; political and other discrimination.</i>	3-48
	<i>Hiring and personnel policies.</i>	3-48
	<i>Probation equivalents.</i>	3-49
	<i>Tenure and contractual protections.</i>	3-51
	<i>Discipline, appeal, and hearing.</i>	3-52.1
	<i>Judicial review.</i>	3-54
3.22	Special Rules for Demotion of Administrators.	3-54.1
3.23	Constitutional Issues: Procedural Due Process.	3-54.1
	<i>Existence of property right in the employment.</i>	3-54.2
	<i>Existence of property right in specific attribute of job.</i>	3-57
	<i>Lay-offs, “furloughs” and repeal of job protections.</i>	3-59
	<i>Deprivation of property right.</i>	3-60
	<i>Pre-deprivation and post-deprivation process.</i>	3-60.1
	<i>“Liberty” interests.</i>	3-61
3.24	Constitutional Issues: Freedom of Speech and of Affiliation	3-62
	<i>Speech.</i>	3-62.1
	<i>Affiliation.</i>	3-64.2
3.25	Constitutional Issues: Privacy, Searches, Seizures, and Testing	3-66
	<i>Searches, generally.</i>	3-66
	<i>Eavesdropping.</i>	3-66.1

	<i>Drug testing</i>	3-67
	<i>Other privacy interests</i>	3-68
3.26	Special Rules for the Conduct of Public Employees	3-69
3.27	Special Compensation Requirements for Public Employees.	3-72.1
3.27a	Statutory Provision for Contractual Recovery of Training Costs from Law Enforcement Officers	3-73
3.28	Collective Bargaining for Public Employees	3-74.1
3.29	Public Employee Collective Bargaining: Authority and Obligation	3-74.2
3.30	Public Employee Collective Bargaining: Grievance and Arbitration.	3-75
3.30a	Construing Public-Employee Collective Bargaining Agreements	3-77
3.31	Public Employee Collective Bargaining: Conflicts with Merit System Legislation	3-78.1
3.32	Public Employee Collective Bargaining: Collective Bargaining Legislation — The Fire Fighters Collective Bargaining Act	3-79
3.32a	Public Employee Collective Bargaining: The Governor’s Executive Order Concerning Collective Bargaining for State Employees	3-81
3.32b	Public Employee Collective Bargaining: Legislation — Urban County Government Police and Fire Employees.	3-81
3.32c	Public Employee Collective Bargaining: Legislation — Officers of Consolidated Local Government	3-87
3.32d	Public Employee Collective Bargaining: Legislation — Deputy Sheriffs and County Police Officers in Counties with Consolidated Local Government or 1st Class City.	3-88
3.33	Public Employee Collective Bargaining: Public Employee Strikes and Job Actions.	3-89
3.34	Public Employee Collective Bargaining: Union Dues and Fees	3-90
3.35	Military Leave and Reinstatement Rights.	3-91
3.36	Residency Requirements.	3-93

CHAPTER 4. PRIVATE-SECTOR COLLECTIVE BARGAINING.		4-1
4.1	Overview	4-1
4.2	Federal Preemption (of Jurisdiction) and Preclusion (of Substantive Claims).	4-1
4.3	Jurisdictional Preemption	4-2
4.4	Supremacy of Substantive Federal Law in Collective Bargaining Agreements.	4-4

CONTENTS

4.5 Arbitration under Collective Bargaining Agreements. 4-5
4.6 Conduct During Strikes and Picketing 4-6
4.7 “The Kentucky Right to Work Act” 4-7

CHAPTER 5. UNEMPLOYMENT INSURANCE 5-1

5.1 Overview 5-1
5.2 Conditions for Eligibility for Benefits, Generally 5-1
5.3 Eligibility: The Requirement of a Week of Unemployment 5-3
5.4 Eligibility: Sufficient Earnings in Covered Employment 5-5
5.5 Eligibility: A Claim, without False Statements and
Not Duplicated 5-6
5.6 Eligibility: Availability for Work 5-7
5.7 Eligibility: Voluntary Quit without Good Cause
Attributable to the Employment 5-8.1
5.8 Eligibility: Unemployment Due to Labor Dispute Other
than a Lockout 5-10.2
5.9 Eligibility: Misconduct 5-12
The statutory provisions 5-12
General principles. 5-13
Intoxicants 5-15
Attendance and tardiness 5-16
Incarceration and criminal conviction 5-16
Insubordination. 5-18
5.10 Unconstitutional or Unlawful Reasons for Discharge 5-19
5.10a Succession and Identification of Correct Employer 5-20
5.11 Administrative Appeals and Hearings: Appeal to a
Referee Hearing 5-22
5.12 Administrative Appeals and Hearings: Appeal to
the Commission 5-25
5.13 Judicial Review 5-28
5.14 The Problem of Parallel Cases 5-29
5.15 Overpayments 5-29

CHAPTER 6. EMPLOYMENT DISCRIMINATION 6-1

6.1 Overview: The Interpretive Value of Federal Law 6-1
6.2 Distinctions from Federal Legislation 6-4
6.3 Applicability of Kentucky’s Employment Discrimination
Statutes 6-4
Threshold for non-disability KCRA cases. 6-4.1
6.4 The Substantive Anti-discrimination Provisions of
Kentucky Law 6-6.1

6.5 Anti-Discrimination Provisions: Race, Color,
and National Origin. 6-7

6.6 Anti-Discrimination Provisions: Religion 6-8

6.7 Anti-Discrimination Provisions: Sex 6-11
 The Kentucky Civil Rights Act 6-11
 The Kentucky equal pay provisions 6-14

6.8 Anti-Discrimination Provisions: Age 6-16

6.9 Anti-Discrimination Provisions: Disability 6-17
 The Kentucky Civil Rights Act 6-17
 The Kentucky Equal Opportunities Act. 6-20.5

6.10 Anti-Discrimination Provisions: Retaliation and Conspiracy. 6-22
 The Kentucky Civil Rights Act. 6-22
 The Equal Opportunities Act 6-23
 The equal pay provisions 6-23
 *Distinguishing “participation” and
 “opposition” claims* 6-24
 Special considerations for retaliation claims 6-26
 *The “but for” standard of causation applies,
 rather than “substantial motivating factor”* 6-28.4
 The requirement of a “conspiracy” 28.5

6.11 Anti-Discrimination Provisions: Harassment 6-28.5

6.12 Anti-Discrimination Provisions: Constitutional Equal
Protection 6-32.6

6.13 Anti-Discrimination Provisions: Advertising and Posting 6-33

6.14 Exculpatory Provisions and Defenses. 6-34
 BFOQ 6-35
 *Compliance with seniority system, collective
 bargaining rights, merit system, or production-
 based distinctions* 6-36
 Preferences prohibited 6-38
 The ministerial exception 6-38

6.15 Record-Keeping Requirements. 6-38.3

6.16 Procedural Issues: Election of Forum. 6-40

6.17 Procedural Issues: Parties 6-44.1

6.18 The Administrative Process: Claims before the State and
Local Commissions. 6-46.1

6.19 The Administrative Process: The Preclusive Effects of
Administrative Adjudications 6-49

6.19a The Administrative Process: Powers of Local
Commissions and Governments 6-49

6.20 The Administrative Process: Disability Discrimination
Claims under the Kentucky Equal Opportunity Act 6-50

CONTENTS

6.21 The Administrative Process: Sex-Based Pay Discrimination
 Claims under Kentucky’s Equal Pay Statutes 6-50.1

6.22 Direct Access to Judicial Remedies 6-50.1

6.23 Direct Access to Judicial Remedies: Statutes of Limitation 6-51

6.24 Direct Access to Judicial Remedies: Procedural Issues 6-54
Discovery. 6-54
Summary judgment 6-54
Preemption by workers’ compensation 6-55
*Application of other legal theories to statutory
 discrimination* 6-56
Jury trials 6-57

6.24a Jurisdictional Issues 6-58.2

6.25 Direct Access to Judicial Remedies: Actions Brought by
 State Agencies 6-58.2

6.26 Disparate Treatment and Disparate Impact Theories 6-58.3

6.27 Conceptual Framework for Proof in Disparate Treatment
 Cases 6-58.3

6.28 Conceptual Framework for Proof in Disparate
 Treatment Cases: The Prima Facie Case. 6-58.6
*Discrimination based on race, sex, color, and
 national origin*. 6-58.6
Retaliation. 6-60
Religion-based discrimination 6-60
Disability-based discrimination 6-60.1

6.29 Conceptual Framework for Proof in Disparate Treatment
 Cases: The Defendant’s Obligation to “Articulate”
 a Non-Discriminatory Motive. 6-63

6.30 Conceptual Framework for Proof in Disparate Treatment
 Cases: The Plaintiff’s Burden to Prove Pretext and
 Discriminatory Intent 6-64.1

6.31 Conceptual Framework for Proof in Disparate Treatment
 Cases: Practicalities and Special Situations 6-64.4
Direct evidence of discrimination 6-64.4
Mixed motive cases 6-64.5
After-acquired evidence. 6-64.7
Age discrimination — “cold hard facts” 6-64.8
Reverse discrimination and affirmative action 6-65
*Proof of the decision-maker’s unlawful motivation;
 the “cat’s paw” theory* 6-66.2

6.32 Conceptual Framework for Proof in Adverse Impact
 Cases 6-66.3

6.33 Relief Available under the Kentucky Statutes. 6-68

6.34 Relief Available under the Kentucky Statutes — “Humiliation and Embarrassment” and “Actual” Damages 6-70

6.35 Relief Available under the Kentucky Statutes — Lost Pay. 6-72

Proof 6-74

Obligation to mitigate 6-74

Availability for work 6-75

Constructive discharge 6-76

Interim amounts actually earned by the claimant. 6-76.2

Collateral sources 6-76.2

Front pay 6-76.2

After-acquired evidence 6-76.4

6.35a Punitive and Liquidated Damages 6-76.4

6.36 Relief Available under the Kentucky Statutes — Reinstatement and Other Equitable Relief 6-77

6.37 Relief Available under the Kentucky Statutes — Attorney Fees 6-77

6.38 Special Issues Concerning Settlement 6-80.2

6.39 Parallel and Collateral Cases — Judicial, Administrative, and Arbitral 6-80.3

CHAPTER 7. WAGES AND HOURS 7-1

7.1 Introduction; Supremacy of Federal Principles 7-1

7.2 The Substantive Provisions Regarding Rates and Payment of Wages, Hours, Breaks and Leaves, and Overtime Requirements 7-1

7.3 Substantive Provisions: Payment of Wages 7-2

Overview 7-2

“Wages” subject to the statutes 7-3

“Employees” covered 7-5

Deductions and withholdings 7-6

Time of payment 7-6.2

7.4 Substantive Provisions: Minimum Wage 7-7

7.5 Substantive Provisions: Overtime 7-8

7.6 Substantive Provisions: Base Hourly Rate 7-10.3

7.7 Substantive Provisions: Work Week 7-11

7.8 Substantive Provisions: Hours Worked, Breaks, and Other Activities 7-12

Generally 7-12

Preliminary and postliminary activity 7-13

Time spent “on call” 7-14

Breaks and meal periods 7-15

Sleeping time 7-16

CONTENTS

	<i>Training sessions</i>	7-16
	<i>Time spent traveling</i>	7-16
	<i>K-9 personnel</i>	7-17
7.9	Substantive Provisions: Employer-Employee Agreements	7-17
7.10	Coverage and Exemptions	7-18.1
7.11	Coverage and Exemptions: The “White Collar” Exemptions.	7-20.1
	<i>Generally; salaried status</i>	7-20.1
	<i>Executives</i>	7-22
	<i>Administrators</i>	7-22.1
	<i>Professionals</i>	7-23
	<i>Supervisors</i>	7-23
	<i>Computer specialists</i>	7-24
7.12	Coverage and Exemptions: Outside Salesmen and Collectors	7-24
	<i>Outside salesmen</i>	7-24
	<i>Outside collectors</i>	7-24
7.13	Coverage and Exemptions: Miscellaneous Exemptions	7-25
	<i>Individual employed in agriculture</i>	7-25
	<i>Employees of retail stores, restaurants, hotels, and motels</i>	7-25
	<i>Domestic service in a private home</i>	7-25
	<i>Learners, apprentices, workers with disabilities, and students</i>	7-26
	<i>Delivery of newspapers</i>	7-26
	<i>State employees</i>	7-26
	<i>Employees of non-profit camps, religious centers, and educational centers</i>	7-26
7.14	Coverage and Exemptions: Special Problems with Public Employment	7-26
7.15	Procedure: Judicial and Administrative Forums	7-28
7.16	Procedure: Direct Action in Court and Associated Remedies	7-31
	<i>Generally</i>	7-31
	<i>Liquidated damages</i>	7-31
	<i>Attorney fees</i>	7-32
	<i>Civil penalties</i>	7-32
	<i>Role of court and jury</i>	7-32
	<i>Statute of limitations</i>	7-32.1
	<i>Class actions</i>	7-32.1
	<i>State enforcement</i>	7-32.2
	<i>Liens for wages</i>	7-32.2
	<i>Retaliatory discharge or discrimination</i>	7-33
7.17	Procedure: Administrative Remedies	7-34
7.18	“Prevailing Wage” Provisions	7-34

CHAPTER 8. FORMS AND PRACTICE SUGGESTIONS	8-1
8.1 The Basic Questions	8-1
8.2 Deciding Whether an Employment Contract Is Necessary.	8-2
8.3 FORM 8-3: Employment Contract	8-3
8.4 FORM 8-4: Covenant Not to Compete	8-6
8.4a Contact between Attorney for an Employee, and Other Employees.	8-7
8.5 Handling Public Sector Collective Bargaining	8-8
8.6 FORM 8-6: Collective Bargaining Ordinance	8-8.1
8.7 FORM 8-7: Petition for Recognition as Collective Bargaining Representative	8-9
8.8 FORM 8-8: Recognition of Collective Bargaining Representative	8-10
8.9 The Importance of an Employee Handbook	8-10
8.10 FORM 8-10: Employee Handbook.	8-11
8.11 Selection of Appropriate Disciplinary Action; Proof (and Disproof) of Just Cause.	8-17
8.12 FORM 8-12: Non-Renewal of Probationary Teacher.	8-19
8.13 FORM 8-13: Disciplinary Charge Against Tenured Teacher	8-20
8.14 FORM 8-14: Tenured Teacher’s Notice of Intent to Answer Charges	8-21
8.15 FORM 8-15: Initial Complaint of Misconduct Against Police Officer	8-21
8.16 FORM 8-16: 48-Hour Notice of Interrogation of Police Officer	8-22
8.17 FORM 8-17: <i>Garrity</i> Warning (and Instructional Cover Memo)	8-23
8.18 FORM 8-18: Notice of Pre-Termination Opportunity to Respond (for Job-Tenured Public Employee).	8-24
8.19 FORM 8-19: Disciplinary Write-Up for Job-Tenured Employee	8-25
8.20 FORM 8-20: Employee’s Appeal to Merit or Civil Service Hearing.	8-26
8.21 FORM 8-21: Employee’s Appeal to Court from Adverse Administrative Hearing on Discipline	8-27
8.22 Negotiation in Lieu of Suit	8-28
8.23 FORM 8-23: Severance Agreement	8-29
8.24 Formation of the Attorney-Client Relationship	8-31
8.25 FORM 8-25: Fee Agreement	8-31
8.26 Choosing the Causes of Action; Choosing the Forum	8-33
8.27 FORM 8-27: Complaint by Public Employee for Constitutional Violation	8-35

CONTENTS

8.28 FORM 8-28: Complaint Based in Contract, for Wrongful Discharge 8-36

8.29 FORM 8-29: Complaint Based in Tort, for Wrongful Discharge 8-38

8.30 FORM 8-30: Complaint for Statutory Discrimination 8-39

8.31 FORM 8-31: Affirmative Defenses to Claim of Statutory Discrimination. 8-41

8.32 FORM 8-32: Complaint for Unpaid Overtime 8-42

8.33 FORM 8-33: Affirmative Defenses for Employer in Overtime Claim. 8-43

8.34 Simultaneous Claims and Issue Preclusion 8-44

8.35 Simultaneous Civil or Criminal Proceedings 8-44

8.36 Some Thoughts on Discovery 8-46

8.37 FORM 8-37: Agreed Order of Confidentiality, for Use in Discovery 8-46

8.38 The Importance of Dispositive Motions 8-47

8.39 Issues in Settlement. 8-48

8.40 Special Considerations for Trial 8-50

8.41 Unemployment Insurance Claims 8-50.1

8.42 FORM 8-42: Appeal to Unemployment Referee Hearing 8-51

8.43 FORM 8-43: Appeal to KUIIC. 8-51

8.44 FORM 8-44: Complaint for Judicial Review of KUIIC Decision. 8-52

INDICES

Forms Index Index-1

Table of Cases Index-2

Table of U.S. Codes Index-35

Table of Kentucky Constitution Citations. Index-37

Table of Kentucky Revised Statutes Index-38

Table of Kentucky Administrative Regulations Index-56

Subject Index Index-60