

LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE

Third Edition

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Clyde W. Summers
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American Casebook Series®

The Labor Law Group



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A.L.G.

To: E.W.S.

C.W.S.

To: Betsy, Nick, Nathan and Ellie, who provide the love and amusement necessary for me to have a healthy work life and undertake projects such as my contribution to the third edition of this book. Beyond a healthy discipline, be gentle with yourself.

K.G.D.

*

Foreword

The Labor Law Group is an association of law teachers, most of whom serve on faculties in the United States; others teach in Belgium, Canada, England, and Israel.

At the December 1946 meeting of the Labor Law Roundtable of the Association of American Law Schools, Professor W. Willard Wirtz (who became Secretary of Labor in 1962) delivered a compelling paper criticizing the labor law course books then available. His remarks so impressed those present that the Roundtable Council organized a general conference on the teaching of the subject. At the conference, held in Ann Arbor in 1947, some conferees agreed to exchange proposals for sections of a hoped-for new course book. The late Professor Robert E. Mathews served as coordinator. Beginning in 1948, a preliminary mimeographed version was used in seventeen schools; each user supplied comments and suggestions for change. In 1953, a hard-cover version was published under the title *Labor Relations and the Law*. The thirty-one "cooperating editors" were so convinced of the value of multi-campus collaboration that they gave up any individual claims to royalties. Instead, those royalties were paid to a trust fund to be used to develop and "provide the best possible materials" for training students in labor law and labor relations. The Declaration of Trust memorializing this agreement was executed November 4, 1953, and remains the Group's charter.

Cooperative ventures among legal scholars are often centered around ideological orthodoxies or common experiences or identities. In contrast, the Labor Law Group has tried to expand the scope of perceptions and experiences represented within its membership. Consistent with this goal, it has attained significant diversification in the racial, gender, national, and ideological composition of its participants and, additionally, has drawn its membership and leadership from institutions that are varied in size, styles, status, and geography.

The founding committee's hope that the initial collaboration would bear fruit has been fulfilled. Under Professor Mathews' continuing chairmanship, the Group's members produced *Readings on Labor Law* in 1955 and *The Employment Relation and the Law* in 1957, edited by Robert Mathews and Benjamin Aaron. A second edition of *Labor Relations and the Law* appeared in 1960, with Benjamin Aaron and Donald H. Wollett as co-chairmen, and a third edition was published in 1965, with Jerre Williams at the helm.

In June of 1969, the Group, now chaired by William P. Murphy, sponsored a conference to reexamine the labor law curriculum. The meeting, held at the University of Colorado, was attended by practitioners and by full-time teachers including nonmembers as well as members of the Group. The conference papers and discussion summaries were distributed to law school libraries and to participants. In meetings that followed the conference, the

Group decided to reshape its work substantially. It restructured itself into ten task forces, each assigned a unit of no more than two hundred pages on a discrete topic such as employment discrimination or union-member relations. An individual teacher could then choose two or three of these units as the material around which to build a particular course. This multi-unit approach dominated the Group's work throughout much of the 1970s under Professor Murphy and his successor as chairman, Herbert L. Sherman, Jr. As the decade progressed and teachers refined their views about what topics to include and how to address them, some units were dropped from the series while others increased in scope and length. Under Professor Sherman's chairmanship, the Group planned a new series of six enlarged books to cover the full range of topics taught by labor and employment law teachers.

Professor James E. Jones, Jr., was elected chairman in 1978 and shepherded to completion the promised set of six full-size, independent casebooks. In addition, during this period supplements were published for some books. The Group continued to reevaluate its work and eventually decided that it was time to convene another conference of law teachers.

In 1984, the Group, now chaired by Robert Covington, sponsored another general conference to discuss developments in the substance and teaching of labor and employment law, this time at Park City, Utah. (The conference papers were distributed to law school libraries as well as participants.) Those discussions and a subsequent working session led to the conclusion that the Group should devote principal attention to three new conventional length course books, one devoted to employment discrimination, one to union-management relations, and one to the individual employment relationship. In addition, work was planned on more abbreviated course books to serve as successors to the Group's earlier works covering public employment bargaining and labor arbitration.

In 1989, with Alvin Goldman as Chair, the Group met in Breckenridge, Colorado, to assess its most recent effort and develop plans for the future. In addition to outlining new course book projects, the Group discussed ways to assist teachers of labor and employment law in their efforts to expand conceptual horizons and perspectives. In pursuit of the latter goals it co-sponsored, in 1992, a conference held at the University of Toronto Faculty of Law at which legal and nonlegal specialists examined alternative models of corporate governance and their impact on workers.

When Robert J. Rabin became Chair in 1996, the Group and a number of invited guests met in Tucson, Arizona, to celebrate the imminent fiftieth anniversary of the Group. The topics of discussion included the impact of the global economy and of changing forms of representation on the teaching of labor and employment law, and the impact of new technologies of electronic publishing on the preparation of teaching materials. The Group honored three of its members who had been present at the creation of the Group, Willard Wirtz, Ben Aaron, and Clyde Summers.

The Group next met in Scottsdale, Arizona in December, 1999, to discuss the production of materials that would more effectively bring emerging issues of labor and employment law into the classroom. Among the issues discussed were integration of international and comparative materials into

the labor and employment curriculum and the pedagogical uses of the world wide web.

Laura J. Cooper became Chair of the Group in July, 2001. In addition to this new edition of *Legal Protection for the Individual Employee*, the Group currently has three other textbooks in print, all published by West Group: *ADR in the Workplace*, by Laura J. Cooper, Dennis R. Nolan and Richard A. Bales; *Employment Discrimination Law* (Sixth Edition), by Robert Belton and Dianne Avery; and *Labor and Employment Law* by Robert Rabin, Eileen Silverstein, George Schatzki, and Kenneth Dau-Schmidt. The Group is also at work on two new projects— a book on government employment (expanding an earlier work on public sector collective bargaining) and a text on labor issues in the global economy.

At any one time, roughly twenty-five to thirty persons are actively engaged in the Group's work; this has proved a practical size, given problems of communication and logistics. Coordination and editorial review of the projects are the responsibility of the executive committee, whose members are the successor trustees of the Group. Governance is by consensus; votes are taken only to elect trustees and to determine whom to invite to join the Group. Since 1953, more than seventy persons have worked on Group projects; in keeping the original agreement, none has ever received anything more than reimbursement of expenses.

The Group's first book examining the individual employment relationship was *The Employment Relation and the Law* (1957), edited by Benjamin Aaron. Its contributors included Clyde Summers, the senior member of the current group of authors. Robert Covington's two editions of a Group coursebook entitled *Social Legislation*, published in the early 1970s, concentrated on statutory aspects of the individual employment relationship. However, by the early 1980s not only had there been considerable expansion of statutory regulation of the field, judicial activism was making important inroads on the common law of the employee-employer relationship. The Group's coursebook *Legislation Protecting the Individual Employee* (Covington & Goldman, 1982) anticipated growing interest in this area. It was succeeded by the first edition of *Legal Protection for the Individual Employee* (Finkin, Goldman & Summers, 1989) which updated the framework and materials for studying the rapidly changing developments of the law of work.

Three assumptions guided preparation of the earlier editions and current edition of this work. First, that separate courses are offered in the areas of collective labor relations and employment discrimination; second, that it is better to study in depth the principal policies governing the individual employment relationship than to provide a cursory catalog of every rule and procedure that might affect the relationship; and third, that legal policy should be responsive to the fact that individual workers often lack the economic power, foresight, or self-discipline to attain the terms and conditions of employment that a rational, prudent person should expect.

Matthew Finkin co-authored the two volume treatise *Individual Employment Law and Litigation*. He has also published several of the more frequently cited articles in the employee rights field and, among other books,

Privacy in Employment Law, 1995. Professor Finkin is co-editor of the *Comparative Labor Law and Policy Journal*. Alvin Goldman's treatise *Labor and Employment Law in the U.S.A.*, 1996, which is currently under revision, spans the full scope of the law of work. Clyde Summers has no doubt written more seminal articles than any other scholar in the employment law, labor law and comparative labor law fields. In addition, he is the only active Group member who participated in the Ann Arbor conference over a half century ago. Joining as co-author for this edition is Kenneth G. Dau-Schmidt. He has a doctorate in economics and his economic perspective, as well as other contributions, provide important additions to this new edition

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