

LABOR AND EMPLOYMENT LAW

PROBLEMS, CASES AND MATERIALS
IN THE LAW OF WORK

Third Edition

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American Casebook Series®



The Labor Law Group

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610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-328-9352

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Printed in the United States of America

ISBN 0-314-25728-4



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Preface

We cover a lot of ground in this book. You will be exposed to a number of workplace issues and a multiplicity of regulatory systems. We want to give you some organizational principle for handling them.

We have organized the casebook around four sets of workplace values, each the theme of one chapter. They are, fair treatment of the individual worker (Chapter One), worker participation in governance of the workplace (Chapter Two), health and safety (Chapter Three), and economic security (Chapter Four). Within each of these chapters we look at various models for securing these workplace values, such as the market, setting of substantive standards, protection of identified categories of workers, and the use of collective bargaining. In Chapters One and Two we set out the basic structure of each of the systems of regulation, describing its operation in some detail. When you get to Chapters Three and Four you should be familiar enough with each system to apply it to the difficult substantive issues those chapters raise.

We give considerable space in this book to the collective bargaining system. This is not meant to express a preference for that approach to resolving workplace problems. Indeed, in these changing times we are all holding our breaths as to what is the most effective means of regulation of the workplace. We explore collective bargaining in more detail because it is the approach you are probably the least familiar with at this stage of your legal education, and we want to be sure you understand how it works and what are its limits. Collective bargaining has provided some unique institutional developments that may be of value in other areas of the law. For example, it departs from ordinary contract law in providing for some regulation of the bargaining process. And it relies on a system of dispute resolution, binding arbitration, that has become a model for the movement towards alternative dispute resolution in other contexts. In Chapter Two we describe the collective bargaining process in somewhat systematic fashion as it normally unfolds.

We provide a number of problem exercises throughout each chapter. We believe that you will profit from attempting to apply the principles you have learned in the course materials to new and complex situations. In these problems we attempt to place you in roles where you must come up with creative solutions and exercise some of the lawyer's skills of drafting, negotiation and problem solving. These problems usually are not designed to convey the textual portion of the book, so that if your instructor chooses not to cover them, you will find the necessary materials in the other parts of the casebook. Where the problem includes some information or

perspective that we want you to consider even if you do not actually work through the problem, we will indicate this in the text.

ROBERT J. RABIN
EILEEN SILVERSTEIN
GEORGE SCHATZKI
KEN DAU-SCHMIDT

May, 2002

Authors' Thanks

This book has diverse roots. It goes back to 1984, when Willard Wirtz and Clyde Summers spoke eloquently at the Park City conference of the Labor Law Group about rethinking labor law. With the help and encouragement of many friends, we attempted to capture those ideas in our first edition. We remain indebted to those whose contributions we acknowledged in the first edition.

Our first two editions endured for well over a decade, giving us the pleasure of a rich collaboration in which we constantly talked and argued about what materials worked and what changes should be made to improve the book. We view the many students and colleagues who have used this book as our collaborators as well, for they have not been shy about telling us what they liked and didn't like. When it finally became time to update the second edition, alas, we were not content to leave things alone. In the third edition we tinkered a bit more, and deleted and replaced some materials, all in the elusive chase of perfection. As the three senior authors prepare to pass the baton, we welcome our colleague Kenneth Dau-Schmidt as a co-author of the third edition. Ken has provided valuable insights and materials, particularly in the area of economics, which is one of his specialties. We also had considerable help for this edition from Christopher David Ruiz Cameron, who teaches at Southwestern Law School, where he is also Associate Dean. Chris joined us for our planning session for the third edition, and provided numerous helpful suggestions. We hope Chris will be able to become a co-author when the fourth edition appears.

We give special thanks to our research assistants at our respective law schools, who helped tame and perfect mountains of earlier drafts. They are Minh Nguyen, Michael Riley, Heather Varley, Marsha Lawson, Jeff White, Chris Bond, Garry Hays, Griffin Dunham, Kelly Powis, Robert Moore, and Angelina Arrington. We reserve our most extravagant praise for our hardworking and cheerful secretaries, Teia Johnson, Chris Ramsdell, Claudette Landry, Delia Roy, Deborah Eads and Sonja Quinones.

EILEEN, GEORGE, BOB AND KEN

*

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 case-books. 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 *Labor and Employment Law*, the Group currently has three other textbooks in print, all published by WestGroup: *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, with Maria L. Ontiveros joining as an author beginning with the 2001 Authors' Case Update; and *Legal Protection for the Individual Employee*, by Matthew W. Finkin, Alvin L. Goldman, and Clyde W. Summers. 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 casebook 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 with the original agreement, none has ever received anything more than reimbursement of expenses.

This book is the Third Edition of a pioneering work by the original three authors, seeking to place the more traditional focus on labor law within a broader examination of the law of work. The book is innovative in both its subject matter and pedagogy. This edition, as did its predecessors, offers provocative essays, dialogues and problems, along with cases and questions for discussion.

Professor Robert J. Rabin, formerly Chair of the Labor Law Group, is a labor arbitrator and mediator who serves as editor of *The Labor Lawyer*, the scholarly journal of the American Bar Association's Section of Labor and Employment Law. He practiced on behalf of both unions and management before joining the faculty of Syracuse University College of Law in 1971. Eileen Silverstein is the Zephaniah Swift Professor of Law at the University of Connecticut School of Law. Before becoming a law teacher in 1974, Professor Silverstein practiced labor and employment law in California on behalf of management clients. She writes and teaches in the areas of property and civil rights, along with labor law. Professor George Schatzki, now at Arizona State University College of Law, served with the National Labor Relations Board and as a union lawyer prior to commencing an academic career that had included teaching at six law schools and serving as dean at two of them. Professor Schatzki has been engaged in authoring books with the Labor Law Group for more than two decades.

Joining as co-author for this Edition is Kenneth G. Dau-Schmidt, the Willard and Margaret Carr Professor of Labor and Employment Law at Indiana University, Bloomington. Professor Dau-Schmidt's economic perspective is an important addition to this new Edition. He has a doctorate in economics and served as a state legislative labor counsel and union attorney before becoming a law teacher. He teaches and writes in the areas of labor and employment law and also on the economic analysis of legal problems.

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