Modern Labor Law in the Private and Public Sectors: Cases and Materials

Seth D. Harris
Joseph E. Slater
Anne Marie Lofaso
David L. Gregory

LexisNexis

MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS

SETH D. HARRIS
Professor of Law and Director Labor and Employment Law Programs
New York Law School

JOSEPH E. SLATER
Eugene N. Balk Professor of Law and Values
University of Toledo College of Law

ANNE MARIE LOFASO
Professor of Law and
Associate Dean for Faculty Research & Development
West Virginia University College of Law

DAVID L. GREGORY
The Dorothy Day Professor of Law and
Executive Director of the Center for
Labor and Employment Law
St. John's University School of Law

LexisNexis®

Casebook ISBN: 978-1-4224-2903-7
Looseleaf ISBN: 978-0-7698-4737-5
Ebook ISBN: 978-0-3271-7961-0

Library of Congress Cataloging-in-Publication Data

Harris, Seth D.
Modern labor law in the private and public sectors : cases and materials / Seth D. Harris, Professor of Law and Director Labor and Employment Law Programs, New York Law School; Joseph E. Slater, Eugene N. Balk Professor of Law and Values, University of Toledo College of Law; Anne Marie Lofaso, Professor of Law and Associate Dean for Faculty Research & Development, West Virginia University College of Law; David L. Gregory, The Dorothy Day Professor of Law and Executive Director of the Center for Labor and Employment Law, St. John's University School of Law.
pages cm
Includes index.
ISBN 978-1-4224-2903-7
1. Labor laws and legislation--United States. 2. Collective bargaining--Law and legislation--United States. 3. Labor unions--Law and legislation--United States. 4. Unfair labor practices--United States. 5. Employee-management relations in government--Law and legislation--United States. I. Slater, Joseph E. II. Lofaso, Anne Marie. III. Gregory, David L. IV. Title.
KF3369.H349 2013
344.7301--dc23 2013004865

NOTE TO USERS
To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW BENDER

(2013–Pub.3289)

MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS

LexisNexis Law School Publishing Advisory Board

DEDICATION

Seth Harris: To Karen, Jonathan, and Daniel, for abiding and supporting my journey wherever it takes us.

Joe Slater: To my mother, Carol W. Slater, a role model as a professor, parent, and person.

Anne Lofaso: To my muses, Jim Heiko and Giorgi Heiko, for enduring my writing and giving joy to my life; to my parents Joseph and Penny Lofaso, for their love.

David Gregory: For Garris and Davy.

PREFACE

About five years ago, Seth Harris, a professor and Director of Labor and Employment Law Programs at New York Law School, approached University of Toledo College of Law Professor Joseph Slater, about co-authoring a casebook that would address both private-sector and public-sector labor law and also discuss modern organizing procedures outside the NLRA process. They agreed that Harris would write the book's private-sector labor law sections, including those aspects of private-sector labor relations that fell outside the gambit of traditional organizing, while Slater would draft the historical and the public-sector labor law sections. About one year after commencing this ambitious project, President Barack Obama appointed Harris to the position of Deputy Secretary of Labor, which effectively removed him from this casebook project. That meant recruiting two additional co-authors to finish the project. In spring 2009, Harris and Slater recruited two of the best in the business: West Virginia University Law Professor Anne Marie Lofaso and St. John's University Law Professor David Gregory.

No one could have anticipated what happened next. After the mid-term elections of 2010, attacks on the collective-bargaining rights of public-sector unions and their members by some governors and state legislatures significantly restricted such rights in a number of states. The changes in public-sector labor laws and the new debates over policy in the public sector meant significant updates and re-writing just to keep up. While this was challenging (and at times aggravating), the project is all the better for our efforts. The events in the public-sector, plus some important controversies and shifts in private-sector labor law, have challenged decades of thinking about labor law in general, in both the private and public sectors. We now have a casebook that is truly modern in its approach to labor law in the United States.

Acknowledgments

The preparation of *Modern Labor Law in the Private and Public Sectors: Cases and Materials* was supported by funds from the University of Toledo College of Law, the West Virginia University College of Law, and New York Law School. The authors wish to express their gratitude to these law schools, especially the Eugene N. Balk Professorship (Toledo) and the Hodges Foundation (West Virginia), for their generous financial support.

The authors also wish to thank the following individuals. Without their work, this book would not be possible.

Seth Harris: Thank you to my co-authors for their excellent and disproportionately sizeable contributions to this project. I owe particular thanks to Joe Slater. Joe shepherded this project brilliantly and with his characteristic wit, energy, and insight after I returned to the public sector. We began this project as partners, but life took over and so did Joe. Thank you, also, to my New York Law School research assistants on this project — Marcelo Martinez and Damien Maree — and New York Law School, its former Dean Richard Matasar, and new Dean Anthony Crowell for their generous support of my research, including this book as well as my public service. Thank you to the countless scholars, teachers, and practitioners of labor and employment law and policy, collective bargaining, organizing, dispute resolution, labor economics, and related subjects who educated me over three decades and made my contributions to this book possible. Finally, thank you to Karen, Jonathan and Daniel — sine qua non.

Joe Slater: Thanks to the teaching assistants who helped me with this project over the years, especially Kelly Walsh, Sarah Corney, and Elijah Welenc. Thanks to the Eugene N. Balk Professorship for financial resources, and to my very patient and supportive Dean, Dan Steinbock. Thanks to my co-authors who taught me so much. Thanks to the members of the ABA Section on Labor and Employment Law, Committee on State and Local Government Bargaining and Employment Law, for putting together extremely useful reports on public-sector labor law; this book features many cases I discovered in these reports that I probably wouldn't have found otherwise. Finally, profound thanks to my inimitable wife Krista Schneider and my awesome son Isaac Slater for all that they do.

Anne Lofaso: I wish to express my sincerest gratitude to my unrivaled dean and friend, WVU Law Dean Joyce E. McConnell, for her unconditional support of my intellectual endeavors; my incomparable colleague, WVU Law Professor Robert Bastress and my consummate co-author, Joe Slater, for their intellectual companionship and inspiration throughout the book drafting and publication process; Joe, Seth, and David, for having faith in my ability to close this project, especially in times when no end was in sight; my administrative assistant, Anna DeWitt, for keeping the trains running; all my former colleagues at the NLRB for their informal assistance on this project, especially Heather Beard, Dawn Goldstein, Ron Meisburg, Eric Moskowitz, Meghan Phillips, Dennis Walsh, and Peter Winkler; and to the following WVU Law research assistants for their invaluable service and dedication: Shannon Kiser (L'13), Ben Visnic (L'13), Daniel Burns (L'11), Patrick Callahan (L'14), Jenny Flanigan (L'12), Sarah Massey (L'12), Michael Moore (L'12), Travis Sayre (L'11), Michael Stark (L'12), Brandon Smith

(L'13), Chad Webb (L'11), Christopher Williamson (L'10), and Michael Cardi (Wake Forest L'13). I am especially grateful to Shannon, Ben, and Brandon for engaging in the thankless task of obtaining all the permissions in this book, and to Michael Moore for engaging in the laborious task of putting together a draft statutory supplement. Every one one of my RAs should also be thanked for laughing at my bad jokes, just to keep my spirits high. Finally, I wish to acknowledge the sacrifices that my husband Jim and daughter Giorgi suffered for the past several years. Recalling the countless times my ~~five~~, ~~six~~, ~~seven~~, eight-year-old child called me on the phone asking me when I was coming home brings pangs to my heart. This book, the fruit of those labors that often kept me from them, represents a vision of a better world — one that I hope to leave for Giorgi and all her of past, present, and future friends, including her future friend Isaac Slater.

David Gregory: I thank my superb St. John's Law student research assistants: Raymond Franklin (Class of 2010); Leslie Hyatt, Reshma Shaw, and Michael Ward (Class of 2011); Jack Newhouse (Class of 2012); Michael Harary and Ian Hayes (Class of 2013). Special thanks to primus inter pares Andrew Midgen (Class of 2013) for his extraordinary, exceptional work.

Seth D. Harris
Professor of Law and
Director Labor and Employment Law Programs
New York Law School

Joseph E. Slater
Eugene N. Balk Professor of Law and Values
University of Toledo College of Law
Toledo, OH

Anne Marie Lofaso
Professor of Law and
Associate Dean for Faculty Research & Development
West Virginia University College of Law
Morgantown, WV

David Gregory
The Dorothy Day Professor of Law and
Executive Director of the
Center for Labor and Employment Law
St. John's University School of Law
Queens, New York

October 11, 2012

INTRODUCTION

The practice of labor law has changed considerably in recent years. First, a significant portion of it is now in the public sector. While union density rates in the private sector have dropped to around seven percent, union rates in the public sector have climbed to nearly 40 percent. Thus, beginning in 2009, over half of all union members in the U.S. have been public employees. Public-sector labor laws are typically modeled in part on the main private-sector labor statute, the National Labor Relations Act (NLRA), but with some significant differences. For example, most public employees cannot legally strike; many are significantly limited in the subjects over which they can bargain; and a significant number have no legal right to bargain collectively at all. Beyond differences in legal rules, the policy debates and political context of public-sector labor law and labor relations are often different from those in the private sector. For example, the first half of 2011 witnessed a wave of state laws restricting the rights of public employees and their unions in ways still unimaginable in the private sector.

Second, unions in the private sector are increasingly abandoning traditional NLRA practices and procedures and adopting new strategies that do not depend on traditional labor law mechanisms. Whether this is because, as union advocates claim, evolving labor law doctrines and the National Labor Relations Board (NLRB) have become too biased against labor to offer unions a fair opportunity, or due simply to frustration with declining density numbers, private-sector unions and worker advocacy organizations are increasingly looking to alternate strategies and even alternate forms of organization, from card-check and neutrality agreements in lieu of NLRB elections, to Workers' Centers in lieu of traditional union representation.

This book incorporates both these modern trends, so that students entering the practice of labor law — on the side of unions, employers, or government agencies — will understand what they are likely to encounter. One of the authors of this book started a labor law job fresh out of law school and, having taken a traditional labor law class, expected to encounter at least mostly the issues his class covered: contract negotiations that could lead to strikes or lockouts, secondary boycotts, and perhaps even some of the more colorfully named NLRA doctrines, such as *Boys Market* injunctions and hot cargo clauses. Instead, he worked on cases involving a union of school employees in Virginia, a state in which public-sector unions can neither strike nor bargain collectively. In that same era, the "Justice for Janitors" campaign of the Service Employees International Union (SEIU), which explicitly made a practice of avoiding NLRB proceedings, was achieving high-profile successes around the country. Students today should be prepared to deal with these sorts of situations and developments, which have been a significant part of the practice for decades.

Other factors have shifted the turf in labor relations. In the past decade, some important unions experimented by splitting from the AFL-CIO, an umbrella organization that has, since the 1950s, included nearly all the significant unions in the U.S., to form the Change-to-Win coalition. While a number of those unions have returned to the AFL-CIO, the nature of union leadership is evolving and debates over the best uses of union resources continue. The NLRB under the George W. Bush administration issued a series of decisions interpreting the NLRA in new ways, in a number of cases overturning

decades of precedent and giving a more restrictive reading to worker and union rights. The NLRB under the Obama Administration has reversed some of those cases and issued new rules broadening the scope of worker and union rights.

Unions tried and (as of this writing) seem to have failed in amending the NLRA through the Employee Free Choice Act (EFCA), which would have required employers to recognize unions if the union demonstrated majority support in a bargaining unit by having employees in that unit sign cards (as opposed to current law, in which the employer is allowed, but not required, to recognize unions based on cards). Notably here, while mandatory card-check recognition would have been a new rule in the private sector, it is already the rule in a number of public-sector jurisdictions. EFCA would also have created stiffer penalties for employer violations of labor law during union organizing campaigns, and it would have required "interest arbitration" to settle impasses over negotiations on first contracts. Again, while interest arbitration would have been new to the private sector, it has long been used in public-sector bargaining impasse procedures.

While the NLRA seems almost immune to formal amendment, in the public sector, labor statutes are amended with some regularity. The attacks on public-sector collective bargaining rights in 2011 and 2012 (summarized near the end of Chapter 1) were the most radical in decades, but since the 1960s, political battles have lead to public employees winning and losing important legal rights in many different jurisdictions. For example, in the early part of the 20th century, two states withdrew bargaining rights for employees of state government, and the Bush administration attempted to greatly limit the bargaining rights of federal employees in, most prominently, the Department of Homeland Security and the Department of Defense.

Amidst the swirl of legal and political battles, students of labor law must always be mindful of the tremendous importance of the working relationship to the parties involved. For employees, jobs provide not only income necessary to live, but also, at least often, a sense of identity and pride. Unions, at their best, provide not only increased bargaining power for individual employees *vis-a-vis* their employers, but also a measure of democratic control over, or at least input into, the workplace. For employers, labor is not only a cost of production but also, at least often, the backbone of the enterprise. Unlike all other factors of production, labor power is produced by human beings who have legal and human rights. Still, employers often feel that decisions regarding the enterprise should be made by the owners and managers, not the workers. Both sides appeal to visions of liberty and freedom that resonate in the American tradition. Labor relies on the freedom to associate and act collectively to gain a democratic voice in workplace decisions that affect the lives of employees. Employers appeal to the freedom to own and control their private property and to run their businesses as they please. How the law mediates these competing ideas is fraught with moral, philosophical, political, and economic concerns.

In the public sector, there is an added concern about the role of private bodies, such as unions, influencing democratically-accountable public institutions. This relates to the broader question of whether public-sector unions should have at least mostly the same types of rights as private-sector unions. One could argue that workplace issues that unions address — wages, hours, and working conditions — are basically the same for, say, a janitor in a public school and a janitor in a private school, and thus that the labor

law rules governing both should be fairly similar. That is the approach of most western democracies. In the U.S., however, public-sector labor laws developed much later and on a much different track than private-sector labor law. Modern concerns about public-sector laws center on the question of whether collective bargaining interferes too much with public budgets and the decisions of elected officials. For example, even if collective bargaining is allowed, should public-sector laws exclude certain subjects from bargaining — subjects that private-sector workers are allowed to negotiate — because in government employment, such subjects rightly should be in the sole discretion of elected officials? Should all types of public workers be allowed to bargain, or just some types? Should strikes in the public sector be banned — and if so, for all government employees or just some? If we ban strikes but allow collective bargaining — as a plurality of states now do — how should bargaining impasses be resolved?

Because public-sector labor laws developed after private-sector law, much of the debate in designing public-sector rules has centered on whether and how private-sector rules should be imported: when to essentially copy them in state public-sector statutes, and when they should be modified or avoided entirely because of concerns specific to the public sector. Students are encouraged to track these debates and develop their own opinions. Moreover, though, the relative success of unions in the public sector in the past several decades as compared to private-sector unions raises the question of whether certain aspects of public sector labor law might profitably be adopted in the private sector. While states are largely preempted from innovating in private-sector labor law, it is fair to ask what decision-makers at the Board, in the federal courts, and the federal legislature can learn from experiences in the public sector.

Acknowledging that public-sector labor law is now a significant part of labor law also challenges some conventional wisdom about unions in the U.S. The "rise and fall" periodization of the history of American labor that focuses essentially exclusively on the private sector changes considerably if we include what is now many decades of experience in the public sector. The story that American workers are too "individualistic" or otherwise culturally disinclined to join unions becomes problematic if we count those who, for example, clean public schools or otherwise labor on behalf of a government entity as authentic "workers." On the other hand, should declining union rates in the private sector be blamed primarily on an unfavorable legal climate (as some critics claim), given that public sector unions have achieved impressive successes under labor laws which generally give unions similar but fewer rights than the rights the NLRA grants in the private sector?

This book is structured around the life cycles of the organizing and collective bargaining processes. The first phase consists of workers' organizing efforts or protests and (typically, albeit not always) employers' efforts to persuade workers not to organize or their responses to protests. Workers may choose to organize themselves into a traditional union or some other type of organization, or simply to protest perceived injustices without creating an organization. Protests and union organizing in the private sector are protected by the NLRA. In the public sector, most states have labor laws that protect these activities, and the Constitution also protects the right to organize.

Workers who decide to organize a union move to a second phase. They either pursue a union representation election administered by the appropriate labor relations agency or choose some alternative means of acquiring union representation, such as a voluntary

recognition agreement with an employer. If the workers succeed in organizing a union, the union and the employer enter a third phase. In the private sector, unions use collective bargaining and both sides deploy economic weapons to influence bargaining outcomes. In the public sector, a majority of jurisdictions allow union collective bargaining, but most limit the subjects of bargaining more strictly than does the NLRA, and most prohibit economic weapons such as strikes and lockouts. Instead, public-sector laws often provide for some combination of mediation, fact-finding, and arbitration to resolve bargaining impasses, and unions and employers use political tactics to influence outcomes. When bargaining produces a collective bargaining agreement, then the fourth phase is reached: the parties administer their agreement and use dispute resolution mechanisms as part of that administration process.

The first part of this casebook provides a history of labor relations in the United States, and the coverage of labor statutes in the private and public sectors. It then moves to organizing and collective worker protests, with one chapter mostly dedicated to modern alternatives to traditional union organizing, and other chapters explaining the traditional labor law protections for worker protests. This part also explores why and how the law of public-sector labor relations developed so much later and, in many ways, so differently, than private-sector law. The bulk of the rest of the book studies the life cycle of unions: collective bargaining; strikes, economic weapons, and impasse resolution in the public sector; contract administration; and secondary activity and related actions. It concludes with three chapters that examine the rights of individual workers within their unions, bargaining relationships in transition (successorship), and preemption.

Two themes are repeated throughout the casebook. The first theme is how policymakers wrestle with the appropriateness of applying private-sector doctrine to government employees and their unions. In some areas of labor law, the rules in both sectors are quite similar because policymakers did not believe the public sector context required a different approach. In other areas, the rules are quite different because policymakers felt that private-sector rules were not appropriate for the public sector. This theme arises in legislative decisions over rights explicitly granted or denied in statutes (*e.g.*, whether a public-sector law should cover certain types of public employees at all, and whether certain public employees should have the right to strike). It also arises when agencies and courts try to decide which of the myriad rules devised by the NLRB and courts in the private sector should be used in the public sector. Even if broad statutory language in a public-sector labor law is the same as the language in the NLRA, do different policy concerns dictate that courts should adopt different rules, at least sometimes, in the public sector? Should the default assumption be that if the statutory language is the same, all the rules flowing from that language should be the same, because that is more efficient or because the public sector should benefit from the much longer and wider experience in the private sector? If so, what if the law in the private sector changes (as it inevitably does) because a new political alignment on the NLRB interprets the NLRA in a new and different way? Should public sector rules — based on interpreting the same statutory language in a state public sector statute — change along with it automatically? Or might the discontents of private-sector labor law give those making policy for the public sector reason to reconsider private-sector rules? This could permit more experimentation and allow states to act even more as "laboratories of democracy" in this area.

The second theme is that, while the law of private-sector labor relations has stagnated,

workers and their organizations, including unions, have responded by finding new ways to organize, both inside and outside traditional forms. Thus, while a comprehensive understanding of modern American labor law requires studying the governing statutes and the doctrines that have emerged from them, it also requires considering how actors in the field have worked around existing doctrine to create new systems, new structures, and new legal issues. Students will be challenged to predict the outcomes of these new strategies — including, but not limited to, analyzing the legal issues they raise.

Each of the book's chapters addresses particular issues that arise in that phase of the relationship between organizing or organized workers and their employers. Each chapter begins with cases and materials relating to private-sector workers and also includes materials relating to the same issue in the context of public-sector employment. In some instances, the public-sector materials are in substantial additional sections, in some cases in quite short additional sections, and in a few sections, the public sector materials are interwoven with the private-sector materials. Notes follow most of the cases, and problems are often provided as well. Key cases that are discussed at length but do not appear as excerpts appear in bold [e.g., ***NLRB v. Hearst Publications***, 322 U.S. 111 (1944)]. Throughout, the goal is to provide students with the knowledge and background that will prepare them for the labor law and labor relations of the 21st century.

TABLE OF CONTENTS