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Resolving Labor and Employment Disputes

A Practical Guide

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Conference on Labor

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Center for Labor and Employment Law at New York University School of Law

The Center for Labor and Employment Law is a program established at New York University School of Law. Professor Samuel Estreicher, Dwight D. Opperman Professor of Law at New York University and an internationally recognized expert on labor and employment law, serves as the Center's director. The objectives of the Center are (a) to promote workplace efficiency and productivity, while at the same time recognizing the need for justice and safety in the workplace and respecting the dignity of work and employees; (b) to promote independent, nonpartisan research that would improve understanding of employment issues generally, with particular emphasis on the connections between human resources decisions and organizational performance; (c) to sponsor a graduate program for the next generation of law teachers and leading practitioners in the fields; and (d) to provide a forum for bringing together leaders from unions, employees, and companies, as well as representatives of plaintiff and defense perspectives, for informal discussion exploring new frameworks for labor—management relations, workplace justice, fair and efficient resolution of employment disputes, and representation in the workplace.

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Editor's Preface

As the papers gathered in this volume were being prepared and presented, the National Labor Relations Board was celebrating a notable milestone. As the Board explained on its website,

The National Labor Relations Board is proud of its 75-year history of enforcing the National Labor Relations Act, the primary law governing relations between employers and employees in the private sector. On July 5, 1935, President Franklin Roosevelt signed the Act into law, stating that the law sought to achieve “common justice and economic advance.” Starting in the Great Depression and continuing through World War II and the economic growth and challenges that followed, the NLRB has worked to guarantee the rights of employees to bargain collectively, if they choose to do so.¹

Echoing FDR and the Board, President Barack Obama issued an open letter to “all those celebrating the 75th anniversary of the National Labor Relations Act”:

Throughout our Nation's history, we have relied on the firm resolve and commitment of working Americans. They are the backbone of our communities, and they power the engine of our economy.

In 1935, President Franklin D. Roosevelt recognized the right of workers to organize by signing landmark legislation which represented “an act of both common justice and economic advance.” The passage of the NLRA helped create a new legal framework for relations between workers and employers and lay the foundation for a strong and equitable American.

Although our Nation has changed and economic challenges have taken on new forms, the underlying principles of the NLRA remain as vital today as they were 75 years ago. On this occasion, we are reminded of the foresight of earlier generations, and we rededicate ourselves to fostering a sustainable working environment for all Americans.²

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1. National Labor Relations Board, 75 Years, 1935-2010, <http://www.nlrb.gov/75th/index.html>.
 2. Letter from Barack Obama, Nov. 5, 2009, at National Labor Relations Board, 75 Years, 1935-2010, <http://www.nlrb.gov/75th/presidentsmessage.html>.

In other words, the core mission of the Board and the core function of the body of law it administers have stayed pretty much the same from the agency's birth down to the present day. But as the Board and the President remind us, there is what might be called the counter-proverb of American labor law: The more things stay the same, the more they change.

This volume is a collection of vivid illustrations of both the constancy and the constancy of change in American labor law, beginning with the keynote address delivered by William B. Liebman ("Challenges on the 75th Anniversary of the National Labor Relations Act"), who chaired the Board from 2009 to 2011, and the comments of M. Patricia Smith ("Insight from the New Sheriff's Top Lawyer: Perspective from the Solicitor's Office"), who has served as Solicitor of Labor in the U.S. Department of Labor since 2010.

Consider, for example, the matter of § 10(j) injunctions, which have been available under the National Labor Relations Act since the statute's enactment in 1935. Section 10(j) has always been an important weapon against unfair labor practices. But its role has evolved over time in response both to ever-changing conditions in labor-management relations in particular and the economy in general, and to changes in enforcement strategies and practices of the Board and the General Counsel. The current place and prospects of § 10(j) are elaborated here in papers by Lafe Solomon ("NLRB General Counsel Initiative on § 10(j) Relief"), Louis P. DiLorenzo ("The Management Perspective: A Management Practitioner's Observations Concerning the Latest General Counsel's Initiatives Regarding the Use of 10(j) Injunctions during Organizing Campaigns"), and Ronald Meisburg ("Office of the NLRB General Counsel: A Retrospective, 2006-2010").

Consider also the roles of other agencies created long after the birth of the Board itself—agencies such as the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs. Both have been key institutions in labor relations since their creation in (respectively) 1965 (pursuant to Title VII of the Civil Rights Act of 1964) and 1978 (pursuant to Executive Order 12086). And they have, like the Board, adhered to core statutory missions (in their cases, antidiscrimination), while at the same time changing to meet changing times and priorities. The papers presented by Gary Siniscalco & Jill Rosenberg ("Getting Ready for Increased Systemic EEO Enforcement"), Katharine Parker ("Best Practices for Federal Contractors") focus on key contemporary developments in those institutions.

And consider the connections between labor-relations law and laws that are not, on their faces, labor laws. In recent years, intellectual property has been an especially important area. Its status seems like to persist, and perhaps grow even greater, in the field of employment relations in years to come, as papers by Michael Delikat & James McQuade ("Enforcing Restrictive Covenants and Protection of Trade Secrets: An Overview of Applicable Legal Principles") and Laurie Berke-Weiss ("Trade Secrets and the Computer Fraud and Abuse Act") suggest.

Then there is the essential matter of dispute resolution—by arbitration, litigation, mediation, and the many hybrids and varieties the continue to crop up—that remains a central feature of a world in which relations between labor and management do not always run smoothly. Marshall Babson & Brian Murphy ("Class Action Arbitration

Waivers and § 7 Rights”) and Zachary D. Fasman (“New Developments in Employment Class Actions”) deal with two currently prominent and deeply intertwined forms: arbitration and class action. And for practitioners, these matters inevitably lead to consideration of the continuing ramification of professional responsibilities in all such contexts, a subject reviewed here by Dennis P. Duffy (“Selected Ethics and Professionalism Issues for Labor and Employment Lawyers”).

Finally, labor relations remains an important and vibrant field of useful scholarly study, as the papers by David Weil (“Fissured Employment”) and Matthew T. Bodie (“Mandatory Disclosure in the Market for Union Representation”) demonstrate.

In addition, it should be noted that all of the good work highlighted above also serves as evidence of the continuing vitality and value of the work of NYU’s Center for Labor and Employment Law. We who labor in the fields of labor and employment law should be grateful to Sam Estreicher and his colleagues for the important contributions the NYU Center makes to the field. The Annual Conference, in particular, is a service NYU has been providing for almost as long as the National Labor Relations Board has been around (and it has done so via the Center since it was founded under Sam Estreicher’s leadership in 1996). This was, after all, their 63rd annual conference.

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