

# A PRIMER ON AMERICAN LABOR LAW

**Fifth Edition**

**William B. Gould IV**



CAMBRIDGE

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Stanford Law School



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## A PRIMER ON AMERICAN LABOR LAW, FIFTH EDITION

*A Primer on American Labor Law* is an accessible guide written for nonspecialists as well as labor lawyers – labor and management representatives, students, and general-practice lawyers, as well as trade unionists, government officials, and academics from other countries. It covers such topics as the National Labor Relations Act, unfair labor practices, the collective bargaining relationship, dispute resolution, the public sector, and public-interest labor law.

This updated fifth edition contains extensive new materials covering developments that include the repeal of or changes in public-employee labor law and the development of case law relating to wrongful dismissals and pension reform in the public sector; bankruptcy in both the private and public sectors; Americans with Disabilities Act litigation and 2008 amendments of that statute; new cases on all subjects, but particularly during the Bush and Obama administrations, National Labor Relations Board decisions and sexual harassment, sexual orientation, and retaliation cases; and the globalization of labor disputes in labor-management relations in the United States, with particular reference to professional sports disputes and the extraterritoriality of American labor law generally.

William B. Gould IV is Charles A. Beardsley Professor of Law, Emeritus, at Stanford Law School. A prolific scholar of labor and discrimination law, Gould has been an influential voice in worker-management relations for more than forty years and served as Chairman of the National Labor Relations Board (NLRB, 1994–98). Professor Gould has been a member of the National Academy of Arbitrators since 1970. As NLRB Chairman, he played a critical role in bringing the 1994–95 baseball strike to its conclusion and has arbitrated and mediated more than two hundred labor disputes, including the 1992 and 1993 salary disputes between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee. He served as Independent Monitor for FirstGroup America, addressing freedom-of-association complaints (2008–10). Gould also served as Special Advisor to the U.S. Department of Housing and Urban Development on project labor agreements (2011–12). A critically acclaimed author of ten books and more than sixty law review articles, Professor Gould is the recipient of five honorary doctorates for his significant contributions to the fields of labor law and labor relations.

*For Edward, who always wanted me to write a book that would reach  
a large and diverse audience*

## Preface to the Fifth Edition

The pace of developments in the decade since the fourth edition was published in 2004 has been brisk. Perhaps in part because of the continued decline of the organized sector of the economy – organized labor shrank to 11 percent in 2012, constituting slightly less than 7 percent of the private sector – the focus on labor-law reform, which had been debated in the 1970s and 1990s, emerged anew between 2007 and 2009. This took the form of the Employee Free Choice Act, which President Barack Obama supported in the 2008 presidential campaign and again subsequent to his inauguration in 2009 – and it was unsuccessful primarily for the same reason that labor-law reform did not see the light of day in 1978, that is, the filibuster in the United States Senate, which requires a supermajority of sixty votes to obtain consideration on the merits. Disillusionment with the appointments of President George W. Bush accelerated demand for labor-law reform, producing a veritable boycott of the National Labor Relations Board akin to what had transpired in the presidency of Ronald Reagan in the 1980s, as well as greater reliance upon voluntary “card check” agreements between labor and management, which thus far appear to be atypical. The so-called September Massacre of 2007 of labor rights by the Bush Board was part of this piece. The failure of President Bush and the Democratic Senate to agree on new appointees between 2007 and 2009 led to what the Supreme

Court characterized as the lack of a statutory quorum, invalidating all of its decisions from 2007 through 2009.<sup>1</sup>

Meanwhile, the Obama Board ran into heavy weather with the Republicans in Congress who attacked NLRB rulemaking, some Board decisions, as well as the General Counsel's issuance of a complaint against Boeing<sup>2</sup> – and, in the process, the inability of the White House to obtain a consensus with the Republican Congress in 2011 produced a round of recess appointments early in 2012.<sup>3</sup> In January 2013, a panel of the Court of Appeals for the District of Columbia held unanimously that President Obama's 2012 recess appointments were unconstitutional under the Recess Clause of the U.S. Constitution, which threatened to put the Board out of business, as it had been earlier between 2007 and 2009.<sup>4</sup>

A similar posture was adopted by Republican state governments that enacted unconstitutional legislation purporting to regulate the basis upon which private-sector unions could be recognized. Paradoxically, given domestic legislative antipathy toward organized labor, increased globalization produced arrangements such as that promoted by the British multinational FirstGroup, which established a process, rooted in part in international labor law, for the purpose of resolving so-called

<sup>1</sup> *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010).

<sup>2</sup> James Rosen, "Fight over Boeing's S.C. Factory Erupts onto National Stage," *Fresno Bee*, September 12, 2011; Kevin Bogardus, "Senator Threatened Board Before Boeing Complaint," *The Hill*, November 9, 2011. Indeed Governor Mitt Romney attacked the Board's Boeing complaint as well. Jon Greenberg, "Mitt Romney Attacks Barack Obama over Boeing Plant Question," *PolitiFact.com* (October 14, 2011), [www.politifact.com/truth-o-meter/statements/2011/oct/14/mitt-romney/mitt-romney-attack-barackobama-over-boeing-plant](http://www.politifact.com/truth-o-meter/statements/2011/oct/14/mitt-romney/mitt-romney-attack-barackobama-over-boeing-plant).

<sup>3</sup> William B. Gould IV, "Crippling the Right to Organize," *New York Times*, December 17, 2011, at A25.

<sup>4</sup> *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013). See also Charlie Savage and Steven Greenhouse, "Court Rejects Obama Move to Fill Posts," *New York Times*, January 25, 2013; Editorial, "A Court Upholds Republican Chicanery," *New York Times*, January 25, 2013. Contra *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc). A more detailed discussion of the decision's impact upon the Board as well as labor and management is contained in Melanie Trotter and Kris Maher, "Companies Challenge Labor Rulings," *Wall Street Journal*, March 9, 2013, at 1.

freedom-of-association complaints.<sup>5</sup> Litigation under the 1789 Alien Tort Claims Act utilizing international labor law for the purpose of adjudicating extraterritorial labor disputes was another significant development.<sup>6</sup> Simultaneously, labor law constitutional protection for the right to organize and engage in collective bargaining in Canada and Europe received more attention in the United States.

Meanwhile, in the wake of the 2010 elections, which saw considerable gains for the Republican Party, Indiana became a new right-to-work state in which union security agreements compelling membership as a condition of employment were prohibited in the private sector in that state. And attention was also turned toward the public-employee unions, particularly in Wisconsin, where public-employee collective bargaining legislation, the first of its kind at a state level in the United States, was repealed in 2011, triggering a recall election, which itself failed in 2012. A different result was obtained in Ohio, where a more moderate repeal was repudiated at the polls in a rebuke to Ohio Governor John Kasich. Legislation or ballot initiatives prohibiting the checkoff of union dues for public-sector labor were enacted in a number of states. The most remarkable legislative shift of all was the enactment of right-to-work legislation in Michigan, long considered a bastion of organized labor, particularly given the presence of the United Auto Workers.<sup>7</sup> All of this recalled the dramatic confrontation between the Republican Party and organized labor that had taken place on the right-to-work issue in the late 1950s in a number of industrialized states such as California.<sup>8</sup>

As immigration became politically contentious and irreconcilable at the national level, state legislatures jumped into the fray,

<sup>5</sup> William B. Gould IV, "Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: The FirstGroup Experience," 66 *Dispute Resol. J.* 46 (2011).

<sup>6</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). This process may be imperiled in 2013 by the Court's grant of certiorari in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

<sup>7</sup> Monica Davey, "Limits on Unions Pass in Michigan, Once a Mainstay," *New York Times*, December 11, 2012.

<sup>8</sup> A. H. Raskin, "5 of 6 States Beat 'Work' Proposals," *New York Times*, November 6, 1958, at 19.

enacting legislation designed to prohibit or exclude undocumented workers. Aspects of this were declared to be unconstitutional by the Supreme Court in 2012.<sup>9</sup> Prior to the Great Recession of 2007–2008 undocumented workers were employed in relatively well-paying jobs in construction as well as unskilled and menial work that citizens and local residents had scorned. Numerous controversies arose over the application of a 2002 Supreme Court ruling involving labor-law protection (or lack thereof) for undocumented employees and other statutes.

Penultimately, the law of both arbitration and antidiscrimination began to change as well. In the former arena, the Supreme Court, reviving and utilizing the Federal Arbitration Act of 1925, promoted labor, individual employment, and commercial arbitration, initially relying upon the idea that arbitral expertise in public law allowed private procedures to replicate public-law protection. But in 2011 the Court, in the same breath, in *AT&T v. Concepcion*<sup>10</sup> reversed course and expressed its hostility to class action arbitrations, emphasizing the nonlegal and informal characteristics of arbitration. In the discrimination arena, in 2008 Congress plugged some of the loopholes created by Supreme Court decisions under the Americans with Disabilities Act identified in the fourth edition. Litigation involving age discrimination, pregnancy discrimination, sexual harassment, as well as same-sex harassment and in some circumstances sexual orientation itself brought more attention. President Obama in 2011 eliminated “Don’t Ask, Don’t Tell” in the armed forces and subsequently expressed his support for same-sex marriages.

Finally, in the area of professional sports, where collective bargaining has been well accepted, both football and basketball players had to retreat in the wake of owner-instituted lockouts against them. Hockey, in which a lockout produced the cancelation of an entire season in 2004–2005, witnessed another use of this tactic in 2012–2013, resulting in a shortened season, just as basketball had experienced on two occasions.

<sup>9</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012).

<sup>10</sup> 131 S. Ct. 1740 (2011).

But in the same year as the recent hockey dispute, the National Football League overreached considerably in locking out referees, whose replacements were deemed incompetent by the public.<sup>11</sup> The erstwhile bad boys of baseball, involved in a thirty years' war of strikes and lockouts since the early 1970s through NLRB intervention in 1995, continued to enjoy a peaceable relationship, as in 2002 and 2006, carried forward in a collective bargaining agreement in 2011 that was characterized as a model, given the considerable benefits for both sides.<sup>12</sup>

The past decade thus contains a variety of new and important developments. They are described and discussed in this fifth edition, which appears thirty-one years after the first edition's publication.

In completing this fifth edition I relied heavily upon the Stanford Law Library led by Paul Lomio and, particularly, the ever resourceful and effervescent Erika Wayne – the nerve center of the law school and its library. The Law Library team, including others who work with Ms. Wayne, like George Wilson, Rachael Samberg, Sergio Stone, Alba Holgado, and Richard Porter, are the very best in the United States and, most probably, the world. It understates the matter to say that they are extremely invaluable.

I am also indebted to a number of very bright people who have helped me with this fifth edition, in particular Mike Scanlon (Stanford Law School, 2010); Christopher Hu (Stanford Law School, 2013); Alison Jones (Stanford Law School, 2013); Anna Yi (University of California, Davis, School of Law, 2014); Eric Weitz (Stanford Law School, 2014); as well as Suzanne Keirstad of Stanford Law School, who did some of the typing. Mr. Scanlon, as well as my research assistants of a decade ago, Paul Edenfield, Henry Dinsdale, and Melanie Vipond – now distinguished labor lawyers all, in Honolulu; Washington, D.C.; Toronto; and Vancouver,

<sup>11</sup> Judy Battista, "The Cost of the NFL's Will to Win," *New York Times*, September 24, 2012, at D2.

<sup>12</sup> William B. Gould IV, "Baseball: A Poster Child of Labor Peace," *Chicago Tribune* (December 2, 2011), [articles.chicagotribune.com/2011-12-02/site/ct-perspec-1202-baseball-20111202\\_1\\_world-baseball-classic-poster-child-competitive-balance](http://articles.chicagotribune.com/2011-12-02/site/ct-perspec-1202-baseball-20111202_1_world-baseball-classic-poster-child-competitive-balance).

respectively – jumped back into the fray and helped me on particular sections of this new edition. I am grateful to all of the above-mentioned extremely talented people.

Finally, I should note that since the fourth edition appeared, I have acted as an Expert Witness for the Province of British Columbia; Santa Clara County, California; and the National Hockey League in both Vancouver, British Columbia, and Montreal, Quebec, in the two most recent lockouts; as an Independent Monitor for FirstGroup America; as Consultant to the Department of Housing and Urban Development; and as an Independent Investigator for the Writers Guild of America West. This work has given me insights and points of view with regard to some of the issues involved in these assignments.

## Preface to the Fourth Edition

The period of time between the third and fourth editions constitutes the longest period between any of the editions of this book published thus far. Much of the discussion of the National Labor Relations Act relates to decisions and policy changes instituted by the National Labor Relations Board when I was its Chairman, appointed by President William Jefferson Clinton on June 28, 1993, and confirmed by the Senate on March 2, 1994. As noted in this fourth edition, perhaps the most important development during my tenure was a sharp and unprecedented upsurge in cases brought under the Board's injunctive authority set forth in Section 10(j). The focus on the NLRA in this edition is also upon a number of important policy decisions issued during my tenure as well as those submitted to the Board while I was Chairman, but decided only subsequent to my departure. Similarly, there is discussion of Supreme Court decisions involving the National Labor Relations Act both prior and subsequent to my tenure. I have chronicled the events preceding my appointment, between appointment and confirmation, and during my four and a half years as Chairman in *Labored Relations: Law, Politics, and the NLRB – A Memoir*. Insofar as relevant to the work of the National Labor Relations Act, this fourth edition attempts to chronicle only the decisions and policy changes without reference to much of the political drama surrounding them. For the latter, the reader can consult *Labored Relations*.

For the same basic reasons alluded to in earlier editions, union representation during these past eleven years has continued to decline to 13.5 percent, 9 percent in the private sector and 37.4 percent in the public sector. As was the case in previous editions, courts of general jurisdiction at the state level have continued to establish job security rights as an exception to the principle that the contract of employment is terminable at will. In the 1990s and at the turn of the century, however, the courts have begun to address employer-devised arbitration procedures designed to substitute that forum for individual claims involving unfair dismissals for courts and jury trials. This constitutes one of the new frontiers of not only judicial decision making but also the policy debate in the political arena.

As anticipated in the third edition, the Americans with Disabilities Act of 1990 became an important area of litigation. But in virtually all cases, the United States Supreme Court rejected the positions of plaintiffs. In addition to cases involving sexual orientation, some of them arising out of President Clinton's 1993 "Don't Ask, Don't Tell" policy applicable to the military, the number of sexual harassment cases increased enormously, most of them involving alleged harassment of women by men. Much new law was made as a result of the Civil Rights Act of 1991 at both the Supreme Court and Circuit Court of Appeals levels. This was attributable to the 1991 amendments' provision for compensatory and punitive damages triggered by the 1991 Anita Hill hearing relating to Justice Clarence Thomas. Some of the cases involved alleged same-sex harassment. And the Supreme Court's 2003 holding that private homosexual conduct between consenting adults is protected by the Constitution<sup>1</sup> will fuel the campaign to make antidiscrimination laws fully applicable to gay and lesbian people.

Labor conflicts in the professional sports arena continue to be an important part of labor-management controversy. A new comprehensive collective bargaining agreement was negotiated in football and baseball

<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

(though baseball did endure a substantial strike, unprecedented in length, during 1994–1995). The basketball owners successfully instituted a lock-out in 1998–1999, the result of which ushered in new salary cap restraints as part of the agreement in that sport. Collective bargaining agreements were negotiated in women’s professional basketball.

The Curt Flood Act of 1998 made the same antitrust standards previously applicable to other sports’ labor–management relations apply to the realm of labor activities in baseball, but a 1996 Supreme Court decision narrowed the scope of antitrust law and pronounced the preeminence of labor law in all sports.<sup>2</sup> However, in 2002, the Major League Baseball Players Association and Major League Baseball were able to resolve their differences by negotiation unlike the case in 1994–1995 when the sport was decimated by a substantial strike.

An important new frontier has emerged as the result of globalization and increased focus on human rights and international labor standards.<sup>3</sup> This is the extraterritorial application of American statutes to the conduct of corporations doing business abroad.<sup>4</sup> Unions, corporations, and nongovernmental organizations are the major participants in this debate which is on the streets (1999 in Seattle is the most prominent illustration), as well as in the courts.

Finally, in 2002, California became a pioneer by enacting the first paid-leave statute in the country, following up on President Clinton’s establishment of unpaid leave a decade ago through the Family and Medical Leave Act of 1993. Shortly thereafter, former governor of California Gray Davis signed into law new legislation providing for mediation and arbitration for farm workers – they continued to be excluded

<sup>2</sup> *Brown v. Professional Football*, 518 U.S. 231 (1996). Cf. William B. Gould IV, “Baseball and Globalization: The Game Played and Heard and Watched ’Round the World (with Apologies to Soccer and Bobby Thomson),” 8 *Ind. J. Global Legal Stud.* 85 (2000).

<sup>3</sup> Robert J. Flanagan and William B. Gould IV, eds., *International Labor Standards: Globalization, Trade, and Public Policy* (Stanford University Press, 2003).

<sup>4</sup> *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002), vacated by and rehearing en banc granted by 403 F.3d 708 (9th Cir. 2005).

from the National Labor Relations Act – when employees were unable to negotiate a collective bargaining agreement.

In this fourth edition, I am indebted to Stanford Law School students Paul Berks '00, Paul Edenfield '02, Michael Meuti '03, William Adams '04, and Glenn Truitt '05; Carrie Williamson of Boalt Hall School of Law '03; and Timothy Snider of Willamette University College of Law '03 for providing research assistance. Mr. Adams played a particularly important and outstanding role in the latter stages of work on this new edition. I am also grateful to Sarah Preston of the London School of Economics for both outstanding research and the typing of this manuscript, and to Kim Dempsey for typing assistance. Similarly, I am appreciative of the typing done by Mary Ann Rundell at the final stages of this fourth edition.

## Preface to the Third Edition

There have been numerous developments since the second edition of this book appeared seven years ago. Inevitably there is a seemingly endless train of litigation before the National Labor Relations Board. The Board now appears to be less ideological and more balanced than at the time of the second edition and thus its decisions and conduct as of the end of 1992 are less controversial than was the case throughout most of the 1980s. Though some of the decisions are significant and thus worthy of attention in this third edition, the shrinking percentage of employees represented by unions in the United States – it is now approximately 15 percent of the work force – has reduced the Board's impact and influence and that of the American labor arbitration system as well.

Deregulation in transportation has produced nonunion competition for the organized sector, and that in turn appears to be primarily responsible for more litigation in the organized sector of those industries. One of the consequences of deregulation is thus the emergence of new precedent under the Railway Labor Act, which covers both railroads and airlines.

Nature abhors a vacuum and individual rights – both of the statutory and common law varieties – have continued to expand for unorganized employees who constitute the vast majority of the work force in the United States. Wrongful-discharge litigation is even more important in this arena than it was at the time of the second edition. Although there have been important state supreme court decisions in jurisdictions

like California and Michigan, which have limited employee rights and remedies, a new line of authority – again, emphasizing the relationship between the unorganized and organized sectors – has sanctioned the filing of wrongful-discharge actions under certain circumstances by employees who are represented by unions and covered by collective bargaining agreements containing clauses that provide for the invocation of arbitration procedures. The complete impact of these decisions has yet to be felt.

Moreover, intertwined with many of the wrongful-discharge common law actions are drug and alcohol testing issues involving dismissals or sometimes simply the institution of new policies that might lead to dismissals. (Unions have been active in protecting such individual rights under both the National Labor Relations Act and the Railway Labor Act as well as in arbitration.) Although Montana has enacted a wrongful-discharge statute discussed in this new edition, no state thus far has fashioned a comprehensive statute in this arena notwithstanding proposals by a California state bar committee in 1984 (the author was cochairman of this committee) as well as more recent ones of a similar nature emanating from the Uniform Law Commissioners. But Congress and the state legislatures have enacted a series of statutes affecting employment relationships – two of the more prominent being the Workers' Adjustment and Retraining Notification Act of 1988 and the Employee Polygraph Protection Act of 1988. The former law modestly emulates legislation and case law already in existence in western Europe and Japan which provides employees with notice, consultation, and other rights in connection with layoffs triggered by economic considerations.

But two of the most important legislative ventures have provided for new forms of protection against discrimination. The Americans with Disabilities Act of 1990 provides far-reaching protection against discrimination in employment for both the physically and mentally handicapped. In October 1991, after two years of bitter dispute, a Democratic Congress and President George Bush agreed upon amendments to title VII of the Civil Rights Act of 1964 in a new law, the Civil Rights Act of