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PUBLIC  
SECTOR  
EMPLOYMENT  
CASES AND MATERIALS

Second Edition



Martin H. Malin  
Ann C. Hodges  
Joseph E. Slater

The Labor Law Group

WEST

# **PUBLIC SECTOR EMPLOYMENT CASES AND MATERIALS**

**Second Edition**

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By

**Martin H. Malin**

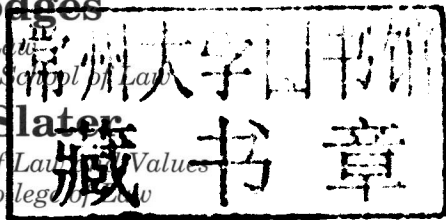
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*To: Joyce Willenborg, my wife and best friend,  
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M.H.M.

*To: my husband Stan Meyer and our children Debbie and  
Chuck Hubler, Elizabeth and Keith Buchholz, and Lisa Meyer*

A.C.H.

*To: my wife Krista Schneider and our wonderful son Isaac Slater*

J.E.S.



## FOREWORD

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The Labor Law Group had its origins in the desire of scholars to produce quality casebooks for instruction in labor and employment law. Over the course of its existence, the hallmarks of the group have been collaborative efforts among scholars, informed by skilled practitioners, under a cooperative non-profit trust in which royalties from past work finance future meetings and projects.

At the 1946 meeting of the Association of American Law Schools, Professor W. Willard Wirtz delivered a compelling paper criticizing the labor law course books then available. His remarks so impressed those present that the “Labor Law Roundtable” of the Association organized a general conference on the teaching of labor law to be held in Ann Arbor in 1947. The late Professor Robert E. Mathews served as coordinator for the Ann Arbor meeting and several conferees agreed to exchange proposals for sections of a new course book that would facilitate training exemplary practitioners of labor law. 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.

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. 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 1970's 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. 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. 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 June, 2003, the Group met in Alton, Ontario, Canada. The focus there was on labor law on the edge, looking at doctrinal synergies between workplace law and other legal and social-science disciplines, and workers on the edge, exploring the

legal issues of highly-compensated technology workers, vulnerable immigrant employees, and unionized manufacturing employees threatened by foreign competition. The Group also heard a report from its study of the status of the teaching of labor and employment law in the nation's law schools and discussed the implications of the study for the Group's future projects. Members of the Group began work on a case book on international labor law at this meeting. During Professor Cooper's term the Group also finished its popular reader *Labor Law Stories* which examines the stories behind many of the most important American labor law cases.

In July 2005, Kenneth G. Dau-Schmidt became the Chair of the Labor Law Group. Shortly after his election, the Group held a meeting in Chicago with nationally recognized practitioners to discuss how best to teach students about the practice of labor law in the new global economy of the information age. The outline that resulted from this meeting served as the basis for *Labor Law in the Contemporary Workplace*. Since the Chicago meeting, the Group has met again three times to discuss and work on new editions of its books and new projects: June 2006 in Saratoga Springs, New York; June 2007 in St. Charles, Illinois; and June 2010 in Lake Arrowhead, California. Other Group projects that grew out of or benefited from these meetings include *International Labor Law: Cases and Materials on Workers' Rights in the Global Economy* and *A Concise Hornbook on Employment Law*. The Group has also hosted: a November 2007 symposium on the problems of low-wage workers, the proceedings of which were published in the *Minnesota Law Review*; a February 2009 symposium on the American Law Institute's Proposed Restatement of Employment Law, the proceedings of which were published in the *Employee Rights and Employment Policy Journal*; and a November 2010 symposium on labor and employment law policies under the Obama administration, the proceedings of which will be published in the *Indiana Law Journal*.

At any one time, roughly twenty-five to thirty persons are actively engaged in the Group's work; this has proven 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 eighty persons have worked on Group projects; in keeping with the original agreement, none has ever received anything more than reimbursement of expenses.

The Labor Law Group currently has eight books in print. In addition to this volume, West has published: *Principles of Employment Law* by Rafael Gely, Ann C. Hodges, Peggie R. Smith, and Susan J. Stabile; *Labor Law in the Contemporary Workplace*, by Kenneth G. Dau-Schmidt, Martin H. Malin, Roberto L. Corrada, Christopher David Ruiz Cameron and Catherine L. Fisk; *International Labor Law: Cases and Materials on Workers' Rights in the Global Economy*, by James Atleson, Lance Compa, Kerry Rittich, Calvin William Sharpe and Marley S. Weiss; *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* (Eighth Edition), by Dianne



Avery, Maria L. Ontiveros, Roberto L. Corrada, Michael L. Selmi and Melissa Hart; *ADR in the Workplace* (Second Edition), by Laura J. Cooper, Dennis R. Nolan and Richard A. Bales; and *Legal Protection for the Individual Employee* (Fourth Edition), by Matthew W. Finkin, Kenneth G. Dau-Schmidt, and Robert N. Covington. Foundation Press has published the Group's eighth book, *Labor Law Stories*, edited by Laura J. Cooper and Catherine L. Fisk.

#### THE EXECUTIVE COMMITTEE

## PREFACE

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Since 1971, when the Labor Law Group first published a casebook on public sector labor law under the authorship of Donald Wollett and Don Sears, the field has changed dramatically. The skepticism which characterized early legislative and judicial attitudes toward collective bargaining in the public sector has been replaced by general acceptance. Union organization in the public sector, in contrast to the private sector, has continued to grow. In 2009, for the first time in history, a majority of union members in the United States were employed by a unit of government. Debates over whether the public sector is different from the private sector have become more nuanced, focusing on the inevitably political context of public sector bargaining and its implications for the structure and processes of bargaining and dispute resolution. And while private sector labor law continues to provide a model for the public sector, there has been a good deal of experimentation, at both federal and state levels, with different ways of structuring the bargaining relationship. Perhaps the most notable experimentation since publication of the prior edition of this book has been the requirement in several states that employers recognize exclusive bargaining representatives on the basis of authorization cards signed by a majority of the members of the bargaining unit, without the need for a representation election.

Succeeding editions of the original casebook, *Collective Bargaining in Public Employment*, with continued authorship by Donald Wollett along with Joseph Grodin, Reginald Alleyne and, later, June Weisberger, sought to bring developments up to date through modifications within the same basic format. Ten years after the last edition of that book, it became apparent that a brand new volume was required. This new book, *Public Sector Employment*, first published in 2004, authored by Joseph Grodin, June Weisberger and Martin Malin as a successor to *Collective Bargaining in Public Employment*, extended coverage to include the individual employee-employer relationship in the public sector, including constitutional rights of public employees and civil service and tenure systems. This edition continues the evolution of the book with expanded coverage of constitutional rights of public employees and civil service and tenure systems. The new edition further develops legislation governing the public sector workplace, including special Fair Labor Standards Act rules and whistleblower protection. It also covers Tenth and Eleventh Amendment limitations on federal regulation of state and local government employment relationships. Accordingly, the book should be useful for courses on public sector employment even in the minority of jurisdictions that have no public employee bargaining statutes.

The new edition updates the material from the first edition. Developments since the first edition have included the debate over the compatibility of collective bargaining for public employees with national security, including

the litigation over regulations issued by the Departments of Defense and Homeland Security that greatly restricted the scope of bargaining; the move by a number of states to requiring card check recognition; and significant constitutional decisions such as *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) and *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). References to statutes and regulations are current as of at least July 2010. We have retained the emphasis upon state law but, we have included substantial references to developments regarding federal employee labor relations. We continue to contrast public sector employment with the private sector, and to raise questions concerning the degree to which the private sector model should apply when government is the employer.

It remains the case that there is no one body of public sector labor law. Indeed, one of the attractions of courses on public sector employment is that the different jurisdictions truly serve as laboratories for different approaches to the issues and allow for comparisons across jurisdictions. We have included material from a wide array of states, but we assume that professors and students will want to supplement the materials in this casebook with materials from their own jurisdictions. A convenient source of information about the law in different jurisdictions is the Association of Labor Relations Agencies (ALRA). ALRA's membership consists of the national, state, provincial and local labor relations agencies in the United States and Canada. Its website, [www.alra.org](http://www.alra.org), contains links to the websites of its member agencies which, in turn, contain links to statutes, regulations and decisions of their jurisdictions.

A few notes about the editing of cases and readings. We have edited out most footnotes, but retained those we believe to be particularly significant or pedagogically useful. In those cases, we retained the original footnote numbers. We have used asterisks instead of ellipses to indicate where we have deleted material in the editing process but also edited out lengthy string citations and pinpoint citations without indicating this with asterisks. Where cases quoted material and used ellipses, we replaced the ellipses with asterisks. We have added parallel citations and otherwise standardized type face and citation style.

We gratefully acknowledge the efforts of many others who helped make this book a reality. We thank Cass Casper (Chicago-Kent College of Law), Paul Falabella, Joseph Laws and Joyce Yoon (University of Richmond) and Kelly Walsh and Sarah Corney (University of Toledo) who provided crucial research assistance and Meredith Fleming (University of Richmond) who provided editorial assistance. We deeply appreciate the invaluable administrative and secretarial support from Sharon Wyatt-Jordan at Chicago-Kent and technical assistance from Lucy Moss of the Chicago-Kent College of Law Library. We thank the following professionals for very helpful comments during the revision process: Martin W. Baumgaertner, R. Douglas Collins, Peter Davis, William Herbert, and Daniel Nielsen. We acknowledge helpful comments on drafts of various chapters from our colleagues in The Labor Law Group. We appreciate financial support from the Labor Law Group, the Hunton & Williams Summer Research Fund at the University of Richmond,

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August 2010

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