

Proceedings of New York University 55th Annual Conference on Labor

Edited by Matthew Bodie and Samuel Estreicher



WORKPLACE DISCRIMINATION, PRIVACY AND SECURITY IN AN AGE OF TERRORISM

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Editors:

Matthew Bodie and Samuel Estreicher



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Workplace Discrimination, Privacy and Security in an Age of Terrorism

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For the victims of the September 11th attacks and their families

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The Center for Labor and Employment Law is a program established at New York University School of Law. Professor Samuel Estreicher, 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, non-partisan 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 field; 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 discussions 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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List of Abbreviations

ACLD Advisory Committee on Labor Diplomacy

ADA Americans with Disabilities Act

AFGE American Federation of Government

Employees

AFL American Federation of Labor ALI administrative law judge

ATSA Airline Transportation Safety Act

BLS Bureau of Labor Statistics

BSEIU Building Service Employees International

Union

CIA Central Intelligence Agency

COBRA Consolidated Omnibus Budget Reconciliation

Act

DOL Department of Labor DWB driving while black

EAP employee assistance program

ECPA Electronic Communications Privacy Act

EEO Equal Employment Opportunity

EEOC Equal Employment Opportunity Commission

EMA Electronic Mail Association
EMT Emergency Medical Technicians

ERISA Employee Retirement Income Security Act

DHS Department of Homeland Security

DOD Department of Defense

DSM Diagnostic and Statistical Manual FAA Federal Aviation Administration FBI Federal Bureau of Investigation

FBIS Federal Bureau of Information Services
FEMA Federal Emergency Management Agency
FISA Foreign Intelligence Surveillance Act
FLRA Federal Labor Relations Authority

FMCS Federal Mediation and Conciliation Service

FMLA Family and Medical Leave Act

FSLMRA Federal Service Labor-Management Relations

Act

LIST OF ABBREVIATIONS

FSIP Federal Services Impasse Panel

FTP file transfer protocol
GML General Municipal Law

GSA General Services Administration

HIPAA Health Insurance Portability and Accountability

Act

HHS Health and Human Services
HMO Health Maintenance Organization

ICCPR International Covenant of Civil and Political

Rights

ICE Bureau of Immigrations and

Customs Enforcement

ILO International Labor Organization

ILWU International Longshore and Warehouse Union

IMMACT Immigration Act

INA Immigration and Nationality Act

INS Immigration and Naturalization Service

IPS International Protective Services

IRCA The Immigration Reform and Control Act

IWWIndustrial Workers of the WorldLCALabor Condition ApplicationLMRALabor Management Relations ActNEMANotice of Electronic Monitoring ActNIMANational Imagery and Mapping Agency

NIRA National Industrial Recovery Act
NLRA National Labor Relations Act
NLRB National Labor Relations Board
NSPS National Security Personnel System
NTEU National Treasury Employees Union
NYWCL New York Workers' Compensation Law

OCAHO Office of the Chief Administrative Hearing

Officer

OPM Office of Personnel Management
OSHA Occupational Safety and Health Act

PATCO Professional Air Traffic Controllers Organization

PFLP Popular Front for the Liberation of

Palestine

PHI protected health information PMA Pacific Maritime Association

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LIST OF ABBREVIATIONS

PTSD post-traumatic stress disorder SCA Stored Communications Act

SEIU Service Employees International Union

SPD summary plan description

SPFPA Security, Police and Fire Professionals

of America

SSA Social Security Administration

TSA Transportation Security Administration

TWU Transport Workers Union UAW United Auto Workers

UFWA United Federal Workers of America

UIW University of Incarnate Word

UMW United Mine Workers

USERRA Uniformed Services Employment and

Reemployment Rights Act

VAWBL Volunteer Ambulance Worker Benefit Law

VFBL Volunteer Firefighter's Benefit Law VRRA Veterans Reemployment Rights Act

WLB War Labor Board

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CHAPTER 1

Introduction: New Realities for the US Workplace

Matthew Bodie and Samuel Estreicher

It has been five years since the terrorist attacks of September 11th. Those attacks have drastically changed our approaches to national security, foreign policy, electronic privacy and immigration policy. But the waves rippling out from September 11th have seemingly touched every aspect of our lives. The workplace is no exception.

How will the workplace respond to this new age of terrorism? This volume brings together works on this critical topic for lawyers, judges, legislators, scholars and citizens in this new age. A number of these papers were presented at New York University's 55th Annual Conference on Labor and Employment, the nation's leading forum for consideration of the law and policies affecting the workplace. The volume also contains articles on this topic that were previously published. It is both a snapshot in time and a foundation for future work.

The volume is divided into four parts. Part I discusses the problem of workplace discrimination in the context of the war on terror. These pieces discuss the broader problem faced by society: weighing the potential benefits of use of ethnic group status as a predicate for selective surveillance with the attendant harms to individuals and societal values. In *Profiling with Apologies*, Professor Sherry Colb discusses reasons why profiling based on nationality may in some cases be appropriate. However, her approach is a cautious one, which includes compensation to the innocent for the additional costs they must bear. Donna Malin of Johnson & Johnson addresses other potential discriminatory behavior in her paper, *May Employers Adopt Rules Requiring 'English Only' in the Workplace?* Although broad English-only rules are

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not favored by the EEOC, Malin discusses the factors used by agencies and courts in assessing individual programs. David Rosoff, an immigration lawyer, focuses on immigrant workers in *Anti-discrimination Provisions of the Immigration Reform and Control Act*. In this ever-changing area, Rosoff provides a snapshot of the protections provided to immigrant workers in the post-9/11 period. Jo Anne Chernev Adlerstein, also a member of the immigration bar, provides a similar overview of the process for highly-skilled immigrant workers in *H-1B Visas and Naturalization Post 9/11*. Part I ends with a discussion of the 'enemy combatant' designation by Professor Juliet Stumpf in her article, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*.

Part II of the volume concerns workplace privacy in an age of terrorism. In *Workplace Privacy after 9/11: Electronic Surveillance and Access to FBI Information*, attorney Clare Sproule discusses the 'treasure trove' of electronic information that is generated about employees. She recommends that employers be cognizant of this material and help frame policies that limit potential government access to it. Management lawyer Marshall Babson takes on another thorny privacy issue in *Monitoring Electronic Mail in the Workplace: Property v. Privacy*. His comprehensive look details why employers generally have the ball in their court on this issue.

Part III examines how collective bargaining has been affected in this new security-conscious environment. In Collective Bargaining over Job Security and Workplace Security in the Wake of September 11th, labor lawyers Robert Batterman and John Fullerton highlight the loss of unionized jobs caused directly by the September 11th attacks and analyze the ways in which unions and employers can approach job loss caused by terrorism. In Employment Rights Following Military Leaves of Absence, employment lawyers Jeffrey S. Klein, Nicholas J. Pappas and Matthew Herman detail the responsibilities of employers in this sensitive area – an area that perhaps is even more relevant today. Strike Season: Protecting Labor-Management Rights in an Age of Terror by Professor Ross Davies raises a concern about vulnerability to labor strikes in an age of terror. The article proposes legislation to better balance the concerns that labor, management, and the general public may have when strikes affect the nation's critical infrastructure. On the flip side, Professor Ruben Garcia argues that national security concerns may have played too influential a role in reducing labor's freedom of association. In Labor's Fragile Right of Association Post 9/11, he argues