

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

**Second Edition**

**July 2017 Supplement**

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## Introduction

The materials that follow update the second edition of the casebook through mid-summer 2017. More dramatic changes, however, are likely in the near future. In the private sector, the Trump NLRB is likely to take more pro-employer positions. This is likely to mean, among other things, reversing a number of precedents of the Obama Board (including but not limited to rules on elections, so-called “micro” bargaining units, joint employers, and graduate assistants). In addition, Republican members of Congress have introduced “nationwide right-to-work” legislation that would forbid unions and employers from agreeing to require represented workers to pay for union representation.

In the public sector, the confirmation of Justice Gorsuch to the Supreme Court likely means a follow up to the *Friedrichs* litigation, probably via the Court granting cert. to review the Seventh Circuit’s *Janus v. AFSCME* decision. This raises the distinct possibility that the entire public sector will, as a matter of constitutional law, be forced to follow the “right to work” rule barring agency-fee clauses. If this happens, look for (at least) three sets of consequences: First, union opponents are likely to try to build on their victory by challenging other aspects of the American union representation model. This might include lawsuits arguing that exclusive representation is illegal in the public sector, or that agency fees are unconstitutional in the private sector. Second, union-friendly states may experiment with new approaches, such as members-only representation, or by creating a mechanism for state itself to pay for parts of unions’ bargaining costs. Third, expect unions themselves to seek out new ways to encourage members to pay dues voluntarily, such as by offering valuable membership incentives.

## CHAPTER 1

### THE HISTORY OF PUBLIC- AND PRIVATE-SECTOR LABOR LAW

**Page 76, near the end of the second full paragraph.** *Toth v. Callaghan*, 995 F.Supp.2d 774 (E.D.Mich. 2014), *appeal dismissed*, No. 14-1351 (6<sup>th</sup> Cir. July 8, 2014) struck down Michigan P.A 45, which had removed collective bargaining rights from graduate student unions. *Toth* held that the law violated the Article IV, § 24 of the Michigan Constitution, which bars changing the original purpose of bills during the enactment process.

**Page 77, end of the last full paragraph.** In 2017, Iowa enacted House File 291, which is largely modeled after Wisconsin Act 10. Among other things, HF 291's severe restrictions apply to most public-sector unions, but not public safety workers; it limits contract negotiations to base wages; unions must undergo mandatory recertification elections and will only be recertified if a majority of the entire bargaining unit votes to do so; automatic dues-deduction is barred; and interest arbitrators cannot grant wage increases in excess of whichever is lower, 3 percent or the increase in the cost of living.

## CHAPTER 2

### LABOR LAW'S SUBJECTS: "EMPLOYEES" AND "EMPLOYERS"

**Page 95, add a new note 5:**

The Board and reviewing courts continue to struggle with whether certain workers are statutory employees, who have rights under the NLRA, or independent contractors, who do not have such rights. Since this book's publication, the courts have reviewed the following three Board decisions: *FedEx Home Delivery v. NLRB*, (D.C. Cir. 2017) (*FedEx II*); *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016); and *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305 (11th Cir. 2016). Significantly, *FedEx II* expressly relied on *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*), which had held that FedEx delivery drivers are independent contractors and not FedEx employees. In both cases, the D.C. Circuit reversed the Board's legal conclusion that the FedEx drivers were employees. The *FedEx II* court further noted that the records of the two cases were "materially indistinguishable." *FedEx II*, 849 F.3d at 1124.

Although FedEx drivers across the country generally have the same job duties, and although Board law and state law governing independent contractor status are based on the Restatement 2d (Agency) § 220(2) and therefore ostensibly the same throughout the sundry U.S. jurisdictions, the conclusions differ. Compare the courts' analyses of the Board cases in *FedEx I* and *FedEx II* with that of the Ninth Circuit interpreting California law in *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 987 (9th Cir. 2014). These different analyses call for the question – Why? In thinking about this question, consider whether the following makes a difference: The D.C. Circuit focused on entrepreneurial opportunity and the Ninth Circuit focused on right of control.

**Page 158, at the end of note 3.** For recent examples of the NLRB taking jurisdiction over charter schools, see *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016) and *Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 68 (2016) (rejecting objections by, respectively, the employer and the union).

### CHAPTER 3

#### UNION ORGANIZING AND EMPLOYER SPEECH

**Page 171, add the following to the end of note 6.** However, the Eighth Circuit recently limited this presumption to employees, rejecting the NLRB’s position that it should apply equally to outside union organizers who were otherwise entitled to enter the employer’s premises. *North Mem’l Health Care v. NLRB*, No. 16-3433, 2017 WL 2657011, at \*8 (8th Cir. June 21, 2017).

**Page 185, add note 12.e.** As discussed in notes 8-9 following *Republic Aviation*, an employer’s otherwise-lawful decision to bar a non-employee from a property may violate the NLRA if it discriminates against protected concerted activity. For example, the NLRB recently held that an employer violated Section 8(a)(1) when it barred an ex-employee from its premises because she had filed a collective action alleging wage and hour violations, where ex-employees were typically allowed access to the property on the same basis as the general public. *MEI-GSR Holdings, LLC*, 365 N.L.R.B. No. 76 (May 16, 2017).

**Page 193, add a new note 6.** The Obama Board was quite active in cases involving work rules, but the Trump Board may reverse course. In a 2016 partial dissent, then-Member (now Chairman) Miscimarra called for the Board to “abandon [*Martin Luther*], which renders unlawful all employment policies, work rules and handbook provisions whenever any employee “would reasonably construe the language to prohibit Section 7 activity.” *William Beaumont Hosp.*, 363 N.L.R.B. No. 162 (Apr. 13, 2016). He wrote:

Under *Lutheran Heritage*, reasonable work requirements have become like Lord Voldemort in *Harry Potter*: they are ever-present but must not be identified by name. Nearly all employees in every workplace aspire to have “harmonious” dealings with their coworkers. . . . Yet, in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.

Instead, Miscimarra wrote that the Board should conduct a balancing test: “when evaluating a facially neutral policy, rule or handbook provision, I believe the Board must evaluate at least two things: (i) the potential adverse impact of the rule on NLRA-protected activity, *and* (ii) the legitimate justifications an employer may have for maintaining the rule. The Board must engage in a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity.”

**Page 197, add the following to the beginning of note 3.** One preliminary issue is whether an employee protest disparages a product – or would be understood by the public to disparage a product – at all. Thus, in *Micklin Enters., Inc. v. NLRB*, No. 14-3099, 2017 WL 2835648 (8th Cir. July 3, 2017), the Eighth Circuit, *en banc*, held that fast food employees lost NLRA protection when they created posters that suggested that because workers did not receive paid sick days, sick workers might be preparing food for customers. The posters cautioned customers that “we hope your immune system is ready because you’re about to take the sandwich test.” Although the protest was clearly connected to a labor dispute, the court concluded it was unprotected because it “target[ed] the food product itself.” In contrast, in *Medco Health Solutions of Law Vegas, Inc.*, 364 N.L.R.B. No. 115 (Aug. 27, 2016), the Board applied the *Republic Aviation* and *Martin Luther* instead of *Jefferson Standard* when an employer disciplined an employee for wearing a shirt that disparaged an employee incentive system rather than a product.

**Page 198, note 4.** The Board’s decision in *MasTech Technologies* was upheld by the D.C. Circuit in a 2-1 decision. *DIRECTV, Inc., v. NLRB*, 837 F.3d 25 (2017). The company filed a petition for *certiorari* that is pending as of the date of this supplement.

**Page 212, add the following to the end of note 2.** See *Hogan Transps., Inc.*, 363 N.L.R.B. No. 196 (May 19, 2016) (holding that employer violated 8(a)(1) “by blaming the Union for attempting to take away [an] unlawful wage increase” after the union filed a ULP charge alleging an *Exchange Parts* violation, and observing that “the Board does not typically require a company to rescind a wage increase” offered in violation of *Exchange Parts*).

**Page 212, add the following at the end of note 3.** What if an employer grants a new benefit to its workers who are not eligible to unionize, but refuses to extend that benefit to union-eligible employees? At least where the employer cites the pendency of a union election as its reason, the Board has held (and the D.C. Circuit affirmed) that this too violates the Act. *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351 (D.C. Cir. 2016).

**Page 222, add the following to the end of the section on “Inflammatory Appeals to Prejudice.”** In a 2016 concurrence, D.C. Circuit Judge Millett criticized what she viewed as the Board’s “the too-often cavalier and enabling approach that the Board’s decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes.” *Consol. Commc’ns v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016). Judge Millett called for the Board to distinguish “zealous expressions of frustration and discontent” from “conduct of a sexually or racially demeaning and degrading nature.” She concluded her opinion as follows:



To be sure, employees' exercise of their statutory rights to oppose employer practices must be vigorously protected, and ample room must be left for powerful and passionate expressions of views in the heated context of a strike. But Board decisions' repeated forbearance of sexually and racially degrading conduct in service of that admirable goal goes too far. After all, the Board is a component of the same United States Government that has fought for decades to root discrimination out of the workplace. Subjecting co-workers and others to abusive treatment that is targeted to their gender, race, or ethnicity is not and should not be a natural byproduct of contentious labor disputes, and it certainly should not be accepted by an arm of the federal government. It is 2016, and "boys will be boys" should be just as forbidden on the picket line as it is on the assembly line.

## CHAPTER 4

### PROTECTION OF WORKERS' PROTEST AND "CONCERTED ACTIVITIES"

**Page 289, add a new subsection c to Problem 4.2.** Shortly after President Trump's inauguration, protests such as the Day Without Immigrants and Day Without Women called on employees to leave work to demonstrate support for issues including civil rights, immigration, raising the minimum wage, and preserving the Affordable Care Act. Would the NLRA cover participation in such a protest? How would you analyze whether an employer would be within its rights to fire an employee who missed work in order to participate? And, given that analysis, is there anything an employee could do to increase the likelihood that her participation would be protected by the NLRA? You may want to re-consider your answers to these questions after you read *Washington Aluminum* in the next section of this chapter. For more on this, see NLRB General Counsel Memo No. 08-10 (July 22, 2008).

**Page 298, replace the section on *Concerted Litigation and Alternative Dispute Resolution* with the following.**

Groups of employees bringing class- or collective-action lawsuits against their employers under various employment laws, or collective grievances under employers' dispute resolution and arbitration policies would seem to fit comfortably within the colloquial definition of "concerted." In *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013), the Board agreed and held that an employer commits a ULP if it requires its employees to sign individual arbitration clauses – that is, agreements precluding employees from filing class actions or collective claims against the employer in any forum. According to the Board, § 7's protection of employees' right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" extends to employees filing class claims and pursuing class litigation to improve their working conditions in administrative, judicial, and arbitral forums.

The Board has affirmed *D.R. Horton's* rule – that employees must have at least one forum (either arbitral or judicial) in which they can bring class or collective claims – in many other cases. But circuit courts have split as to whether the Board's rule is permissible, and the Supreme Court has agreed to hear a trio of cases presenting this issue next Term. The Supreme Court granted cert. in *Lewis v. Epic Sys.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); and *Murphy Oil USA, Inc., v. NLRB*, 808 F.3d 1013 (5th Cir. 2013). In *Epic Systems* and *Ernst & Young*, the courts held that the NLRA's language clearly supported the Board's rule. But in *Murphy Oil*, the Fifth Circuit relied on its earlier analysis rejecting the Board's *D.R. Horton* decision, which held that the Board's rule was inconsistent with the Federal Arbitration Act (FAA).

The Supreme Court granted *cert.* shortly before President Trump's inauguration. Since then, the new Acting Solicitor General has informed the Supreme Court that his office will be arguing that the NLRB's rule is inconsistent with the FAA. However, the Solicitor General has also authorized the NLRB to represent itself before the Supreme Court, and the Board will presumably continue to defend its current rule.

But even if the Board also decides to reverse course, its *D.R. Horton* rule will not be left undefended in the Supreme Court. Note that the NLRB is a party in only one of the three cases that the Supreme Court will hear. That is because the other two cases began as class or collective actions filed by employees claiming wage and hour violations. In each case, the employer moved to dismiss the lawsuits and compel individual arbitration; in response, the employees argued that the relevant individual arbitration clauses were unenforceable under the Board's *D.R. Horton* rule. Thus, these cases illustrate the wide-ranging effects of the Board's rule: in many cases, it will allow employees can bring a class or collective vehicle to prosecute their claims, which may be too small to be worth pursuing on an individual basis.

Finally, in *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189 (Aug. 27, 2015), the Board extended its *D.R. Horton* rule, and held that the fact that an employer offered an employee an opportunity to opt out of an individual arbitration clause did not render that clause enforceable. The Board relied on its own precedent as well as the Norris-LaGuardia Act, both of which bar employers from asking employees to commit to pre-dispute waivers of their rights to engage in collective action.

**Page 299, add the following to the end of the section on *Use of Social Media*.** In a later case, the Board found, and the Second Circuit affirmed, that "liking" a post on Facebook could also constitute concerted activity. *Three D, LLC v. NLRB*, 629 F. App'x. 33 (2d Cir. 2015).

**Page 325, add a new Note 5.** Even where public employees are permitted to bargain collectively, other issues may complicate *Weingarten* rights. *Prince George's County Civilian Employee's Ass'n v. Prince George's County*, 447 Md. 180 (2016), held that a Maryland county did not have the authority to negotiate a contract clause with a union granting *Weingarten* rights in *criminal* investigations of employees.

## **Chapter 6**

### **REMEDIES**

**Pages 441–42, add to the end of note 7.**

Notwithstanding the court’s decision in *Latino Express*, 776 F.3d at 479 (awarding reasonable attorneys’ fees to Board in civil litigation), the Board is without inherent authority to award attorneys’ fees in an administrative proceeding. See *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 804–06 (D.C.Cir.1997). Following that line of reasoning, the court in *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C. Cir. 2016), refused to award attorney fees to pay the union’s and the NLRB General Counsel’s litigation costs incurred in the Board’s *administrative* proceedings. The court nevertheless enforced the Board’s award of the union’s bargaining costs as a remedy for the Section 8(a)(5) violation. Specifically, it held that, in a bad-faith refusal to bargain case, “the Board may require an employer to reimburse a union’s bargaining expenses pursuant to its remedial authority under section 10(c) of the Act.” *Id.* at 1087.

## CHAPTER 7

### ELECTING A UNION REPRESENTATIVE

**Page 529, add a new note 6.** In public institutes of higher education, full-time, tenure-track faculty are usually not in the same bargaining unit as part-time, adjunct faculty, on the theory that the employees lack sufficient community of interest. *See, e.g., Tompkins Cortland Community College Adjuncts Ass'n*, 50 PERB ¶4001 (NY PERB, Feb. 8, 2017). For a contrary example holding that over-fragmentation concerns require one unit for both types of employees, *see Employees of Beaver County Community College*, 47 Pennsylvania Pub. Employee Rep. ¶ 78 (Pa. Lab. Rel. Bd., Feb. 16, 2016).

## CHAPTER 8

### ORGANIZING WITHOUT AN ELECTION

**Page 600, add a new note between notes 1 and 2.** The day before his NLRB term ended, Member Hirozawa issued a concurrence endorsing Professor Morris’s position in *Children’s Hospital & Research Center of Oakland*, 364 N.L.R.B. No. 114 (Aug. 26, 2016). The case was about whether the employer was required to arbitrate grievances with a union that had been replaced by another union, given that the grievance arose while the first union still enjoyed majority status. The Board answered “yes,” reasoning that it was logical to require the employer to arbitrate with the first union because there was no other mechanism to redress violations of the contract between that union and the employer. However, Member Hirozawa would have gone further, writing that:

Section 8(a)(5) provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees, subject to the provisions of section 9(a).” Section 9(a), in turn, provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .” The Board’s decision in this case explains what the subject-to-Section-9(a) clause means and marshals powerful arguments in support of its interpretation of the statute. That holding alone fully justifies the result in this case.

I think it is also useful, however, to consider what the subject-to-Section-9(a) clause does *not* mean. It does not mean that for an employer to have a duty to bargain with a union on behalf of its employees, the union must be a Section 9(a) exclusive representative. This reading finds ample support in the text of the Act.

First, the Section 8(a)(5) clause at issue here simply says, “subject to the provisions of section 9(a).” It does not say, if such representative is “the representative of the employees as provided in section 9(a).” Clearly, the Wagner Act Congress, which drafted the language of Section 8(a)(5), knew how to impose such a requirement if it so intended. It imposed precisely that requirement, using precisely that language, in a parallel subsection of the same section of the Act, Section 8(a)(3). The absence of such a requirement from Section 8(a)(5) is a strong indication that no such requirement was intended by Congress.

Second, the Act’s statement of the right enforced by Section 8(a)(5) is unencumbered by any requirement of Section 9(a) status. That statement appears, of course, in Section 7: “Employees shall have the right . . . to bargain collectively through representatives of their own choosing . . . .” Again, there is no requirement that the representatives through which employees exercise their right

to bargain have attained Section 9(a) status or otherwise demonstrated majority support. In my view, these provisions, in the light they shed on the intended scope of Section 8(a)(5), reinforce the Board's finding of a violation of that section for refusal to bargain with a superseded union, which by definition was no longer a Section 9(a) exclusive representative.

## CHAPTER 9

### THE DUTY TO BARGAIN COLLECTIVELY

**Page 638, end of carryover paragraph.** Compare also *Boling v. Public Employees Rel. Bd.*, 216 Cal.Rptr.3d 757 (Cal. Ct. App. 2017). The relevant agency held that San Diego was obliged to bargain with a union of city employees before it could place a citizen-sponsored initiative involving certain pension-related issues on the ballot. The court reversed, holding, among other things, that the initiative was not a *de facto* governing-body-sponsored ballot proposal, and that the mayor's support of the initiative could not be imputed to the city council.

**Page 683, end of the first paragraph under Section C.** But the rule applies to more mundane matters as well. The Washington Public Employment Relations Commission held that an employer committed a ULP when it unilaterally and without negotiating discontinued its practice of providing free coffee to correctional employees (the WPERC held that this was a mandatory topic of negotiation because it involved working conditions). *King Cnty. Corr. Guild v. King Cnty.*, WPERC Case No. 26573-U-14 (May 26, 2016).

**Page 693, add a new note 5.** New Jersey is unusual in that it uses both rules: the dynamic status quo rule for most public employees, but the static status quo rule for teachers. For an explanation of how this came about, and a court's rejection of the state labor agency's attempt to change from dynamic to static for non-teaching employees, see *In Re County of Atlantic and PBA Local 243*, 445 N.J. Super. 1 (N.J. App. 2016).



## CHAPTER 10

### SUBJECTS INCLUDED IN THE DUTY TO BARGAIN COLLECTIVELY

**Page 758, end of the second paragraph.** On the other hand, *Int’l B’hood of Teamsters Local 700 v. Illinois Labor Rel. Bd.*, 2017 IL App (1st) 152993, held that a sheriff’s department order stating that its employees may not associate with gang members was a mandatory subject of bargaining.

**Page 759, end of the first full paragraph.** In contrast, *City of Allentown v. IAFF Local 302*, 157 A.3d 899 (Pa. 2017) held that under Pennsylvania law, the number of firefighters on duty per shift was a mandatory subject of bargaining, not a matter of inherent management prerogative.

**Page 762, end of the last full paragraph.** Applying a standard “balancing test,” the New Hampshire public-sector agency held that a school system moving from a “block” schedule to an “A/B” schedule for classes was a mandatory subject of bargaining, rejecting the employer’s argument that this should be a matter of educational policy reserved to management. *Sugar River Educ. Ass’n v. Claremont School Dist.*, New Hampshire PERB, Dec. No. 2016-176 (Case No. E-0188-2) (July 29, 2016).

## CHAPTER 11

### ECONOMIC WEAPONS AND IMPASSE RESOLUTION

**Page 862, end of note 4.** Conversely, not all pickets in support of legal strikes are lawful. *See, e.g., Harrison Hills Teachers' Ass'n v. State Emp. Rel. Bd.*, 56 N.E.3d 986 (Oh. Ct. App. 2016) (rejecting a constitutional challenge to provision of state statute making it a ULP for union to induce or encourage any individual in connection with a labor relations dispute to picket any place of private employment of any public official).

**Page 959, continuation of note 3, after the sentence ending “the state House did not.”** Unions backed essentially identical legislation in the summer of 2016, with events playing out the same way (the state House ultimately failed to override the Governor’s veto).

## Chapter 13

### GRIEVANCE-ARBITRATION

**Pages 1063–64, add the following discussion of Deflategate in note 6, immediately before the discussion of *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977):**

In *NFL Mgmt. Council v. NFLPA*, 820 F.3d 527, 541 (2d Cir. 2016), the Second Circuit reversed the district court’s decision and reinstated the arbitral award.

The majority held that Goodell did not exceed his authority as an appellate arbitrator by upholding the suspension on new grounds, namely, Brady’s destruction of his cell phone, because “[n]othing in Article 46 [of the Collective Bargaining Agreement (CBA)] limits the authority of the arbitrator to examine or reassess the factual basis for a suspension.” The court added that although Commissioner Goodell upheld the suspension on new grounds, he “did not increase the punishment as a consequence of the destruction of the cell phone—the four game suspension was not increased. Rather, the cell phone destruction merely provided further support for the Commissioner’s determination that Brady had failed to cooperate, and served as the basis for an adverse inference as to his participation in the scheme to deflate footballs.” The court denied the Patriots’ and Brady’s petition for rehearing en banc.

Anne Marie Lofaso, *Deflategate: What’s the Steelworkers Trilogy Got to Do with It?* 6 BERKELEY J. ENTERTAINMENT & SPORTS LAW 48, 56 (2017). Which court’s analysis is more persuasive?

## CHAPTER 14

### INDIVIDUAL WORKERS AND THEIR UNIONS

**Page 1143, replace the first paragraph (about local right to work laws) with the following.**

You will note that the preceding list includes only states, and no municipalities. But municipalities have also begun to enact right-to-work ordinances, raising the question of whether those ordinances are preempted by the NLRA. The main textual argument in favor of preemption is that NLRA § 14(b) says that the Act does not preempt “State or Territorial” right-to-work laws. But municipalities are neither states nor territories, so their right-to-work laws are preempted by § 8(a)(3) of the Act, which permits the negotiation of union security agreements. Further, proponents of this view argue that Congress generally intended to preempt the entire field of regulation of union security clauses, and that as a result, it accords with probable congressional intent to read § 14(b) narrowly. A district court in Illinois accepted this view in *Int’l Union of Operating Eng’rs, Local 399 v. Village of Lincolnshire*, No. 16-c-2395, 2017 WL 75742 (N.D. Ill. Jan. 7, 2017).

Conversely, the Sixth Circuit held that local right-to-work laws are permitted under § 14(b) in *United Auto., Aerospace, & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016). In *Hardin County*, the Court reasoned that § 14(b)’s use of the word “state” includes political subdivisions of the state, relying in part on the text of the statute, and in part on cases suggesting that statutes should be construed in a manner that preserves the traditional ability of states to delegate lawmaking authority to their subdivisions.

If the Seventh Circuit affirms the district court in *Lincolnshire*, it will create a circuit split that will be likely to be resolved by the Supreme Court. If the outcome is that the NLRA does not preempt local right-to-work ordinances, remember that states will still be free to exercise their sovereignty over municipalities to decide whether or not to permit local variation in this area.

Another issue regarding the scope of § 14(b)’s authorization of state right-to-work laws is whether states may exempt workers from paying union hiring hall fees. In *Simms v. Local 1752, Int’l Longshoremen Ass’n*, 838 F.3d 613 (5th Cir. 2016), the Fifth Circuit answered “no.”

**Page 1143, add the following to the end of the middle paragraph.** The Seventh Circuit declined to overrule *Sweeney* in *Int’l Union of Operating Eng’rs Local 139 v. Schimel*, No. 16-3736, 2017 WL 2962896 (7th Cir. July 12, 2017). In addition, a district court in Idaho rejected a similar set of arguments in *Int’l Union of Operating Eng’rs v. Wasden*, 217 F.Supp. 3d 1209 (D. Idaho 2016), and the union plaintiff has filed an appeal in the Ninth Circuit.

**Page 1159, add the following to the end of note 1.** For more on this point, see Joseph Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?* (forthcoming, University of Nebraska Law Review 2017).

**Page 1162, replace the third paragraph with the following.**

In 2015, the Supreme Court agreed to re-consider *Abood* in *Friedrichs v. California Teachers' Ass'n*. After oral argument, commentators widely predicted that the Court would vote to overturn *Abood*. However, after Justice Scalia died, the Court announced that was equally divided in *Friedrichs*, meaning that the lower court decision (which applied *Abood*) was affirmed. 136 S.Ct. 1083 (2016). However, now that the Supreme Court is back to full strength, it may accept another case inviting it to overrule *Abood*. One likely candidate is *Janus v. Am. Fed. of State, Cty, & Mun. Emps., Council 31*, 851 F.3d 746 (7th Cir. 2017).

**Page 1190, add the following new note between notes 1 and 2.** There are many recent cases featuring union objectors who argue that they should be entitled to more robust procedural protections and/or unions challenging the validity of state statutes that provide more protections to objectors. These cases have involved both the public and private sectors. *See, e.g., Hamidi v. Serv. Emps Int'l Union, Local 1000*, No. 2:14-cv-319, 2017 WL 531861 (E.D. Cal. Feb. 8, 2017) (upholding opt-out requirement for union objectors, and rejecting First Amendment challenge to obligation that employees renew their objections annual and by mail, and that they include their social security numbers with their objections); *Int'l Ass'n of Machinists Dist. 10 v. Scott*, No. 16-cv-77, 2016 WL 7475720 (W.D. Wisc. Dec. 28, 2016) (holding that Wisconsin statute prohibiting dues check off authorizations unless revocable upon 30 days' notice was preempted by § 302 of the LMRA); *Sands v. NLRB*, 825 F.3d 778 (D.C. Cir. 2016) (holding that union did not commit ULP by failing to tell employee how much she would save if she became an agency fee payer).

## **Chapter 15**

### **BARGAINING RELATIONSHIPS IN TRANSITION**

**Page 1212, add the following paragraph to the end of note 5.**

In *NLRB v. Lily Transportation Corp.*, 853 F.3d 31 (1st Cir. 2017), Associate Justice David Souter, writing for the court, upheld the Board's rule in *UGL*.

## CHAPTER 16

### MODERN AUTHORITY OVER LABOR RELATIONS

**Page 1233, add the following to the end of note 4.** However, in *Southeast La. Bldg. & Constr. Trades Council v. Jindal*, 107 F.Supp. 3d 584 (E.D. La. 2015), a district court held that a state law prohibiting public entities from entering into project labor agreements (or funding projects that include project labor agreements) fell under the market participant exception.

**Page 1235, add the following to the end of note 5e.** Recently, the UFCW-linked group OURWalmart engaged in a series of protests inside and around Wal-Mart stores, and Wal-Mart responded by filing trespass lawsuits in a number of state courts. With one exception, these state courts have concluded that Wal-Mart's claims are not preempted. *See UFCW v. Wal-Mart Stores, Inc.*, No. 02-C-13-181974, 2017 WL 2691235 (Md. 2017) (holding trespass and nuisance suit fell under *Garmon*'s "local feeling" exception and therefore was not preempted by NLRA); *UFCS v. Wal-Mart Stores, Inc.*, No. 02-15-00374-cv, 2016 WL 6277370 (Tex. App. Oct. 27, 2016) (holding trespass and nuisance actions not preempted, and discussing similar conclusions by state courts in California, Colorado, Florida, and Maryland); *but see Wal-Mart Stores, Inc. v. UFCW*, 354 P.3d 31 (Wash. Ct. App. 2015) (Wal-Mart's trespass action did not implicate "'deeply rooted' local interest because the UFCW's activities were not violent, intentional torts, or threaten violence").

**Page 1243, add the following to the end of note 1a.** A related issue involves minimum standards laws that contain an exemption for employees who are covered by a collective bargaining agreement. For example, in 2014, Los Angeles adopted a minimum wage ordinance for hotel workers that contained an exemption for hotels covered by a collective bargaining agreement. Non-union hotels sued to invalidate the law, arguing that either the law in general or the waiver for union hotels was preempted by *Machinists*. However, the Ninth Circuit disagreed, because the law did not interfere with labor dispute resolution. *Am. Hotel & Lodging Ass'n v. Los Angeles*, 834 F.3d 958 (9th Cir. 2016) (citing *Livadas v. Bradshaw*). In contrast, a federal district court in New York held that the NLRA preempted a city ordinance that required non-union car wash companies to post a \$150,000 surety bond, but required only a \$30,000 bond from car washes that entered into a collective bargaining agreement or an "active monitoring" agreement that would ensure timely and accurate wage payments. *Ass'n of Car Wash Owners, Inc. v. City of NY*, 15-cv-08157 (S.D.N.Y. May 26, 2017).