

Modern Labor Law in the Private and Public Sectors

Modern Labor Law in the Private and Public Sectors

Cases and Materials

THIRD EDITION

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Preface

About fourteen years ago, Seth Harris, at that time a professor and Director of Labor and Employment Law Programs at New York Law School, approached University of Toledo College of Law Professor Joseph Slater, about co-authoring a casebook that would address both private-sector and public-sector labor law and also discuss modern organizing procedures outside the NLRA process. They agreed that Harris would write the book's private-sector labor law sections, including those aspects of private-sector labor relations that fell outside the gambit of traditional organizing, while Slater would draft the historical and the public-sector labor law sections. About one year after commencing this ambitious project, President Barack Obama appointed Harris to the position of Deputy U.S. Secretary of Labor, which effectively removed him from this casebook project. That meant recruiting two additional co-authors to finish the project. In spring 2009, Harris and Slater recruited two of the best in the business: West Virginia University Law Professor Anne Marie Lofaso and St. John's University Law Professor David Gregory.

No one could have anticipated what happened next. After the mid-term elections of 2010, attacks on the collective-bargaining rights of public-sector unions and their members by some governors and state legislatures significantly restricted such rights in several states. The changes in public-sector labor laws and the new debates over policy in the public sector meant significant updates and re-writing just to keep up. While this was challenging (and at times aggravating), the project is all the better for our efforts. The events in the public-sector, plus some important controversies and shifts in private-sector labor law, have challenged decades of thinking about labor law in general, in both the private and public sectors. The first edition was finally published in 2013. We now have a casebook that is truly modern in its approach to labor law in the United States.

Our vision for the second edition, published in January 2016, was to incorporate the Obama Board's more progressive view of labor law and to compare that vision with take backs in the public sector and push backs from the judicial branch. Harris returned to his co-author responsibilities in 2014 after leaving the Obama Administration. Soon thereafter, rising star labor law scholar and teacher Charlotte Garden agreed to join as a fourth co-author to take the place of David Gregory who retired from his role with this casebook.

The past four-plus years were once again exciting for labor scholars and practitioners, resulting in a third edition with a uniquely modern approach to labor law instruction. The dawn of this period coincides with Colin Kaepernick's protests

during the playing of “The Star-Spangled Banner” at the opening of football games. In the great tradition of U.S. labor history, Kaepernick’s protests mixed political with workplace grievances. Our third edition also covers the transition from the Obama Board to the Trump Board. During this period, we welcomed Dick Griffin, former NLRB General Counsel (2013–2017), who has helped us meticulously and accurately navigate these changes. While the Trump Board has used rulemaking and adjudication to cut back on workers’ rights, public-sector employees fought against the political tide, which included a devastating blow to public-sector unions imposed by the Supreme Court in *Janus v. AFSCME* (June 2018) (declaring unconstitutional agency fee payments without prior employee consent). The years 2018–2019 witnessed a wave of teachers’ strikes that began in West Virginia. The success of that statewide, two-week strike—a strike that included all 55 counties, enjoyed public support, and ended with a pay raise—inspired similar education workers’ strikes in Oklahoma, Arizona, Kentucky, Georgia, Virginia, North Carolina, Chicago, Los Angeles, and Denver. This national strike wave has sparked the Red for Ed movement—a fight that links the educators’ cause with students’ educational rights. The period ends, as it began, with a growth in private-sector collective action which connects workplace with political goals. These concerted activities have been bolstered by a surging interest in labor law reform within the Democratic Party, as evidenced by the Protecting the Right to Organize Act, a bill that, if enacted, would greatly strengthen workers’ rights to engage in concerted activity.

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Introduction

The practice of labor law has changed considerably in recent years. First, a significant portion of it is now in the public sector. While union density rates in the private sector have dropped to around seven percent, union rates in the public sector have climbed to nearly 40 percent. Thus, beginning in 2009, around half of all union members in the U.S. have been public employees. Public-sector labor laws are typically modeled in part on the main private-sector labor statute, the National Labor Relations Act (NLRA), but with some significant differences. For example, most public employees cannot legally strike; many are significantly limited in the subjects over which they can bargain; and a significant number have no legal right to bargain collectively at all. Beyond differences in legal rules, the policy debates and political context of public-sector labor law and labor relations are often different from those in the private sector. For example, the first half of 2011 witnessed a wave of state laws restricting the rights of public employees and their unions in ways still unimaginable in the private sector.

Second, unions in the private sector are increasingly abandoning traditional NLRA practices and procedures and adopting new strategies that do not depend on traditional labor law mechanisms. Whether this is because, as union advocates claim, evolving labor law doctrines and the National Labor Relations Board (NLRB) have become too biased against labor to offer unions a fair opportunity, or due simply to frustration with declining density numbers, private-sector unions and worker advocacy organizations are increasingly looking to alternate strategies and even alternate forms of organization, from card-check and neutrality agreements in lieu of NLRB elections, to Workers' Centers in lieu of traditional union representation.

This book incorporates both these modern trends, so that students entering the practice of labor law — on the side of unions, employers, or government agencies — will understand what they are likely to encounter. One of the authors of this book started a labor law job fresh out of law school and, having taken a traditional labor law class, expected to encounter at least mostly the issues his class covered: contract negotiations that could lead to strikes or lockouts, secondary boycotts, and perhaps even some of the more colorfully named NLRA doctrines, such as *Boys Market* injunctions and hot cargo clauses. Instead, he worked on cases involving a union of school employees in Virginia, a state in which public-sector unions could neither strike nor bargain collectively. In that same era, the “Justice for Janitors” campaign of the Service Employees International Union (SEIU), which explicitly made a practice of avoiding NLRB proceedings, was achieving high-profile successes around the

country. Students today should be prepared to deal with these sorts of situations and developments, which have been a significant part of the practice for decades.

Other factors have shifted the turf in labor relations. In the past two decades, some important unions experimented by splitting from the AFL-CIO, an umbrella organization that has, since the 1950s, included nearly all the significant unions in the U.S., to form the Change-to-Win coalition. While a number of those unions have returned to the AFL-CIO, the nature of union leadership is evolving and debates over the best uses of union resources continue. The NLRB under the George W. Bush administration issued a series of decisions interpreting the NLRA in new ways, in a number of cases overturning decades of precedent and giving a more restrictive reading to worker and union rights. The NLRB under the Obama Administration reversed some of those cases and issued new rules broadening the scope of worker and union rights. The NLRB under Trump has swung the pendulum aggressively the other way.

While the NLRA seems almost immune to formal amendment, in the public sector, labor statutes are amended with some regularity. The attacks on public-sector collective bargaining rights in 2011 and 2012 (summarized near the end of Chapter 1) were the most radical in decades, but since the 1960s and through the present, political battles have led to public employees winning and losing important legal rights in many different jurisdictions.

Amidst the swirl of legal and political battles, students of labor law must always be mindful of the tremendous importance of the working relationship to the parties involved. For employees, jobs provide not only income necessary to live, but also, at least often, a sense of identity and pride. Unions, at their best, provide not only increased bargaining power for individual employees *vis-a-vis* their employers, but also a measure of democratic control over, or at least input into, the workplace. For employers, labor is not only a cost of production but also, at least often, the backbone of the enterprise. Unlike all other factors of production, labor power is produced by human beings who have legal and human rights. Still, employers often feel that decisions regarding the enterprise should be made by the owners and managers, not the workers. Both sides appeal to visions of liberty and freedom that resonate in the American tradition. Labor relies on the freedom to associate and act collectively to gain a democratic voice in workplace decisions that affect the lives of employees. Employers appeal to the freedom to own and control their private property and to run their businesses as they please. How the law mediates these competing ideas is fraught with moral, philosophical, political, and economic concerns.

In the public sector, there is an added concern about the role of private bodies, such as unions, influencing democratically accountable public institutions. This relates to the broader question of whether public-sector unions should have at least mostly the same types of rights as private-sector unions. One could argue that workplace issues that unions address—wages, hours, and working conditions—are basically the same for, say, a janitor in a public school and a janitor in a private school, and thus that the labor law rules governing both should be fairly similar.

That is the approach of most western democracies. In the U.S., however, public-sector labor laws developed much later and on a much different track than private-sector labor law. Modern concerns about public-sector laws center on the question of whether collective bargaining interferes too much with public budgets and the decisions of elected officials. For example, even if collective bargaining is allowed, should public-sector laws exclude certain subjects from bargaining—subjects that private-sector workers are allowed to negotiate—because in government employment, such subjects rightly should be in the sole discretion of elected officials? Should all types of public workers be allowed to bargain, or just some types? Should strikes in the public sector be banned—and if so, for all government employees or just some? If we ban strikes but allow collective bargaining—as a plurality of states now do—how should bargaining impasses be resolved?

Because public-sector labor laws developed after private-sector law, much of the debate in designing public-sector rules has centered on whether and how private-sector rules should be imported: when to essentially copy them in state public-sector statutes, and when they should be modified or avoided entirely because of concerns specific to the public sector. Students are encouraged to track these debates and develop their own opinions. Moreover, though, the relative success of unions in the public sector in the past several decades as compared to private-sector unions raises the question of whether certain aspects of public sector labor law might profitably be adopted in the private sector. While states are largely preempted from innovating in private-sector labor law, it is fair to ask what decision-makers at the Board, in the federal courts, and the federal legislature can learn from experiences in the public sector.

Acknowledging that public-sector labor law is now a significant part of labor law also challenges some conventional wisdom about unions in the U.S. The “rise and fall” periodization of the history of American labor that focuses essentially exclusively on the private sector changes considerably if we include what is now many decades of experience in the public sector. The story that American workers are too “individualistic” or otherwise culturally disinclined to join unions becomes problematic if we count those who, for example, clean public schools or otherwise labor on behalf of a government entity as authentic “workers.” On the other hand, should declining union rates in the private sector be blamed primarily on an unfavorable legal climate (as some critics claim), given that public sector unions have achieved impressive successes under labor laws which generally give unions similar but fewer rights than the rights the NLRA grants in the private sector?

This book is structured around the life cycles of the organizing and collective bargaining processes. The first phase consists of workers’ organizing efforts or protests and (typically, albeit not always) employers’ efforts to persuade workers not to organize or their responses to protests. Workers may choose to organize themselves into a traditional union or some other type of organization, or simply to protest perceived injustices without creating an organization. Protests and union organizing in the private sector are protected by the NLRA. In the public sector, most

states have labor laws that protect these activities, and the Constitution also protects the right to organize.

Workers who decide to organize a union move to a second phase. They either pursue a union representation election administered by the appropriate labor relations agency or choose some alternative means of acquiring union representation, such as a voluntary recognition agreement with an employer. If the workers succeed in organizing a union, the union and the employer enter a third phase. In the private sector, unions use collective bargaining and both sides deploy economic weapons to influence bargaining outcomes. In the public sector, a majority of jurisdictions allow union collective bargaining, but most limit the subjects of bargaining more strictly than does the NLRA, and most prohibit economic weapons such as strikes and lockouts. Instead, public-sector laws often provide for some combination of mediation, fact-finding, and arbitration to resolve bargaining impasses, and unions and employers use political tactics to influence outcomes. When bargaining produces a collective bargaining agreement, then the fourth phase is reached: the parties administer their agreement and use dispute resolution mechanisms as part of that administration process.

The first part of this casebook provides a history of labor relations in the United States, and the coverage of labor statutes in the private and public sectors. It then moves to organizing and collective worker protests, with one chapter mostly dedicated to modern alternatives to traditional union organizing, and other chapters explaining the traditional labor law protections for worker protests. This part also explores why and how the law of public-sector labor relations developed so much later and, in many ways, so differently, than private-sector law. The bulk of the rest of the book studies the life cycle of unions: collective bargaining; strikes, economic weapons, and impasse resolution in the public sector; contract administration; and secondary activity and related actions. It concludes with three chapters that examine the rights of individual workers within their unions, bargaining relationships in transition (successorship), and preemption.

Two themes are repeated throughout the casebook. The first theme is how policymakers wrestle with the appropriateness of applying private-sector doctrine to government employees and their unions. In some areas of labor law, the rules in both sectors are quite similar because policymakers did not believe the public sector context required a different approach. In other areas, the rules are quite different because policymakers felt that private-sector rules were not appropriate for the public sector. This theme arises in legislative decisions over rights explicitly granted or denied in statutes (*e.g.*, whether a public-sector law should cover certain types of public employees at all, and whether certain public employees should have the right to strike). It also arises when agencies and courts try to decide which of the myriad rules devised by the NLRB and courts in the private sector should be used in the public sector. Even if broad statutory language in a public-sector labor law is the same as the language in the NLRA, do different policy concerns dictate that courts should adopt different rules, at least sometimes, in the public sector? Should the

default assumption be that if the statutory language is the same, all the rules flowing from that language should be the same, because that is more efficient or because the public sector should benefit from the much longer and wider experience in the private sector? If so, what if the law in the private sector changes (as it inevitably does) because a new political alignment on the NLRB interprets the NLRA in a new and different way? Should public sector rules—based on interpreting the same statutory language in a state public sector statute—change along with it automatically? Or might the discontents of private-sector labor law give those making policy for the public sector reason to reconsider private-sector rules? This could permit more experimentation and allow states to act even more as “laboratories of democracy” in this area.

The second theme is that, while the law of private-sector labor relations has stagnated, workers and their organizations, including unions, have responded by finding new ways to organize, both inside and outside traditional forms. Thus, while a comprehensive understanding of modern American labor law requires studying the governing statutes and the doctrines that have emerged from them, it also requires considering how actors in the field have worked around existing doctrine to create new systems, new structures, and new legal issues. Students will be challenged to predict the outcomes of these new strategies—including, but not limited to, analyzing the legal issues they raise.

Each of the book’s chapters addresses particular issues that arise in that phase of the relationship between organizing or organized workers and their employers. Each chapter begins with cases and materials relating to private-sector workers and also includes materials relating to the same issue in the context of public-sector employment. In some instances, the public-sector materials are in substantial additional sections, in some cases in quite short additional sections, and in a few sections, the public sector materials are interwoven with the private-sector materials. Notes follow most of the cases, and problems are often provided as well. Key cases that are discussed at length but do not appear as excerpts appear in bold [*e.g.*, *NLRB v. Hearst Publications*, 322 U.S. 111 (1944)]. Throughout, the goal is to provide students with the knowledge and background that will prepare them for the labor law and labor relations of the 21st century.

