

# Work Law



# Work Law

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## Cases and Materials

FIFTH EDITION

**Marion G. Crain**

WILEY B. RUTLEDGE PROFESSOR OF LAW  
WASHINGTON UNIVERSITY SCHOOL OF LAW

**Pauline T. Kim**

DANIEL NOYES KIRBY PROFESSOR OF LAW  
WASHINGTON UNIVERSITY SCHOOL OF LAW

**Michael Selmi**

FOUNDATION PROFESSOR OF LAW  
SANDRA DAY O'CONNOR COLLEGE OF LAW  
ARIZONA STATE UNIVERSITY

**Brishen Rogers**

PROFESSOR OF LAW  
GEORGETOWN UNIVERSITY



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# Contents

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Acknowledgments	xvii
Preface	xxi

## PART ONE

Introduction: Regulating Work	3
Chapter 1 • The Historical Evolution of Work Law	5
A. The Meaning of Work	5
Kenneth L. Karst, <i>The Coming Crisis of Work in Constitutional Perspective</i>	5
Notes	7
B. The Rise and Fall of Freedom of Contract	11
<i>Lochner v. New York</i>	12
Notes	19
C. The New Deal Labor Laws and the U.S.'s Collective Bargaining Model	22
1. The Labor Laws	23
Notes	26
2. The Philosophy of Unionism, Industrial Pluralism, and the Practice of Collective Bargaining	29
RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO?	29
Notes	31
3. The Decline of Unionism and Collective Bargaining	34
4. A Rebirth of Unionism in the 2020s?	37
D. The Individual Rights Model	39
1. Core Aspects of the Individual Rights Model	40
2. Costs and Benefits of the Individual Rights Model	42
Katherine Van Wezel Stone, <i>The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System</i>	42
Notes	43

3. Economic and Social Bases for the Individual Rights Model	45
<b>Chapter 2 • Defining the Boundaries of the Employment Relationship</b>	<b>53</b>
A. Employee?—or Volunteer?—or Intern?—or Something Else Entirely??	54
1. Volunteers	54
2. Unpaid Student Interns	55
3. Graduate Students	56
4. Student Athletes	57
5. Prisoners	59
B. Employees Versus Independent Contractors	60
<i>Cotter v. Lyft, Inc.</i>	61
Notes	68
C. Exclusions Based on Citizenship	72
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i>	73
Notes	80

## PART TWO

<b>Balancing Employer and Employee Interests: Individual Versus Collective Responses</b>	<b>85</b>
<b>Chapter 3 • Contracting for Individual Job Security</b>	<b>89</b>
A. The Presumption of Employment At-Will	90
1. Historical Background	90
<i>Savage v. Spur Distributing Co.</i>	93
Notes	95
2. Alternative Models	98
a. The Union Sector	98
Roger I. Abrams & Dennis R. Nolan, <i>Toward a Theory of “Just Cause” in Employee Discipline Cases</i>	99
Cynthia L. Estlund, <i>Free Speech and Due Process in the Workplace</i>	100
Notes	101
b. Public Employment	102
<i>Board of Regents of State Colleges v. Roth</i>	102
Notes	105
3. The Contemporary Era	109
B. Overcoming the Presumption by Agreement	111
1. Written Contracts	111
Notes	113
2. Oral Contracts	114
Notes	116

3. Implied Agreements	121
<i>Woolley v. Hoffmann-La Roche, Inc.</i>	121
Notes	127
<i>Asmus v. Pacific Bell</i>	133
Notes	138
C. What Is “Cause”?	140
D. Promissory Estoppel as a Limit on Employment-at-Will	143
<i>Cocchiara v. Lithia Motors, Inc.</i>	143
Notes	146
<b>Chapter 4 • Public Policy Protections for Individual Job Security</b>	<b>153</b>
A. The Public Policy Exception	155
<i>Sheets v. Teddy’s Frosted Foods, Inc.</i>	155
Notes	159
B. What Constitutes Public Policy?	165
<i>Hayes v. Eateries, Inc.</i>	166
Notes	170
<i>Gantt v. Sentry Insurance</i>	175
Notes	180
C. What Is a “Discharge”?	185
Notes	188
D. The Special Case of Attorneys	189
Notes	192
E. Revisiting the Presumption of At-Will Employment	194
Richard A. Epstein, <i>In Defense of the Contract at Will</i>	194
Pauline T. Kim, <i>Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World</i>	197
Notes	199
<b>Chapter 5 • Collective Job Security</b>	<b>205</b>
A. Collective Job Security Under the National Labor Relations Act	205
1. Union Organizing Drives: §§ 8(a)(1) and 8(a)(3)	206
<i>Textile Workers Union v. Darlington Manufacturing Co.</i>	206
Notes	211
2. Collective Job Loss Where the Workforce Is Already Unionized: § 8(a)(5)	215
<i>First National Maintenance Corp. v. NLRB</i>	216
Notes	223
Problem for Discussion	226
B. Common Law Contract, Property, and Tort Claims	227
Kent Greenfield, <i>The Unjustified Absence of Federal Fraud Protection in the Labor Market</i>	227

<i>Local 1330, United Steel Workers of America v. United States Steel Corp.</i>	230
Notes	237
C. Worker Adjustment and Retraining Notification Act	243
1. The Statute	243
2. Enforcement and Compliance Issues	244
3. Statutory Interpretation Issues	246
<i>Childress v. Darby Lumber, Inc.</i>	249
Notes	254
D. The Unemployment Insurance System	261
Gillian Lester, <i>The Unemployment Insurance and Wealth Redistribution</i>	262
Notes	263
<b>Chapter 6 • Employee Mobility</b>	269
A. Covenants Not to Compete	271
<i>Hopper v. All Pet Animal Clinic, Inc.</i>	271
Notes	279
B. Nonsolicitation Agreements	288
<i>Bankers Life &amp; Casualty Co. v. American Senior Benefits LLC</i>	288
Notes	291
C. Trade Secrets	294
<i>Allstate Insurance Co. v. Fougere</i>	294
Notes	302
D. The Duty of Loyalty	308
<i>Salas v. Total Air Services, LLC</i>	308
Notes	314
E. Employee Inventions	320
<i>Wommack v. Durham Pecan Co.</i>	320
Notes	325
<b>Chapter 7 • Dignitary Interests</b>	327
A. Avoiding Emotional Harm	329
<i>Wornick Co. v. Casas</i>	329
Notes	332
<i>Bodewig v. K-Mart, Inc.</i>	333
<i>Hollomon v. Keadle</i>	336
Notes	339
B. Privacy	342
1. Constitutional Protection for Public Employees	343
<i>O'Connor v. Ortega</i>	343
<i>City of Ontario v. Quon</i>	349



Notes	352
2. Common Law Protections for Private Employees	358
a. Intrusion on Seclusion	359
<i>K-Mart Corp. Store No. 7441 v. Trotti</i>	359
Notes	362
b. Publicity to Private Life	369
<i>Borquez v. Robert C. Ozer, P.C.</i>	369
Notes	373
3. Collective Approaches to Protecting Employee Privacy	376
<i>Colgate-Palmolive Co. &amp; Local 15, International</i>	
<i>Chemical Workers Union</i>	377
Notes	379
4. Statutory Privacy Protections	382
a. Medical and Genetic Information	383
i. The Americans with Disabilities Act	384
ii. The Genetic Information Nondiscrimination Act	385
Notes	387
iii. Wellness Programs	387
b. Consumer Protections for Employee Data	390
i. Fair Credit Reporting Act	390
ii. California Consumer Privacy Act	391
Notes	393
C. Autonomy	393
<i>McCavitt v. Swiss Reinsurance America Corp.</i>	394
Notes	397
D. Reputation	401
<i>Zinda v. Louisiana Pacific Corp.</i>	402
Notes	407
<i>Chambers v. American Trans Air, Inc.</i>	411
Notes	414
E. Impacts of Algorithmic Management	418
Notes	423
<b>Chapter 8 • Employee Voice</b>	429
A. Employee Interests in Voice	430
Cynthia L. Estlund, <i>Working Together:</i>	
<i>The Workplace, Civil Society, and the Law</i>	430
Note	432
B. Constitutional Protections	432
<i>Connick v. Myers</i>	435
Notes	440
Problem	451
<i>Garcetti v. Ceballos</i>	452

Notes	459
Problem	466
C. The Common Law	466
<i>Edmondson v. Shearer Lumber Products</i>	467
Notes	470
D. Statutory Protections for Employee Speech	477
1. State Statutory Protection for Speech and Political Activity	477
2. Statutory Protections Against Retaliation	481
3. Whistleblower Protections of the Sarbanes-Oxley Act	483
a. Who Is Protected?	487
b. What Is Protected Activity?	489
<i>Wiest v. Lynch</i>	489
Notes	497
4. Whistleblower Provisions of the Dodd-Frank Act	502
E. Collective Voice Protections—The NLRA	505
1. The Voice-Protection Function of NLRA § 7	507
Clyde W. Summers, <i>The Privatization of Personal</i>	
<i>Freedoms and Enrichment of Democracy:</i>	
<i>Some Lessons From Labor Law</i>	507
Note	508
2. NLRA § 7 Rights in the Non-Union Workplace	510
<i>NLRB v. Washington Aluminum Co.</i>	511
Notes	515
<i>Timekeeping Systems, Inc.</i>	517
<i>Triple Play Sports Bar and Grille</i>	523
Notes	528
3. Employer Policies Restricting Collective Action	531
Note on Pay Secrecy Policies	534
<b>PART THREE</b>	
<b>Freedom from Discrimination Versus Flexibility</b>	537
<b>Chapter 9 • Employment Discrimination Law</b>	539
A. Introduction	539
B. Claims of Intentional Discrimination: The Disparate Treatment Model	543
1. Individual Claims of Intentional Discrimination	543
<i>McDonnell Douglas Corp. v. Green</i>	545
Notes	548
<i>St. Mary's Honor Center v. Hicks</i>	549
Notes	554
2. The Mixed-Motives Proof Structure	561
<i>Desert Palace, Inc. v. Costa</i>	561
Notes	565

3. Retaliation Claims	568
4. Intentional Discrimination Class Claims: Pattern or Practice and the BFOQ	575
a. Pattern or Practice Claims	575
b. The BFOQ Defense	577
C. Disparate Impact Claims and Their Relation to Other Theories of Discrimination	580
<i>Griggs v. Duke Power Co.</i>	580
Notes	585
D. Sexual Harassment Law	592
1. The Hostile Working Environment Theory	593
<i>Billings v. Town of Grafton</i>	593
Notes	600
2. Employer Liability	605
<i>Burlington Industries, Inc. v. Ellerth</i>	605
Notes	615
E. Sexual Orientation Discrimination	623
<i>Bostock v. Clayton County, Georgia</i>	623
Notes	637
F. Age Discrimination—The Age Discrimination in Employment Act (ADEA)	639
G. Disability Discrimination: The Americans With Disabilities Act	645
1. Defining Disability	645
<i>Weaving v. City Of Hillsboro</i>	648
Notes	657
2. “Qualified” Individual and the Duty to Accommodate	659
<i>Hostettler v. College of Wooster</i>	659
Notes	666
H. Contemporary Workplace Issues	672
1. The FMLA	672
2. Diversity in the Workplace	677

## PART FOUR

<b>Government Intervention for the Public Good: Legislating a Safety Net</b>	<b>683</b>
<b>Chapter 10 • The Regulation of Wages and Hours</b>	<b>685</b>
A. Overview of the FLSA: Historical Origins and Current Provisions	687
1. The History of Wage and Hour Regulation	687
<i>West Coast Hotel Co. v. Parrish</i>	689
Notes	693
2. Overview of the FLSA	695
a. Minimum Wage Provisions	695

b. Overtime Pay Provisions	695
c. Child Labor Provisions	696
Notes	697
B. The Policy Debate Around the Minimum Wage	701
Brishen Rogers, <i>Justice at Work: Minimum Wage Laws and Social Equality</i>	703
Notes	705
C. Who Is Covered?	707
1. FLSA Coverage of Entities	707
2. The Existence of an Employment Relationship	707
3. Exemptions from Coverage	708
4. Applying FLSA's Test for Employment Status	712
a. Independent Contractors	712
<i>Heath v. Perdue Farms, Inc.</i>	712
Notes	718
b. Trainees and Interns	721
<i>Benjamin v. B &amp; H Educ., Inc.</i>	721
Notes	727
D. What Is Compensable Time?	733
1. "Off-the-Clock" Work	734
<i>Perry v. City of New York</i>	734
Notes	743
2. "On-Call" Time	747
<i>Dinges v. Sacred Heart St. Mary's Hospitals, Inc.</i>	748
Notes	751
3. Other Time-Keeping Issues	754
E. The "White Collar" Exemptions	760
1. The Policy Debate Around Overtime and the "White-Collar" Exemptions	761
Deborah C. Malamud, <i>Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation</i>	761
Notes	763
2. The Overtime Exemptions: Details	764
a. Executive, Administrative and Professional Employees	764
i. Executive Employees	766
ii. Administrative employees	771
iii. Professional Employees	775
b. Outside Sales Employees	784
c. Computer Professionals	787
d. The "Combination" and "Highly Compensated" Exemptions	790
F. Enforcement	791

1. Basics	791
2. Retaliation Complaints	794
3. Defenses and Limitations on Liability	797
4. FLSA Collective Actions and Rule 23 Class Actions	798
<b>Chapter 11 • Health and Pension Plans—ERISA Regulation</b>	<b>803</b>
A. Health Benefits	804
B. Pension Benefits	807
1. Defined Benefit Plans	810
2. Defined Contribution Plans, 401(k)s and Their Investments	810
a. The Structure and Remedies of the Plans	811
<i>LaRue v. DeWolff, Boberg &amp; Associates, Inc.</i>	811
Notes	814
b. Breach of Fiduciary Duty	815
<i>Smith v. CommonSpirit Health</i>	816
Notes	822
<b>Chapter 12 • Health and Safety</b>	<b>827</b>
A. Workers' Compensation	828
1. The Origins of Workers' Compensation Laws	828
a. The Common Law Approach	829
<i>Farwell v. The Boston and Worcester Rail Road Corp.</i>	829
Notes	832
b. The Compensation Acts	836
Arthur Larson, <i>The Nature and Origins</i>	
<i>of Workmen's Compensation</i>	836
<i>New York Central Railroad Co. v. White</i>	837
Notes	841
2. Basic Benefits and Coverage	842
a. Benefits and Procedures	842
b. Who Is an Employee?	845
c. "Arising out of and in the Course of Employment"	847
<i>Prows v. Industrial Commission of Utah</i>	847
Notes	853
<i>Houser v. Bi-Lo, Inc.</i>	854
Notes	857
3. Exclusivity of Remedies	859
a. The Fundamental Bargain	859
<i>Eckis v. Sea World Corp.</i>	859
Notes	863
b. Exception for Intentional Acts	863
<i>Whitaker v. Town of Scotland Neck</i>	864

Notes	868
c. Non-Physical Torts	872
<i>Cole v. Fair Oaks Fire Protection District</i>	873
Notes	876
B. OSHA	880
1. The Structure of the Statute	881
a. Promulgating Standards	881
i. Ergonomics Standards	881
ii. Other Enforcement Means	883
b. Inspection and Enforcement Scheme	883
2. The General Duty Clause	885
<i>Seaworld v. Perez</i>	885
Notes	893
3. Employee Rights	896
<i>Whirlpool Corp. v. Marshall, Secretary of Labor</i>	896
Notes	902
C. Reflections on Worker Safety	904
<b>PART FIVE</b>	
<b>Systems of Justice: Public Versus Private, Collective Versus Individual</b>	907
<b>Chapter 13 • Arbitration of Workplace Disputes</b>	909
A. Arbitration as a Workplace Dispute Resolution Mechanism:	
Overview	909
Notes	911
B. Arbitration in the Non-Union Workplace	914
<i>Gilmer v. Interstate/Johnson Lane Corp.</i>	914
Notes	920
C. Workers Excluded from FAA Coverage: The “Transportation Worker” Exemption	922
<i>Southwest Airlines Co. v. Saxon</i>	923
Notes	929
D. The Uses and Limits of Mandatory Employment Arbitration Agreements	932
1. Minimum Standards of Fairness	933
Notes	934
2. State Contract Law Principles	937
<i>Roe v. SFBSC Management, LLC</i>	938
Notes	945
3. Challenging Waivers of Class Claims	954
<i>Epic Systems Corporation v. Lewis</i>	956
Notes	967

## CONTENTS

xv

E.   Reconsidering Employer-Promulgated Arbitration Systems	971
Katherine Van Wezel Stone, <i>Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s</i>	971
Samuel Estreicher, <i>Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements</i>	973
Alexander J.S. Colvin & Kelly Pike, <i>Saturns and Rickshaws Revisited: What Kind of Arbitration System Has Developed?</i>	974
Notes	977
<b>Table of Cases</b>	985
<b>Index</b>	1011





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# Preface

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The law of work has evolved as a patchwork of legal interventions in the labor market, sometimes by statute, and sometimes through the common law of judicial decisions. Most law school curricula divide the law of work into three topical areas—Labor Law, Employment Law, and Employment Discrimination—and offer separate courses in each area. Labor law in the United States is understood to encompass the study of the National Labor Relations Act, the law governing union organizing and collective bargaining. It is the law of collective rights at work. Employment law refers to the statutes and common law governing individual rights at work. It ranges from minimum standards legislation to judicially created doctrines based in tort and contract law. Employment discrimination law deals with the statutes and interpretative case law advancing the antidiscrimination norm in the workplace. These statutes address the problem of status discrimination at work (e.g., discrimination on the basis of race, sex, national origin, ethnicity, religion, age, disability, sexual orientation, or gender identity).

Regulation of the employment relation defies such categorical thinking, however. The law has struggled with the tension between the desire to leave things to private contract and market forces, and the impulse to intervene to redress inequitable results occasioned by the imbalance of power between employees and employers. In some areas freedom of contract principles have prevailed. In other areas the law has considered it essential to extend protection to employees to act collectively in dealing with the employer, as in the labor laws. Another prevalent response has been government legislation to afford minimum standards of protection to all workers, and to prohibit discrimination against those historically disadvantaged in the American labor market, such as people of color, women, and persons with disabilities. These legal regimes overlap and relate to one another in complex ways that are obscured by categorical study.

We believe that acquaintance with historical context and the multiple legal structures governing the workplace is vital for today's lawyers. Historical legal context affords important insights about how the law may evolve in the future. Understanding the story behind the decline of labor unions and labor law provides critical assistance in understanding and evaluating individual employee rights. Minimum standards legislation was established partly because gaps in union representation left many

workers unprotected at the workplace. Antidiscrimination law responded to union failures to represent the rights of subordinated groups. Is there any logical stopping point to this progression? As each new right is conceptualized and political momentum builds for legal protection, will laws continue to proliferate? Similarly, as groups of employees previously excluded from protection against discrimination press for legal agency, will new employment discrimination statutes be enacted? Where is the sunset? Yet at the same time, the emergence of an increasingly global economy militates in favor of more flexibility for U.S. employers attempting to compete in an international market. Will employers block new protective legislation? Will legislative impasse ensue, as it ultimately did in the area of labor law? What, then, might evolve to replace individual statutory rights?

A comprehensive study of the law of work also provides an opportunity to assess critically what form enforcement of rights should take. Should conflicts between employers and employees be channeled into private resolution systems such as collective bargaining or contractual arbitration, or is the public interest sufficient to justify committing administrative and judicial resources to it? What is the significance of casting employee rights as collective—and therefore entrusting their enforcement to an employee representative such as a union—versus conceptualizing them as individual? Doesn't history also warn of the risks of subordinating individual interests to those of the collective, particularly in the context of a diverse workforce with minority groups characterized by race, ethnicity or gender?

Accordingly, we have denominated this text “Work Law” and endeavor here to present basic materials on each system of labor market regulation. We identify core themes of conflict and concern in the workplace, canvass the governing law, and offer a vantage point for assessment. Several themes furnish the organizing structure for the book. We ask how law should mediate the perennial conflict between employer and employee rights; what difference it makes whether employee rights are conceptualized individually or collectively; what significance the increasing racial, ethnic, and gender diversity of the workforce should have for legal policy; whether workplace rights should be negotiated privately (via collective bargaining or individual contract) or should be determined in public fora (courts and legislatures).

The book will be most useful in Employment Law courses that address the significance of conceptualizing rights at work individually as opposed to collectively. Its strength, we believe, is its refusal to categorize the law of the workplace in doctrinal boxes that may be out-of-date by the time the book reaches maturity. We advert to Labor Law principles at a number of points throughout the book, but at a policy level rather than a doctrinal level, as a way of introducing and evaluating an alternative model of employee representation; we assume no knowledge of Labor Law on the part of teacher or student and make no effort here to provide a satisfactory substitute for a Labor Law text. We offer some detail in the law of Employment Discrimination but do so primarily with an eye toward surveying the field and assessing antidiscrimination regulation as a response to an increasingly diverse workforce, rather than providing an in-depth study of Employment Discrimination principles.

This text surveys the existing legal landscape, but it does not stop there. Work Law is an exciting and intellectually stimulating practice area because it is of necessity in a constant state of flux, responding to labor market innovations. Flexibility in thinking is vital to this area of practice. We urge students to reject traditional rigid categories and to ask: what new paths might emerge from a holistic conception of Work Law, and the demolition of categorical divides between Labor Law, Employment Law, and Employment Discrimination Law? Toward that end, we offer the following specific questions as a guide for study. We suggest that professors and students consider them in each area covered throughout the course:

1. Which worker desires predominate in this area? Which employer desires predominate? What public interests, if any, are at stake? In short, what is the justification for law to enter the market in this area?

2. What form has the law assumed in this area: e.g., statutory, common law, agency regulation/decisionmaking?

A. What is the substance of the law?

B. Who is covered by it (how are covered employees defined, which employers are covered)?

C. What are the catalysts for change and is the law in this area receptive to change?

3. What remedies does the law offer for the harms/problems it conceptualizes? Are they adequate?

A. How is the law enforced and what are the enforcement mechanisms? Who enforces it (e.g., watchdog system or individuals, agency or union, etc.)? Is the law enforced by federal or state authorities?

B. What is the interaction between systems of law addressing a given area (e.g. collective bargaining and individual statutory rights; federal vs. state regulation)?

C. Is adjudication private or public? What is the significance of this choice?

4. What extralegal alternatives are available? What human resource strategies have employers developed to manage their workforces? What self-help strategies do employees utilize, both individually and collectively? Are they adequate?

We are grateful to the many other authors whose work graces these pages, for permission to use their words to tell the story of Work Law. We also owe thanks to all who have assisted us in our day-to-day work on this project. We offer special thanks to Washington University School of Law, Arizona State College of Law and Georgetown Law School for providing research support; to our hardworking and enthusiastic student research assistants Sara Bisantz, Anna Chestnut, Thomas Khristenko, Grace Carpenter, Nicholas Ogilvie-Thompson, Anthony Chang, Danielle Huber, Alison Hagani, and Bennett Flanagan, and to Rachel Mance, who provided expert administrative and clerical support.

We have included relevant statutory provisions at appropriate points in the text for convenience; accordingly, use of a Statutory Supplement is not necessary. We chose to edit the cases according to the following conventions: parallel citations and other distracting material have been removed to make the cases as readable as possible. Extraneous detail was omitted to conserve space and focus attention on the issues in the principal cases we included, using ellipses to indicate all deletions of text other than footnotes or citations to authority. Original footnote numbers for included footnotes are shown in brackets at the outset of the footnote. We conformed to bluebook citation format wherever possible to ensure consistency, but ignored the rules when they were silly or unhelpful.

We hope you enjoy this journey through the law of work!

**MARION CRAIN**

**PAULINE KIM**

**MIKE SELMI**

**BRISHEN ROGERS**



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# Table of Cases

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- 14 Penn Plaza LLC v. Pyett, 959
- A.E.P. Industries, Inc. v. McClure, 274
- A.L.A. Schechter Poultry Corp. v. United States, 689
- A.P.R.A. Fuel Oil Buyers Group, Inc., 74, 79, 80
- AARP v. EEOC, 389
- Abbott v. Lockheed Martin Corp., 814
- Abdul-Malik v. AirTran Airways, Inc., 341
- ABF Freight Sys., 380
- Abrasic 90 Inc. v. Weldcote Metals, Inc., 303
- ACAS Acquisitions (Precitech) Inc. v. Hobert, 281
- Acosta v. Cathedral Buffet, Inc., 733
- Adair v. United States, 11, 12
- Adams v. O'Reilly Auto., Inc., 619
- Adams v. Palm Beach Cnty., 732
- Adams v. Postmates, Inc., 970
- Adams v. Trs. of the Univ. of N.C.-Wilmington, 465
- Adkins v. Children's Hosp., 20, 21, 689, 690, 692, 693
- Adkins v. Lab. Ready, Inc., 920
- Adler v. Am. Standard Corp., 160
- Advanced Technologies, 527, 528
- Aesthetic Facial & Ocular Plastic Surgery Ctr. v. Zaldivar, 286
- AFL-CIO v. OSHA, 883
- AFSCME Council 79 v. Scott, 357
- Agis v. Howard Johnson Co., 333
- Aguilar v. Mgmt. & Training Corp., 760
- AHS Staffing, LLC v. Quest Staffing Grp., Inc., 303
- Akpeneye v. United States, 755
- Al Minor & Assoc. v. Martin, 304
- Albemarle Paper Co. v. Moody, 589, 615
- Albert v. Oshkosh Corp., 822
- Alcantara v. Duran Landscaping, Inc., 793
- Aldea-Tirado v. Pricewaterhouse Coopers, LLP, 949
- Alden v. Maine, 699
- Alexander v. Anthony Int'l, L.P., 945
- Alexander v. FedEx Ground Package Sys., 69, 71
- Alexander v. Gardner-Denver Co., 912, 914, 919
- Ali v. Federal Bureau of Prisons, 926, 927, 928
- Ali v. Regan, 667, 670
- Allen v. Admin Review Board, 491
- Allen v. City of Chicago, 589, 746, 747
- Allen v. Salt Lake County, 619
- Allied Chem. Corp. v. Wells, 856, 857
- Allstate Insurance Co. v. Fougere, 294
- Allstates Refractory Contractors, LLC v. Su, 893
- Alpha Sch. Bus. Co. v. Wagner, 314
- Alstate Maint. LLC, 516
- Altavion, Inc. v. Konica Minolta Sys. Lab. Inc., 303
- Alternative Entertainment, NLRB v., 960
- Amazon.com Services, LLC, 35, 478, 509

- American Alliance for Equal Rights v. Fearless Fund Mgt. LLC, 680
- American Building Maintenance Industries, United States v., 928
- American Express Co. v. Italian Colors Rest., 921, 933, 958
- American National Ins. Co., NLRB v., 218
- American Postal Workers Union, Columbus Area Loc. v. U.S. Postal Serv., 353
- American Textile Manufacturers Institute v. Donovan, 883
- Ames v. Ohio Dept. of Youth Servs., 681
- AMN Healthcare, Inc. v. AYA Healthcare Servs., Inc., 287
- Amos v. Oakdale Knitting Co., 797
- Anderson v. Douglas & Lomason Co., 129, 131
- Anderson v. Mt. Clemens Pottery Co., 757, 801
- Anderson v. Vanden Dorpel, 409
- Andrew v. Clark, 462
- Anonymous v. Macy, 636
- Antenor v. D & S Farms, 720
- Anthony Crane Rental, Inc. v. Reich, 887
- API Ams., Inc. v. Miller, 304
- Applied Medical Distribution Corp. v. Jarrells, 307
- Arakelian v. Omnicare, Inc., 286
- Armendariz v. Found. Health Psychcare Servs., Inc., 944, 945, 946
- Armour & Co. v. Wantock, 747
- Arnold v. Ben Kanowsky, Inc., 787
- Asmus v. Pacific Bell, 133
- Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 588
- Astra USA, Inc. v. Bildman, 316
- AT&T Mobility LLC v. Concepcion, 921, 929, 946, 950, 955, 958, 959
- Atkin v. Kansas, 20
- Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 899
- Auer v. Robbins, 750
- Augat, Inc. v. Aegis, Inc., 311, 314
- Austin-Berryhill, Inc., 376
- Ayala v. Antelope Valley Newspapers, Inc., 65, 67
- Azam v. D.C. Taxicab Comm'n, 355
- Babcock & Wilcox, 478
- Bachelder v. America West Airlines, Inc., 675
- Backus v. Baptist Med. Ctr., 579
- Baker v. Bristol Care, Inc., 948
- Baker v. Smith & Wesson, 498
- Baldwin v. BlueCross/Blue Shield of Ala., 619
- Baldwin v. Foxx, 638
- Balla v. Gambro, Inc., 189
- Balmer v. Hawkeye Steel, 186
- Baltimore & Ohio Southwestern R. Co. v. Burtch, 925, 929
- Bankers Life & Casualty Co. v. American Senior Benefits LLC, 288
- Bankey v. Storer Broad. Co., 139
- Barbee v. Household Automotive Finance Corp., 398, 399
- Barchock v. CVS Health Corp., 822
- Barfield v. N.Y. City Health & Hosps. Corp., 720
- Barnes v. Costle, 632
- Barnes v. Train, 632
- Barnes-Staples v. Carnahan, 558
- Baroid Div. of NL Indus., Inc. v. OSHRC, 887, 890
- Barrentine v. Arkansas-Best Freight Sys., 695, 919
- Basic, Inc. v. Levinson, 496
- Baskett v. Autonomous Rsch. LLP, 488
- Beacom v. Oracle Am., Inc., 498
- Bear, Stearns & Co. v. Sharon, 283

- Beaumont v. Brown, 374  
 Beckford v. Dep't of Corr., 621  
 Beckley Oncology Assocs., Inc. v. Abumasmah, 911  
 Beckman v. Cox Broadcasting Corp., 275  
 Beliz v. W.H. Mcleod & Sons Packing Co., 715  
 Benedict v. Hewlett-Packard Co., 789  
 Benjamin v. B & H Educ., Inc., 721  
 Benson v. Enter. Leasing Co. of Orlando, LLC, 255  
 Benson v. Wal-Mart Stores East, LP, 667  
 Berube v. Fashion Centre, Ltd., 119  
 Beyene v. Hilton Hotels Corp., 375  
 BHC Northwest Psychiatric Hosp. LLC v. Secretary of Labor, 893  
 Bias v. E. Associated Coal Corp., 863  
 Bilinsky v. Am. Airlines, Inc., 669  
 Billings v. Atkinson, 360  
 Billings v. Town of Grafton, 593  
 Bills v. Cactus Fam. Farms, 718  
 Bimbo Bakeries USA, Inc. v. Botticella, 305  
 Bird v. Shearson Lehman/Am. Express, Inc., 920  
 Bissonnette v. LePage Bakeries Park St., LLC, 930  
 Bland v. Edward D. Jones & Co., L.P., 293  
 Bland v. Roberts, 445, 531  
 Blankenship v. Parke Care Centers, Inc., 610, 614  
 Board of Regents of State Colleges v. Roth, 102, 106, 107  
 Board of Trustees v. Garrett, 543  
 Boddie v. Connecticut, 108, 109  
 Bodenstab v. Cnty. of Cook, 652  
 Bodewig v. K-Mart, Inc., 333  
 Bodle v. TXL Mortg. Corp., 792  
 Boehm v. Black Diamond Casino Events, LLC, 304  
 Boeing Co., 224  
 Boeing Co., Inc., 532, 534  
 Bollinger Shipyards Inc. v. Dir., 82  
 Bollinger v. Fall River Rural Elec. Co-op., Inc., 129, 139  
 Borquez v. Robert C. Ozer, P.C., 369, 374  
 Borse v. Piece Goods Shop, Inc., 472  
 Borzilleri v. Mosby, 448, 450  
 Bosley v. Cargill Meat Sols. Corp., 674  
 Bosley v. McLaughlin, 20  
 Bostock v. Clayton Cnty., 51, 623  
 Boston Med. Ctr. Corp., 57  
 Boutilier v. INS, 636, 637  
 Boyer-Liberto v. Fontainebleau Corp., 602  
 Boykin v. Fam. Dollar Stores of Mich., LLC, 949  
 Boyle v. Vista Eyewear, Inc. 177, 182, 183  
 Boynton v. ClearChoiceMD, MSO, LLC, 150  
 Bradford v. U.S. Dep't of Labor, 686  
 Brady v. Maryland, 441, 462  
 Bragdon v. Abbott, 647  
 Brandt v. City of Cedar Falls, 640  
 Branham v. Celadon Trucking Servs., Inc., 878  
 Brant v. Schneider Nation, Inc., 708  
 Branti v. Finkel, 437, 446, 447  
 Braun v. Alaska Commercial Fishing and Agric. Bank, 142  
 Brewer v. Tracy, 277  
 Brewers & Maltsters, Local Union No. 6 v. NLRB, 379, 380  
 Briarwood Mgt., Inc. v. EEOC, 638  
 Brigham v. Dillon Cos., 189  
 Brigham v. Eugene Water & Electric Bd., 754  
 Brigham v. Frontier Airlines, 670  
 Bright v. Hous. Nw. Med. Ctr. Survivors Inc., 752, 753  
 Briscoe v. City of New Haven, 592

- Britto v. Prospect Chartercare SJHSRI, LLC, 949  
 Broadrick v. Oklahoma, 451  
 Brock, Inc. v. Flowers Foods, Inc., 931  
 Brockmeyer v. Dun & Bradstreet, 150, 162, 177  
 Broussard v. CACI, Inc.—Federal, 117  
 Brown & Brown, Inc. v. Johnson, 282, 284  
 Brown Univ., 57  
 Brown v. Chicago Bd. of Educ., 465  
 Brown v. MFC Finance Co. of Oklahoma, 168  
 Brown v. Nexus Bus. Sols., LLC, 774  
 Brown v. Nucor Corp., 577  
 Brown v. Safeway Stores, Inc., 117  
 Brown v. Transcon Lines, 156  
 Brown v. Wal-Mart Stores East, L.P., 558  
 Bruce A. v. Google, Inc., In the Matter of, 859  
 Bruce v. Worcester Reg'l Transit Auth., 461  
 Brunke v. Goodyear Tire & Rubber Co., 647  
 Brunner v. Al Attar, 398, 474  
 Buchanan v. Alexander, 465  
 Bull v. United States, 756  
 Bulman v. Safeway, Inc., 129  
 Bunch v. W.R. Grace & Co., 815  
 Bunn v. Khoury Bros., 670  
 Bunting v. Oregon, 691  
 Buon v. Spindler, 560  
 Burk v. K-Mart Corp., 167  
 Burkhart v. Semitool, Inc., 192  
 Burlingham v. Gray, 68  
 Burlington Industries, Inc. v. Ellerth, 605, 620, 795  
 Burlington Northern & Santa Fe Railway Co. v. White, 568, 569, 626  
 Burlington Truck Lines, Inc. v. United States, 80  
 Burnett v. LFW Inc., 675  
 Burns v. McGregor Elec. Indus., Corp., 600  
 Burson v. Milton Hall Surgical Assocs., LLC, 292  
 Burstein v. Entel, Inc., 566  
 Burten v. Milton Bradley Co., 298  
 Butler v. Allstate Heritage Life Ins. Co., 129  
 Butler v. Fluor Corp., 254  
 Byrd v. Ill. Dep't of Pub. Health, 501  
 Cabaniss v. Hipsley, 372  
 Cadena v. Customer Connexx, LLC, 758  
 Calderon v. GEICO Gen. Ins. Co., 772  
 California Federal Savings & Loan Ass'n v. Guerra, 672, 673  
 Calleon v. Miyagi, 119  
 Calloway v. Caraco Pharm. Labs., Ltd., 255  
 Camara v. Mun. Ct., 352  
 Cameco, Inc. v. Gedicke, 314  
 Campbell v. City of Los Angeles, 800  
 Campbell v. Gen. Dynamics Gov't Sys. Corp., 949  
 Campbell v. Husky Hogs, L.L.C., 184  
 Campbell v. Keagle, Inc., 936  
 Cannon v. Jacobs Field Servs. N. Am., Inc., 657  
 Capili v. Finish Line, Inc., 935, 952  
 Capriole v. Uber Techs., Inc., 932  
 Caraballo-Caraballo v. Correctional Admin., 558  
 Cardoza v. Bloomin' Brands, Inc., 758  
 Carey v. 24 Hour Fitness, USA, Inc., 948  
 Carey v. Brown, 436, 471  
 Carl v. Children's Hosp., 473  
 Carnig v. Carr, 94, 96  
 Carpenter v. United States, 354  
 Carroll v. Workers' Compensation Appeal Board, 857, 858  
 Caskey v. Colgate-Palmolive Co., 674

- Castellanos v. State, 71  
 Castillo v. Givens, 716  
 Castle v. Eurofresh, Inc., 59  
 Castleberry v. Boeing Co., 410  
 Caudle v. Hard Drive Express, Inc., 795, 796  
 Cedar Point Nursery v. Hassid, 36, 509  
 Cedeno v. Sasson, 969  
 Cemex Constr. Materials Pac., LLC, 214  
 Central Ind. Podiatry v. Krueger, 286  
 Chaidez v. Ford Motor Co., 590  
 Chamber of Commerce v. Bonta, 982  
 Chambers v. American Trans Air, Inc., 411  
 Chandler v. Industrial Commission, 848  
 Chaney v. Plainfield Healthcare Ctr., 579  
 Chao v. Ladies Apparel Group, Ltd., 792  
 Chao v. Tradesmen Int'l, Inc., 755  
 Charland v. Norge Division, Borg-Warner Corp., 236  
 Charter Twp. of (See Name of Township)  
 Chau v. Starbucks, 700  
 Chavarria v. Ralph's Grocery Co., 946, 947, 948  
 Chavez v. Manville Prods. Corp., 473  
 Cheeks v. Freeport Pancake House, Inc., 792, 793  
 Chemical Workers v. Pittsburgh Plate Glass Co., 218  
 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 80, 711, 732  
 Chewy, Inc. v. U.S. Dept. of Labor, 893  
 Chicago Teachers Union v. Bd. of Education, 590  
 Chicago Teachers Union, Local No. 1 v. Bd. of Educ., 577  
 Chicago, Burlington & Quincy R. Co. v. McGuire, 691  
 Chicago, United States v., 584  
 Childress v. Darby Lumber, Inc., 249  
 Chisolm v. Foothill Cap. Corp., 373  
 Chouteau v. Netco Constr., 845  
 Christopher v. SmithKline Beecham Corp. d/b/a Glaxo-SmithKline, 785  
 Church v. Westchester County, 858  
 Churchill's Restaurant, 521  
 Circuit City Stores, Inc. v. Adams, 922, 925, 926, 930, 931  
 City Disposal Sys., NLRB v., 517, 956  
 City of (See Name of City)  
 Clark County. Sch. Dist. v. Breeden, 570  
 Clark v. A & L Home Care & Training Ctr., LLC, 800  
 Clark v. Teamsters Loc. Union 651, 366  
 Cleary v. American Airlines, Inc., 151  
 Cleveland Bd. of Educ. v. Loudermill, 108  
 Cline v. Clinical Perfusion, Inc., 640  
 Clinkscale v. St. Therese of New Hope, 676  
 Cloutier v. Great Atl. & Pac. Tea Co., 182  
 Coates v. Heat Wagons, Inc., 280  
 Coates v. Wal-Mart Stores, Inc., 877  
 Coats v. Dish Network, LLC, 401  
 Cocchiara v. Lithia Motors, Inc., 143, 147  
 Coelho v. Posi-Seal Intern., Inc., 149  
 Cohen v. Lord, Day & Lord, 286  
 Coker v. Whittington, 358  
 Colby v. Union Sec. Ins. Co., 825  
 Cole v. Burns Int'l Sec. Servs., 933, 934  
 Cole v. Chandler, 878  
 Cole v. Fair Oaks Fire Protection District, 873, 879  
 Coleman v. Donahoe, 556  
 Coleman v. Retina Consultants, P.C., 281  
 Colgate-Palmolive Co. & Local 15, International Chemical Workers Union, 377  
 Colon v. Major Perry St. Corp., 82

- Columbia Univ., 57  
 Combs v. City Elec. Supply Co., 172  
 Combs v. Elite Title Co., Inc., 281  
 Commercial Bankers Life Ins. Co. of  
     America v. Smith, 273  
 Communications Workers v. NLRB,  
     510  
 Comstock v. Consumers Mkts., Inc.,  
     341  
 Comtran Grp. v. U.S. Dep't of Labor,  
     894  
 ConAgra, Inc., McMillan Co. Div., 890  
 Connecticut Nat. Bank v. Germain, 564  
 Connecticut v. Teal, 591  
 Conner v. Cleveland Cnty., 745  
 Connick v. Myers, 435, 441, 445, 456,  
     468  
 Connick v. Thompson, 441  
 Connor v. Schnuck Mkts., 796  
 Container Corp. of America, NLRB v.,  
     528  
 Continental Airlines, Inc. v. Keenan,  
     128  
 Cooper v. Empower U Inc., 333, 340  
 Coppage v. Kansas, 12  
 Corporate Techs., Inc. v. Harnett, 280,  
     292  
 Correa v. Working Families United for  
     N.J., 472  
 Cotran v. Rollins Hudig Hall Int'l, Inc.,  
     143  
 Cotter v. Lyft, Inc., 61, 69  
 Cotto v. United Techs. Corp., 478  
 Coutard v. Municipal Credit Union,  
     675  
 Crady v. Liberty Nat. Bank & Trust Co.  
     of Ind., 611  
 Craig v. Not for Profit Hosp. Corp., 184  
 Crawford v. BNSF Ry. Co., 619  
 Crawford v. Metro. Gov't of Nashville &  
     Davidson Cnty., Tennessee, 571  
 Crea v. FMC Corp., 468  
 Credeur v. Louisiana, 667  
 Crews v. Buckman Laboratories  
     International, 191, 193  
 Crockett v. Mission Hosp., Inc., 619  
 Cromer v. Brown, 442  
 Crouse v. Town of Moncks Corner, 459  
 Crowell v. M Street Ent., 746  
 Cunningham v. Lyft, Inc., 932  
 Cunningham v. N.Y. State Dep't of Lab.,  
     355  
 D.A. Collins Constr. Co. v. Secretary of  
     Labor, 893  
 D.R. Horton, Inc. v. NLRB, 956  
 D.R. Horton, Inc., 956  
 Dade Cty. v. Alvarez, 756  
 Dahlia v. Rodriguez, 461  
 Daley v. Wellpoint Health Networks,  
     Inc., 319  
 Dalheim v. KDFW-TV, 773  
 Dalton v. Camp, 315  
 Dancy v. Fina Oil & Chem. Co., 373  
 Darby, United States v., 694  
 Darlington Mfg. Co., 211  
 Darrow v. Integris Health, Inc., 182  
 Daugherty v. Sajar Plastics, Inc., 658  
 Davis v. Bd. of Cnty. Comm'rs, 417  
 Davis v. District of Columbia, 590  
 Davis v. Nordstrom, Inc., 130, 140  
 Davis v. O'Melveny & Myers, 952  
 Davis v. Sioux City, 607  
 Davis v. Washington Univ., 822  
 Day v. Staples, Inc., 494, 495, 498  
 Dayton Coal & Iron Co. v. Barton, 20  
 De Petris v. Union Settlement Ass'n,  
     129  
 Debord v. Mercy Health Sys., 619  
 DeCrane v. Eckart, 459, 462  
 Del Monte Fresh, Produce Co. v. Dole  
     Food Co., 305  
 Delgado v. Phelps Dodge Chino, Inc.,  
     869  
 Delmonte v. Laidlaw Env't Servs., 398  
 Demasse v. ITT Corp., 134, 138

- Demers v. Austin, 465  
 Demyanovich v. Cadon Plating & Coatings, L.L.C., 676  
 Denius v. Dunlap, 357  
 DePaula v. Easter Seals El Mirador, 558  
 DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp., 282  
 Desert Palace, Inc. v. Costa, 561  
 Deslandes v. McDonald's USA, 288  
 Desmond v. PNGI Charles Town Gaming LLC, 772  
 DeSoto v. Bd. of Parks & Recreation, 341  
 Dewey & LeBoeuf, LLP, 257, 258  
 Dey v. Colt Constr. & Dev. Co., 599  
 Diamond Shamrock Refining and Marketing Co. v. Mendez, 330, 331  
 Diamond v. Colonial Life & Accident Ins. Co., 566  
 Diaz v. Sohnen Enters., 949, 950  
 Dicks v. Jensen, 304  
 Dighello v. Thurston Foods, 473  
 Digital Realty Tr. v. Somers, 502, 503  
 Dillon v. Champion Jogbra, Inc., 131, 132  
 Dinges v. Sacred Heart St. Mary's Hospitals, Inc., 748  
 Dionne v. Se. Foam Converting & Packaging, Inc., 303  
 DIRECTV, Inc. v. Imburgia, 958  
 District Lodge 26, Int'l Ass'n of Machinists & Aerospace Workers v. United Techs. Corp., 226  
 Dixon v. Coburg Dairy, Inc., 481  
 Do No Harm v. Pfizer, Inc., 680  
 Dobrosmylov v. DeSales Meda Grp., Inc., 784  
 Doe v. Independence Blue Cross, 807  
 Doe v. Luzerne Cnty., 353  
 Doe v. Ozark Christian Coll., 417  
 Dooley v. Liberty Mutual Ins. Co., 756  
 Dorshkind v. Oak Park Place of Dubuque II, L.L.C., 180, 183  
 Dothard v. Rawlinson, 577, 578  
 Dotson v. Pfizer, Inc., 675  
 Dow v. Columbus-Cabrini Med. Ctr., 130  
 Doyle v. Holy Cross Hosp., 138  
 DraftKings, Inc. v. Hermalyn, 282  
 Drake v. Cheyenne Newspapers, Inc., 474  
 Drake v. Geochemistry and Environmental Chemistry Research, Inc., 142  
 Dreis & Krump Mfg. Co. Inc. v. NLRB, 521, 522  
 Dreis & Krump Mfg., Inc., 530  
 Dubilier Condenser Corp., United States v., 326  
 Dubuque Packing Co., 223  
 Duffner v. Alberty, 273  
 Duncan v. Jack Henry & Assocs., Inc., 807  
 Dusel v. Factory Mutual Ins. Co., 559  
 Dusto v. Rogers Corp., 870  
 Dutch Maid Bakeries v. Schleicher, 275  
 Dybach v. State of Florida Department of Corrections, 778  
 Dynamex Operations W., Inc. v. Superior Ct., 70  
 E.J. Brooks Co. v. Cambridge Sec. Seals, 307  
 E.M.D. Sales, Inc. v. Carrera, 765  
 EarthWeb, Inc. v. Schlack, 281  
 Easley v. Fairway Indep. Mortg. Corp., 398  
 Easom v. US Well Servs., Inc., 256, 257  
 East Tennessee, V. & G. R. Co. v. Staub, 94  
 Eastern Associated Coal Corp. v. United Mine Workers, 910  
 Eastex, Inc. v. NLRB, 515  
 Eastus v. ISS Facility Services, Inc., 924  
 Eberline v. Douglas J. Holdings, Inc., 728



- Eckis v. Sea World Corp., 859  
 Edgar v. Haines, 444  
 Edmondson v. Shearer Lumber Products, 467  
 Edwards v. Arthur Andersen LLP, 287  
 EEOC v. Cent. Wholesalers, Inc., 602  
 EEOC v. Ford Motor Co., 665  
 EEOC v. Hacienda Hotel, 81  
 EEOC v. Honeywell Int'l, 389  
 EEOC v. Joe's Stone Crab, 571  
 EEOC v. Luce, Forward, Hamilton & Scripps, 920  
 EEOC v. Methodist Hospitals of Dallas, 668  
 EEOC v. Orion Energy Sys., 389  
 EEOC v. Phase 2 Invs. Inc., 82  
 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 624, 638  
 EEOC v. Shell Oil Co., 612  
 EEOC v. St. Joseph's Hosp., 668  
 EEOC v. V. & J. Foods, Inc., 618  
 EEOC v. Woodmen of the World Life Ins. Soc'y, 935  
 EEOC v. Wyoming, 641  
 EEOC v. Yellow Freight Systems, Inc., 667  
 El San Juan Hotel, 528  
 El v. SEPTA, 590  
 Elbeshbeshy v. Franklin Inst., 410  
 Electrical Workers IBEW Local 1229 (Jefferson Standard), NLRB v., 522, 526, 527, 529  
 Elliott v. Roach, 412  
 Ellis v. City of Seattle, 161  
 Ellis v. DHL Express, Inc., 258, 259  
 Ellison v. Brady, 605  
 Elm City Cheese Co. v. Federico, 303  
 El-Nahal v. Yassky, 354  
 Elrod v. Burns, 437, 446, 447  
 Emerick v. Cardiac Study Ctr., 286  
 Encino Motorcars, LLC v. Navarro, 787  
 Engquist v. Or. Dep't of Agric., 358  
 Enterprise Rent-A-Car Wage & Hour Practices Litigation, In re, 721  
 Environment Servs. Inc. v. Carter, 281  
 Epic Systems Corp. v. Lewis, 956, 969  
 Equity Ins. Managers of Ill. v. McNichols, 114  
 Erdman v. City of Madison, 590  
 Erhart v. Bofil Holding, Inc., 499  
 Erie R. Co. v. Shuart, 926  
 Escobar v. Spartan Sec. Serv., 82  
 Estee Lauder Cos. v. Batra, 283  
 Estrada v. FedEx Ground Package Sys., Inc., 67  
 Ettenson v. Burke, 408, 409  
 Evance v. Trumann Health Servs., LLC, 557  
 Evangelical Lutheran Church and School v. EEOC, 633  
 Evans v. Akers, 814  
 Evans v. Cooperative Response Center, Inc., 668  
 Evans v. General Motors Corp., 306  
 F & H Coatings, LLC v. Acosta, 895  
 Fabi Constr. Co. v. Sec'y of Labor, 887, 892, 893  
 Faidley v. UPS, 667  
 Faragher v. City of Boca Raton, 596, 598, 615  
 Farwell v. The Boston And Worcester Rail Road Corp., 829  
 Fast Food Workers Comm. & Serv. Emps. Int'l Union v. NLRB, 72  
 Fazio v. City & Cnty. of San Francisco, 447  
 Fearnow v. Ridenour, 286  
 FedEx Home Delivery v. NLRB, 71  
 Feges v. Perkins Restaurants, Inc., 130  
 Feldman v. L. Enf't Assocs., Corp., 501  
 Ferrari v. Ford Motor Co., 658  
 Fibreboard Paper Prods. Corp. v. NLRB, 215, 216, 218, 219, 220, 378  
 Fife v. Harmon, 778



- Fifield v. Premier Dealer Servs., 287  
 Finkel v. Cashman Prof'l, Inc., 303  
 Firestone Tire & Rubber Co. v. Bruch, 824  
 First Express Grp., Inc. v. Easter, 303  
 First National Maintenance Corp. v. NLRB, 216  
 Fischer v. Mt. Olive Lutheran Church, 366  
 Fisher v. SD Protection, Inc., 793  
 Flaherty v. Gas Research Institute, 611  
 Fletcher v. Price Chopper Foods of Trumann, Inc., 365  
 Flint Avenue, LLC v. DOL, 766  
 Flores v. FS Blinds, LLC, 745  
 Florida v. Harris, 352  
 Fochtman v. Hendren Plastics, 731  
 Fogel v. Tr. of Iowa Coll., 130  
 Foley v. Interactive Data Corp., 118, 120, 172, 173, 880  
 Foley v. Polaroid Corp., 878  
 Ford Motor Co. v. EEOC, 612, 616  
 Ford Motor Co. v. NLRB, 377, 378  
 Fort Bend County v. Davis, 541  
 Fortune v. Nat'l Cash Reg., 151  
 Foster v. Nationwide Mutual Ins. Co., 774  
 Fowler v. OSP Prevention Grp., 772  
 Frampton v. Central Indiana Gas Co., 156, 163  
 Franchina v. City of Providence, 601  
 Francis v. City of Meriden, 658  
 Franklin v. Duke Univ., 948  
 Franklin v. Local 2 of the Sheet Metal Workers Int'l Ass'n, 590  
 Fraser v. Nationwide Mut. Ins. Co., 383  
 Fraternal Ord. of Police v. Philadelphia, 357  
 Freitag v. Ayers, 462  
 Freund Baking Co. v. NLRB, 801  
 Fried v. Wynn Las Vegas, LLC, 621  
 Frith v. Whole Foods Mkt., 475  
 Frlekin v. Apple, Inc., 760  
 Fulford v. Drawdy Bros. Constr., II, Inc., 286  
 Furnco Constr. Corp. v. Waters, 548  
 Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 881  
 Gallagher v. C.H. Robinson Worldwide, Inc., 602  
 Gantt v. Sentry Insurance, 175, 879  
 Garcetti v. Ceballos, 452, 460, 461, 463, 464  
 Garcia v. Tractor Supply Co., 401  
 Garcia-Celestino v. Ruiz Harvesting, Inc., 719  
 Gardner v. Evans, 468  
 Garrison v. Conagra Foods Packaged Foods, LLC, 770  
 Garrison v. Louisiana, 436  
 Gaston County v. United States, 582  
 Gawley v. Indiana Univ., 619  
 Geary v. United States Steel Corp., 157, 470  
 Geduldig v. Aiello, 672  
 Gelber v. Akal Security, Inc., 797  
 General Bldg. Contractors Ass'n v. Pennsylvania, 543  
 General Dynamics Corp. v. Superior Court, 192, 193, 194  
 General Electric v. Gilbert, 672  
 Gibney v. Evolution Mktg. Rsch., LLC, 488  
 Gibson v. Phillip Morris, Inc., 407  
 Gilbert v. City of Chicopee, 461  
 Gill v. United States, 324, 325  
 Gillespie v. Wisconsin, 587  
 Gilmer v. Interstate/Johnson Lane Corp., 914, 922  
 Gilstrap v. Suchinati LLC, 792  
 Gimeno v. NCHMD, Inc., 825  
 Gissel Packing Co., NLRB v., 212, 214  
 Givhan v. Western Line Consol. School Dist., 457

- Glatt v. Fox Searchlight Pictures, Inc., 56, 722, 725, 727, 729, 799, 801
- Glenn v. Clearman's Golden Cock Inn, Inc., 156
- Gobielle v. Liberty Mut., Ins. Co., 806
- Goff-Hamel v. Obstetricians & Gynecologists, P.C., 148
- Gogos v. AMS Mech. Sys., 657
- Gold v. FedEx Freight E., Inc. (In Re Rodriguez), 544
- Goldberg v. Whitaker House Coop, Inc., 708
- Golden Rd. Motor Inn, Inc. v. Islam, 284
- Gonzalez-Sanchez v. Int'l Paper Co., 719
- Gorman v. Consol. Edison Corp., 759
- Gorski v. N.H. Dep't of Corr., 598
- Goulding v. NJ Friendship House, Inc., 859
- Govier v. North Sound Bank, 138, 139
- Goza v. Memphis Light, Gas & Water Div., 443
- Grace v. Family Dollar Stores, 768, 769
- Grady v. Affiliated Cent., Inc., 560
- Graham v. Cent. Fid. Bank, 121
- Gram v. Liberty Mut. Ins., 151
- Granite Rock Co. v. Teamsters, 951
- Green Forest, City of, v. Morse, 338
- Green Tree Fin. Corp.-Alabama v. Randolph, 935
- Green v. Franklin Nat'l Bank, 621
- Green v. Ralee Engineering Co., 175, 180, 182
- Green v. Wyman-Gordon Co., 877
- Gregory, United States v., 578
- Greissman v. Rawlings & Assocs., 181, 192
- Griffith v. City of Des Moines, 566
- Griggs v. Duke Power Co., 546, 580
- Grimes v. Cnty. of Cook, 373, 375
- Groce v. Foster, 168
- Gross v. FBL Fin. Servs., Inc., 568, 625, 640
- Grouse v. Group Health Plan, Inc., 147
- Groves Truck & Trailer, 521, 522
- Gryga v. Henkels & McCoy Grp., Inc., 488
- GTE Products Corp. v. Stewart, 192, 193
- GTE Sw., Inc. v. Bruce, 341
- Guardians Ass'n of N.Y. Police Dep't v. Civil Serv. Comm'n, 588
- Gulf Oil Corp. v. Copp Paving Co., 928
- Gunther v. Iowa State Men's Reformatory, 578
- Gustafson v. Adkins, 353
- Guz v. Bechtel Nat. Inc., 119, 120
- Guzman-Rosario v. UPS, Inc., 647
- H.K. Porter Co. v. NLRB, 23
- Hagan v. Quinn, 450
- Hagebak v. Stone, 407, 408
- Hale v. Arizona, 724
- Halferty v. Pulse Drug Co., 753, 754
- Hall St. Assocs., L.L.C. v. Mattel, Inc., 911
- Hall v. Kosei St. Marys Corp., 473
- Hall v. Treasure Bay V.I. Corp., 936
- Hancock v. Cnty. of Rensselaer, 357
- Handicapped Children's Educ. Bd. of Sheboygan Cty. v. Lukaszewski, 114
- Hanna v. WCI Cmty's., Inc., 486
- Hansen v. SkyWest Airlines, 340
- Harco Trucking, LLC, 965
- Hardin v. Stynchcomb, 578
- Harless v. First National Bank in Fairmont, 157
- Harlston v. McDonnell Douglas Corp., 611
- Harman v. Moore's Quality Snack Foods, 855
- Harnishfeger v. United States, 459, 460
- Harp v. Charter Communs., Inc., 496
- Harris Corp., 521, 522
- Harris v. Forklift Sys., Inc., 596, 602, 603, 604
- Harvey Barnett, Inc. v. Shidler, 304

- Hassler v. Circle C. Resources, 283, 284  
 Hayes v. Eateries, Inc., 166  
 Hayes v. Wal-Mart Stores, Inc., 408  
 Haywood v. Barnes, 715  
 Hazelwood Sch. Dist. v. United States, 576  
 Hazen Paper Co. v. Biggins, 640  
 HCTec Partners, LLC v. Crawford, 280  
 Head v. Glacier Northwest, Inc., 653  
 Healey v. Southwood Psychiatric Hosp., 579  
 Hearst Publ'ns, NLRB v., 60  
 Heath v. Perdue Farms, Inc., 712  
 Hebert v. FMC Techs., Inc., 776  
 Heck's, Inc., 521  
 Heckman v. Zurich Holding Co. of Am., 192  
 Heder v. City of Two Rivers, Wisconsin, 293  
 Heffernan v. City of Paterson, 464  
 Heim v. Daniel, 465  
 Heimeshoff v. Hartford Life & Accident Ins. Co., 824  
 Heisler v. Metro. Council, 652  
 Helf v. Chevron, U.S.A., 870, 871  
 Hellanbrand v. Nat'l Waste Assocs., 369  
 Helm v. Kansas, 618  
 Hennagir v. Utah Dep't of Corr., 668, 669  
 Henry v. Milwaukee County, 578  
 Henson v. City of Dundee, 596, 607, 610  
 Henson v. Pulaski Cnty. Sheriff Dep't, 755  
 Hentzel v. Singer Co., 177  
 Herbster v. North Am. Co. for Life & Health Ins., 190, 191  
 Hernandez v. City of Phoenix, 445  
 Hernandez v. UPS Supply Chain Sols., Inc., 148  
 Hernandez-Loring v. Universidad Metropolitana, 597, 599  
 Hett v. Ploetz, 404  
 Heyman v. Queens Village Committee for Mental Health, 658  
 Hicks v. St. Mary's Honor Ctr., 555  
 Hill v. Ross, 678  
 Hispanics United of Buffalo, Inc., 531  
 Hively v. Ivy Tech Community College of Ind., 635, 638  
 Hobbs v. EVO Inc., 791  
 Hobbs v. United States, 323, 324  
 Hocutt v. Minda Supply Co., 869  
 Hoendermis v. Advanced Physical Therapy, Inc., 129, 130  
 Hoffman Plastic Compounds, Inc. v. NLRB, 73  
 Hoffman v. Caterpillar, Inc., 544  
 Hoffmann-La Roche Inc. v. Zeltwanger, 341  
 Holcomb v. Iona Coll., 557  
 Holden v. Hardy, 14, 19, 691, 840  
 Holihan v. Lucky Stores, Inc., 652  
 Hollins v. Regency Corp., 727  
 Hollomon v. Keadle, 336  
 Holloway v. Arthur Andersen & Co., 631  
 Holly Farms v. NLRB, 717, 718  
 Holzapfel v. Town of Newburgh, 746  
 Home Care Ass'n of Am. v. Weil, 711  
 Home Depot USA, Inc., 515, 516  
 Homecare and Training Center, LLC, 800  
 Honeyfund.com, Inc. v. Governor, 680  
 Hooters of Am., Inc. v. Phillips, 934  
 Hoover v. Drivetrain, LLC, 248  
 Hopper v. All Pet Animal Clinic, Inc., 271  
 Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 633  
 Hoste v. Shanty Creek Management, Inc., 846, 847  
 Hostettler v. College of Wooster, 659  
 Hotel Emps. & Rest. Emps. Int'l Union Local 54 v. Elsinore Shore Assocs., 254  
 House v. Cannon Mills Co., 149

- Houser v. Bi-Lo, Inc., 854  
 Hoy v. Angelone, 341  
 Huff v. Swartz, 319  
 Hughes v. Northwestern University, 815, 822  
 Hughes v. Nw. Univ., 819  
 Humphries v. CBOCS W., Inc., 569  
 Hunter v. Sparling, 138  
 Huong Que, Inc. v. Luu, 314  
 Hurt v. Commerce Energy, Inc., 785  
  
 IBP, Inc. v. Alvarez, 758, 759  
 Immediato v. Postmates, Inc., 931  
 In re (See Name of Party or Matter)  
 In the Matter of (See Name of Matter)  
 Incase Inc. v. Timex Corp., 297  
 Industrial Union Department v. American Petroleum Institute, 883  
 Ingersoll-Rand Co. v. McClendon, 184  
 Ingram v. Cantwell-Cleary Co., Inc., 304  
 INS v. National Center for Immigrants' Rights, Inc., 75  
 Integrity Staffing Sols., Inc. v. Busk, 759, 760  
 International Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 184  
 International Bhd. of Teamsters v. United States, 575  
 International Union, UAW v. General Dynamics Land Systems Division, 893  
 Isett v. Aetna Life Insur. Co., 776  
 Iskanian v. CLS Transp. L.A., LLC, 968  
 Ives v. South Buffalo Railway Co., 836  
  
 Jacobson v. Massachusetts, 19  
 Jacques v. DiMarzio, Inc., 654  
 Jake's Fireworks v. Acosta, 893  
 Jakubowski v. Christ Hosp., Inc., 670  
 James v. Hampton, 353  
 James v. McDonald's Corp., 935  
 James Way Corp., In re, 251  
 Janus v. AFSCME, Council 31, 36  
  
 Jeannette Corp. v. NLRB, 520  
 Jefferson Standard, 527  
 Jefferson v. Sewon Am., Inc., 569  
 Jenkins v. Medford, 448  
 Jenkins v. Nell, 558  
 Jenkins v. Region Nine Hous. Corp., 148  
 Jennings v. Minco Technology Labs, Inc., 367  
 Jet Courier Serv., Inc. v. Mulei, 316  
 Jewel Tea Co. v. Williams, 784  
 Jin v. Metro. Life Ins. Co., 617, 620  
 Jin-Ming Lin v. Chinatown Rest. Corp., 82  
 Johns-Manville Products Corp. v. Superior Court, 872, 874, 875, 876, 877  
 Johnson v. Allen, 365  
 Johnson v. Am. United Life Ins., 824  
 Johnson v. K Mart Corp., 365, 375  
 Johnson v. McDonnell Douglas Corp., 128  
 Johnson v. NCAA, 58  
 Johnson v. Rudolph Wurlitzer Co., 404  
 Johnson v. Transportation Agency, Santa Clara County, 678  
 Johnson v. Westinghouse Air Brake Tech. Corp., 557  
 Johnson-Bateman Co., 376  
 Jones & Laughlin Steel Corp., NLRB v., 24, 962, 963  
 Jones v. Bernanke, 570  
 Jones v. City of Boston, 590  
 Jones v. Fluor Daniel Servs. Corp., 340  
 Jones v. Southpeak Interactive Corp. of Del., 486  
 Jones, United States v., 354  
 Juday v. FCA US LLC, 674  
 Juino v. Livingston Par. Fire Dist. No. 5, 55  
  
 Karch v. BayBank FSB, 375, 880  
 Kardulas v. Florida Machine Products Co., 323

- Karibian v. Columbia Univ., 617  
Karpinski v. Ingrasci, 280  
Karren v. Far W. Fed. Sav., 398  
Karstetter v. King Cnty. Corr. Guild,  
192  
Kassem v. Wash. Hosp. Ctr., 332  
Kasten v. Saint-Gobain Performance  
Plastics Corp., 794, 795  
Katz, NLRB v., 218  
Kavanagh v. Grand Union, 757  
Kaye v. Rosefelde, 316  
Keith v. City of Oakland, 669, 670  
Kellar v. Summit Seating, Inc., 743  
Kemp v. Regeneron Pharmaceuticals,  
Inc., 676  
Kennedy v. Bremerton Sch. Dist., 460,  
461  
Kennedy v. Commonwealth Edison,  
774, 775  
Kern v. Palmer Coll. of Chiropractic,  
141, 143  
Kestenbaum v. Pennzoil Co., 119, 120  
Keyishian v. Board of Regents, 433  
Khachatourian v. Hacienda La Puente  
Unified Sch. Dist., 353  
Kiewit Potter Constructors Co. v. Secre-  
tary of Labor, 883  
Kimmel v. Fla. Bd. of Regents, 543  
Kindred Nursing Centers L.P. v. Clark,  
958, 959  
King v. United States, 644  
Kinney v. St. Mary's Health, Inc., 666,  
667  
Kinsey v. Macur, 375  
Kinzer v. Whole Foods Market, Inc.,  
475  
Kirkland v. City of Maryville, 444  
Kleber v. CareFusion Corp., 641  
Kleinhesselink v. Chevron, U.S.A., 863  
Klick v. Cenikor Found., 731  
K-Mart Corp. Store No. 7441 v. Trotti,  
359  
Knowlton v. Shaw, 148  
Knoxville Iron Co. v. Harbison, 691  
Kocsis v. MultiCare Management, Inc.,  
611  
Koeppel v. Speirs, 365  
Kolheim v. Glynn Cnty., 755  
Korb v. Raytheon Corp., 473  
Koster v. P & P Enters., Inc., 141  
Krieg v. Seybold, 357  
Kurtzman v. Applied Analytical  
Industries, Inc., 149  
L.R. Willson & Sons, Inc. v. OSHRC,  
894  
La Belle v. Barclay's Cap., 499  
Lambert v. Tesla, Inc., 920  
Lamonica v. Safe Hurricane Shutters,  
Inc., 82  
Lamorte Burns & Co. v. Walters, 315  
Lamps Plus, Inc. v. Varela, 950, 967, 968  
Landers v. Nat'l R.R. Passenger Corp.,  
410  
Landgraf v. USI Film Products, 562  
Lane v. Franks, 460, 463  
Langdon v. Saga Corp., 130  
Lanning v. SEPTA, 588, 589  
Lapidus v. N.Y.C. Chapter of N.Y. State  
Ass'n for Retarded Child., Inc., 332  
Larios v. Lunardi, 353  
LaRue v. DeWolff, Boberg & Associates,  
Inc., 811  
Lasen, Inc. v. Tadjkov, 305  
Latif v. Morgan Stanley & Co., 953, 982  
Lauth v. Covance, Inc., 644  
Lawson v. Creely, 352  
Lawson v. FMR LLC, 484, 487, 488  
Lazette v. Kulmatycki, 383  
Lechmere, Inc. v. NLRB, 509  
Ledbetter v. Goodyear Tire & Rubber  
Co., 535  
Lederer v. Hargraves Tech. Corp., 183  
Lee-Crespo v. Schering-Plough Del  
Caribe Inc., 597, 598  
LeJeune v. Coin Acceptors, Inc., 302  
Leshinsky v. Telvent GIT, S.A., 499  
Lewis v. City of Union City, 556, 557

- Lim v. TForce Logistics, Inc., 934  
 Lindenmuth v. McCreer, 373, 375, 407  
 Ling Nan Zheng v. Liberty Apparel Co., 72  
 Linn v. Plant Guards Local 114, 526, 527  
 Lipsett v. Univ. of Puerto Rico, 598, 604  
 Lissick v. Anderson Corp., 674  
 Livingston Shirt Co., 509  
 Livitsanos v. Superior Court, 863  
 Lizama v. Workmen's Comp. Appeals Bd., 862  
 LKQ Corp. v. Rutledge, 281, 284  
 Local 246 Utility Workers Union of America v. Southern California Edison Company, 251  
 Local 461, Int'l Union of Elec., Radio & Mach. Workers v. Singer Co., 225, 226  
 Lochner v. New York, 12, 688  
 Lockard v. Pizza Hut, 621  
 Lockhart v. Republic Servs., Inc., 795  
 Lockheed Martin Corp. v. AAtlas Commerce, Inc., 319  
 Lockheed Martin Corp. v. Admin. Rev. Bd., 486, 499, 501  
 Lockheed Shipbuilding Co., 376  
 Logan v. MGM Grand Detroit Casino, 936  
 Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 777  
 Long Island Care at Home v. Coke, 711  
 Long v. Dunlop Sports Grp., Inc., 260  
 Loper Bright Enters. v. Raimondo, 699, 711, 721, 733  
 Lopez v. Cintas Corp., 931  
 Los Angeles Dept. of Water and Power v. Manhart, 628  
 Lowe v. Walbro LLC, 544  
 Loy v. Rehab Synergies, 744  
 Lubcke v. Boise City/Ada County Housing Authority, 468  
 Lucas v. Jerusalem Café, 82  
 Luck v. Southern Pacific Transportation Co., 368, 369  
 Luedtke v. Nabors Alaska Drilling, Inc., 369  
 Lumley v. Wagner, 269  
 Lunsford v. Sterilite of Ohio, 368  
 Lutheran Heritage Village-Livonia, 532  
 Lydall, Inc. v. Ruschmeyer, 302  
 Lyons v. Katy Indep. Sch. Dist., 659  
 Lyster v. Ryan's Fam. Steak Houses, Inc., 937  
 M.O.C.H.A. Soc'y, Inc. v. City of Buffalo, 590  
 Madden v. Lumber One Home Ctr., Inc., 771  
 Madray v. Publix Supermarkets, Inc., 618  
 Magtoles v. United Staffing Registry, 293  
 Main v. Skaggs Community Hospital, 112  
 Makovi v. Sherwin-Williams Co., 184  
 Malin v. Hospira, Inc., 570  
 Maloney v. Conn. Orthopedics, P.C., 130  
 Manning v. Bos. Med. Ctr. Corp., 743  
 Mannix v. Cty. of Monroe, 139  
 Marcus v. Am. Contract Bridge, 773  
 Markley v U.S. Bank Nat'l Ass'n, 558  
 Marrero v. Goya of P.R., Inc., 597  
 Marshall v. Barlow's, Inc., 883, 884  
 Marshall v. Gipson Steel, Inc., 303  
 Martin v. F.E. Moran, Inc., 572  
 Martin v. Ind. Mich. Power Co., 788, 789  
 Martin v. Spring Break '83 Productions, LLC, 793  
 Martinez-Fuerte, United States v., 356  
 Martinez-Mendoza v. Champion Int'l Corp., 72  
 Martinez v. Combs, 64  
 Martinez v. UPMC Susquehanna, 640

- Marzuq v. Cadete Enters., 770  
 Mason v. Avaya Commc'ns, Inc., 667  
 Massachusetts Mut. Life Ins. Co. v. Russell, 811, 812, 813  
 MasTec Advanced Technologies, 527, 528  
 Matamoros v. Starbucks Corp., 700  
 Matney v. Barrick Gold of North America, 822  
 Mator v. Wesco Distribution, Inc., 822  
 Mayes v. WinLo Holdings, Inc., 544  
 Mayfield v. DOL, 765  
 Mayhew v. Town of Smyrna, 442  
 Mazzeo v. Color Resolution Int'l, LLC, 657  
 McAlindin v. County of San Diego, 653, 654, 656  
 McCaffrey v. Brobeck, Phleger & Harrison, 260  
 McCallister Co. v. Kastella, 315  
 McCavitt v. Swiss Reinsurance America Corp., 394  
 McClusky v. City of North Bend, 161  
 McCreight v. AuburnBank, 567  
 McDermott Int'l, Inc. v. Wilander, 928  
 McDonald v. West Branch, 919  
 McDonnell Douglas Corp. v. Green, 545  
 McElmurry v. Ark. Power & Light Co., 325  
 McGarvey v. Key Prop. Mgmt. LLC, 472  
 McGinest v. GTE Serv. Corp., 566, 573  
 McNerney v. Charter Golf, Inc., 121  
 McKay v. Miami-Dade Cnty., 730, 733  
 McLaughlin v. Gastrointestinal Specialists, Inc., 182  
 McLaughlin v. Richland Shoe Co., 740, 798  
 McMichael v. Transocean Offshore Deepwater Drilling, Inc., 644  
 Meadows v. NCR Corp., 743  
 Meerbrey v. Marshall Field & Co., 877  
 Mei Xing Yu v. Hasaki Rest., Inc., 793  
 Meiners v. Wells Fargo & Co., 821  
 Mendoza v. J.M. Smucker Co., 385  
 Mercy Health Servs., Inc. v. Efstratiadis, 286  
 Merfeld v. Warren Cnty. Health Servs., 332, 341  
 Meritor Sav. Bank, FSB v. Vinson, 592, 593, 596, 607, 608, 611, 612, 615  
 Merritt Hawkins & Assocs. v. Gresham, 281  
 Mertens v. Hewitt Assocs., 804  
 Metzler v. Fed. Home Loan Bank, 569  
 Meyers Industries, 517, 519, 521, 526  
 Mezonos Maven Bakery, Inc., 81, 84  
 Michigan Corr. Org. v. Mich. Dep't of Corr., 792  
 Midland, City of, v. O'Bryant, 165  
 Miklin Enters., Inc. v. NLRB, 529  
 Miller Plastic Prods., Inc., 516  
 Miller v. AT&T Corp., 675  
 Miller v. Motorola, 374  
 Miller v. Pub. Storage Mgmt., Inc., 920  
 Miller v. Travis Cnty., 771  
 Miller v. Wilson, 20  
 Million v. Warren County, 579  
 Millison v. E.I. du Pont de Nemours & Co., 869, 872  
 Mills v. Hankla, 188  
 Mills v. Health Care Serv. Corp., 680, 681  
 Millsap v. Fed. Express Corp., 64  
 Milman v. Fieger & Fieger, P.C., 676  
 Milner v. Department of Navy, 631  
 Mintz v. Mark Bartelstein & Assocs., 366  
 Mitchell v. Robert DeMario Jewelry, Inc., 794  
 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 915, 916, 917, 918, 919, 933  
 Mobley v. St. Luke's Health Sys., Inc., 667  
 Modern Carpet Indus., NLRB v., 516



- Modeski v. Summit Retail Sols., Inc., 787
- Mohanty v. St. John Heart Clinic, S.C., 286
- Mohr v. Dustrol, Inc., 562
- Mollett v. Lawrence County Bd. of Developmental Disabilities, 315
- Monette v. Elec. Data Sys. Corp., 669
- Monteagudo v. Asociación de Empleados del Estado Libre Asociado, 620
- Montgomery v. Gadson, 472
- Montoya v. CRST Expedited, 752
- Moody v. Atlantic City Bd. of Educ., 617
- Morgan v. Allison Crane & Rigging LLC, 657, 659
- Morgan v. Family Dollar Stores, 767, 768, 769
- Morgan v. Sundance, Inc., 950, 951
- Morris v. Town of Independence, 556
- Morrison v. Circuit City Stores, Inc., 934
- Morrison v. Int'l Programs Consortiums, 708
- Moser v. Las Vegas Metro. Police Dep't, 444, 445, 446
- Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 915, 916, 932, 951, 954, 958, 977
- Moss Planing Mill Co., 965
- Mountain Shadows Golf Resort, 527
- Mountain Timber Co. v. Washington, 691
- Mounteer v. Utah Power & Light Co., 878
- Mulcahey v. New England Newspapers, Inc., 858
- Muldrow v. City of St. Louis, 569
- Muller v. Oregon, 20, 688
- Murphy v. Am. Home Prods., 160, 395
- Murray v. UBS Sec., LLC, 500, 501
- Murray v. United Food & Com. Workers Int'l Union, Local 400, 937
- Mushroom Transportation Co. v. NLRB, 520
- Musnick v. King Motor Co. of Fort Lauderdale, 935
- Mutual Funds Inv. Litig., In re, 814
- Myers v. City of Centerville, 442
- N.J. Civ. Just. Inst. v. Grewal, 982
- NAACP v. Claiborne Hardware Co., 436, 471
- Narayan v. EGL, Inc., 63, 67
- Narducci v. Moore, 353
- NASA v. Nelson, 357, 358
- National Captioning Inst., Inc., 376
- National Fed'n for Cancer Research v. A.G. Edwards & Sons, Inc., 951
- National Fed'n of Fed. Emps. v. Vilsack, 357
- National Realty & Constr. Co. v. OSHRC, 886, 887, 889
- National Steel Corp., 379
- National Steel Corp. v. NLRB, 379
- National Treasury Employees Union v. Von Raab, 356
- National Treasury Emps. Union, United States v., 451
- Nationwide Mut. Ins. Co. v. Darden, 69, 708, 714
- Natsource LLC v. Paribello, 281
- NCRNC v. NLRB, 376
- Nebraska v. Su, 686, 687
- Nees v. Hocks, 156, 164
- Nelson Trabue, Inc. v. Prof. Mgmt.-Auto., Inc., 111, 142
- Nelson v. Lake Elmo Bank, 407
- Nelson v. Lapeyrouse Grain Corp., 408
- Nelson v. McClatchey Newspapers, 480
- Nesbitt v. FCNH, Inc., 934
- Nese v. Julian Nordic Constr. Co., 647
- Nevada Dep't. of Human Resources v. Hibbs, 673
- Nevada v. DOL, 790



- New Jersey v. T.L.O., 344, 347, 348, 352  
New Prime Inc. v. Oliveira, 625, 922, 924  
New River Industries, Inc. v. NLRB, 520  
New York Central R. Co. v. White, 691, 837  
New York Univ., 57  
Newsom v. Glob. Data Sys., Inc., 293  
Nichols v. Alcatel USA, Inc., 814  
Nicholson v. CPC Int'l Inc., 918  
Nielsen v. AECOM Tech. Corp., 498  
Nielsen v. DeVry, 785  
Nino v. Jewelry Exch., Inc., 951, 952  
NLRB v. (See Name of Defendant)  
Northrop Grumman Sys. Corp. v. ARB, 498, 499  
Northwestern Univ., 58  
Novartis Wage and Hour Litigation, In re, 785, 786, 787  
Novosel v. Nationwide Ins. Co., 469, 470  
Nunies v. HIE Holdings, Inc., 658  
Nutt v. Knutson, 120  
Nuzum v. Ozark Auto. Distribs., Inc., 647  
  
O'Bryan v. KTIV Television, 365  
O'Connor v. Davis, 56  
O'Connor v. Ortega, 343, 350, 351  
O'Connor v. Uber Techs., 69  
Odsather v. Richardson, 846  
Officers for Justice v. Civil Serv. Comm'n, 588  
Ogden v. Robertson, 184  
Ohanian v. Avis Rent A Car System, Inc., 117, 118  
Ohlson v. Brady, 463  
Oliver v. United States, 345  
Oncale v. Sundowner Offshore Servs., Inc., 593, 596, 599, 628, 631  
Ontario, City of, v. Quon, 349, 353, 356  
Opara v. Yellen, 559  
Optos, Inc. v. Topcon Med. Sys., Inc., 300  
Oransky v. Martin Marietta Materials, Inc., 474  
Ortega v. O'Connor, 355  
Ortiz v. Werner Enters. Inc., 560  
Ossman v. Meredith Corp., 544  
Otis v. Parker, 19  
Oubre v. Entergy Operations, Inc., 644  
Outside Television, Inc. v. Murin, 286  
Owen v. Bristol Care, Inc., 955  
Owsley v. San Antonio Independent School District, 779  
Oxford Health Plans LLC v. Sutter, 912  
Ozark Trailers, Inc., 203  
  
Pagel v. TIN Inc., 676  
Paine v. Ride-Away, Inc., 401  
Palma v. NLRB, 84  
Palmateer v. International Harvester Co., 165, 471  
Parexel Int'l Corp. v. Feliciano, 496  
Parilla v. IAP Worldwide Servs., VI, Inc., 936  
Parker Drilling Management Services, Ltd. v. Newton, 924  
Parker v. Reema Consulting Servs., Inc., 601  
Parks v. City of Warner Robins, 399  
Parnar v. Americana Hotels, Inc., 177  
Parrish v. West Coast Hotel Co., 690  
Parth v. Pomona Valley Hosp., 754  
Passananti v. Cook County, 602  
Passmore v. Multi-Management Services, Inc., 417  
Patel v. Quality Inn South, 78, 81  
Pavesich v. New England Life Insurance Co., 372  
Payne v. Savannah Coll. of Art and Design, Inc., 936  
Payne v. Western & Atlantic Railroad Co., 91, 92, 93, 153, 154  
PC Connection, Inc. v. Sillich, 292

- Pearson v. Hope Lumber & Supply Co., Inc., 167  
 Peck v. Imedia, Inc., 148  
 Pegasystems Inc. v. Appian Corp., 303  
 Pelcha v. MW Bancorp, Inc., 639, 644  
 Pelican Bay Forest Prods., Inc. v. Western Timber Prods., Inc., 304  
 Pembroke, City of, v. Hagin, 293  
 Pena v. Am. Meat Packing Corp., 255  
 Pendlebury v. Starbucks Coffee Co., 769  
 Penn v. Ryan's Fam. Steak Houses, Inc., 937  
 Pennsylvania Power & Light Co. v. OSHRC, 894  
 Pennsylvania State Police v. Suders, 617, 618  
 Pension Benefit Guar. Corp. v. LTV Corp., 630, 809  
 People v. (See Name of Defendant)  
 PepsiCo, Inc. v. Redmond, 305  
 Perdue v. Sanofi-Aventis U.S., LLC, 669  
 Perez v. City of Roseville, 358  
 Perez v. Clearwater Paper Co., 903  
 Perez v. Express Scripts, Inc., 790  
 Perez v. Thorntons, Inc., 560  
 Pernell v. Fla. Bd. of Governors, 465  
 Perrin v. United States, 924  
 Perry v. City of New York, 734, 745, 746  
 Perry v. Jaguar of Troy, 675  
 Perry v. Sindermann, 105  
 Perry v. Stitzer Buick GMC, Inc., 880  
 Peter Cailler Kohler Swiss Chocolates Co., NLRB v., 964  
 Petermann v. International Brotherhood of Teamsters, 156, 162  
 Peters v. Gilead Sciences, Inc., 150  
 Peterson Machinery Co. v. Max, 304  
 Peterson v. Browning, 182  
 Phason v. Meridian Rail Corp., 258, 259  
 Phillips v. Martin Marietta Corp., 627, 630, 632  
 Phillips v. Smalley Maint. Servs., 365  
 Phipps v. Clark Oil & Refin. Corp., 161, 182  
 Physician Specialists in Anesthesia, P.C. v. Wildmon, 315  
 Pia v. URS Energy & Constr., Inc., 171  
 Pickering v. Board of Education, 433, 434, 440  
 Pierce v. Ortho Pharmaceutical Corp., 157, 177, 181  
 Pine River State Bank v. Mettille, 110, 126  
 Pineda v. JTCH Apartments, L.L.C., 794  
 Pippins v. KPMG, LLP, 776  
 Piron v. Gen. Dynamics Info. Tech., 248  
 Pitcher v. United Oil & Gas Syndicate, Inc., 96  
 Pizarro v. Home Depot, Inc., 822  
 Platone v. FLYI, Inc., 498, 499  
 Platone v. FLYI, Inc., In the Matter of, 491, 498, 499  
 Polonczyk v. Anthem BlueCross & BlueShield, 807  
 Pomales v. Celulares Telefonica, Inc., 598  
 Porter v. City of Manchester, 162  
 Postal Service, 521  
 Postal Service Bd. of Governors v. Aikens, 552, 564  
 Poublon v. C.H. Robinson Co., 936  
 Poultrymen's Service Corp., 965  
 Praeses LLC v. Bell, 303  
 PrePaid Legal Services, Inc. v. Cahill, 290  
 Press v. Poizner, 61  
 Price v. City of Fort Wayne, 675  
 Price v. Valvoline, LLC, 680  
 Price Waterhouse v. Hopkins, 545, 561, 562, 564, 565, 626  
 Prill v. NLRB, 517, 519  
 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 951, 966  
 Prime Therapeutics, LLC v. Beatty, 305  
 Progressive Prods., Inc. v. Swartz, 306  
 Prowel v. Wise Business Forms, Inc., 637

- Prows v. Industrial Commission of Utah, 847  
 Prudential Locations, LLC v. Gagnon, 280  
 Pryor v. Sch. Dist. No. 1, 462  
 Prysak v. R.L. Polk Co., 473  
 Pugh v. See's Candies, Inc., 118  
 Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 383  
 Purple Communications, Inc., 509  
  
 Quick v. Donaldson Co., 596  
 Quigg v. Thomas Cty. Sch. Dist., 567  
  
 Rachid v. Jack in the Box, Inc., 566  
 Radisson Plaza Minneapolis, 521  
 Ramirez v. Charter Commc'ns, Inc., 946, 948  
 Ramirez v. Statewide Harvesting & Hauling, 718  
 Randi W. v. Muroc Joint Unified School District, 416  
 Rankin v. McPherson, 443, 446  
 RAV Truck & Trailer Repairs, Inc., 224  
 RAV Truck & Trailer Repairs, Inc. v. NLRB, 224  
 Ray v. Int'l Paper Co., 618  
 Ray v. L.A. Cnty. Dep't of Soc. Servs., 720  
 Red Rock Casino Resort & Spa, 214  
 Reddy v. Community Health Foundation of Man, 274, 275  
 Reed v. MBNA Marketing Systems, Inc., 617, 618  
 Reed v. Shepard, 601  
 Reeser v. Yellow Freight Sys., Inc., 855, 856  
 Reeves v. Hanlon, 319  
 Reeves v. Sanderson Plumbing Products, Inc., 555, 556, 564, 640  
 Reich v. Dep't of Conservation & Nat. Res., 743  
 Reich v. Gateway Press, Inc., 781  
 Reich v. Kelly-Springfield Tire Co., 884  
 Reich v. Montana Sulphur & Chem. Co., 884  
 Reich v. New York, 773  
 Reich v. Newspapers of New England, Inc., 782  
 Reich v. S. New England Telecomm Corp., 797  
 Reich v. Wyoming, 779  
 Reilly v. City of Atlantic City, 463  
 Reliable Fire Equip. Co. v. Arredondo, 280  
 Republic Aviation Corp. v. NLRB, 508  
 Reuther v. Fowler & Williams, Inc., 156  
 Reyazuddin v. Montgomery County, 670  
 Reyes, In re, 81  
 Reyes v. Remington Hybrid Seed Co., 720  
 Reyes-Trujillo v. Four Star Greenhouse, 720  
 Rhea Lana, Inc. v. Dep't of Lab., 733  
 Rhinehimer v. U.S. Bancorp Invs., Inc., 498  
 Rhoades v. Norfolk & Western Ry. Co., 190  
 Ricci v. DeStefano, 591  
 Richardson v. Chicago Transit Authority, 657  
 Ricketts v. Vann, 715  
 Ridley v. Krout, 273, 274, 276  
 Riley v. California, 354  
 Rio All-Suites Hotel & Casino, 510  
 Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm., 647  
 Ritter v. Bd. of Educ., 332  
 Rittmann v. Amazon.com, Inc., 925, 931  
 Rivera v. NIBCO, Inc., 81, 82, 83  
 Rivera v. Rochester Genesee Reg'l Transp. Auth., 569  
 Rivera-Corraliza v. Puig-Morales, 297  
 Rivera-Velazquez v. Regan, 658  
 Robert C. Ozer, P.C. v. Borquez, 375  
 Robert v. Bd. of Cnty. Comm'rs, 667

- Roberts v. Gestamp West Virginia, LLC, 675
- Roberts v. Sea-Land Services, Inc., 924
- Robinson v. Sappington, 618
- Rocky Mountain Hospital & Medical Service v. Mariani, 181
- Rodriguez de Quijas v. Shearson/American Express, Inc., 915, 917
- Rodriguez v. Farm Stores Grocery, Inc., 767
- Roe v. SFBSC Management, LLC, 938, 939, 940, 942, 943
- Roe-Midgett v. CC Servs., Inc., 771, 772, 774
- Rogers v. Missouri Pac. R.R. Co., 564
- Rogers v. Riggs, 442
- Ronderos v. USF Reddaway, Inc., 946
- Ronnie v. Office Depot, LLC, 498
- Roquet v. Arthur Andersen LLP, 254
- Rosatone v. GTE Sprint Commc'ns, 148
- Rose v. Anderson Hay & Grain Co., 184
- Rose v. PSA Airlines, Inc., 806
- Rosecrans v. Intermountain Soap & Chem. Co., 142
- Roth v. United States, 436
- Rowan v. Lockheed Martin Energy Sys., Inc., 642
- Rowe v. Montgomery Ward & Co., 115, 116
- Rowlands v. United Parcel Serv., 570
- Roy v. Cnty. of Lexington, 797
- Rulon-Miller v. Int'l Bus. Machs. Corp., 363
- Russ v. TRW, Inc., 333
- Russell v. Massachusetts Mut. Life Ins. Co., 813
- Rutan v. Republican Party, 447
- Rutherford Food v. McComb, 714, 724
- Rutlin v. Prime Succession, Inc., 779
- Ryan v. Brown Motors, 142
- Sabine Pilot Serv., Inc. v. Hauck, 330, 484
- Sabourin v. University of Utah, 674
- Safeshred, Inc. v. Martinez, 162, 172
- Safety-Kleen Sys., Inc., v. Hennkens, 286
- Safeway, Inc. v. OSHRC, 894, 895
- Salas v. Total Air Services, LLC, 308
- Salazar v. McDonald's Corp., 721
- San Diego Bldg. Trades Council v. Garmon, 184
- San Diego, City of, v. Roe, 444
- Sanders v. Kohler Co., 260
- Sandifer v. United States Steel Corp., 924
- Sands Appliance Servs., Inc. v. Wilson, 293
- Sanghvi v. St. Catherine's Hosp., Inc., 544
- Sarullo v. U.S. Postal Serv., 557
- Savage v. Glendale Union High Sch., 543
- Savage v. Spur Distributing Co., 93, 110, 148
- Schaefer v. Ind. Mich. Power Co., 775
- Scherk v. Alberto-Culver Co., 957, 958
- Schlosser v. VRHabilis, LLC, 601
- Schmidt v. Levi Strauss Co., 486
- Schultz v. Indus. Coils, Inc., 473
- Schumann v. Collier Anesthesia, P.A., 722, 725, 727
- Schumann v. Dianon Sys., Inc., 478
- Schurr v. Resorts Int'l Hotel, Inc., 678
- Scott v. Pacific Coast Borax Co., 861, 862
- Scroghan v. Kraftco Corp., 398
- Scusa v. Nestle U.S.A. Co., 600
- Searls v. Johns Hopkins Hosp., 670
- Seaworld v. Perez, 885
- Sedima, S.P.R.L. v. Imrex Co., 631
- Sehie v. City of Aurora, 756
- Semper v. Providence St. Vincent Med. Ctr., 668
- Sempowich v. Tactile Sys. Tech., Inc., 560

- Senne v. Kansas City Royals Baseball Corp., 720, 784  
 Severson v. Heartland Woodcraft, Inc., 668  
 Shara v. Maine-Endwell Cent. Sch. Dist., 442  
 Sharp v. S & S Activewear LLC, 602  
 Shaw v. Prentice Hall Computer Publ'g, Inc., 772  
 Shea v. Galaxie Lumber & Constr. Co., 794  
 Shearson/American Express Inc. v. McMahon, 915, 916, 917  
 Shebar v. Sanyo Bus. Sys. Corp., 118  
 Sheets v. Teddy's Frosted Foods, Inc., 155  
 Shelton v. Tucker, 433  
 Shephard v. CompSource Okla., 184  
 Sherwood v. Washington Post, 782  
 Shockley v. PrimeLending, 949  
 Shoemaker v. Myers, 878, 879  
 Shoen v. Amerco, Inc., 112  
 Sides v. Macon Cty. Greyhound Park, Inc., 255  
 Silva v. Campbell, 83  
 Silver v. New York Stock Exchange, 105  
 Singh v. City of New York, 757  
 Singh v. Radio Shack Corp., 822  
 Singh v. Uber Techs., Inc., 931  
 Skidmore v. Swift & Co., 748, 899  
 Skinner v. Railway Labor Executives' Ass'n, 356  
 Skirchak v. Dynamics Rsch. Corp., 949  
 Slack v. Kanawha Cnty. Hous. and Redevelopment Auth., 188  
 Slate v. Saxon, Marquoit, Bertoni, & Todd, 145  
 Slattery v. Hochul, 474  
 Sloat v. Hewlett Packard Enterprise, Co., 644  
 Smith v. Bd. of Dirs. of Triad Mfg., 936  
 Smith v. City of Salem, Ohio, 637  
 Smith v. CommonSpirit Health, 816, 817  
 Smith v. First Union Nat'l Bank, 597  
 Smith v. Jackson, 640, 641  
 Smith v. Liberty Mut. Ins. Co., 631  
 Smith v. Midland Brake, Inc., 668  
 Smith v. Ochsner Health Sys., 791  
 Smith v. Xerox Corp., 586  
 Smiths Grp. PLC v. Frisbie, 283  
 Smithson v. Austin, 667  
 Smothers v. Solvay Chems., Inc., 676  
 Smullin v. Mity Enters., Inc., 259  
 Smyth v. Pillsbury Co., 365, 366  
 Snap-On Tools, Inc., 376  
 Sofia v. McWilliams, 341  
 Solis v. Laurelbrook Sanitarium & Sch., Inc., 725, 728  
 Solis v. Washington, 778  
 Solkoff v. Pa. State Univ., 793  
 Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 948  
 Southwest Airlines Co. v. Saxon, 923, 931, 954  
 Southwestern Energy Prod. Co. v. Berry-Helfand, 307  
 Sowards v. Norbar, Inc., 364  
 Spandsco Oil and Royalty Co., 965  
 Spano v. Boeing Co., 814  
 Specht v. City of New York, 461  
 Spence v. U.S. Dept. of Veterans Affairs, 569, 570  
 Spinner v. David Landau & Assoc., LLC, 487  
 Springfield Library & Museum, 528  
 Sprint/United Mgmt. Co. v. Mendelsohn, 561  
 St. Mary's Honor Center v. Hicks, 549  
 Staff Mgmt. v. Jiminez, 82, 83  
 Star Tribune, 376  
 Starbucks Corp., 211  
 Starr v. Pearle Vision, Inc., 407, 408  
 State v. Wal-Mart Stores, Inc., 395, 397

- Stearns v. Beckman Instruments, Inc., 323  
 Steele v. Thiokol Corp., 652  
 Stegall v. Resource Tech. Corp., 903  
 Stegemann v. Gannett Co., Inc., 822  
 Steiner v. Mitchell, 758  
 Stengart v. Loving Care Agency, 366  
 Stephens v. Erickson, 569  
 Stericycle, Inc., 532  
 Stericycle, Inc., In re, 801  
 Stern Produce Co. v. NLRB, 427  
 Stevens v. Rite Aid Corp., 666  
 Stewart v. Paul, Hastings, Janofsky & Walker, LLP, 952  
 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 968  
 Strass v. Kaiser Found. Health Plan of Mid-Atlantic, 130  
 Stroka v. United Airlines, 858  
 Strothers v. City of Laurel, 570, 620  
 Strozinsky v. Sch. Dist., 182, 185, 186  
 Students for Fair Admissions v. President & Fellows of Harvard Coll., 680  
 Su v. L & Y Food, Inc., 792  
 Suburban Air Freight, Inc. v. Aust, 293  
 Suchodolski v. Michigan Consolidated Gas Co., 181  
 Sunbelt Rentals, Inc. v. McAndrews, 306  
 Sure-Tan, Inc. v. NLRB, 74, 75, 77, 79, 186, 187  
 Sutherland v. Ernst & Young LLP, 955  
 Sutton v. United AirLines, Inc., 646, 652  
 Sutula-Johnson v. Office Depot, Inc., 138  
 Sventko v. Kroger Co., 156  
 Swales v. KLLM Transport Servs., LLC, 800  
 Swanson v. Univ. of Cincinnati, 647  
 Sylvester v. Parexel Int'l LLC, In the Matter of, 492, 498  
 System Concepts, Inc v. Dixon, 277  
 Tamara Foods, Inc., NLRB v., 903  
 Tameny v. Atl. Richfield Co., 161, 173, 176  
 Tandy Corp. v. Bone, 337, 338  
 Taylor v. Metzger, 340  
 Taylor v. Solis, 569  
 Teamsters Local v. NLRB, 210  
 Tench v. Weaver, 273, 276  
 Terminix Cos. v. Dobson, 930  
 Terrell v. Rowsey, 365  
 Terrell v. Secretary Dept. of Veterans Affairs, 567  
 Texas & New Orleans R. Co. v. Bhd. of Ry. Clerks, 22  
 Texas Dept. of Community Affairs v. Burdine, 550, 551, 552, 554, 562  
 Texas v. DOL, 766, 790  
 Texas v. Trump, 686  
 Textile Workers Union v. Darlington Manufacturing Co., 206, 213, 214, 218, 236  
 Thibodeau v. Design Grp. One Architects, 184  
 Thompson v. N. Am. Stainless, LP, 571, 796  
 Thor Power Tool Co., NLRB v., 521, 522  
 Thornton v. Fed. Express Corp., 619  
 Thornton v. McClatchy Newspapers, Inc., 652  
 Thorson v. Gemini, Inc., 675  
 Thygeson v. U.S. Bancorp, 366  
 Tides v. Boeing Co., 500  
 Timekeeping Systems, Inc., 517  
 TNS, Inc. v. NLRB, 903  
 Todaro v. Twp. of Union, 730  
 Tony & Susan Alamo Found. v. Sec'y of Lab., 55, 724, 732, 733  
 Torgerson v. City of Rochester, 544  
 Torrence v. Hewitt Associates, 277  
 Torres v. Pisano, 609  
 Torres v. Precision Indus., 83  
 Toth v. Square D Co., 332  
 Touchard v. La-Z-Boy Inc., 189

- TouchPoint Sols., Inc. v. Eastman Kodak Co., 300
- Toussaint v. Blue Cross & Blue Shield of Mich., 114, 115, 128
- Town & Country Elec., NLRB v., 530
- Toyota Motor Mfg. v. Williams, 646
- Trans World Airlines, Inc. v. Thurston, 545
- Transportation Management Corp., NLRB v., 78
- Tribble v. Edison Int'l, 815
- Triple Play Sports Bar and Grille, 523
- Trombetta v. Detroit, Toledo & Ironton R. Co., 157
- Trosper v. Bag 'N Save, 188
- TSC Indus., Inc. v. Northway, Inc., 496
- Tum v. Barber Foods, Inc., 758, 759
- Turiano v. City of Phx., 352
- Turner v. Anheuser-Busch, Inc., 186, 187, 188
- Twin Peaks Canning Co. v. Industrial Commission, 849, 850
- Twyman v. Twyman, 330, 331
- Tyger v. Precision Drilling Corp., 759
- Tyndall v. Nat'l Educ. Ctrs., Inc., 667
- Tynes v. Florida Dept. of Juvenile Justice, 558, 559, 560
- Tyson Foods Inc. v. Bouaphakeo, 799, 801
- U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 451, 471, 472
- U.S. Dep't of Lab. v. Cole Enters., 758
- U.S. Off. of Pers. Mgmt. Data Sec. Breach Litig., In re, 358
- UAW v. Johnson Controls, Inc., 22, 578
- UAW v. ZF Boge Elastmetall LLC, 226
- UFCW Local 751 v. Brown Grp., Inc., 245
- United Paperworkers Int'l Union v. Misco, Inc., 910
- United States v. (See Name of Defendant)
- United Steel Workers Local 2660 v. U.S. Steel Corp., 254
- United Steel Workers of America, Local No. 1330 v. United States Steel Corp., 220, 227, 230
- United Steelworkers v. Enter. Wheel & Car Corp., 910
- Universal Engraving, Inc. v. Duarte, 281
- Universal Plant Servs., Inc. v. Dresser-Rand Grp., Inc., 304
- University of Texas Sw. Med. Ctr. v. Nassar, 568, 570, 625
- Uronis v. Cabot Oil & Gas Corp., 796
- Usenko v. MEMC LLC, 822
- Usery v. Whirlpool Corp., 416 F. Supp. 30–34 898
- USI Insurance Servs. Nat'l, Inc. v. Ogden, 292
- Valerio v. Putnam Assocs., Inc., 763, 764
- Valley Med. Specialists v. Farber, 286
- Van Asdale v. Int'l Game Tech., 491
- Vance v. Ball State University, 616
- Vannerson v. Board of Regents of University of Oklahoma, 169
- Vanskike v. Peters, 59
- Varity Corp. v. Howe, 812
- Vasquez v. SaniSure, Inc., 950
- Vaughn v. Phoenix House New York, 731
- Vela v. City of Houston, 779
- Velarde v. GW GJ, Inc., 727
- Velez v. Sanchez, 82
- Verduzco v. General Dynamics, Convair Div., 179
- Verfeurth v. Orion Energy Sys., Inc., 498
- Vickery v. Ardagh Glass Inc., 281
- Viet v. Le, 745
- Viking River Cruises, Inc. v. Moriana, 968, 969



- Virginia v. Luzik, 699  
 Vitucci, People v. 164  
  
 W.G. Fairfield Co. v. OSHRC, 895  
 W.G. Yates & Sons Constr. Co. v. OSHRC, 894  
 Wadler v. BioRad Labs., Inc., 498  
 Wagenseller v. Scottsdale Mem. Hosp., 151  
 Wagner v. City of Globe, 171  
 Waithaka v. Amazon.com, Inc., 931  
 Walker v. Abbott Labs., 543  
 Walker v. Braes Feed Ingredients, Inc., 410  
 Wall Sys., Inc. v. Pompa, 316  
 Wallace v. Grubhub Holdings, Inc., 925  
 Walling v. A.H. Belo Corp., 754  
 Walling v. Portland Terminal Co., 723  
 Wal-Mart Stores, Inc. v. Dukes, 577, 800  
 Wal-Mart Stores, Inc. v. Lee, 364  
 Walsh v. Until Serv. Corp., 771  
 Walthour v. Chipio Windshield Repair, LLC, 955  
 Walton v. Nova Info. Sys., 486  
 Wang v. Chinese Daily News, 781, 800  
 Wang v. Phx. Satellite Television US, Inc., 56  
 Wards Cove Packing Co. v. Atonio, 587  
 Ware v. Indus. Comm'n, 846  
 Warren v. DeSantis, 461  
 Washington Aluminum Co., NLRB v., 511, 903, 964  
 Waters v. Churchill, 456, 464  
 Watson v. Fort Worth Bank & Trust, 589, 626  
 Watson v. Graves, 59  
 Watts v. Indiana, 397  
 Weaving v. City Of Hillsboro, 648  
 Welch v. Chao, 501  
 Wells Fargo Ins. Servs., USA, Inc. v. Link, 292  
 WeRide Corp. v. Huang, 304  
 Wesco Autobody Supply, Inc. v. Ernest, 314  
 West Coast Hotel v. Parrish, 21, 22, 689  
 West Hollywood Cmty. Health & Fitness Ctr. v. Cal. Unemployment Ins. Appeals Bd., 64  
 Western Air Lines v. Criswell, 579, 642, 643  
 Western Blue Print Co. v. Roberts, 314  
 Whalen v. Roe, 357, 358  
 Wheeler v. BL Dev. Corp., 161  
 Wheeler v. Georgetown Univ. Hosp., 557  
 Whelan Sec. Co. v. Kennebrew, 292  
 WHIC LLC v. NextGen Labs., Inc., 307  
 Whirlpool Corp. v. Marshall, 516, 896  
 Whitaker v. Town of Scotland Neck, 864  
 Whitaker v. Wis. Dep't of Health Servs., 667  
 White v. Baptist Memorial Health Care Corp., 739  
 White v. Baxter Healthcare Corp., 566  
 White v. N.H. Dep't of Corr., 597  
 White v. State, 189  
 Whole Foods Mkts., Inc., 516  
 Wickman v. Nw. Nat'l Ins. Co., 824  
 Wiegand v. Motiva Enters., 473  
 Wieman v. Updegraff, 433  
 Wierman v. Casey's Gen. Stores, 676  
 Wiest v. Lynch, 489  
 Wilczak v. General Motors, LLC, 569  
 Wilde v. Houlton Reg. Hosp., 142  
 Wilkerson v. Univ. of N. Tex., 107  
 Willard v. Huntington Ford, 640, 644  
 Willard v. Khotol Servs. Corp., 150  
 Williams v. Dallas Area Rapid Transit, 543  
 Williams v. Dallas Indep. Sch. Dist., 459  
 Williams v. Hobbs, 276  
 Williams v. Strickland, 724  
 Wilson v. Cable News Network, 480  
 Wilson v. Cox, 544



- Wilson v. Monarch Paper Co., 340  
Wilson v. New, 688  
Wilson v. Southwest Airlines Co., 579  
Wisconsin v. Constantineau, 103  
Wolski v. Gardner Police Dep't, 353,  
356  
Wommack v. Durham Pecan Co., 320  
Woodson v. Rowland, 866, 867  
Woolley v. Hoffmann-La Roche, Inc.,  
121  
Wooters v. Unitech Intl., Inc., 310  
Wornick Co. v. Casas, 329  
Wozniak v. Adesida, 465  
Wyatt v. Nissan North America, Inc.,  
600, 620  
Wygant v. Jackson Board of Education,  
678  
  
Yazzie v. Nat'l Org. for Women, 407  
Yelling v. St. Vincent's Health Sys., 602,  
639  
Yeshiva Univ., NLRB v., 506  
Ypsilanti Twp. v. Gen. Motors Corp.,  
242  
Ypsilanti, Charter Twp. of, v. Gen.  
Motors Corp., 241, 242  
  
Zammit v. Hobson & Hobson, P.C., 292  
Zetwick v. County of Yolo, 601  
Zheng v. Liberty Apparel Co., 720  
Zicarelli v. Dart, 676, 677  
Zimmerman v. Buchheit of Sparta, Inc.,  
189  
Zimmerman v. Valdak Corp., 864  
Zinda v. Louisiana Pacific Corp., 402

