

TABLE OF CONTENTS

FOREWORD.....	V
PREFACE.....	XI
ACKNOWLEDGMENTS.....	XV
THE LABOR LAW GROUP.....	XVII
TABLE OF CASES.....	XLI
Chapter 1. The Evolution of the Contemporary Workplace	1
A. Introduction.....	1
Notes and Questions.....	2
Notes.....	8
B. A Brief History of American Labor Law.....	11
1. The Artisanal Period: The Transition from Employment Rights Based on Status to “Free Labor” Contracts.....	12
a. The Organization of Production and Labor.....	12
Artisanal Production in the Nineteenth Century.....	12
Notes.....	14
b. Collective Action During the Artisanal Period.....	15
Notes.....	17
c. The Judicial Response to Collective Action: The Doctrines of Criminal and Civil Conspiracy.....	17
Vegeahn v. Guntner.....	19
Notes.....	24
d. The End of the Artisanal Era.....	26
2. The Labor Relations System of the Industrial Era.....	27
a. The “Labor Problem” and the Development of Industrial Management Practices.....	27
The Labor System of the Industrial Era.....	27
Note.....	29
b. The Early Industrial Period (1890–1932): The Gilded Age, the Progressive Era and the Roaring Twenties.....	29
i. Labor Relations During the Early Industrial Period.....	29
ii. The Courts’ Response.....	32
Notes.....	34
Notes.....	40
iii. The Railway Labor Act.....	40
Railway Labor Act of 1926.....	41
Notes.....	43
iv. The End of the Early Industrial Period: The Great Depression and the Norris-LaGuardia Act.....	44
Notes.....	47

c.	The Middle of the Industrial Period (1932–1950): The New Deal, World War II, and Its Immediate Aftermath	48
i.	The National Labor Relations Act (the Wagner Act)	49
a)	Legislative History of the Act.....	49
b)	The National Labor Relations Board.....	49
b)	The Purposes of the Wagner Act.....	51
Notes	52	
c)	The Provisions of the Wagner Act.....	54
Notes	58	
ii.	The Courts’ Response: The Constitutionality of the Wagner Act.....	58
NLRB v. Jones & Laughlin Steel Corp.....	59	
Notes	63	
iii.	The Rise of Industrial Unionism Under the Wagner Act: From the Great Depression to World War II.....	65
iv.	The Taft-Hartley Amendments to the NLRA	68
a)	Legislative History of the Amendments	68
b)	The National Labor Relations Board.....	68
b)	Provisions of the Taft-Hartley Amendments	69
Notes	72	
d.	The Late Industrial Period (1947–1970): Post-War America	75
i.	Labor Relations During the Late Industrial Period: The Cold War, the Seizure of the Steel Plants, the AFL-CIO Merger	76
ii.	Labor Legislation of Post-War America: The Landrum-Griffin Act and Public Labor Relations Acts.....	79
a)	The Landrum-Griffin Act	79
Origins of the LMRDA.....	79	
Notes	80	
b)	Public Sector Labor Relations Acts.....	82
Notes	88	
3.	The Rise of the New Information Technology and the Global Economy: The Market Driven Workforce and the Challenges of Organizing in the Contemporary Workplace.....	94
a.	The Organization of Production in the New Economic Environment	94
Notes.....	101	
b.	Labor Relations in the New Economic Environment	107
Notes.....	109	
c.	Opportunities for Unions in the New Economic Environment	111
Notes.....	113	
	Chapter 2. Collective Action in the Workplace	117
A.	Introduction	117
Notes	119	

B.	Concerted Activity for Mutual Aid and Protection	121
1.	Concerted Activity	121
	Communal Rights	122
	NLRB v. Washington Aluminum Co.	125
	Notes.....	127
	NLRB v. City Disposal Systems, Inc.	131
	Notes.....	139
2.	Mutual Aid and Protection	142
	IBM Corp.....	144
	Notes.....	150
	Eastex, Inc. v. National Labor Relations Board	151
	Notes.....	153
	Fresh & Easy Neighborhood Market, Inc.	156
	Notes.....	164
3.	Unprotected Conduct.....	165
	Lion Elastomers LLC and U.S. Steelworkers, Local 228.....	167
	Notes.....	178
C.	Interference, Restraint and Coercion of Concerted Activity	181
1.	Waiver of Rights to Collective Litigation	181
	Epic Systems Corp. v. Lewis.....	181
	Notes.....	194
2.	The Effect of Employer Handbooks/Work Rules on Concerted Activity	195
	Stericycle, Inc. and Teamsters Local 628.....	195
	Notes.....	204
D.	Strikes	206
1.	Why Protect Strikes?.....	207
	Notes.....	213
2.	Exceptions to Section 7 Protections for Strike Activity	214
a.	Sit-Down Strikes and Slow-Downs.....	214
	Elk Lumber Company	216
	Notes.....	218
b.	Intermittent Strikes	219
	Walmart Stores, Inc. and The Organization United for Respect at Walmart (Our Walmart)	219
	Notes.....	223
c.	Relation to Working Conditions	224
d.	What Is a Strike?	225
e.	“Indefensible” Conduct	226
	International Protective Services, Inc.....	226
	Notes.....	229
f.	Disloyalty	231
	Notes.....	232
g.	Picket Line Misconduct	233
	Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiations.....	234
	Notes.....	235

Chapter 3. Boundaries of Collective Representation	237
A. Introduction	237
Notes	238
B. Who Is an “Employee”?	241
1. Contingent Workers	243
a. Independent Contractors	246
Roadway Package System Inc.....	250
Notes.....	255
The Atlanta Opera, Inc.....	261
Notes.....	282
Home Health Care Workers Get Organized	283
Notes.....	287
b. Leased Employees and Subcontractors’ Employees	290
i. Leased Employees.....	290
Miller & Anderson, Inc.	292
Notes	300
ii. Subcontractors’ Employees	303
Notes	305
2. Union Organizers	305
Notes.....	307
NLRB v. Town & Country Electric, Inc.	309
Notes.....	313
3. Apprentices: Graduate Students, Trainees, and House Staff	315
Trustees of Columbia University.....	316
Notes.....	327
A Special Note on College Athletes	330
4. Transborder Workers	332
a. Undocumented Workers.....	332
Hoffman Plastic Compounds, Inc. v. NLRB.....	333
Notes.....	338
Borderline Decisions: Hoffman Plastics Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy.....	339
Notes.....	341
b. Foreign and Multi-Country Workers.....	343
Workers’ Freedom of Association in the United States: The Gap Between Ideals and Practice	344
Notes.....	346
C. Who (or What) Is the “Employer”?	348
1. Supervisors	351
In re Oakwood Healthcare, Inc.....	352
Notes.....	365
2. Managerial and Confidential Employees.....	369
NLRB v. Yeshiva University	370
Notes.....	377
3. Public Sector Employers	380
Pennsylvania Virtual Charter School	381

Notes.....	389
4. Multiple Entities or Single Entity? The Single Employer and Alter Ego Doctrines	392
a. The Single Employer Doctrine	393
Mercy Hospital of Buffalo	394
Notes.....	400
b. The Alter Ego Doctrine.....	401
Michael’s Painting, Inc. & Painting L.A., Inc.	401
Notes.....	406
5. Joint Employers.....	408
Browning-Ferris Industries of California, Inc. (<i>BFI II</i>).....	411
Notes.....	425
6. Transborder Employers	426
Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.	427
Notes.....	432
Chapter 4. Establishing Collective Representation.....	435
A. Introduction	435
Notes	437
B. Definition of Labor Organization	439
1. Employer Domination, Support, and Interference	440
Electromation, Inc.	441
Crown, Cork & Seal Co.	452
Notes.....	457
2. Exclusive Representation and Majority Rule	462
a. The Issue of Minority Unions	462
The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace	462
International Ladies’ Garment Workers’ Union (Bernhard- Altmann Texas Corp.) v. NLRB	465
Notes.....	469
b. Exclusive Representation and Its Obligations	472
Emporium Capwell Co. v. Western Addition Community Org.	474
Notes.....	482
C. Regulation of Access.....	485
1. Employee Access to Coworkers.....	486
Bexar County Performing Arts Center Foundation D/B/A Tobin Center for the Performing Arts.....	491
Notes.....	498
Caesars Entertainment (Rio All-Suites Hotel and Casino)	499
Notes.....	505
2. Access by Nonemployee Organizers	507
Lechmere, Inc. v. NLRB.....	508
Notes.....	511
Technology Service Solutions (I).....	515
Notes.....	520

3.	Access and Laboratory Conditions	521
D.	Regulation of Speech	523
	NLRB v. Gissel Packing Co.	523
	Notes	526
E.	Regulation of Other Types of Coercion	531
1.	Grant or Withdrawal of Benefits	531
	NLRB v. Exchange Parts Co.	531
	Notes.....	533
2.	Interrogation and Polling.....	535
3.	Surveillance	537
	Allegheny Ludlum Corp. v. NLRB	538
	Notes.....	541
F.	Protection Against Discrimination.....	542
	NLRB v. Transportation Management Corp.	542
	Notes	546
	Town & Country Electric v. NLRB.....	549
	Notes	553
	Textile Workers Union of America v. Darlington Mfg. Co.	555
	Notes	560
G.	Routes to Union Recognition	563
1.	Appropriate Bargaining Units.....	564
	American Hospital Ass'n v. NLRB	565
	Note	567
	Friendly Ice Cream Corp. v. NLRB	568
	Notes.....	574
	American Steel Construction, Inc.	576
	Notes.....	588
2.	Representation Elections	589
3.	Bargaining Orders.....	598
	NLRB v. Gissel Packing Co.	598
	Linden Lumber v. NLRB.....	608
	Cemex Construction Materials, LLC	612
	Notes.....	641
4.	Voluntary Recognition and Other Methods Outside the NLRA's Processes	645
a.	Recognition/Organizational Picketing	646
	International Hod Carriers, Local 840 (Blinne Construction).....	649
	Notes.....	656
	New Otani Hotel & Garden.....	659
	Notes.....	663
b.	Lawful Voluntary Recognition	664
	Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms	664
	Notes.....	668
	Dana Corp.	669
	Lamons Gasket Co.....	672

Notes.....	688
Dana Corp. (II).....	689
Chapter 5. Collective Bargaining	703
A. Introduction	703
Notes	707
B. Models of the Collective Bargaining Process.....	708
1. The National Labor Relations Act.....	708
NLRB v. Insurance Agents’ International Union.....	708
Notes.....	715
NLRB v. Katz.....	716
Notes.....	720
2. Railway Labor Act	723
American Train Dispatchers Dep’t., Brotherhood of Locomotive	
Engineers v. Fort Smith R.R. Co.	724
Notes.....	727
3. The Public Sector.....	728
Philadelphia Housing Authority v. Pennsylvania Labor	
Relations Board	729
Notes.....	732
C. Determining Good Faith: The Problem of Surface Bargaining	733
1. Surface Bargaining Under the NLRA.....	733
NLRB v. American National Insurance Co.	734
Notes.....	738
Hardesty Company, Inc. DBA Mid-Continent Concrete.....	739
Notes.....	743
2. Surface Bargaining and the RLA	745
3. Surface Bargaining in the Public Sector.....	745
D. Interpreting “Good Faith” as Objective Rules of Conduct.....	746
1. The Duty to Supply Information Under the NLRA.....	746
Detroit Edison Co. v. NLRB.....	747
Notes.....	754
Notes.....	758
2. Information Disclosure Under the RLA and in the Public	
Sector.....	759
3. Other Per Se Violations Under the NLRA	760
Mercy Health Partners	761
Notes.....	763
E. The Effect of a Strike on the Duty to Bargain.....	765
F. The Duty to Bargain During the Term of a Contract	767
UAW v. NLRB	767
Notes	772
G. Subjects of Bargaining	775
1. The NLRA	775
Fibreboard Paper Products Corp. v. NLRB	777
First National Maintenance Corp. v. NLRB.....	782
Notes.....	787

Dubuque Packing Co.	789
Notes.....	795
Notes.....	797
2. Railway Labor Act	798
3. The Public Sector	799
H. Bargaining Remedies	800
H. K. Porter Co. v. NLRB.....	800
Notes	803
Municipality of Metropolitan Seattle v. Public Employment Relations Commission	804
Notes	809
Chapter 6. Economic Weapons	811
A. Introduction	811
Notes	818
B. Constitutional Protections for Strikes and Protest.....	818
1. Due Process Protections for Employers	818
2. First Amendment Protections for Workers.....	819
a. Picketing.....	821
Thornhill v. Alabama.....	821
Notes.....	824
International Brotherhood of Teamsters v. Vogt.....	824
Notes.....	827
Notes.....	829
b. Boycotts	833
National Association for the Advancement of Colored People v. Claiborne Hardware Co.....	833
Notes.....	836
International Longshoremen’s Association v. Allied International, Inc.	838
Notes.....	840
c. Other Regulation of Labor Protest	841
C. Statutory Protections for Employee Protest.....	842
1. Strikes	842
a. The Right to Strike	842
b. Exceptions to Statutory Protections for Strikes	843
c. The Effect of a No-Strike Clause	844
d. Sympathy Strikes	845
Electronic Data Systems Corporation	847
Notes.....	848
e. Special Statutory Limitations on Strikes.....	849
Notes.....	852
f. Work Stoppages in the Public Sector	853
2. Legal Regulation of Efforts to Encourage or Discourage Solidarity.....	856
a. Management Tactics: Replacing Striking Workers	856
NLRB v. Mackay Radio & Telegraph Co.....	856

	Notes.....	858
	A Note on the Use of Permanent Replacements.....	859
	Notes.....	862
	Notes.....	865
	Trans World Airlines, Inc. v. Independent Federation of Flight Attendants	866
	Notes.....	871
	b. Union Tactics in the Battle for Solidarity.....	872
	Notes.....	875
	A Note on Corporate Social Responsibility Campaigns	875
D.	Employer Weapons.....	876
	1. Lockouts	876
	Notes.....	879
	2. Partial Lockouts	881
	Midwest Generation	881
	Local 15, International Brotherhood of Electrical Workers v. NLRB (Midwest Generation)	884
	Notes.....	887
	3. Replacement Workers During Lockouts	887
	International Paper Co. v. NLRB.....	888
	Notes.....	894
E.	Statutory Protections for Employers: Secondary Activity	896
	1. The Primary-Secondary Distinction.....	897
	2. Common Work Sites	903
	a. Identifying the Primary Employer	903
	NLRB v. Denver Building & Construction Trades Council ...	904
	Notes.....	906
	b. The General Rule for Common Work Sites.....	908
	Sailors' Union of the Pacific (Moore Dry Dock Co.)	908
	Notes.....	910
	c. Separate Gates.....	911
	Local 761, International Union of Electrical Workers v. NLRB (General Electric Corp.)	912
	Notes.....	917
	Building & Construction Trades Council (Markwell & Hartz, Inc.)	919
	Notes.....	925
	3. Permissible Secondary Appeals.....	926
	a. Consumer Appeals Under the Proviso	926
	NLRB v. Fruit and Vegetable Packers, Local 760 (Tree Fruits).....	927
	Notes.....	933
	Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council.....	934
	Notes.....	937
	b. Consumer Appeals Not Covered by the Proviso	937
	Note	941

4.	Hot Cargo Agreements	942
a.	History and Contemporary Significance of Agreements	942
	Notes	948
b.	Hot Cargo Agreements and Double-Breasting in Construction	950
	Sheet Metal Workers Local 91 v. NLRB	951
	Notes	952
5.	Work Assignment Disputes	953
Chapter 7. Life Under the Collective Bargaining Agreement		955
A.	Introduction	955
B.	Workplace Self-Governance Under the Collective Bargaining Agreement	956
1.	Enforcing the Agreement to Arbitrate	959
	United Steelworkers of America v. American Manufacturing Co.	959
	United Steelworkers of America v. Warrior & Gulf Navigation Co.	961
	Notes	967
	A Note on Arbitration in Non-Union Settings	972
2.	Enforcing the Arbitration Award	975
	United Steelworkers of America v. Enterprise Wheel & Car Corp.	975
	Notes	977
	Major League Baseball Players Association v. Garvey	980
	Notes	983
	Eastern Associated Coal Co. v. United Mine Workers	988
	Notes	993
3.	A Glimpse at Arbitral Common Law	994
	Uniroyal, Inc.	995
	Kroger Limited Partnership	997
	Buckeye Feed Mill, Inc.	1001
	Notes	1003
	A Note on the Railway Labor Act	1004
	A Note on the Public Sector	1005
C.	The Collective Bargaining Agreement and the Norris-LaGuardia Act	1006
1.	Enjoining Breaches of the No Strike Clause	1007
	Boys Markets, Inc. v. Retail Clerks Union Local 770	1007
	Notes	1012
	Buffalo Forge Co. v. United Steelworkers of America	1013
	Notes	1017
2.	Enjoining Employer Conduct Pending Arbitration	1020
	Lever Brothers Co. v. International Chemical Workers Union Local 217	1021
	Notes	1023

D. The Individual and the Collective Process 1023

1. The Union’s Duty of Fair Representation 1024

 a. Origins of the Duty of Fair Representation 1024

 The Supreme Court and the Duty of Fair Representation 1024

 Notes 1026

 b. The Duty of Fair Representation: Substantive Standards of Conduct 1027

 Vaca v. Sipes 1027

 Notes 1034

 c. Duty of Fair Representation: Enforcement Procedures and Remedies 1035

2. Rights of Retirees 1037

 Notes 1039

3. Super-Seniority and Hiring Halls 1041

 Notes 1044

E. The Contractual Grievance Procedure and “External” Public Law ... 1046

1. The Grievance Procedure and the NLRB 1047

 Notes 1052

2. Grievance Arbitration and Statutory Claims 1053

 14 Penn Plaza, LLC v. Pyett 1054

 Notes 1064

 A Note on the Preclusive Effect of Arbitration 1067

 Notes 1070

3. Arbitral Consideration of Public Law Claims 1071

 The Evolving Role of the Labor Arbitrator 1071

 Notes 1072

 Coastal Oil of New England, Inc. v. Teamsters Local No. 25 1073

 Notes 1076

Chapter 8. Collective Activism: The Expanding Boundaries of the Modern Labor Law Practice 1079

A. Introduction 1080

B. New Labor Organizations and New Forms of Worker Activism 1083

1. New Forms of Labor Organization 1084

 Notes 1089

2. New Forms of Worker Activism 1090

 The Problem with Corporate Social Responsibility 1090

 Notes 1092

 Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers 1093

 Notes 1095

3. NLRA Protections for and Restrictions on Worker Centers and Worker-Driven Corporate Social Responsibility Campaigns 1097

 a. Section 7 Protection for Worker Campaign Activism 1097

 Orchard Park Health Care Center 1098

 Notes 1100

	Protections Against Retaliatory Employer Lawsuits After <i>BE & K Construction v. NLRB</i>	1102
	Notes.....	1104
	b. NLRA Preemption and New Collective Activism	1105
	Notes.....	1108
	c. NLRA (and Other) Restrictions on Worker Centers and New Forms of Activism	1109
C.	Unions and International Law	1110
	1. International Agencies and Labor Standards	1113
	2. Protecting Workers' Rights Through International Trade Agreements	1114
	3. Cross-Border Coalitions and Other Human Rights Strategies ...	1119
	a. Alien Tort Statute.....	1119
	b. Worker-Driven Social Responsibility Campaigns in the International Context.....	1122
	Notes.....	1123
D.	Regulation of Union Political Activity, Union Security, and Union Finances	1124
	1. A Campaign Finance Primer: Political Activity, Expenditures, and Fundraising by Unions and Other Groups	1124
	Notes.....	1128
	2. The Regulation of Union Security and Union Dues: History and Overview	1129
	3. Public Sector Union Security and Dues	1136
	<i>Janus v. American Federation of State, County & Municipal Employees, Council 31</i>	1137
	Notes.....	1149
	4. Union Security Under the NLRA	1150
	<i>NLRB v. General Motors Corp.</i>	1151
	<i>Communication Workers of America v. Beck</i>	1153
	Notes.....	1155
	A Note on the Effect of Right-to-Work Laws on Union Members	1155
	<i>Chicago Teachers Union v. Hudson</i>	1157
	Notes.....	1162
	<i>Ellis v. Brotherhood of Railway Clerks</i>	1162
	Notes.....	1166
	A Note on the Union's Duty to Disclose Beck Rights	1168
	Notes.....	1170
	5. Other Rights of Union Members Vis à Vis the Union Under the NLRA	1171
	Notes.....	1173
E.	Union Governance and Elections Under the LMRDA	1174
	1. Union Governance	1176
	Notes.....	1178
	2. Trusteeships.....	1180
	Notes.....	1180

3.	Union Finances	1181
4.	Union Disclosure	1182
	Notes.....	1184
5.	Prohibitions on Employer Contributions to Unions	1184
	Notes.....	1185
Chapter 9. Ending the Collective Bargaining Relationship		1187
A.	Introduction	1187
	Notes	1188
	Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights	1190
	Note	1193
B.	Withdrawal of Recognition	1194
	Allentown Mack Sales & Service, Inc. v. NLRB.....	1194
	Notes	1202
	Levitz Furniture Co.....	1204
	Notes	1212
C.	Decertification	1214
	SFO Good-Nite Inn, LLC	1215
	Notes	1220
	Decertification Elections and Industrial Stability: Need for Reform	1221
	Notes	1224
D.	Successorship.....	1224
	NLRB v. Burns Int'l Security Services	1225
	Notes	1230
	Fall River Dyeing v. NLRB.....	1232
	Notes	1239
E.	Rejection of Collective Bargaining Agreements in Bankruptcy	1242
	1. Labor's Fears About Bankruptcy	1242
	2. The Law Responds.....	1244
	a. In the Private Sector: Section 1113	1244
	In re Carey Transportation, Inc.....	1246
	Notes.....	1256
	b. In the Public Sector: Chapter 9	1258
	3. The Aftermath: What Rejection Means	1262
	Notes.....	1264
F.	Antitrust and the End of the Collective Bargaining Relationship.....	1265
	1. Statutory and Nonstatutory Labor Antitrust Exemptions	1265
	2. Application to Multiemployer Bargaining in General	1267
	3. Application to Workers Characterized as Independent Contractors	1268
	4. Application to Multiemployer Bargaining in Professional Team Sports	1271

Chapter 10. Preemption	1275
A. Introduction	1275
Notes	1276
B. <i>Garmon</i> Preemption.....	1280
San Diego Building Trades Council v. Garmon.....	1280
Notes	1284
Glacier Northwest, Inc. v. Teamsters Local Union No. 174	1288
Notes	1296
C. <i>Machinists</i> Preemption	1300
Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission	1300
Notes	1306
Chamber of Commerce v. Brown.....	1311
Notes	1317
D. Section 301 Preemption	1320
Lingle v. Norge Division of Magic Chef, Inc.	1321
Notes	1325
INDEX.....	1329