

# Table of Contents

## Volume 1

### CHAPTER 1. ORGANIZING THE UNORGANIZED

#### I. THE ROLE OF THE LAWYER IN ORGANIZING

§ 1:1 Lawyer participation in organizing

#### II. SOURCE OF LABOR LAW

§ 1:2 Historical development of labor law

§ 1:3 Present scope of labor law

#### III. EARLY STAGES OF THE ORGANIZING PROCESS

§ 1:4 Beginning to organize

§ 1:5 Demand for recognition and bargaining

§ 1:6 The NLRB petition

§ 1:7 —Recognition strikes and expedited elections

§ 1:8 —The Notice of Hearing and Statement of Position

§ 1:9 The prehearing conference

§ 1:10 The formal hearing

§ 1:11 Appropriate bargaining unit

§ 1:12 —Supervisors

§ 1:13 —Independent contractors

§ 1:14 —Part-time, temporary, seasonal, and casual workers

§ 1:15 —Part-time and dual-function workers

§ 1:16 —Temporary workers

§ 1:17 —Seasonal and casual workers

§ 1:18 —Contingent workers

§ 1:19 —Employees on leave or layoff; Discharged employees

§ 1:20 —Strikers and strike replacements

§ 1:21 —Salts

§ 1:22 —Managerial employees

§ 1:23 —Relatives of management

§ 1:24 —Confidential employees

§ 1:25 —Professional, academic, and student employees

§ 1:26 —Technical employees

§ 1:27 —Craft units

- § 1:28 —Guards
- § 1:29 —Agricultural employees
- § 1:30 Joint employers
- § 1:31 Organizing during the stall
- § 1:32 Independent unions

#### **IV. THE ELECTION CAMPAIGN & CAMPAIGN TACTICS**

- § 1:33 Election campaigning
- § 1:34 Roles of organizer and lawyer in election campaigning
- § 1:35 Union conduct in organizing
- § 1:36 Law governing content of campaign propaganda
- § 1:37 —Need to avoid overdependence on “paper organizing”
- § 1:38 Other election campaign tactics

#### **V. IN-PLANT REPRESENTATION AS A UNION-BUILDING TOOL**

- § 1:39 In-plant representation

#### **VI. EMPLOYERS’ ANTI-UNION TACTICS**

- § 1:40 Employer anti-union campaigns
- § 1:41 Control of the business
- § 1:42 Psychological techniques
- § 1:43 Use of supervisory pressure
- § 1:44 Spying and “vote no” committees
- § 1:45 Employer-arranged meetings
- § 1:46 Blocking charges
- § 1:47 Employer favoritism toward another union

#### **VII. THE LEGAL RESPONSE TO EMPLOYER DESTRUCTION OF AN ELECTION CAMPAIGN**

- § 1:48 Tactical considerations for responding to employer anti-union tactics
- § 1:49 Unfair labor practice charges
- § 1:50 Section 10(j) relief
- § 1:51 Bargaining orders
- § 1:52 Extraordinary remedies
- § 1:53 Striking for recognition
- § 1:54 Litigation to defend workers’ rights
- § 1:55 Objections to elections

#### **VIII. SOLICITATION AND DISTRIBUTION RIGHTS OF EMPLOYEE ORGANIZERS**

- § 1:56 Solicitation and distribution rules

## TABLE OF CONTENTS

- § 1:57 —Equal rights to communicate
- § 1:58 —Lunch and rest periods
- § 1:59 —No solicitation or distribution “except as provided by law”
- § 1:60 —No solicitation or distribution “without approval”
- § 1:61 —Nonenforcement of rules
- § 1:62 —Clarification of overbroad rules
- § 1:63 —Existence of rule
- § 1:64 —Valid rule for illegal purpose
- § 1:65 —Discrimination in rule enforcement
- § 1:66 —Discrimination against rival unions
- § 1:67 —Waiver of organizational rights by union
- § 1:68 Content of union literature
- § 1:69 Union insignia: Signs, buttons, union cards, and t-shirts
- § 1:70 —Offensive content
- § 1:71 — —The employer’s public image
- § 1:72 — —Safety and job performance
- § 1:73 — —The employer’s property rights
- § 1:74 —No-talk rules
- § 1:75 —Reading of literature
- § 1:76 Organizers’ access to plant bulletin boards
- § 1:77 Restrictions on access by off-duty employees
- § 1:78 Industry exceptions to solicitation and distribution rules
- § 1:79 —Retail stores
- § 1:80 —Health care institutions
- § 1:81 Company restrictions on employee e-mail use

## **IX. SOLICITATION AND DISTRIBUTION RIGHTS OF OUTSIDE ORGANIZERS**

- § 1:82 Basic principles on outside organizers & the *Lechmere* decision
- § 1:83 Ejection of activists and outside organizers
- § 1:84 Access to bargaining unit employees’ names and addresses & the voter list by outside organizers

## **X. EMPLOYER RETALIATION**

- § 1:85 Retaliation by employers
- § 1:86 Threats by supervisors
- § 1:87 Interrogation of employees
- § 1:88 Discharge for organizing activities
- § 1:89 Demotions, transfers, and discipline
- § 1:90 Retaliation for filing charges
- § 1:91 Protection may be delayed

- § 1:92 Discrimination against internal union organizers, or salts

## **XI. VOLUNTARY RECOGNITION**

- § 1:93 What should be included in card check agreements
- § 1:94 Neutrality, access and other contract provisions
- § 1:95 Role of NLRB in card check and neutrality agreements
- § 1:96 Project labor agreements, labor peace ordinances, and other governmental measures
- § 1:97 Worker centers

## **CHAPTER 2. OPPOSING DISCRIMINATORY DISCHARGES**

- § 2:1 The legal landscape
- § 2:2 Screening and shaping the discharge case
- § 2:3 Bringing a case before the NLRB
- § 2:4 “Activities for mutual aid or protection” under Section 7
- § 2:5 “Concerted activities” under Section 7
- § 2:6 Unprotected activity
- § 2:7 Workers’ rights under Section 8(a)(4)
- § 2:8 Proving discriminatory intent under Sections 8(a)(3) and 8(a)(4)
- § 2:9 *Weingarten* rights: The right to have a representative at disciplinary interviews
- § 2:10 Remedies for discharged workers under the NLRA
- § 2:11 Public employees’ rights to free speech: General principles
- § 2:12 Is the employee’s speech protected?
- § 2:13 The balancing test for free speech rights
- § 2:14 Proving retaliation for exercising free speech rights
- § 2:15 Obtaining relief for the denial of free speech rights
- § 2:16 Public employees’ freedom of association
- § 2:17 Public employees’ rights to due process: Property rights
- § 2:18 Public employees’ rights to due process in discipline: Liberty interests
- § 2:19 Public employees’ rights to privacy: Employer searches
- § 2:20 Public employees’ rights to privacy: Drug testing
- § 2:21 Public employees’ rights to protection against self-incrimination
- § 2:22 Discharge in breach of individual employment contracts
- § 2:23 Discharge in violation of public policy: Common law theories
- § 2:24 Discharge in violation of public policy: Federal whistleblower statutes

## TABLE OF CONTENTS

- § 2:25 —The Occupational Safety & Health Act of 1970  
 (“OSHA”) model
- § 2:26 —The Surface Transportation Assistance Act (“STAA”) model
- § 2:27 —The Energy Reorganization Act (“ERA”) model
- § 2:28 —Whistleblower Protection Act
- § 2:29 —The Federal Labor Relations Act
- § 2:30 —The Federal Mine Health and Safety Act
- § 2:31 —The Longshore and Harbor Workers’ Compensation Act
- § 2:32 —The False Claims Act
- § 2:33 The grievance arbitration procedure
- § 2:34 Individual presentation of grievances under a collective bargaining agreement
- § 2:35 Arbitration of statutory claims under a collective bargaining agreement
- § 2:36 Arbitration of discharge claims under individual employment agreements
- § 2:37 Deferral of LMRA claims before arbitration
- § 2:38 Deferral after arbitration under *Spielberg*
- § 2:39 Preemption of state wrongful termination claims under Section 301 of the LMRA
- § 2:40 —Avoiding preemption
- § 2:41 Preemption of state wrongful termination claims under the NLRA
- § 2:42 Preemption of claims against unions
- § 2:43 Preemption under ERISA
- § 2:44 Preemption under other statutes

## CHAPTER 3. THE DUTY TO BARGAIN COLLECTIVELY

- § 3:1 The principle of exclusive representation
- § 3:2 The unit for bargaining
- § 3:3 Mandatory, permissive and illegal subjects of bargaining
- § 3:4 The duty to bargain in good faith
- § 3:5 Per se violations
- § 3:6 —Unilateral changes
- § 3:7 —Insisting to impasse on nonmandatory subjects
- § 3:8 —Failure to provide information
- § 3:9 —Direct dealing
- § 3:10 Formation, reopening and termination of the agreement
- § 3:11 Waiver and acquiescence
- § 3:12 Withdrawal of recognition
- § 3:13 Alter egos, single employers and joint employers
- § 3:14 —Alter egos

- § 3:15 —Single employers
- § 3:16 —Joint employers
- § 3:17 Successorship
- § 3:18 Subcontracting, relocation of unit work and plant closures
- § 3:19 Remedies for the employer's failure to bargain

## **CHAPTER 4. RIGHT TO STRIKE AND OTHER FORMS OF ECONOMIC ACTION**

### **I. INTRODUCTION TO STRIKES AND SIMILAR ACTIONS**

- § 4:1 Overview of strikes and similar actions

### **II. INDIVIDUAL STRIKERS' RIGHTS: DISCIPLINE, DISCHARGE, AND REPLACEMENT**

- § 4:2 Basic principles of strikes
- § 4:3 Economic strikes & reinstatement rights of strikers
- § 4:4 —Discharge vs. replacement
- § 4:5 —Striker misconduct
- § 4:6 —Protecting economic strikers' rights through strike settlement agreements
- § 4:7 —Strikers' right to benefits
- § 4:8 —Strike benefits
- § 4:9 —Other restrictions on an employer's right to replace strikers
- § 4:10 Unfair labor practice strikes
- § 4:11 —Reinstatement rights of unfair labor practice strikers
- § 4:12 —Unfair labor practice strikes in breach of no-strike clauses
- § 4:13 Sympathy strikes
- § 4:14 —Picket line at employer's premises
- § 4:15 —Picket line at another employer's premises
- § 4:16 —Contract provisions governing the right to respect picket lines
- § 4:17 Strikes over abnormally dangerous working conditions or "safety strikes"
- § 4:18 —Tactics in a safety strike
- § 4:19 Unprotected strikes & strikes in breach of a no-strike clause
- § 4:20 —Sit-down strikes
- § 4:21 —Minority strikes
- § 4:22 —Partial strikes
- § 4:23 —Strikes during statutory notice periods
- § 4:24 —Other unprotected strikes

## TABLE OF CONTENTS

- § 4:25 Defending strikers disciplined for unprotected strike activity or strike misconduct in arbitration
- § 4:26 —Picket line misconduct
- § 4:27 —Unprotected strikes: Strikes in breach of a no-strike clause and partial strikes
- § 4:28 —Sympathy strike issues

### III. SECONDARY BOYCOTTS

- § 4:29 Basic principles of secondary boycotts
- § 4:30 Who is “secondary”?
- § 4:31 —Alter egos, single employers and joint employers
- § 4:32 —The *Hearst* doctrine
- § 4:33 —The “ally” doctrine
- § 4:34 — —Performance of struck work
- § 4:35 — —Arranged by the primary employer
- § 4:36 — —In order to defeat the strike
- § 4:37 —Who is a person? Who is an employee?
- § 4:38 Reserved gates, common situs, and ambulatory picketing
- § 4:39 —Picketing at the primary employer’s site
- § 4:40 —Picketing at a common site
- § 4:41 — —Picketing while the primary employer is present
- § 4:42 — —Picketing while the primary employer is engaged in its normal business
- § 4:43 — —Picketing reasonably close to the dispute and adequacy of the reserved gates
- § 4:44 — —Clearly disclosing the nature of the dispute on picket signs
- § 4:45 — —Additional factors
- § 4:46 —Ambulatory picketing
- § 4:47 Publicity other than picketing
- § 4:48 “Bannering” and inflated rats
- § 4:49 Threats of secondary activity
- § 4:50 Hot cargo clauses and other unlawful bargaining demands
- § 4:51 Consumer boycotts
- § 4:52 —Picketing
- § 4:53 —Publicity other than picketing
- § 4:54 Political boycotts
- § 4:55 Lobbying

### IV. OTHER FEDERAL LAW RESTRICTIONS ON THE RIGHT TO STRIKE

- § 4:56 Recognitional picketing
- § 4:57 Jurisdictional picketing
- § 4:58 National emergency strikes

- § 4:59 Antitrust restrictions
- § 4:60 —The statutory exemption
- § 4:61 —The nonstatutory exemption

## V. DEFENDING THE UNION AND STRIKERS IN STATE COURT

- § 4:62 Defense of union and strikers under state law
- § 4:63 Injunction actions and the scope of state authority
- § 4:64 —Violence
- § 4:65 —Mass picketing
- § 4:66 —Trespass
- § 4:67 —Residential picketing
- § 4:68 —Name-calling, libel, and harassment
- § 4:69 —Contacting employees away from the site
- § 4:70 Pre-strike preparations for contesting temporary or preliminary injunctions
- § 4:71 Notice
- § 4:72 Removal
- § 4:73 The hearing
- § 4:74 Terms of the injunction: Little Norris-LaGuardia Acts
- § 4:75 —Federal preemption
- § 4:76 —Vagueness, ambiguity and specificity
- § 4:77 Counterclaims, cross-injunctions and civil rights actions
- § 4:78 NLRB intervention
- § 4:79 Contempt
- § 4:80 Damage actions

## VI. DEFENDING THE UNION AND STRIKERS IN FEDERAL COURT

- § 4:81 *Boys Markets* injunctions, in general
- § 4:82 —Prerequisites for issuance of a *Boys Markets* injunction
- § 4:83 — —Contractual obligation to arbitrate
- § 4:84 — —Management willingness to arbitrate
- § 4:85 — —Injunction warranted in equity
- § 4:86 — —Union responsibility for the strike
- § 4:87 —Procedural issues
- § 4:88 — —Procedure in federal court
- § 4:89 —Prospective *Boys Markets* injunctions
- § 4:90 —Contempt
- § 4:91 Section 301 damage actions
- § 4:92 —Individual liability of union members
- § 4:93 —Union financial liability under Section 301 and the “best efforts” doctrine
- § 4:94 — —The “mass action” doctrine

## TABLE OF CONTENTS

- § 4:95 — —Ostensible authority
- § 4:96 — —Ratification
- § 4:97 —Arbitrating Section 301 damage claims
- § 4:98 Section 303 damage actions
- § 4:99 Section 10(l) injunctions
- § 4:100 Other federal claims

## **VII. MAINTAINING STRIKE DISCIPLINE**

- § 4:101 Introduction to strike discipline
- § 4:102 Statutory limitations on union discipline of union members
- § 4:103 What action may a union take against its members?

## **VIII. LOCKOUTS**

- § 4:104 Introduction to lockouts
- § 4:105 Bad faith bargaining
- § 4:106 Nonmandatory subjects of bargaining
- § 4:107 Anti-union animus
- § 4:108 Partial lockouts
- § 4:109 Indirect economic interest
- § 4:110 Replacement of locked-out employees

## **IX. RIGHTS OF STRIKERS UNDER THE RAILWAY LABOR ACT**

- § 4:111 Introduction to strikes under the Railway Labor Act
- § 4:112 Right to strike under RLA and classification of dispute as “major” or “minor”
- § 4:113 —Strikes over major disputes
- § 4:114 —Strikes over minor disputes
- § 4:115 Secondary strikes and boycotts
- § 4:116 Other restrictions on the right to strike
- § 4:117 Discipline and replacement of strikers

APPENDIX 4A. Sample Local Union Instructions to Pickets

## **CHAPTER 5. RIGHTS OF CONSTRUCTION WORKERS**

### **I. OVERVIEW OF CONSTRUCTION WORKER RIGHTS**

- § 5:1 Introduction to construction worker unions

### **II. ORGANIZING IN THE CONSTRUCTION INDUSTRY**

- § 5:2 Construction industry organizing

- § 5:3 —Choosing the approach to construction industry organizing
- § 5:4 NLRB elections in the construction industry
- § 5:5 —Appropriate bargaining unit
- § 5:6 — —When employer and union are parties to prehire agreement
- § 5:7 — —When there is no prehire agreement
- § 5:8 —Voter eligibility
- § 5:9 Prehire agreements
- § 5:10 —The *Deklewa* decision
- § 5:11 —Enforceability
- § 5:12 — —Picketing
- § 5:13 — —Survival of some contractual obligations after expiration
- § 5:14 —Repudiation
- § 5:15 —Conversion to Section 9(a) status
- § 5:16 Voluntary recognition in the construction industry
- § 5:17 Salting in the construction industry
- § 5:18 —Refusal to hire and refusal to consider
- § 5:19 —“Neutral” employment policy defense

### **III. SUBCONTRACTING CLAUSES IN CONSTRUCTION INDUSTRY CONTRACTS**

- § 5:20 Construction industry subcontracting clauses
- § 5:21 Primary and secondary clauses distinguished
- § 5:22 “Primary” subcontracting clauses
- § 5:23 —Test for determining primary status
- § 5:24 —Examples of primary subcontracting clauses
- § 5:25 “Secondary” subcontracting clauses
- § 5:26 —The construction industry proviso
- § 5:27 —The *Connell* decision
- § 5:28 —Prehire agreements and the proviso
- § 5:29 —Broad application of secondary subcontracting clauses
- § 5:30 —Action to obtain or enforce a lawful secondary subcontracting clause

### **IV. JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY**

- § 5:31 Construction industry jurisdictional disputes
- § 5:32 Plan for the settlement of jurisdictional disputes in the construction industry
- § 5:33 Charges under Section 8(b)(4)(ii)(D)
- § 5:34 Section 10(k) proceeding

## TABLE OF CONTENTS

### **V. EXCLUSIVE HIRING HALLS IN THE CONSTRUCTION INDUSTRY**

- § 5:35 Exclusive hiring halls
- § 5:36 Creation of the exclusive hiring hall
- § 5:37 Financing the exclusive hiring hall
- § 5:38 Employer's duty to use the exclusive hiring hall
- § 5:39 Criteria for priority of referral in an exclusive hiring hall
  - § 5:40 —Compliance with priority rules
  - § 5:41 —Applicant availability
  - § 5:42 —Permissible criteria
    - § 5:43 — —Minimum training or experience
    - § 5:44 — —Length of service with "employer"
    - § 5:45 — —Residency
    - § 5:46 — —Name requests by an employer
    - § 5:47 — —Name referrals by the union: Stewards
    - § 5:48 — —"Good conduct"
  - § 5:49 —Impermissible criteria—Union membership
  - § 5:50 — —Exercise of protected rights
  - § 5:51 — —Financial delinquencies
  - § 5:52 — —Arbitrary or irrelevant criteria
- § 5:53 Disclosure of hiring hall rules and criteria
- § 5:54 Changes in criteria and rules, and notice of changes for hiring halls
- § 5:55 Applicants' access to hiring hall information and records
- § 5:56 Employers' access to hiring hall records
- § 5:57 Enforcement and remedies: Arenas in which hiring hall violations may be challenged
  - § 5:58 —Statute of limitations
  - § 5:59 —Exhaustion of administrative remedies
  - § 5:60 —Remedies
  - § 5:61 —Employer liability

### **VI. CHALLENGING DOUBLE-BREASTED OPERATIONS IN THE BUILDING TRADES**

- § 5:62 Double-breasted operations in the building trades
- § 5:63 The single-employer doctrine
  - § 5:64 —Single employer
  - § 5:65 —Appropriateness of the bargaining unit
- § 5:66 The alter ego doctrine
- § 5:67 Gathering information about double-breasted companies
- § 5:68 Forums available for challenging double-breasted operations
  - § 5:69 —National Labor Relations Act

- § 5:70 —Contractual grievance or arbitration procedure
- § 5:71 —Breach of contract lawsuits & union enforcement
- § 5:72 — —Trust fund enforcement

APPENDIX 5A. Letter and Grievance with Questionnaire to  
Double-Breasted Contractor

APPENDIX 5B. Work-Preservation Clause

## Volume 2

### CHAPTER 6. EMPLOYMENT DISCRIMINATION LAW

#### I. INTRODUCTION TO EMPLOYMENT DISCRIMINATION LAWS

- § 6:1 Overview of laws on employment discrimination

#### II. FEDERAL SOURCES OF PROTECTION AGAINST DISCRIMINATION

##### A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- § 6:2 Introduction to Title VII
- § 6:3 Title VII—Coverage
- § 6:4 —Procedural features
- § 6:5 —Forms of relief

##### B. CIVIL RIGHTS ACT OF 1991

- § 6:6 Introduction to the Civil Rights Act of 1991
- § 6:7 Civil Rights Act of 1991—Expanded relief available
- § 6:8 —*Patterson v. McLean* overturned
- § 6:9 —Portions of *Wards Cove Packing v. Atonio* overturned
- § 6:10 —No retroactive application

##### C. AGE DISCRIMINATION IN EMPLOYMENT ACT

- § 6:11 Introduction to ADEA
- § 6:12 ADEA—Coverage
- § 6:13 —Relief available
- § 6:14 —Procedural features

##### D. EQUAL PAY ACT

- § 6:15 Introduction to Equal Pay Act
- § 6:16 Equal Pay Act—Who can be sued
- § 6:17 —Relief available

TABLE OF CONTENTS

**E. PREGNANCY DISCRIMINATION ACT**

§ 6:18 Introduction to PDA

**F. 42 U.S.C.A. § 1981**

§ 6:19 Introduction to Section 1981

**G. 42 U.S.C.A. § 1983**

§ 6:20 Introduction to Section 1983

§ 6:21 Section 1983—Claims in employment context

§ 6:22 —Statute of limitations

**H. AMERICANS WITH DISABILITIES ACT &  
REHABILITATION ACT**

§ 6:23 Americans with Disabilities Act

§ 6:24 Rehabilitation Act

**III. STATE ANTI-DISCRIMINATION CLAIMS**

§ 6:25 Introduction to state employment discrimination  
claims

§ 6:26 State fair employment practices statutes

§ 6:27 —Common law torts and contractual claims

§ 6:28 State constitutions

**IV. PROTECTED CATEGORIES**

§ 6:29 Race

§ 6:30 —Combined race and other factors

§ 6:31 —Discrimination based on association with members  
of protected classes

§ 6:32 Color

§ 6:33 National origin

§ 6:34 —Ability to speak English

§ 6:35 —Citizenship

§ 6:36 —Immigration Reform and Control Act

§ 6:37 Sex

§ 6:38 —BFOQ defense

§ 6:39 —Pregnancy

§ 6:40 —Sex stereotyping

§ 6:41 Sexual orientation

§ 6:42 Sex—Gender identity

§ 6:43 Religion

§ 6:44 —What constitutes a religion

§ 6:45 —Reasonable accommodation

§ 6:46 —Exemptions under Title VII

- § 6:47 Age
- § 6:48 —BFOQ defense
- § 6:49 — —Bona fide executive or high policymaker
- § 6:50 —Older Workers Benefit Protection Act
- § 6:51 — —Benefits
- § 6:52 — — —Early retirement
- § 6:53 — — —Other benefits
- § 6:54 — —Release of ADEA claims in settlement or  
severance agreement
- § 6:55 —Intersection of age discrimination with ERISA
- § 6:56 Disability
- § 6:57 Retaliation

## **V. THEORIES FOR PROVING DISCRIMINATION**

- § 6:58 Disparate treatment
- § 6:59 —Common statutory language
- § 6:60 — —“Terms, conditions, or privileges of employment”
- § 6:61 — —Motivation “because of” a protected characteristic
- § 6:62 —Methods of proof
- § 6:63 — —Direct method
- § 6:64 — —Indirect method
- § 6:65 —Proving pretext
- § 6:66 — —Direct evidence of discrimination
- § 6:67 — —Evidence of similarly situated employees
- § 6:68 — —Statistical evidence
- § 6:69 — —Other evidence
- § 6:70 —Causation standard
- § 6:71 — —Motivating-factor test
- § 6:72 — —But-for test
- § 6:73 —Pattern or practice
- § 6:74 Disparate impact
- § 6:75 —Burden of proof
- § 6:76 — —Title VII
- § 6:77 — —ADEA
- § 6:78 —Statistical proof
- § 6:79 Discriminatory seniority systems
- § 6:80 Harassment
- § 6:81 —Tangible employment action
- § 6:82 —Hostile work environment
- § 6:83 — —Reasonable woman
- § 6:84 —Affirmative defense
- § 6:85 — —Employer’s duty to prevent and remedy  
harassment
- § 6:86 — —Employee’s duty to avoid harm
- § 6:87 —Proof of psychological injury
- § 6:88 —Evidence of plaintiff’s conduct in the workplace

## TABLE OF CONTENTS

- § 6:89 —Employer liability for harassment by coworkers and nonemployees
- § 6:90 —Conduct need not be sexual
- § 6:91 —Same-sex sexual harassment
- § 6:92 Retaliation
- § 6:93 —Protected activity
- § 6:94 —Reasonable belief that action was prohibited
- § 6:95 —Adverse actions
- § 6:96 —Temporal proximity
- § 6:97 Reasonable accommodation
- § 6:98 Discrimination in wages

## VI. PROCEDURAL ISSUES

- § 6:99 Exhaustion of administrative remedies
- § 6:100 —Exhaustion of remedies under Title VII
- § 6:101 —No exhaustion requirement for claims under Section 1983
- § 6:102 —Exhaustion with state agencies
- § 6:103 —Exhaustion of tort claims when suing governmental agencies
- § 6:104 —Arbitration agreements and grievance procedures
- § 6:105 — —Collective bargaining agreements
- § 6:106 — —Individual arbitration agreements
- § 6:107 — —Appealability of arbitration decisions
- § 6:108 Statute of limitations & continuing violation doctrine
- § 6:109 —Equitable tolling and equitable estoppel
- § 6:110 —Waiver
- § 6:111 Choice of forum
- § 6:112 —Supplementary jurisdiction
- § 6:113 —Preemption by Labor-Management Relations Act
- § 6:114 — —Workers' compensation preemption

## VII. EVIDENTIARY ISSUES

- § 6:115 Ex parte contact with employees
- § 6:116 —Former employees
- § 6:117 —Current employees
- § 6:118 —Employer's intimidation of witnesses
- § 6:119 Evidence of discrimination against others
- § 6:120 Discriminatory comments
- § 6:121 "Self-serving" testimony
- § 6:122 After-acquired evidence
- § 6:123 Immigration status
- § 6:124 Relevance of sexual conduct or history

## VIII. RELIEF

- § 6:125 Introduction to relief from discrimination

- § 6:126 Back pay
- § 6:127 Front pay
- § 6:128 Injunctive relief
- § 6:129 Compensatory damages
- § 6:130 —Proving psychological damages
- § 6:131 Liquidated damages
- § 6:132 Punitive damages
- § 6:133 —Amount of award
- § 6:134 Mitigation of damages
- § 6:135 Taxability of damages awards
- § 6:136 Attorney's fees
- § 6:137 —Statutory authority
- § 6:138 —Prevailing party
- § 6:139 —Computation of fees
- § 6:140 —Taxability of attorney's fees awards

## **CHAPTER 7. WORKERS WITH DISABILITIES: THE ADA AND OTHER LAWS**

### **I. INTRODUCTION TO LAWS APPLICABLE TO WORKERS WITH DISABILITIES**

- § 7:1 Rights of individuals with disabilities
- § 7:2 Americans with Disabilities Act
- § 7:3 Section 501 of the Rehabilitation Act
- § 7:4 Section 504 of the Rehabilitation Act
- § 7:5 Rehabilitation Act interpreted consistently with the  
ADA
- § 7:6 Family and Medical Leave Act
- § 7:7 Other federal statutes
- § 7:8 ADA regulations and interpretations
- § 7:9 State law
- § 7:10 Rights of persons with disabilities

### **II. THE ADA AND THE REHABILITATION ACT OF 1973**

- § 7:11 Relationship of the two statutes
- § 7:12 —Choosing between the two statutes
- § 7:13 Who can bring suit?
- § 7:14 —Specific exclusions
- § 7:15 —Class actions
- § 7:16 Who can be sued?
- § 7:17 —Rehabilitation Act compared
- § 7:18 —Agency issues
- § 7:19 —Integrated enterprises, successorship, alter ego, &  
other coverage problems

## TABLE OF CONTENTS

|        |                                                                         |
|--------|-------------------------------------------------------------------------|
| § 7:20 | —Liability of individual defendants                                     |
| § 7:21 | Prohibited practices                                                    |
| § 7:22 | —Preemployment inquiries and exams                                      |
| § 7:23 | —Postoffer medical examinations                                         |
| § 7:24 | —Examination and inquiry of employees                                   |
| § 7:25 | —Confidentiality and breach of privacy                                  |
| § 7:26 | —Retaliation and interference                                           |
| § 7:27 | —Disability-based harassment                                            |
| § 7:28 | —Associational discrimination                                           |
| § 7:29 | —Qualification standards                                                |
| § 7:30 | Administrative requirements and exhaustion under the ADA                |
| § 7:31 | Administrative requirements and exhaustion under the Rehabilitation Act |
| § 7:32 | Arbitration agreements                                                  |
| § 7:33 | Other considerations                                                    |

## III. PROVING A CLAIM

|        |                                                                                           |
|--------|-------------------------------------------------------------------------------------------|
| § 7:34 | The elements of a cause of action                                                         |
| § 7:35 | Proving plaintiff is an individual with a disability                                      |
| § 7:36 | The impact of the ADA Amendments Act of 2008 on the definition of disability              |
| § 7:37 | Proving plaintiff is an individual with a disability—<br>What is an impairment?           |
| § 7:38 | —What constitutes a major life activity?                                                  |
| § 7:39 | —What does “substantially limits” mean?                                                   |
| § 7:40 | —Duration and impact of impairment                                                        |
| § 7:41 | —What does “substantially limits” mean?—<br>Impairments that are episodic or in remission |
| § 7:42 | —What does “substantially limits” mean?—Multiple impairments                              |
| § 7:43 | —Substantial limitation: Work activities                                                  |
| § 7:44 | —Impairments that are “virtually always” a disability                                     |
| § 7:45 | —Record of a disability                                                                   |
| § 7:46 | —“Regarded as” or perceived disabilities                                                  |
| § 7:47 | —HIV status                                                                               |
| § 7:48 | —Mental health disabilities                                                               |
| § 7:49 | —Learning disabilities                                                                    |
| § 7:50 | Proving plaintiff is qualified                                                            |
| § 7:51 | —Essential functions of the job                                                           |
| § 7:52 | —Use of physical requirements as essential job functions                                  |
| § 7:53 | —Production standards                                                                     |
| § 7:54 | —Overtime                                                                                 |
| § 7:55 | —Attendance                                                                               |
| § 7:56 | —Rotating shifts and “cross training”                                                     |

- § 7:57 — —Certification requirements
- § 7:58 — —Relevance of statements regarding disability on applications for insurance benefits
- § 7:59 — —Employer's discrimination or failure to provide accommodation
- § 7:60 — —Qualified vs. absolute statements of disability
- § 7:61 — —Specificity of plaintiff's allegations
- § 7:62 — —Relevant time frame
- § 7:63 — —Relevant condition
- § 7:64 — —Differences in the definition of disability
- § 7:65 — —Plaintiff's receipt or acceptance of benefits
- § 7:66 — —Judicial estoppel
- § 7:67 — —Unsworn statements
- § 7:68 Reasonable accommodation
- § 7:69 — —Disclosure of disability and request for accommodation
- § 7:70 — —The interactive process
- § 7:71 — —Teleworking as an accommodation
- § 7:72 — —Flexible leave and attendance policies
- § 7:73 — —Job restructuring
- § 7:74 — —Reassignment
- § 7:75 — —"100% Healed" policies
- § 7:76 Burden of proof
- § 7:77 Causation
- § 7:78 Pretext and other evidence of discrimination

#### **IV. THE RELATIONSHIP BETWEEN THE ADA AND COLLECTIVE BARGAINING: POTENTIAL FOR A FRIENDLY ALLIANCE**

- § 7:79 Introduction and analytical approach
- § 7:80 NLRA duty to bargain in good faith
- § 7:81 — —Approach to statutory analysis
- § 7:82 — —The NLRB General Counsel Advice Memorandum
- § 7:83 — —Privacy rights
- § 7:84 Potential for conflicts with seniority systems
- § 7:85 NLRB deferral under *Collyer*
- § 7:86 Unlawful collective bargaining agreements under the ADA
- § 7:87 The prohibition against direct dealing with represented employees
- § 7:88 Duty of fair representation
- § 7:89 — —No employer right to receive union contribution in ADA cases
- § 7:90 — —Accommodations and accessibility
- § 7:91 — —Unions as employers
- § 7:92 Choosing ADA or grievance arbitration

## TABLE OF CONTENTS

- § 7:93 —Conflicts between the ADA and arbitration awards
- § 7:94 —Arbitrating ADA issues
- § 7:95 State law remedies for disability discrimination
- § 7:96 NLRB and EEOC procedural memorandum of understanding

## V. EMPLOYER DEFENSES

- § 7:97 Available employer defenses
- § 7:98 Undue hardship
- § 7:99 Direct threat
- § 7:100 Estoppel
- § 7:101 Drug and alcohol use
- § 7:102 Good-faith accommodation defense
- § 7:103 After-acquired evidence
- § 7:104 Conflict with other laws, and preemption
- § 7:105 Waiver
- § 7:106 Eleventh Amendment immunity
- § 7:107 Claim and issue preclusion
- § 7:108 *Rooker/Feldman* doctrine
- § 7:109 Business necessity

## VI. REMEDIES

- § 7:110 Available remedies for disability discrimination
- § 7:111 ADA Title I
- § 7:112 —Injunctive and declaratory relief
- § 7:113 —Back pay
- § 7:114 —Reinstatement
- § 7:115 —Front pay
- § 7:116 —Nominal damages
- § 7:117 —Compensatory damages
- § 7:118 —Punitive damages
- § 7:119 —Attorney's fees
- § 7:120 —Costs
- § 7:121 —Interest
- § 7:122 Section 501 of the Rehabilitation Act
- § 7:123 Section 503 of the Rehabilitation Act
- § 7:124 Section 504 of the Rehabilitation Act
- § 7:125 ADA Title II
- § 7:126 State law

## VII. PROCEDURAL MATTERS

- § 7:127 Right to proceed anonymously
- § 7:128 Right to appointment of counsel
- § 7:129 Statute of limitations
- § 7:130 —Continuing violation

- § 7:131 —Relief from statutes of limitations
- § 7:132 Survival of actions
- § 7:133 Jury trials
- § 7:134 —Right to a jury trial
- § 7:135 —The jury charge

## **VIII. INTERRELATION WITH OTHER STATUTES**

- § 7:136 The FMLA and its potential interactions with the ADA and the Rehabilitation Act
- § 7:137 FMLA coverage
- § 7:138 Serious health conditions under the FMLA
- § 7:139 FMLA leave benefits
- § 7:140 Comparison of the FMLA with the ADA and Rehabilitation Act

## **CHAPTER 8. FAIR LABOR STANDARDS ACT**

### **I. OVERVIEW OF THE ACT**

- § 8:1 Introduction to the Fair Labor Standards Act
- § 8:2 Minimum wage
- § 8:3 Overtime

### **II. COVERAGE ISSUES**

- § 8:4 Individual coverage: Employees engaged in commerce or in the production of goods for commerce
- § 8:5 Enterprise coverage—Employees working for covered enterprises
- § 8:6 —Related activities
- § 8:7 —Common business purpose
- § 8:8 —Commerce, employee, and dollar requirements
- § 8:9 State and local government employers
- § 8:10 Independent contractors
- § 8:11 Other coverage issues

### **III. SIGNIFICANT EXEMPTIONS FROM FLSA COVERAGE**

- § 8:12 White-collar exemptions
- § 8:13 —Salary basis
- § 8:14 —“Duties test” for employees employed in a bona fide executive capacity
- § 8:15 —“Duties test” for employees employed in a bona fide administrative capacity
- § 8:16 —“Duties test” for employees employed in a bona fide professional capacity

## TABLE OF CONTENTS

- § 8:17 —Blanket requirements, blanket exemptions, and blanket nonexemptions
- § 8:18 Outside salespeople
- § 8:19 Agricultural employees
- § 8:20 Learners and apprentices
- § 8:21 —Learners
- § 8:22 —Apprentices
- § 8:23 Retail and service establishment overtime exemptions
- § 8:24 Transportation industry overtime exemptions
- § 8:25 —Seamen
- § 8:26 —Motor carriers
- § 8:27 —Railroads
- § 8:28 —Airlines
- § 8:29 —Local delivery employees
- § 8:30 —Taxicab drivers
- § 8:31 Partial overtime exemption

## IV. MINIMUM WAGE PRINCIPLES

- § 8:32 Introduction to minimum wage under the FLSA
- § 8:33 Effect of FLSA minimum wage guarantees on contracts
- § 8:34 Paycheck deductions, reimbursement of employer expenses
- § 8:35 Gap time
- § 8:36 Tipped employees
- § 8:37 Students, trainees and interns

## V. OVERTIME PRINCIPLES

- § 8:38 Determination of the regular rate
- § 8:39 —Blended rates
- § 8:40 —Hourly rates
- § 8:41 —Piece rates
- § 8:42 —Day rates and job rates
- § 8:43 —Salaried employees
- § 8:44 Exceptions to the time-and-one-half rule & “*Belo* plans”
- § 8:45 —Compensatory time off for public employees

## VI. COMPENSABLE TIME UNDER FLSA AND PORTAL-TO-PORTAL ACT

- § 8:46 Introduction to compensable time
- § 8:47 “Suffered or permitted to work”
- § 8:48 Waiting and on-call time
- § 8:49 Rest periods and meal periods
- § 8:50 Sleep time
- § 8:51 Meetings and trainings

§ 8:52 Portal-to-Portal Act exclusions

## **VII. RECORDKEEPING**

§ 8:53 FLSA recordkeeping

## **VIII. RETALIATION AND DISCRIMINATION**

§ 8:54 Retaliation and discrimination under the FLSA

## **IX. ENFORCEMENT**

- § 8:55 Plaintiffs
- § 8:56 Defendants
- § 8:57 Burden of proof
- § 8:58 Remedies
  - § 8:59 —Injunctions
  - § 8:60 —Back wages
  - § 8:61 —Emotional distress
  - § 8:62 —Liquidated damages
  - § 8:63 —Punitive damages
  - § 8:64 —Prejudgment interest
  - § 8:65 —Attorney's fees and costs of suit
- § 8:66 Employer defenses
- § 8:67 Mandatory arbitration
- § 8:68 Statute of limitations
- § 8:69 Settlement

## **CHAPTER 9. RETIREMENT, PENSION, AND HEALTH AND WELFARE BENEFITS**

### **I. HISTORICAL BACKGROUND AND STATUTORY BASIS**

§ 9:1 Federal regulation of employee benefits

### **II. DEFERRED COMPENSATION PLANS**

- § 9:2 Types of qualified plans
  - § 9:3 —Defined contribution plans
  - § 9:4 — —Profit-sharing plans
  - § 9:5 — —Stock bonus plans
  - § 9:6 — —Money purchase pension plans
  - § 9:7 —Defined benefit plans
  - § 9:8 —Plans with cash or deferred arrangements
  - § 9:9 — —401(k) plans
  - § 9:10 — —SIMPLE plans
  - § 9:11 —Choosing the best plan for rank-and-file employees

## TABLE OF CONTENTS

|        |                                                                                                            |
|--------|------------------------------------------------------------------------------------------------------------|
| § 9:12 | Qualification and disqualification of a plan                                                               |
| § 9:13 | The exclusive benefit rule                                                                                 |
| § 9:14 | Coverage requirements                                                                                      |
| § 9:15 | —Minimum participation test under Section 401(a)(26)                                                       |
| § 9:16 | —Minimum coverage test under Section 410(b): Ratio percentage test                                         |
| § 9:17 | —Average benefit test                                                                                      |
| § 9:18 | —Nondiscrimination in contributions or benefits under Section 401(a)(4)                                    |
| § 9:19 | —Mandatory disaggregation of plan into separate plans                                                      |
| § 9:20 | —Testing by rate groups                                                                                    |
| § 9:21 | —Implications of nondiscrimination, minimum participation and minimum coverage rules for certain employees |
| § 9:22 | —Whom to count                                                                                             |
| § 9:23 | —When to test                                                                                              |
| § 9:24 | Vesting                                                                                                    |
| § 9:25 | —Five-year cliff or seven-year graded vesting                                                              |
| § 9:26 | —Defined contribution plans and top-heavy rules                                                            |
| § 9:27 | —Year of service                                                                                           |
| § 9:28 | —Breaks in service                                                                                         |
| § 9:29 | —Forfeitures                                                                                               |
| § 9:30 | —Impact of vesting requirements                                                                            |
| § 9:31 | Integration                                                                                                |
| § 9:32 | Minimum funding standards                                                                                  |
| § 9:33 | Union-negotiated plans                                                                                     |
| § 9:34 | Keogh plans                                                                                                |
| § 9:35 | Individual retirement plans                                                                                |
| § 9:36 | Employee stock ownership plans                                                                             |
| § 9:37 | Distributions from qualified plans                                                                         |
| § 9:38 | —General rule                                                                                              |
| § 9:39 | —Tax-free rollovers                                                                                        |
| § 9:40 | —Ten-percent tax on early withdrawals                                                                      |
| § 9:41 | —Required distributions                                                                                    |
| § 9:42 | —Suspension of pension benefits                                                                            |
| § 9:43 | —Plan loans                                                                                                |

### III. RIGHTS OF PARTICIPANTS: DISCLOSURE REQUIREMENTS

|        |                                                                               |
|--------|-------------------------------------------------------------------------------|
| § 9:44 | Required reports                                                              |
| § 9:45 | Remedies for inadequate or misleading disclosure in summary plan descriptions |
| § 9:46 | —Other reports                                                                |

### IV. PLAN TERMINATIONS

|        |                                                |
|--------|------------------------------------------------|
| § 9:47 | Employee and union rights in plan terminations |
|--------|------------------------------------------------|

## **V. PROCEDURAL ISSUES IN ERISA LITIGATION**

- § 9:48 Exhaustion of plan remedies
- § 9:49 Standard of review
- § 9:50 Venue
- § 9:51 Jury trials
- § 9:52 Attorney's fees
- § 9:53 Arbitration

## **VI. USING ESTOPPEL DOCTRINES TO RECOVER BENEFITS**

- § 9:54 Can a plan be required to provide benefits it does not owe, but promised to provide?

## **VII. FIDUCIARY RESPONSIBILITY**

- § 9:55 Introduction to fiduciary responsibility
- § 9:56 Who is a fiduciary?
- § 9:57 Fiduciary standards
- § 9:58 Prohibited transactions
- § 9:59 Remedies for breach of fiduciary duty
- § 9:60 Social investments

## **VIII. RETIREE WELFARE BENEFIT LITIGATION**

- § 9:61 Enforcing promises of lifetime benefits

## **IX. MINIMUM STANDARDS LITIGATION**

- § 9:62 Introduction to minimum standards litigation
- § 9:63 Coverage, participation and the break-in-service rule
- § 9:64 Forfeitures and suspension of benefits
- § 9:65 Discrimination

## **X. HIPAA RIGHTS**

- § 9:66 Benefit Protections under HIPAA
- § 9:67 HIPAA Privacy Rights and Security Rules

## **XI. COBRA RIGHTS**

- § 9:68 What is a "qualifying event" for COBRA benefits?
- § 9:69 Benefits provided by COBRA
- § 9:70 COBRA notice and election requirements
- § 9:71 The COBRA Subsidy under ARRA
- § 9:72 COBRA rights in the case of sale or shutdown of a business and other major changes
- § 9:73 COBRA and FMLA rights

## **XII. HEALTH CARE REFORM**

- § 9:74 Introduction to health care reform

## TABLE OF CONTENTS

|        |                                                                                                    |
|--------|----------------------------------------------------------------------------------------------------|
| § 9:75 | Grandfathered health plans                                                                         |
| § 9:76 | Extension of dependent coverage                                                                    |
| § 9:77 | Employer mandate—"Pay or Play" provisions                                                          |
| § 9:78 | Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections |
| § 9:79 | Medical loss ratios                                                                                |
| § 9:80 | Retiree subsidy and reinsurance program                                                            |
| § 9:81 | Free choice voucher                                                                                |
| § 9:82 | Automatic enrollment                                                                               |
| § 9:83 | Review of unreasonable premium increases                                                           |
| § 9:84 | Small business tax credit                                                                          |
| § 9:85 | Nondiscrimination in benefits                                                                      |
| § 9:86 | Internal claims and appeals and external review procedures                                         |
| § 9:87 | Uniform summary of benefits and coverages                                                          |
| § 9:88 | Health benefit exchanges                                                                           |
| § 9:89 | Consumer Operated and Oriented Plans (CO-OPs)                                                      |
| § 9:90 | Compliance timeline for significant GHP Provisions                                                 |

## **XIII. ASSOCIATION HEALTH PLANS**

|        |                                          |
|--------|------------------------------------------|
| § 9:91 | Introduction to association health plans |
|--------|------------------------------------------|

## **CHAPTER 10. THE WARN ACT**

|         |                                                                               |
|---------|-------------------------------------------------------------------------------|
| § 10:1  | Introduction to the WARN Act                                                  |
| § 10:2  | Administration and enforcement of the WARN Act, in general                    |
| § 10:3  | Definition of employer under the WARN Act: The "business enterprise"          |
| § 10:4  | —Number of employees                                                          |
| § 10:5  | Plant closing or mass layoff under the WARN Act: Number of affected employees |
| § 10:6  | —The single site requirement                                                  |
| § 10:7  | Requirement under the WARN Act of employment loss                             |
| § 10:8  | Notice requirements under the WARN Act                                        |
| § 10:9  | —When less than 60 days' notice is permitted                                  |
| § 10:10 | —When no notice is required                                                   |
| § 10:11 | When to sue under the WARN Act                                                |
| § 10:12 | Where to sue under the WARN Act                                               |
| § 10:13 | Remedies under the WARN Act                                                   |
| § 10:14 | Reduction under the WARN Act of employer liability                            |
| § 10:15 | WARN Act claims in bankruptcy                                                 |
| § 10:16 | Federal laws providing benefits for dislocated workers                        |

## **CHAPTER 11. THE DUTY OF FAIR REPRESENTATION**

### **I. BASIC PRINCIPLES OF FAIR REPRESENTATION**

- § 11:1 Overview of the duty of fair representation
- § 11:2 Origin of the duty of fair representation—Relationship to exclusive representation
- § 11:3 —Early U.S. Supreme Court cases
- § 11:4 —The NLRB imposes the duty
- § 11:5 The current jurisprudential status of the duty of fair representation

### **II. THE FAIR REPRESENTATION STANDARD TO BE APPLIED**

- § 11:6 Arbitrary conduct
- § 11:7 Discriminatory conduct
- § 11:8 Bad faith conduct
- § 11:9 The causation requirement

### **III. PARTICULAR FAIR REPRESENTATION CLAIMS**

- § 11:10 Introduction to duty of fair representation claims
- § 11:11 Grievance handling and contract administration
- § 11:12 Collective bargaining negotiations
- § 11:13 Strike activities
- § 11:14 Operation of a hiring hall
- § 11:15 Union security and what unions may require
- § 11:16 —Unions' use of dues
- § 11:17 —Dues checkoff
- § 11:18 Union security and union-caused discharges
- § 11:19 Other fair representation claims

### **IV. FAIR REPRESENTATION PROCEDURAL ISSUES**

- § 11:20 Choice of forums
- § 11:21 Proper parties
- § 11:22 Limitations periods
- § 11:23 Attempting to plead around the six-month limitations period in the hybrid case
- § 11:24 Exhaustion of contractual remedies
- § 11:25 Exhaustion of internal union remedies
- § 11:26 Pleading issues
- § 11:27 Evidentiary issues

## TABLE OF CONTENTS

- § 11:28 Jury trial
- § 11:29 Available relief—Back pay and other economic damages
- § 11:30 —Reinstatement and other equitable relief
- § 11:31 —Damages for emotional distress
- § 11:32 —Punitive damages
- § 11:33 —Attorney’s fees
- § 11:34 —Post-Judgment/Late-Discovered evidence
- § 11:35 —NLRB remedies in fair representation cases

## Volume 3

### **CHAPTER 12. RIGHTS OF UNION MEMBERS WITHIN THEIR UNIONS**

#### **I. HISTORY, PURPOSE & GENERAL REQUIREMENTS OF THE LMRDA**

- § 12:1 Introduction
- § 12:2 Tactical considerations in the use of the LMRDA
- § 12:3 Who is a union “member”?
- § 12:4 Definition of “employer” and “employee”
- § 12:5 Definition of “labor organization”
- § 12:6 Bill of rights of union members

#### **II. EQUAL RIGHT TO PARTICIPATE IN GOVERNING**

- § 12:7 Introduction
- § 12:8 Restrictions on the scope of Section 101(a)(1)
- § 12:9 —Use in pre-election suits
- § 12:10 —The distinction between direct and indirect attacks
- § 12:11 Right to vote on contracts, mergers, and other matters
- § 12:12 Right to have votes implemented
- § 12:13 Right to fair voting and decision-making procedures
- § 12:14 Fairness of “advisory” procedures
- § 12:15 Exclusion of classes of members
- § 12:16 Right to have and attend union meetings

#### **III. FREEDOM OF SPEECH AND ASSEMBLY**

- § 12:17 Introduction
- § 12:18 Types of expression protected
- § 12:19 Right of assembly
- § 12:20 Acts that may violate Section 101(a)(2)

- § 12:21 Defenses to Section 101(a)(2) claims
- § 12:22 Defense under the provisos and standards for their application
- § 12:23 —Interests protected by the provisos
- § 12:24 Rights of union officers

#### **IV. DUES, INITIATION FEES, AND ASSESSMENTS**

- § 12:25 Introduction
- § 12:26 “Dues” and “assessments”
- § 12:27 “Increased” or “levied”
- § 12:28 Required procedures
- § 12:29 Relief

#### **V. THE RIGHT TO SUE**

- § 12:30 Introduction
- § 12:31 Union restrictions on the right to sue
- § 12:32 Employer assistance to litigation

#### **VI. DISCIPLINARY SAFEGUARDS**

- § 12:33 Introduction
- § 12:34 Discipline covered by provisions
- § 12:35 —Actions related to employment
- § 12:36 —Nonpayment of dues
- § 12:37 —Treatment of union entities and officers
- § 12:38 Prehearing requirement of notice
- § 12:39 —Reasonable time to prepare defense
- § 12:40 Full and fair hearing
- § 12:41 —Biased tribunals
- § 12:42 —Procedures at trial
- § 12:43 —Fair determinations
- § 12:44 Internal union review of trials and appeals
- § 12:45 —De novo review
- § 12:46 Effect of rights in union constitution
- § 12:47 Waiver of procedural rights
- § 12:48 Relief

#### **VII. OVERLAP BETWEEN TITLE I AND OTHER LEGAL PROTECTIONS**

- § 12:49 Retention of existing rights
- § 12:50 Overlap between Title I and other LMRDA titles

#### **VIII. ADDITIONAL LMRDA TITLE I GUARANTEES**

- § 12:51 Right to copies of collective bargaining agreements
- § 12:52 Information to union members about provisions of the Act

TABLE OF CONTENTS

**IX. ENFORCEMENT OF TITLE I**

**A. IN GENERAL**

§ 12:53 Section 102 and Title I litigation

**B. JURISDICTION AND VENUE**

§ 12:54 Jurisdiction

§ 12:55 Venue

**C. EXHAUSTION OF INTERNAL UNION REMEDIES**

§ 12:56 Introduction

§ 12:57 What exhaustion is required?

§ 12:58 —Four-month limitation

§ 12:59 —What is satisfactory exhaustion?

§ 12:60 Exceptions to the exhaustion requirement

§ 12:61 —Futility

§ 12:62 —Irreparable injury

§ 12:63 —Void action

§ 12:64 —Free speech

§ 12:65 —Union-initiated action

**D. PARTIES**

§ 12:66 Plaintiffs

§ 12:67 Union entities as defendants

§ 12:68 —Individuals

§ 12:69 —Necessary parties

§ 12:70 Employers

**E. PRACTICE ISSUES AND CONSIDERATIONS**

§ 12:71 Statute of limitations

§ 12:72 Service of process

§ 12:73 Waiver of Title I rights

§ 12:74 Jury trial

§ 12:75 Abusive counterclaims

§ 12:76 Discovery

§ 12:77 Representation of the union during the litigation

§ 12:78 Alleging conspiracy to violate Title I

**F. REMEDIES**

§ 12:79 Damages

**X. EQUITABLE RELIEF**

§ 12:80 Equitable relief available

§ 12:81 —Preliminary relief

## **XI. ATTORNEY'S FEES**

§ 12:82 Attorney's fees

## **CHAPTER 13. INTERNAL UNION ELECTIONS**

### **I. OVERVIEW AND DEFINITIONS OF UNION ELECTIONS**

§ 13:1 Overview of union elections

§ 13:2 Union officers

§ 13:3 Local, intermediate and national labor organizations

### **II. SUBSTANTIVE STANDARDS FOR UNION ELECTIONS**

§ 13:4 Frequency and elections covered

§ 13:5 Eligibility to vote and run for office

§ 13:6 —General considerations governing eligibility to run

§ 13:7 —Good standing and employment at the trade

§ 13:8 — —Meeting attendance

§ 13:9 — —Office holding

§ 13:10 — —Membership in certain branch or group

§ 13:11 — —Sections 502 and 504

§ 13:12 — —Other qualifications

§ 13:13 —Eligibility to vote

§ 13:14 Nominating procedures

§ 13:15 —Notice

§ 13:16 —Means of nomination

§ 13:17 Distribution of literature, union publications and membership lists

§ 13:18 —Conditions for coverage

§ 13:19 —Access to lists of members

§ 13:20 — —Required access

§ 13:21 —Distribution of literature

§ 13:22 — —Minimum standards imposed whether or not special privileges are extended

§ 13:23 — —Discrimination in distribution

§ 13:24 —Access to union publications

§ 13:25 Campaign safeguards: Union funds

§ 13:26 —Employer funds

§ 13:27 —Notice of election

§ 13:28 —Improper interference

§ 13:29 Balloting safeguards: Secret ballot

## TABLE OF CONTENTS

- § 13:30 —Opportunity to vote; Absentee voting
- § 13:31 —Administration of balloting; Observers
- § 13:32 Intermediate and international conventions
- § 13:33 Conformity to constitution and bylaws
- § 13:34 Right to be installed

### **III. INTERNAL AND ADMINISTRATIVE PROCEDURES PRECEDING LMRDA TITLE IV ENFORCEMENT ACTIONS**

- § 13:35 Introduction to Title IV enforcement actions
- § 13:36 Exhaustion of union remedies
- § 13:37 —General rule on effect of scope of internal union protests
  - § 13:38 — —Fairly discernible violations
  - § 13:39 — —Member ignorance of violations
- § 13:40 —Procedures for union exhaustion
- § 13:41 Complaint to the Secretary of Labor
  - § 13:42 —Time for filing with the secretary
  - § 13:43 — —Filing after three months' exhaustion
  - § 13:44 — —Filing after the union's final decision
  - § 13:45 —Scope of the complaint
- § 13:46 Secretary's investigation and finding of probable cause
  - § 13:47 —Time for the secretary to file

### **IV. LITIGATION OF LMRDA TITLE IV POST- ELECTION CASES**

- § 13:48 Parties to the suit—Defendants
- § 13:49 —Plaintiffs; Intervention by members as plaintiffs
- § 13:50 Control of the union during litigation
- § 13:51 Miscellaneous issues in litigation
- § 13:52 Entitlement to relief: Violations “may have affected the outcome”
  - § 13:53 —Scope of the rule
  - § 13:54 —Rebutting the prima facie case
- § 13:55 Effect of intervening elections
- § 13:56 Mootness of action; Other impediments to relief
- § 13:57 Settlement
- § 13:58 Remedies
  - § 13:59 —Specific remedies
- § 13:60 —Delays in supervised election
- § 13:61 —Collusive violations
- § 13:62 Supervised elections and certification of winners
- § 13:63 —Certification of election winners
- § 13:64 Challenging the Secretary's rejection of election complaints

- § 13:65 Election-related suits by union members
- § 13:66 Procedures for removal of officers

## **CHAPTER 14. REPRESENTING UNIONS AND EMPLOYEES IN BANKRUPTCY CASES**

### **I. OVERVIEW OF REPRESENTING UNIONS AND EMPLOYEES IN BANKRUPTCY CASES**

#### **A. BANKRUPTCY CONSIDERATIONS**

- § 14:1 Introduction to bankruptcy
- § 14:2 Employee claims

#### **B. PREPETITION CLAIMS**

- § 14:3 Wages, salaries and commissions
- § 14:4 Vacation pay
- § 14:5 Severance pay
- § 14:6 Back pay awards
- § 14:7 Employee benefits

#### **C. ADMINISTRATIVE EXPENSES**

- § 14:8 Administrative expenses in bankruptcy
- § 14:9 Postpetition wages
- § 14:10 Payroll deductions
- § 14:11 Severance pay
- § 14:12 Back pay awards
- § 14:13 WARN Act claims
- § 14:14 Employee benefit plan contributions
- § 14:15 Withdrawal liability

### **II. EMPLOYEE REPRESENTATION ON THE CREDITORS' COMMITTEE**

- § 14:16 The creditors' committee
- § 14:17 The right of unions to membership on the creditors'  
committee
- § 14:18 The role of the creditors' committee

### **III. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS**

- § 14:19 Rejection of collective bargaining agreements
- § 14:20 The pre-*Bildisco* standard
- § 14:21 The *Bildisco* decision
- § 14:22 Section 1113
- § 14:23 Section 1113(f) and monetary obligations

## TABLE OF CONTENTS

- § 14:24 Defending motion to reject a collective bargaining agreement
- § 14:25 The duty to bargain
- § 14:26 The right to strike
- § 14:27 Is rejection “necessary”?
- § 14:28 Is the proposal “fair and equitable”?
- § 14:29 Good cause to reject the proposal
- § 14:30 Balancing the equities
- § 14:31 Interim relief

## **IV. THE EFFECTS OF ASSUMPTION OR REJECTION**

- § 14:32 Assumption
- § 14:33 Rejection

## **V. RETIREE BENEFITS**

- § 14:34 Retiree benefits in bankruptcy

## **VI. THE AUTOMATIC STAY**

- § 14:35 The automatic stay
- § 14:36 NLRB proceedings
- § 14:37 Arbitration

## **VII. TACTICAL CONSIDERATIONS**

- § 14:38 Resources
- § 14:39 Participation
- § 14:40 Finding out what is going on
- § 14:41 —The first meeting of creditors
- § 14:42 Should the debtor remain in charge?
- § 14:43 Participation on the creditors’ committee
- § 14:44 The plan and disclosure statement
- § 14:45 Conclusion of Chapter 11 process

## **CHAPTER 15. ORGANIZING AND REPRESENTING IMMIGRANT WORKERS**

### **I. INTRODUCTION TO IMMIGRATION STATUSES**

- § 15:1 Immigration status
- § 15:2 Lawful permanent resident status
- § 15:3 Temporary work visas
- § 15:4 —The H-2A visa program
- § 15:5 —The H-2B visa program
- § 15:6 Temporary work authorization

- § 15:7 Temporary protected status
- § 15:8 Deferred Action for Childhood Arrivals (DACA)
- § 15:9 U and T visas
- § 15:10 Special Immigrant Juveniles
- § 15:11 Labor investigation-based deferred action
- § 15:12 Undocumented workers
- § 15:13 Public charge rule

## **II. THE SUBSTANTIVE RIGHTS OF IMMIGRANT WORKERS**

- § 15:14 Remedies available to immigrant workers under federal and state labor and employment statutes
- § 15:15 Discoverability of information related to immigration status

## **III. RAIDS AND IMMIGRATION WORKSITE ENFORCEMENT**

### **A. THE CONSTITUTIONAL RIGHTS OF IMMIGRANT WORKERS**

- § 15:16 Introduction to immigrant worker rights
- § 15:17 ICE may not enter or search the nonpublic areas of a workplace without consent or a valid judicial warrant under the Fourth Amendment
- § 15:18 —The warrant must be a valid judicial warrant
- § 15:19 — —Limited exceptions to the valid judicial warrant requirement
- § 15:20 —Administrative warrants issued by DHS or ICE do not grant legal authority to enter nonpublic areas

### **B. QUESTIONING, DETENTION, AND ARREST OF WORKERS AT THE WORKPLACE**

- § 15:21 ICE cannot detain individuals without reasonable suspicion or arrest them without probable cause
- § 15:22 Federal regulations limit ICE agents' power to question, detain, and arrest individuals without a warrant
- § 15:23 Strategies for workers' rights advocates and workers to resist unlawful ICE conduct during workplace raids

TABLE OF CONTENTS

**IV. EMPLOYER OBLIGATIONS TO COMPLY WITH IMMIGRATION LAWS**

**A. REQUIREMENT THAT EMPLOYERS VERIFY IDENTITY AND AUTHORIZATION TO WORK UNDER THE IMMIGRATION REFORM AND CONTROL ACT**

- § 15:24 Introduction to employer requirements under immigration laws
- § 15:25 Reverification
- § 15:26 Social Security Administration “no-match” letters
- § 15:27 E-Verify

**B. WORKSITE ENFORCEMENT: I-9 AUDITS**

- § 15:28 Introduction to workforce enforcement
- § 15:29 Worksite enforcement during a “labor dispute”
- § 15:30 —Deconfliction process pursuant to the DHS-DOL MOU
- § 15:31 —Triggering the DHS-DOL MOU
- § 15:32 Employer self-audits
- § 15:33 Best practices when dealing with I-9 audits

**C. NATIONAL ORIGIN AND CITIZENSHIP STATUS DISCRIMINATION IN EMPLOYMENT**

- § 15:34 Anti-discrimination provisions of the Immigration and Nationality Act
- § 15:35 National origin discrimination under Title VII

**Table of Cases**

**Index**