# 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

§ 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 Discrimination against internal union organizers, or salts

## XI. VOLUNTARY RECOGNITION

§ 1:92 What should be included in card check agreements
§ 1:93 Neutrality, access and other contract provisions
§ 1:94 Role of NLRB in card check and neutrality agreements
§ 1:95 Project labor agreements, labor peace ordinances, and other governmental measures
§ 1:96 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
§ 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
§ 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
§ 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

**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

#### 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
§ 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
§ 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—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?—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
§ 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
§ 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
§ 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

§ 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

§ 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

## 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

§ 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

§ 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

## 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**