Public Sector Employment: Cases and Materials

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PREFACE

Shortly after publication of the second edition of this casebook, dramatic changes occurred in public sector labor law, most visibly in Wisconsin where large public demonstrations captured the attention of the nation while protesting the virtual elimination of collective bargaining rights for most public employees in Wisconsin, home of the first public sector bargaining law enacted in 1959. A number of other states changed their laws, most reducing bargaining rights, although some of the changes were later revoked by public referendum. This retrenchment of bargaining rights, which was not uniform, was attributed to state financial difficulties following the recession that began in 2007. Despite the legal changes since 2011, union membership in the public sector has changed little, remaining at 35.2% of the workforce in 2015, slightly down from 35.7% in 2014.

During the same time period, several Supreme Court decisions limited the ability of unions to charge nonmembers for representation and questioned the constitutionality of union security laws in the public sector. The Court granted certiorari in Friedrichs v. California Teachers Association, where the plaintiffs sought to overturn the Court’s 1977 decision in Abood v. Detroit Board of Education. The Abood Court held that union security laws, which allow unions to charge employees for the representation they are required by law to provide, do not violate the First Amendment rights of employees. An overruling of Abood had the potential to dramatically impact union resources and change both public sector unions and public sector labor law. However, following the death of Justice Scalia, the Ninth Circuit’s decision in Friedrichs, which relied on Abood and upheld the constitutionality of the fees, was affirmed in a per curiam opinion by an equally divided Court. These recent developments follow several decades of increasing acceptance of public sector bargaining, illustrating the impact of shifting views of public policy on laws relating to public employees and the dynamism of the field of public sector employment.

The Labor Law Group initially published a casebook on public sector labor law in 1971, under the authorship of Donald Wollett and Don Sears. In succeeding years, the skepticism which characterized early legislative and judicial attitudes toward collective bargaining in the public sector was replaced by general, although not universal, acceptance. Union organization in the public sector, in contrast to the private sector, continued to grow. In recent years, membership has remained relatively stable, although it has declined substantially in some states that significantly curtailed public employee collective bargaining rights, most notably Wisconsin. Debates over whether the public sector is different
from the private sector became more nuanced, focusing on the inevitably political context of public sector bargaining and its implications for the structure and processes of bargaining and dispute resolution. And while private sector labor law continues to provide a model for the public sector, there has been a good deal of experimentation, at both federal and state levels, with different ways of structuring the bargaining relationship.

Succeeding editions of the original casebook, *Collective Bargaining in Public Employment*, with continued authorship by Donald Wollett along with Joseph Grodin, Reginald Alleyne and, later, June Weisberger, sought to bring developments up to date through modifications within the same basic format. Ten years after the last edition of that book, it became apparent that a brand new volume was required. This new book, *Public Sector Employment*, first published in 2004, authored by Joseph Grodin, June Weisberger and Martin Malin as a successor to *Collective Bargaining in Public Employment*, extended coverage to include the individual employee-employer relationship in the public sector, including constitutional rights of public employees and civil service and tenure systems. The second edition, authored by Martin Malin, Ann Hodges and Joseph Slater, continued the evolution of the book with expanded coverage of constitutional rights of public employees and civil service and tenure systems. It incorporated legislation governing the public sector workplace, including special Fair Labor Standards Act rules and whistleblower protection, and covered Tenth and Eleventh Amendment limitations on federal regulation of state and local government employment relationships. The second edition made the book more useful for courses on public sector employment even in the minority of jurisdictions that have no public employee bargaining statutes.

The third edition updates the material from the second edition. Most significantly, the statutory changes that occurred in 2011 and following years are included, along with developments in the area of union security. The law relating to First Amendment rights of public employees continues to draw attention and the new edition includes developing caselaw in the area. New material includes a chapter on the blurred boundaries between private and public employers in areas such as charter schools and home healthcare employees paid by the state but hired by private individuals. We have also added material on two other areas that have become prominent since the last edition—public sector pensions and the impact of municipal bankruptcy on public sector employees, public sector retirees, and public sector collective bargaining agreements. We have retained the emphasis upon state law, but we have included substantial references to federal employee labor relations. We continue to contrast public sector employment with the private sector, and to raise questions concerning the degree to which the private sector model should apply when government is the employer.
It remains the case that there is no one body of public sector labor law. Indeed, one of the attractions of courses on public sector employment is that the different jurisdictions truly serve as laboratories for different approaches to the issues and allow for comparisons across jurisdictions. We have included material from a wide array of states, but we assume that professors and students will want to supplement the materials in this casebook with materials from their own jurisdictions. A convenient source of information about the law in different jurisdictions is the Association of Labor Relations Agencies (ALRA). ALRA’s membership consists of the national, state, provincial and local labor relations agencies in the United States and Canada. Its website, www.alra.org, contains links to the websites of its member agencies which, in turn, contain links to statutes, regulations and decisions of their jurisdictions.

A few notes about the editing of cases and readings. We have edited out most footnotes, but retained those we believe to be particularly significant or pedagogically useful. In those cases, we retained the original footnote numbers. We have used asterisks instead of ellipses to indicate where we have deleted material in the editing process but also edited out lengthy string citations and pinpoint citations without indicating this with asterisks. We have added parallel citations and otherwise standardized type face and citation style.

We gratefully acknowledge the efforts of many others who helped make this book a reality. We thank Christopher Ryan Dodson, Megan Donovan and Milena Radovic of the University of Richmond who provided crucial research assistance. We deeply appreciate the invaluable administrative and secretarial support from Sharon Wyatt-Jordan at Chicago-Kent and technical assistance from Deborah Ginsberg of the Chicago-Kent College of Law Library. We have benefited from the work of the ABA State and Local Government Bargaining and Employment Law Committee in finding cases. We acknowledge helpful comments on drafts of various chapters from our colleagues in The Labor Law Group. We appreciate financial support from the Labor Law Group, and summer research support from Chicago-Kent, the Hunton & Williams Summer Research Fellowship Program Fund at the University of Richmond, and the Eugene N. Balk Professorship at the University of Toledo College of Law. Most of all, we express our gratitude to those who came before us on Collective Bargaining in Public Employment and the first edition of Public Sector Employment: Donald Wollett, Don Sears, Reginald Alleyne, Joseph Grodin and June Weisberger.

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May 2016
The Labor Law Group had its origins in the desire of scholars to produce quality casebooks for instruction in labor and employment law. Over the course of its existence, the hallmarks of the Group have been collaborative efforts among scholars, informed by skilled practitioners, under a cooperative nonprofit trust in which royalties from past work finance future meetings and projects.

At the 1946 meeting of the Association of American Law Schools, Professor W. Willard Wirtz delivered a compelling paper criticizing the labor law coursebooks then available. His remarks so impressed those present that the Labor Law Roundtable of the Association organized a general conference on the teaching of labor law to be held in Ann Arbor in 1947. The late Professor Robert E. Mathews served as coordinator for the Ann Arbor meeting, and several conferees agreed to exchange proposals for sections of a new coursebook that would facilitate training exemplary practitioners of labor law. Beginning in 1948, a preliminary mimeographed version was used in seventeen schools; each user supplied comments and suggestions for change. In 1953, a hardcover version was published under the title *Labor Relations and the Law*. The thirty-one "cooperating editors" were so convinced of the value of multicampus collaboration that they gave up any individual claims to royalties. Instead, those royalties were paid to a trust fund to be used to develop and "provide the best possible materials" for training students in labor law and labor relations. The Declaration of Trust memorializing this agreement was executed November 4, 1953, and remains the Group's charter.

The founding committee's hope that the initial collaboration would bear fruit has been fulfilled. Under Professor Mathews's continuing leadership, the Group's members produced *Readings on Labor Law* in 1955 and *The Employment Relation and the Law* in 1957, edited by Robert Mathews and Benjamin Aaron. A second edition of *Labor Relations and the Law* appeared in 1960, with Benjamin Aaron and Donald H. Wollett as coeditors of the book and cochair of the Group, and a third edition was published in 1965, with Jerre S. Williams at the helm.

In June 1969 the Group, now chaired by William P. Murphy, sponsored a conference to reexamine the labor law curriculum. Practitioners and full-time teachers, including nonmembers as well as members of the Group, attended the meeting, held at the University of Colorado. In meetings that followed the conference, the Group decided to reshape its work substantially. It restructured itself into ten task forces,
each assigned a unit of no more than two hundred pages on a discrete
topic such as employment discrimination or union-member relations. An
individual teacher could then choose two or three of these units as the
material around which to build a particular course. This multiunit
approach dominated the Group’s work throughout much of the 1970s
under Professor Murphy and his successor as chair, Herbert L. Sherman,
Jr.

As the 1970s progressed and teachers refined their views about what
topics to include and how to address them, some units were dropped from
the series while others increased in scope and length. Under Professor
Sherman’s leadership, the Group planned a new series of six enlarged
books to cover the full range of topics taught by labor and employment
law teachers. Professor James E. Jones, Jr., was elected chair in 1978,
and he shepherded to completion the promised set of six full-size,
independent casebooks. The Group continued to reevaluate its work and
eventually decided that it was time to convene another conference of law
teachers.

In 1984 the Group, now chaired by Robert Covington, sponsored
another general conference to discuss developments in the substance and
teaching of labor and employment law, this time in Park City, Utah.
Those discussions and a subsequent working session led to the conclusion
that the Group should devote principal attention to three new
conventional length coursebooks, one devoted to employment
discrimination, one to union-management relations, and one to the
individual employment relationship. In addition, work was planned on
more abbreviated coursebooks to serve as successors to the Group’s
earlier works covering public employment bargaining and labor
arbitration.

In 1989, with Alvin Goldman as chair, the Group met in
Breckenridge, Colorado, to assess its most recent efforts and develop
plans for the future. In addition to outlining new coursebook projects, the
Group discussed ways to assist teachers of labor and employment law in
their efforts to expand conceptual horizons and perspectives. In pursuit of
the latter goals it cosponsored, in 1992, a conference held at the
University of Toronto Faculty of Law at which legal and nonlegal
specialists examined alternative models of corporate governance and their
impact on workers.

When Robert J. Rabin became chair in 1996, the Group and a
number of invited guests met in Tucson, Arizona, to celebrate the
imminent fiftieth anniversary of the Group. The topics of discussion
included the impact of the global economy and of changing forms of
representation on the teaching of labor and employment law, and the
impact of new technologies of electronic publishing on the preparation of
teaching materials. The Group honored three of its members who had been present at the creation of the Group, Willard Wirtz, Ben Aaron, and Clyde Summers. The Group next met in Scottsdale, Arizona, in December 1999, to discuss the production of materials that would more effectively bring emerging issues of labor and employment law into the classroom. Among the issues discussed were integration of international and comparative materials into the labor and employment curriculum and the pedagogical uses of the World Wide Web.

Laura J. Cooper became chair of the Group in July 2001. In June 2003, the Group met in Alton, Ontario, Canada. The focus there was on "labor law on the edge"—looking at doctrinal synergies between workplace law and other legal and social-science disciplines—and "workers on the edge"—exploring the legal issues of highly compensated technology workers, vulnerable immigrant employees, and unionized manufacturing employees threatened by foreign competition. The Group also heard a report from its study of the status of the teaching of labor and employment law in the nation's law schools and discussed the implications of the study for the Group's future projects. Members of the Group began work on the casebook on international labor law at this meeting. During Professor Cooper's term, the Group also finished its popular reader Labor Law Stories, which examines the stories behind many of the most important American labor law cases.

In July 2005, Kenneth G. Dau-Schmidt became the chair of the Labor Law Group. Shortly after his election, the Group held a meeting in Chicago with nationally recognized practitioners to discuss how best to teach students about the practice of labor law in the new global economy of the information age. The outline that resulted from this meeting served as the basis for Labor Law in the Contemporary Workplace. Following the Chicago meeting, the Group met several times to work on new editions of its books and develop new projects: June 2006 in Saratoga Springs, New York; June 2007 in St. Charles, Illinois; and June 2010 in Arrowhead, California. Group projects that grew out of or benefited from these meetings include International Labor Law: Cases and Materials on Workers' Rights in the Global Economy and A Concise Hornbook on Employment Law. The Group also hosted: a November 2007 symposium on the problems of low-wage workers, the proceedings of which were published in the Minnesota Law Review; a February 2009 symposium on the American Law Institute's Proposed Restatement of Employment Law, the proceedings of which were published in the Employee Rights and Employment Policy Journal; and a November 2010 symposium on labor and employment law policies under the Obama administration, the proceedings of which were published in the Indiana Law Journal.

Marion Crain became chair of the Group at the beginning of 2011. That same year, the Group sponsored a one-day conference on the crisis
confronting public-sector employment, the proceedings of which were published in the *ABA Journal of Labor and Employment Law*. In 2011 the Group also hosted a meeting of experts in Chicago to consider the ongoing Restatement of Employment Law project. In June 2012, the Group met in Asheville, North Carolina, and approved the formation of an editorial policy committee charged with establishing policies to ensure that the Group’s products continue to reflect its tradition of close collaboration and high standards. The Asheville meeting served as the genesis for a labor arbitrator training workshop for academics in Chicago in December 2012. In February 2013, the Group cosponsored a symposium at the University of California—Irvine School of Law on alternatives to the Wagner Act and employment law models of workplace protection. The proceedings of the conference, called “Re-imagining Labor Law: Building Worker Collectivities After the NLRA,” which was published in the *UC Irvine Law Review*. In June 2014, the Group met in Ithaca, New York and conducted a lively educational program.

Stephen F. Befort and Melissa Hart became cochairs of the Group at the beginning of 2015. In that year, Group members voted to approve a partnership between the Group and IIT Chicago-Kent College of Law to oversee the publication of the *Employee Rights and Employment Policy Journal*. As of the date of this publication, Group members are working on one new casebook and three new casebook editions.

At any one time, roughly twenty-five to thirty members are actively engaged in the Group’s work; this has proven to be a practical size, given the challenges of communication and logistics. Coordination and editorial review of the projects are the responsibility of the executive committee, whose members are the successor trustees of the Group. Governance is by consensus; votes are taken only to elect trustees and to determine whom to invite to join the Group. Since 1953, more than eighty persons have worked on Group projects; in keeping with the original agreement, none has ever received anything more than reimbursement of expenses.


The Executive Committee
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